

RESOLUTION NO. 3/23/CONS

**REGULATION ON THE IDENTIFICATION OF BENCHMARK
CRITERIA FOR DETERMINING FAIR COMPENSATION FOR THE
ONLINE USE OF PRESS PUBLICATIONS, AS SET FORTH UNDER
ARTICLE 43-bis OF LAW NO. 633 OF 22 APRIL 1941**

THE AUTHORITY,

IN the Council meeting held on 19 January 2023;

WHEREAS articles 21, 33 and 41 of the Constitution;

WHEREAS Law no. 481 of 14 November 1995 concerning the “*Regulation of competition and of public utilities. Institution of the Authority regulating public utility services*”;

WHEREAS Law no. 249 of 31 July 1997, concerning the “*Institution of the Communications Authority and the regulation of telecommunication and radio-television systems*”;

WHEREAS, in particular, article 1(6)(c), no. 14 of Law no. 249 of 31 July 1997, which establishes that “*The Council shall perform and hold all other functions and powers provided for under Law no. 481 of 14 November 1995, as well as all other Authority functions not explicitly assigned to the infrastructure and networks committee and the services and products commission*”;

WHEREAS Communication COM (2015) 192 *final* of the Commission to the European Parliament, to the Council, to the Economic and Social Committee and to the Committee of the Regions of 6 May 2015, on “*A digital single market strategy for Europe*”;

WHEREAS Communication COM (2016) 288 *final* of the Commission to the European Parliament, to the Council, to the Economic and Social Committee and to the Committee of the Regions of 25 May 2016, on “*Online platforms and the digital single market. Opportunities and challenges for Europe*”;

WHEREAS Communication COM (2018) 236 *final* of the Commission to the European Parliament, to the Council, to the Economic and Social Committee and to the Committee of the Regions of 26 April 2018, on “*Tackling online disinformation: a European approach*”;

WHEREAS the strengthened Code of Practice on disinformation, signed and presented on 16 June 2022 by 34 signatories who joined the revision process of best practices adopted in 2018;

WHEREAS Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019, on promoting fairness and transparency for business users of online intermediation services and, in particular, article 2 concerning the definitions of provider of online intermediation services and online search engine;

WHEREAS Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022, on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (hereinafter also referred to as Digital Markets Act or “DMA”);

WHEREAS Regulation (EU) 2022/65 of the European Parliament and of the Council of 19 October 2022, on a Single Market for digital services and amending Directive 2000/31/EC (hereinafter also referred to as Digital Services Act or “DSA”);

WHEREAS Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society;

WHEREAS Directive (EU) 2019/790/EU of the European Parliament and of the Council of 17 April 2019, on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC and, in particular, article 15 (hereinafter also referred to as Directive);

WHEREAS Law no. 53 of 22 April 2021, on “*granting authority to the Government for transposing European Directives and enforcing other European Union acts – European Delegation Law 2019-2020*”, in particular article 9, which sets out the principles and guiding criteria for the transposition of Directive (EU) 2019/790;

WHEREAS Legislative Decree no. 177 of 8 November 2021 concerning the “*Enforcement of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Single Digital Market and amending Directives 96/9/EC and 2001/29/EC*” (hereinafter also referred to as Decree);

WHEREAS Law no. 633 of 22 April 1941, on the “*Protection of copyright and other rights related its exercise*” (hereinafter also referred to as LDA – copyright law);

WHEREAS, in particular, article 43-bis of Law no. 633 of 22 April 1941, as introduced by article 1(1)(c) of Legislative Decree no. 177 of 8 November 2021, which entrusts the Authority with the task of adopting a regulation for identifying the benchmark criteria for a establishing the fair compensation to publishers for the online use of press publications by the providers of information society services, as well as monitoring compliance with the information and communication duties set forth under said article;

WHEREAS Law no. 317 of 21 June 1986 on the “*Provisions for implementing European rules related to European regulation and information procedures concerning technical regulations and rules of information society services*”;

WHEREAS Law no. 47 of 8 February 1948 on “*Provisions concerning the press*”;

WHEREAS Law no. 69 of 3 February 1963, on the “*Set of rules related to the profession of journalism*”, in particular article 2(1), which states that “*Journalists have an irrepressible right to freedom of information and criticism, which shall be limited by compliance with the law, laid down to protect the personality of others; it shall be their duty to respect the truth of facts, while always fulfilling the duties that loyalty and good faith entail*”;

WHEREAS Law no. 416 of 5 August 1981 on the “*Regulation of publishers and provisions for publishing*”;

WHEREAS Law no. 62 of 7 March 2001, on “*New rules concerning publishing and publishing products and amendments to Law no. 416 of 5 August 1981*”;

WHEREAS Legislative Decree no. 35 of 15 March 2017 on the “*Implementation of Directive 2014/26/EU concerning the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market*”;

WHEREAS Legislative Decree no. 208 of 8 November 2021 on the “*Implementation of Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of the evolution of market realities*”;

WHEREAS, in particular, article 4, which, among the fundamental principles of the system, not only audiovisual and radio media services, but also video sharing platform services, includes “*the guarantee of freedom and of pluralism of radio and television broadcasting media, the preservation of freedom of expression for all individuals, including the right to freedom of opinion and that of receiving or communicating information or ideas with no limits in terms of boundaries, while respecting human dignity, complying with the principle of non-discrimination, combating hate speech, ensuring objectivity, completeness, truthfulness and information impartiality, countering disinformation strategies, protecting copyright and intellectual property rights*”;

WHEREAS Resolution no. 410/14/CONS of 29 July 2014, on the “*Rules of procedure concerning administrative penalties and obligations and public consultation on the document “Guidelines for quantifying administrative fines imposed by the Communications Authority”*”;

WHEREAS Resolution no. 146/15/CONS of 25 March 2015, on the “*Conclusion of the fact-finding enquiry on ‘Information and the Internet in Italy. Business models, use, jobs’, started by Resolution no. 113/14/CONS*”, which analyses the information offer in Italy, in terms of features and transformation of information itself, and in terms of the business models adopted by the publishers;

WHEREAS Resolution no. 423/17/CONS of 6 November 2017, “*Setting up a technical panel for ensuring pluralism and correct information on digital platforms*” and the Technical Report of the Panel of 9 November 2018, “*The strategies of online disinformation and the supply chain of fake content*”;

WHEREAS Resolution no. 79/20/CONS of 27 February 2020, “*Conclusion of the fact-finding enquiry into ‘Digital platforms and the information system’, set up by Resolution no. 309/16/CONS*”, and the *Interim Report* of November 2018, “*News vs. fake in the information system*”;

WHEREAS Resolution no. 236/17/CONS of 12 June 2017, “*Conclusion of the fact-finding enquiry into systems for measuring mass media audience*”;

WHEREAS Resolution no. 194/21/CONS of 10 June 2021, “*Guidelines for measuring audience in the new digital ecosystem*”;

WHEREAS Resolution no. 107/19/CONS of 5 April 2019, “*Adoption of the Regulation of consultation procedures in proceedings falling within the Authority’s scope*”;

TAKING DUE ACCOUNT OF the principles formalised by the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights and Fundamental Freedoms concerning the protection of copyright and e-commerce;

CONSIDERING that the Authority has requested preliminary information to acquire – from the stakeholders identified by the provisions set forth under article 43-bis of the copyright law – information and fact-finding elements that may help zero in on the trends of the sector;

WHEREAS Resolution no. 195/22/CONS of 15 June 2022, *“Public consultation on the Draft Regulation structure concerning the identification of benchmark criteria for establishing fair compensation for the online use of press publications set forth under article 43-bis of Law no. 633 of 22 April 1941”*;

CONSIDERING that, in the public consultation started with the aforesaid Resolution no. 195/22/CONS, hearing requests were submitted by: Associazione Nazionale Editoria di Settore (hereinafter, also “ANES”, prot. no. 208664 of 5 July 2022), Evolution ADV s.r.l. (prot. no. 211986, of 7 July 2022), Federazione Italiana Editori Giornali (hereinafter, also “FIEG”, prot. no. 214593 of 11 July 2022), FederRassegne (prot. no. 215382 of 12 July 2022), GEDI Gruppo Editoriale (hereinafter, also “GEDI”, prot. no. 215849 of 12 July 2022), ITmedia Consulting (prot. no. 216047 of 12 July 2022), Anitec-Assinform (prot. no. 216993 of 13 July 2022), Agenzia Giornalistica Italia (hereinafter, also “AGI”, prot. no. 217207 of 13 July 2022), Data Stampa s.r.l. and UniRass (prot. no. 217558 of 13 July 2022), Meta Platforms Ireland Limited (hereinafter, also “Meta”, prot. no. 218099 of 14 July 2022), Google Italy s.r.l. (hereinafter, also “Google”, prot. no. 218101 of 14 July 2022), AssoRassegne Stampa (prot. no. 219732 of 15 July 2022), IAB Italia (prot. no. 219746 of 15 July 2022), L’Eco della Stampa s.p.a. (prot. no. 219706 of 15 July 2022), Caltagirone Editore s.p.a. (hereinafter, also “Caltagirone”, prot. no. 234688 of 29 July 2022), Società Italiana degli Autori e Editori (hereinafter, also “SIAE”, prot. 239366 of 3 August 2022), Fondazione Italia Digitale (communication of 6 September 2022), Ordine dei Giornalisti (prot. no. 274172 of 23 September 2022);

WHEREAS the remarks made during the public consultation were made by the following parties: AGI (prot. no. 217207 of 13 July 2022), Citynews s.p.a. (prot. no. 221420 of 18 July 2022), Fondazione Italia Digitale (prot. no. 223497 of 19 July 2022), International Advertising Association Italy Chapter (prot. no. 225367 of 21 July 2022), Associazione Nazionale Stampa Online (prot. no. 225449 of 21 July 2022), Altroconsumo (prot. no. 227496 of 22 July 2022), Coalition for Creativity (C4C) and NoiSiamo Rete (prot. no. 228299 of 25 July 2022), Caltagirone (prot. no. 228903 of 25 July 2022), FederRassegne (prot. no. 228904 of 25 July 2022), Federazione Italiana Liberi Editori (prot. no. 230264 of 26 July 2022), ITmedia Consulting (prot. no. 230292 of 26 July 2022), R.T.I. s.p.a. (prot. no. 234511 of 29 July 2022), Consorzio Netcomm (prot. no. 234827 of 29 July 2022), ANES (prot. no. 236204 of 1 August 2022), UnioneStampa Periodica Italiana (prot. no. 237768 of 2 August 2022), RCS Mediagroup s.p.a. (prot. no. 238706 of 3 August 2022), SIAE (prot. 239366 of 3 August 2022), GEDI (prot. no. 239826 of 4 August 2022), Anitec-Assinform (prot. no. 240126 of 4 August 2022), Google (prot. no. 240202 of 4 August 2022), Confindustria Radio Televisioni (prot. no. 240783 of 5 August 2022), FIEG (prot. no. 240960 of 5 August 2022), Il Sole 24 Ore s.p.a. (prot. no. 243180 of 10 August 2022), prof. Giusella Finocchiaro and prof. Oreste Pollicino (prot. no. 244029 of 11 August 2022), Ciao People s.r.l. (prot. no. 244097 of 11 August 2022), RAI s.p.a. (prot. no. 245176 of 16 August 2022), AssoRassegne Stampa

(prot. no. 245920 of 18 August 2022), Sky Italia s.r.l. (prot. no. 246137 of 19 August 2022), L'Ecodella Stampa s.p.a. (prot. no. 246140 of 19 August 2022), IAB Italia (prot. no. 246615 of 22 August 2022), Meta (prot. no. 246603 of 22 August 2022), prof. Marco Gambaro (prot. no. 246602 of 22 August 2022), Data Stampa s.r.l. e UniRass (prot. no. 246240 of 19 August 2022);

TAKING DUE ACCOUNT OF the remarks made during the hearings by the following parties that requested it: AssoRassegne on 12 September 2022, Data Stampa s.r.l. and UniRass on 12 September 2022, FederRassegne on 13 September 2022, L'Eco della Stampa s.p.a. on 13 September 2022, FIEG on 14 September 2022, ANES on 14 September 2022, GEDI on 20 September 2022, SIAE on 22 September 2022, AGI on 22 September 2022, Caltagirone on 22 September 2022, ITmedia Consulting on 23 September 2022, Anitec-Assinform on 26 September 2022, IAB Italia on 26 September 2022, Meta on 27 September 2022, Evolution ADV s.r.l. on 27 September 2022, Google on 28 September 2022, Fondazione Italia Digitale on 29 September 2022, Ordine dei Giornalisti on 29 September 2022;

CONSIDERING the following:

- recital 54 of Directive EU 2019/790 states that “*A free and pluralist press is essential to ensure quality journalism and the citizens' access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society. The wide availability of online press publications has given rise to the emergence of new online services, such as news aggregators or media monitoring services, for which the reuse of press publications constitutes an important part of their business models and a source of revenue [...] With no acknowledgment of newspaper publishers as right-holders, the licensing and enforcement of rights in press publications regarding online use by information society service providers in the digital environment are often complex and inefficient*”;
- the Directive therefore aims to ensure a harmonised legal protection for the online use of press publications by providers of information society services, so as to remunerate the publisher's investment while also providing quality information. However, the Directive also acknowledges that the possibility of using single words or very brief excerpts of press publications is not covered by the rights set forth under the Directive itself, provided that said very brief excerpt does not undermine the effectiveness of the acknowledged right;
- article 15 of the Directive aims to bridge the so-called *value gap*, namely, the unfair distribution of the value generated by the exploitation, in the digital sphere, of protected content between the right-holder (publisher) and the service provider, which transmits said content online. The goal is therefore to enable the circulation of contents, favouring a more rational allocation of resources. This calls for a watchful balance between the several fundamental rights involved, taking due account of the features of the new digital ecosystem;

- the explanatory report of the transposition decree (Legislative Decree no. 177/2021) states that *“the basic goal of the European measure is that of modernising the legal framework of the European Union concerning copyright, adjusting it to the current digital environment [...] starting from the assumption that the context of the enjoyment of creative content, hence of copyright-protected intellectual works, has been greatly changed by the constantly evolving technology”*;
- the incessant development of information and telematic technologies has indeed transformed the ways we retrieve and exchange information, by innovating and simplifying them;
- information society service providers, in particular the providers of intermediation services and online research, have been playing an increasingly important role in our social and economic lives, offering systems for accessing and distributing content; the new methods of online content distribution have drawn more and more people, who in turn have benefitted from a more streamlined circulation of the content itself;
- “press publication” includes not only literary works, but also multimedia elements associated with texts, such as photographs and videos;
- the widespread availability of online press publications has led to the advent of new online services, such as news aggregators or media monitoring services; for said services the reuse of press publications is a relevant part of their business models and a source of income;
- providers generally offer services to the users free-of-charge, since their remuneration stems from advertising revenue and from using the data users have given to them;
- if we consider the so-called traditional media (television, radio and publishing industry), the last decade has been marked by a general drop in overall revenue, both in terms of revenue from users and from advertising, though the latter source suffered the greatest drop. In such a context, revenue from the several means deriving from online operations has increased, but not enough to offset the losses generated by the drop in sales in traditional media channels;
- daily press publications (newspapers) are the sector that suffered the greatest structural and immediate economic problems, with overall revenues, from both sales and advertising, shrinking. It seems unlikely that an increase in the sale of digital copies can reverse such a trend;

- furthermore, there are many providers that use content, including press content, to retain users on their services, exploiting the economic features of the multifaceted markets through several business strategies that tend to hinder multi-homing and raise switching costs, even to collect greater advertising revenue;
- other providers, such as media monitoring and press review enterprises, provide users with services that are alternative to the ones publishers offer for enjoying press publications;
- the issue of fair compensation for the service providers’ use of press publications, including media monitoring and press review enterprises, has been the object of a thorough and doctrinal debate in Italy and Europe, both in terms of copyright protection and competition regulation; with reference to the latter, European competition and antitrust authorities have taken relevant measures;
- indeed, the European directives concerning copyright make sure that right-holders may profitably exploit the marketing or the offer of protected items by granting licenses upon payment for each use of said items. According to established jurisprudence, in order to be appropriate, said payment must be reasonably paired with the economic value of the provided service. In particular, there must be a reasonable ratio to the actual or potential number of users that enjoy it or wish to enjoy it (CGUE ruling in lawsuits C-403/08 and C-429/08 *Football Association Premier League and A./QC Leisure and A. Karen Murphy/Media Protection Services LTD*);
- Legislative Decree no. 177/2021 has amended the text of Law no. 633/1941, adding article 43-bis, which clearly lays down that publishers must be assigned the exclusive reproduction and communication rights set forth under articles 13 and 16 of the copyright law (LDA) by information society service providers, including media monitoring and press review enterprises. In particular, paragraph 8 sets forth the notion of the “fair compensation” the providers owe to the publishers for the online use of press publications;
- the law entrusts the Authority with the task of identifying the benchmark criteria for establishing fair compensation, taking due account, among other things, even of the criteria indicated by way of example: bargaining between the two parties shall take place “*also taking into account the criteria defined under the regulation*” (emphasis added);
- article 43-bis of the copyright law (LDA) firstly assigns the parties the task of defining, by mutual agreement and based on the talks held in good faith, the amount of fair compensation; it may be possible to appeal to a judge or to request, as an alternative, the action of the Authority, which shall assess compliance with the criteria identified in the regulation of the relevant economic proposals and then recommend one *ex officio* should both proposals be deemed non-compliant;

- the rule must be understood and interpreted in the light of the spirit of EU law and, in particular, of the principle that underlies article 15 of the Directive. Hence fair compensation is, preliminarily, to be freely bargained by the parties, which – fully exercising their contractual autonomy – may reach an agreement that “could” take into account “even” the criteria indicated by the Authority under the Regulation;
- the rule, while balancing the interests at stake, necessarily takes into account the constitutionally protected freedom of economic initiative of the parties, whose freedom of negotiation is an expression. Nevertheless, the provision – in attributing a role to the Authority at the request of a party and if no agreement has been reached – also takes into account the imbalance of bargaining power between the parties;
- the Directive itself formalises that *“It is therefore necessary to provide at Union level for harmonised legal protection for press publications in respect of online uses by information society service providers”* (recital 55), assuming that *“The wide availability of press publications online has given rise to the emergence of new online services, such as news aggregators or media monitoring services, for whom the reuse of press publications constitutes an important part of their business models and a source of revenue.”* (emphasis added);
- it is worthwhile pointing out, preliminarily, that the notion of *“information society service provider”* is indeed very broad and includes parties that differ greatly and whose operations are based on different business models. Within the scope of *“information society services”* – namely, services typically provided upon remote payment, via electronic means for processing and storing data and upon individual request of a service recipient – the lawmaker has included a number of providers;
- media monitoring and press review are services that are structurally and functionally dependent from publishers and whose business model is not comparable to that of online platforms operating in digital markets. News aggregators and search engines, in turn, are not comparable to social networks. Said differences should be taken in due consideration when drafting the criteria that help quantify and define fair compensation;
- in order to ensure access to information, as well as the functioning of the services that ensure the users’ research and sharing of press publications, fair compensation is not owed in the event of publication, aggregation or sharing of hyperlinks or of single words or very brief excerpts, especially should said excerpts be processed directly by the publishers to sum up press publications that may be automatically used by intermediation and research services, even if the service allows the user to have a preview of the publication;

- the lawmaker, in its definition of “very brief excerpt”, has prioritised a qualitative notion, has favoured a qualitative notion, leaving the occurrence of exempted cases to be checked on a case-by-case basis. The decision was preceded by a thorough debate on the possibility of envisaging a purely quantitative criterion, based on the quantification of the number of words that corresponds to a very brief excerpt (similar to the solution proposed by the Court of Justice of the European Union for the Infopaq case). The lawmaker, opting for a qualitative solution, reckoned that the excerpt cannot be a substitute for the piece of news, since the excerpt must not be exhaustive enough to meet the information requirement to such an extent as to render unnecessary the reading of the article whose content is “merely anticipated” by the excerpt. Nothing is provided for as to the economic value of the brief excerpt;
- furthermore, the report to Legislative Decree no. 177/2021, which specifically refers to the “*uploading, online, of a press publication, by the same publisher, following their own free will*”, clarifies that the case in point does not fall within the sphere of implementation of article 43-bis, since the rule aims to regulate content platforms’ use of information whose rights are held by the publishers;
- the Authority therefore reckons that while enforcing copyright regulation in electronic communication networks it is necessary to carefully balance the several rights at stake, respecting, on the one hand, freedom of expression and thought and ensuring people’s access to culture and the Internet and, on the other, ensuring the protection of copyright;
- in order to identify the benchmark criteria for establishing fair compensation, the Authority shall bear in mind the many interests involved in this sector. The major goal is to preserve the value of works in the digital environment and, in particular, of press publications intermediated by information society service providers, including media monitoring and press review enterprises. In this regard, the criteria aim to promote a fair and proportionate remuneration for publishers, affecting the value gap, including with a view to preserve the stimulation of production of a given quantity of quality information that is socially appropriate, seen as information is a public good;
- the rule is therefore underpinned by the need to pair an appropriate protection of quality information (aimed at preserving the public interest) with an impartial, truthful, correct and objective information that may adequately contribute to growth and to cultural, social and political development. The rule is therefore functional to the protection of information pluralism, which is the representative and founding mission of the Authority, insofar as it enforces a balanced adjustment of the interests at stake, guaranteeing that the prerequisites needed to preserve a proper funding of publishers be met, seen as it is a crucial factor for quality information, and even more crucial at a moment when the phenomenon of disinformation and the ability of specific contents to become dominant because they go viral and not owing to their proven authoritativeness is becoming alarming;

- Information is indeed an economic asset characterised by sizeable overhead costs, hence the publisher has the twofold and reasonable need, on the one hand, to recoup investment costs and, on the other, to make a profit;
- The new digital context had imposed new business models, superseding the ones the traditional national publishing industry was anchored to and boosting the key role of content-sharing platforms;
- in an open and competitive environment, revenues for publishers can be generated by payment for information (subscriptions, paid access to websites) and from (online) advertising. However, the digital world imposes models that differ from the traditional ones: a high level of (advertising) revenues requires a widespread circulation of news. The criteria for defining fair compensation must therefore be able to pair the twofold need of ensuring quality information and adequate remuneration for those who produce the news, while also facilitating the sector's efficient evolution, on a technological level too;
- the economic nature of information as an experience good, together with the deep change the online information system is undergoing, in terms of both supply and demand, as detected and analysed by the Authority in several fact-finding enquiries, also bring about the risk of a drop in the quality of information content circulating on the Internet, which is also to be seen in the emergence of complex disinformation phenomena;
- from this standpoint, the benchmark criteria for establishing fair compensation must provide appropriate stimuli in order for quality information content to be promoted. This represents a value for all stakeholders: for publishers, since it acknowledges their *quid pluris*, which distinguishes press publications; for providers and media monitoring and press review enterprises, since quality information helps boost the reputation of said enterprises and may make their services more palatable, even for advertisers, and this raises the value of the advertising space made available by the provider, as well as that managed by the publisher itself; for end users, since press publications are a key element for exercising fundamental rights, even more so considering information's contribution to the people's correct perception of economic, social and political phenomena and to how people form their views;
- furthermore, the benchmark criteria for identifying fair compensation must encourage all the parties involved, each one in its own sphere of action, to keep investing a lot in technological innovation;
- the recipients of the provisions set forth under the regulation envisaged by article 43-bis of the copyright law form a composite set of enterprises, in particular when it comes to intermediaries, and to a lesser extent, and differently, when it comes to publishers;

- regarding publishers, without prejudice to the definition set forth under Legislative Decree no. 177/2021, it is important to stress that the audience is not limited to people residing in our country. As pointed out in the explanatory report to the mentioned Legislative Decree, the definition of “publisher” includes all news publishers that meet specific requirements, namely the ones registered with the court and with an editor-in-chief, in compliance with Italian press laws (registration with the court and with the Communications Operators Register kept by the Authority). The broader definition provided for under paragraph 3 of Article 43-bis derives, however, from the need to ensure the enforcement of the rule also with reference to European publishers targeting the Italian public, whose national publishing laws might entail different requirements;
- given the very dynamic business models and the need to preserve the parties’ negotiating freedom in order for them to reach mutually beneficial agreements, the criteria must reflect the structural differences between the parties, so as to avoid undue market distortions, and they should also take into account differences in terms of the parties’ bargaining power. Their definitions should also be sufficiently generic and flexible in terms of practical implementation, so as to facilitate their enforcement in a specific case and make them adaptable to the evolution of market trends over time;
- in this regard, as mentioned above, within the context of information society service providers, a distinction should be made with respect to media monitoring and press review enterprises, since they are characterised by structural differences relating to several aspects: the nature of the services they offer; the type of demand they meet; the different revenue and cost structure underlying the operations they perform; the business relationships with publishers and the extent and distribution of bargaining power;
- in particular, while media monitoring and press review enterprises provide their services, usually for a fee, to customers who sign contracts for the provision of the relevant customised services, which benefit many end users belonging to the contractor’s organisation, other information society service providers have a business model that chiefly relies on online advertising revenues and on revenues deriving from the exploitation of big data, obtained through the profiling and segmentation of end users by analysing their browsing and usage data;
- regarding media monitoring and press review enterprises, the specific nature of the service suggests establishing *ad-hoc* criteria that take into account the contractual dynamics of the sector, striking a fair balance between the opposing needs of publishers and media monitoring and press review enterprises in such a way as to ensure that the negotiation for accessing this crucial resource occurs in accordance with reasonable and fair criteria;

- from this standpoint, the criteria identified by the lawmaker, while being illustrative, appear not to be entirely enforceable in the press review sector;
- hence, the Authority reckoned it had to identify at least two different sets of benchmark criteria for fair compensation, which must be consistent with said differences, starting from the breakdown of the criteria set forth under article 43-bis;
- moreover, the provisions of the Authority may require an update and a reassessment over time, even because of evolving market trends. For this reason, the Authority shall set up a plan to monitor the regulation’s effects, to be listed in the AIR (Regulatory Impact Analysis) report, which provides useful fact-finding elements to the Authority for its VIR (Regulatory Impact Verification), provided for by the lawmaker under article 2(1) of Legislative Decree no. 177 of 8 November 2021;
- regarding the amendment and/or supplementary proposals formulated by the participants in the consultation on the structure of the Draft Regulation, with specific reference to definitions, scope, criteria for establishing fair compensation and procedural profiles, the main positions represented are reconstructed below, always indicating the reasons that led to the acceptance of one solution rather than another, as reflected in the final text of the regulation.

Chapter I

General Principles

Article 1 **(Definitions)**

Main positions of the parties involved

Some parties, agreeing with the formulation of the proposed definitions, made no remarks and deemed unnecessary suggesting further definitions.

Other parties did make some remarks as to the article in point.

Regarding the definition of “information society service provider” or “provider”

One party, in order to avoid a manipulative and distorted interpretation of the rule, suggests reformulating the definition of “information society service provider” or “provider” to make it consistent with recital 54 of Directive EU 2019/790 and prevent a misleading enlargement of the rule’s enforceability to parties other than those (online information content aggregators and media monitoring enterprises) indicated under the copyright directive and the national transposition regulation. To this end, the party suggests the following definition of “information society service provider” or “provider”: *“the natural or legal person or non-acknowledged association that provides a service, in*

the information society, which consists exclusively or mainly in allowing ~~allows~~ the online use of press publications". Another party reckons that it would be appropriate to better outline the concept of "online use", considering that media monitoring and press review services do not give rise to forms of online reproduction and disclosure. Finally, another party points out that the concept of "online use" of press publications is perhaps – starting from the primary provision enforced by the regulation – somewhat limited "terminologically", potentially ignoring (should the interpretation of "online" be literal) relevant cases worthy of copyright protection, such as the use, offline, of "pay-per-free" publications that can be downloaded. It therefore reckons it is desirable to clarify the definition, or rather, provide a specific definition that can include said cases too (namely, adjectivizing with the term "digital" rather than with the term "online").

Regarding the definition of "information society service"

One party suggests pointing out that "information society service", as set forth under article 1(1)(b) of Law no. 317 of 21 June 1986, as amended by Legislative Decree no. 223 of 15 December 2017, as subsequently amended and supplemented, means "*any information society service, namely, any service normally provided upon payment, remotely, via electronic means and upon individual request of a service recipient*";

Regarding the definition of "publishing product"

As for the definition of "publishing product", some parties point out that such definition is not included in the text of the European Directive, nor in the text of the transposition decree, both of which solely refer to online use of press publications. They therefore consider the definition of "publishing product" very broad, since it refers to 'products' made with a digital support – and which may, potentially, include non-press content too – which are communicated to the general public "by any means". Since said term is mentioned in some of the criteria listed under article 4(2), such as those set forth under letters *d*), *g*) e *h*), such a definition risks including, in the costs borne by the publisher, even costs that are by no means related to the content disclosed online, therefore clashing with the spirit of the Directive and of the transposition decree. Should said definition be kept, it could potentially unduly benefit press publishers that have sizeable offline operations, to the detriment of publishers who operate online only. Hence, it suggests that the definition "publishing product" be replaced in the regulation with "*press publications disclosed online*", or to modify it be replacing the wording "by any means" with the word "online" or with the wording "via electronic means". Another party reckons it worthwhile clarifying whether the publication or the communication of information to the general public should be limited to "press" information, otherwise the definition structure risks becoming far too broad, potentially including all types of "information", including archival or historical information.

Regarding the definition of “press publication”

Regarding the definition “press publication”, a number of parties made remarks. One party asks the Authority to further clarify the exclusion of publications with a scientific or academic purpose from press publications, pursuant to article 43-bis(2) of the copyright law (LDA), deeming such publications worthy of being fully considered press publications. Two more parties point out that the proposed definition, in the paragraph stating “*published in any means of communication*” seems to include in the press publication – which entails the right to fair compensation – any type of press content, even that of hardcopy only newspapers, while the principle of the Directive refers to online use only. They therefore deem appropriate a reformulation of the definition, which should include online publications only. Two parties suggest inserting, under the definition “press publication”, the wording “*or exclusively consist of*” after the wording “*a set mainly formed by literary press works, which may include*”. Another party points out that it may be useful (in order to avoid potentially manipulative interpretations) to add to the definition “press publication” the fact that there is no prejudice to any copyright owed for the use of pictorial and photographic works included in the press publication.

Other parties, on the other hand, reckon that the definition “press publication” should reflect the parameters and exceptions set forth under Directive EU 2019/790 and under article 43-bis of the copyright law (LDA). To this end, three parties suggest explicitly mentioning that periodical publications with a scientific or academic purpose are not to be considered press publications. One party in particular claims the Authority should provide a list of press publications, intended for the Italian public, that meet the requirements for benefitting from the relevant rights, pursuant to the copyright law (LDA). In this regard, it points out that, should no such list be made available, providers will face several practical problems, which will likely cause an increase in delays and disputes. It would therefore be inappropriate to entrust the online platform with the task of defining “press publications” or “news”; in this regard, it should be specified that “*likewise, websites, such as blogs, which provide information within the framework of an activity that is not conducted following the publisher’s initiative or under its responsibility and control, are not considered press publications*”.

Regarding the definition of “publisher of press publications”

Some parties commented on the definition of “publisher of press publications” or “publisher”, pointing out the following: in particular, three parties reckon that not mentioning any accurate list of players that can be classified as publishers could be particularly problematic and might favour conflict between the parties. A possible solution could therefore be introducing an amendment to the text, envisaging that only communication operators registered with the ROC (Register of Communications Operators) be considered. In fact, with no indications, service providers would find it extremely difficult to identify a publisher who therefore has the right to fair compensation. To this end, they hope the Authority will provide a list of “publishers of press publications” or publishers. One party asks the Authority to stress that the definition “publisher of press publications” or “publisher” includes – aside from the registered news publishers – even non-registered news publishers, which have apparently been left out of

said definition and, consequently, excluded from the enforcement of the rule in point. Such a request chiefly stems from the needs of small and medium publishers that publish their contents online only, for whom – should they meet specific requirements and pursuant to article 3-a of Law no. 103 of 16 July 2012 – it is not mandatory to register with the records office of the relevant tribunal. In particular, it should be noted that Directive EU 2019/790 itself, under recital 54, stresses that “*The wide availability of press publications online has given rise to the emergence of new online services*” and, in this regard, the initial observations of Resolution no. 195/22/CONS claim that “*new forms of online content distribution have drawn an increasingly vast public, which has therefore benefitted from a more favourable circulation of the contents themselves*”. According to the respondent, these new online services include, pursuant to the texts of the EU Directive and of the Resolution, news aggregators or media monitoring services, which also gather content proceeding from non-registered news publishers. Hence, there is no understanding why, apparently, given the structure of the regulation, non-registered news publishers are excluded from the definition of publishers; consequently, there is no understanding why the principle of fair compensation does not apply to them, since the purposes of a free and pluralist press would therefore not be achieved, nor those of a free market, which the Directive intends to pursue.

Regarding the definition of “very brief excerpt”

Several parties commented on the definition “very brief excerpt”, deeming it particularly qualitative, therefore entailing risks in terms of legal certainty, and highlighting the need for official parameters that may guide the interpretation of said definition, not limited to merely mentioning the need to read the whole article. To this end, one party suggests comparing such concept to the generic right to quote, set forth under article 1(1) of the copyright law (LDA), pursuant to which quoting someone else’s work without being authorised by the holder of the rights of the work is not forbidden but subject to limitations: namely, it must be made for the purpose of critique or debate and must not hinder the use of the work. By applying such principle to the case in point, by way of example, quoting a press work should be considered forbidden when it ceases to have an explanatory function and takes on a business-related function. With reference to the text excerpts that, while considered to be brief, should not be covered by the definition of “very brief excerpt” (since they are relevant in economic terms – especially for information society service providers), the fair compensation principle should be enforced proportionally to the portion of text used. In this regard, the party suggests including, among the indicated criteria, a specific reference to the part of the text used compared to the full text of the content. The indicated definition of “very brief excerpt” is therefore not agreed with, nor is there agreement as to the lawmaker’s decision to opt for quality rather than quantity, since the “quality” of the portion of the press publication is assessed discretionally, firstly by the service provider that decides to publish it, and secondly by the judge, who – in the event of a challenge – will have to express his/her opinion on it. One party points out that such definition should be more definite, specifying that the excerpt does not jeopardise the press publication publishers’ investments in content production by measuring them with qualitative and quantitative parameters. For example it reckons that a very brief excerpt should also have the possibility of being multimedia content (e.g. a photography miniature, paired with words) and being defined with certain parameters. It reckons that a balanced definition could envisage a maximum limit of 200

alphanumeric symbols; below such limit, text content should always be considered as such. Another party points out that the lawmaker's decision to opt for a quality-based definition rather than a quantity-based one for "brief excerpts" rules out absurd limitations but ends up creating a lack of certainty of law for the operators, since the proposed definition can evidently lead to very subjective assessments. Should a title be sufficiently descriptive, it could be stated that reading it is sufficient to get the gist of the story, especially nowadays, when many news articles are written hastily, with very little background investigation. It also points out that it should clearly be stated that all types of hyperlinks, including framing and embedding, should be allowed. Both private use and non-business use should be excluded from the scope of enforcement of this new right held by the publishers. The fact that said types of use occur on a business platform should be irrelevant. In this regard, it is possible to give the example of a football club proudly sharing a screenshot of an article mentioning one of its teams on its social media page: such kind of sharing should not entail the payment of a fee. In addition, the types of use permitted under copyright exceptions, such as the use of public domain works and use allowed under a non-exclusive licence, should also be explicitly stated as lying outside the scope of this new right.

Another party points out that, while literally complying with the regulations, the way excerpts are shown on the web page could actually provide for the bypassing of the regulation itself. The concurrent presentation of several excerpts associated with the same piece of news, each one with a different content, could indeed satisfy the reader's information requirements, hence they would no longer entirely consult every single article. Therefore, it is apparently appropriate to associate the "very brief excerpt" definition with the context in which it is represented too, with the following definition: *"any portion of press publication that does not relieve users, including because of the way it is shown within the platform context, from the need to consult the entire press article"*. Two parties propose specifying that the definition "very brief excerpt" should explicitly *"exclude single photographs or video fragments"* (which could be part of the press publication while also being considered content that is independent from the article), so as to avoid a manipulative interpretation of the definition that would lead to a free use of photographs and videos taken from the articles. In this regard, one party suggests the following definition: *"very brief excerpt: any portion of the press publication that does not relieve users from the need to consult the entire press article, excluding individual photographs or video fragments"*. Another party suggests the following amendment: *"very brief excerpt: any portion of press publication with a literary nature that does not relieve users from the need to consult the entire press article"*.

Regarding the definition of "collective management organisation"

One party reckons it is necessary to detail the definition of "collective management organisation", in order for it to also include the sector's most represented trade associations, so as to start – while respecting the parties' freedom of economic enterprise – collective bargaining for establishing fair compensation. In fact, it reckons that resorting to collective bargaining through bodies dealing with collective management of press review rights may simplify the establishment of fair compensation, to the benefit of both publishers and press reviewers. Resorting to forms of collective bargaining would allow to cut transaction costs, optimise the process of legal acquisition of contents and establish

technical and contract standards, as well as economic enhancement parameters shared by publishers and media monitoring and press review enterprises. To this end, it suggests defining the collective management organisation as follows: “*body set forth under article 2(1) of Legislative Decree no. 35 of 15 March 2017 or trade association that significantly represents publishers, information society service providers and media monitoring and press review enterprises*”.

Regarding the definitions of “contractor” and “end user”

Some parties made remarks on the definitions of “contractor” and “end user”. One party points out that the definition of “end user”, implied by the definition of “contractor”, does not match the same definition of it in the media monitoring and press review sector, apparently incorporated in the grounds of the resolution on page 19, second line, which identifies the “end user” not as the final recipient of a service subscribed to by a contractor, but simply as the individual natural person entitled to access a service within the organisation of the relevant beneficiary. The difference between these two notions of “end user” is not merely nominal and also requires clarification and consideration for a correct assessment of the criterion set forth under article 6(1)(b) of the Draft Regulation. In particular, should the contractor be a collective body, authorising access to the service for all the heads/holders of the various bodies or offices could not be configured as being for the individual “benefit” of those bodies or offices but, rather, “for the exclusive benefit of the body”, insofar as it is functionally necessary for an “informed” performance of the activity of the body itself. Because of this, those who enjoy the service do not enjoy it personally, but simply offer their physical mediation in order for the body to use it. The case – which is not so frequent, but no so rare either – where a contractor enters into a contract for the provision of media monitoring or press review services for the benefit, or even for the benefit, of one or more parties, is different: in this case, the possibility envisaged under definitions (m) and (n) would indeed come about – i.e. services entered into by a contractor “for the benefit” of one or more parties, each one actually “benefitting” from the service it entered into itself.

Concluding, in order to avoid confusion, it suggests modifying the definition of “contractor” as follows: “*natural or legal person or unrecognised association that, regardless of the purpose, signs a contract, including for the benefit of a number of end users of another party or a number of other parties, for the provision of a media monitoring or press review service*”. In addition, it proposes that the definition of “end user” be formulated, or, if necessary, divided into two definitions, so as to make a distinction between the “end user”, who is the actual final recipient of a service, and the “end user” who does not “enjoy” a service, but within the recipient’s organisation merely provides physical mediation so that the beneficiary may enjoy it.

Two parties suggest removing, from the definition of “end user”, the reference to “*legal person or unrecognised association*”. In this regard, they point out that there are many more parties using the press review service than parties to be identified as those who technically purchase the product. Each contractor involves tens of thousands of end users, whether employees, members or officials, who have access to press publications through the press review, thus potentially meeting their need for information without having to purchase the newspaper. Hence, while the contractor may well be a natural or legal person, the same does not apply to the end user, whose notion is included in the criteria

for determining fair compensation precisely as an indicator of the extent and scope of the press reviewers' use of press publications relevant for the purposes set forth under article 43-bis of the copyright law (LDA). The element to be taken into consideration should therefore be related to the total number of individuals who have access to the content, while reference to legal persons is misleading and potentially underestimating and should be removed. The definition should encompass all individuals within the organisation of the contractor (client of the reviewer) who may access press publications through the press review service, since the availability of the content in question is sufficient. That said, one party suggests the following definition of "end user": "~~natural person or legal person or unrecognised association that uses~~ may use an information society service, including media monitoring or press review services subscribed to by a contractor".

Regarding the addition of new definitions

Some parties suggest adding more definitions. One party proposes adding, after letter (d), a new letter (e) concerning the definition of "*online content sharing services provider: an information society service provider whose major purpose, or one of its major purposes, is that of storing and giving access to the general public to a large quantity of works protected by copyright or other protected material uploaded by its users, which the service organises and promotes usually for a profit*".

Two parties suggest adding the following two new definitions: "article", "press review", proposing the following: "*article: any written piece that, in a press publication, addresses a topic (news, current affairs, economy, etc)*"; "*press review: the selection, indexing and collection of press articles, published in press publications, concerning a given topic over a given period, generally on a daily basis*". Three parties stressed that the definition of "individual user" may be introduced, since the term, mentioned under article 43-bis of the copyright law (LDA), is also mentioned in the Draft Regulation, under article 2(3), where the "individual users" are excluded from the scope of the regulation. In this regard, they trust in a clarification by the Authority, since, they point out, even a body or an enterprise have no business-related purposes when distributing – internally – some newspaper articles featuring quotes of their own organisation. They therefore reckon it would be fair, at least in similar cases, that bodies and enterprises too be considered "individual users". In their opinion, such a consideration would also go, for example, for cases such as the launching a new product on the market, when the enterprise may wish to share, internally (or even with its business network) a selection of the articles published by the press for that event.

Another party, considering the Resolution's many references to the "social media", hopes that the following *ad-hoc* definition be added: "*social network or social media: an online digital service that provides for the creation of virtual social networks through Internet websites and technologies that enable users to interact and share texts and/or images and/or videos and/or audio*".

Regarding the definition of "media monitoring and press review enterprise"

As for the definition of "media monitoring and press review enterprise", some parties agree with the definition and made no remarks.

One party agrees with the proposed definition, which comprehensively describes the activity of a media monitoring and press review enterprise, as typically performed in the Italian market, pointing out that the term "online" evidently includes "remote"

reproduction and disclosure of press publications, regardless of their format (hardcopy/digital and online).

Another party, while sharing the range of the definition, draws the Authority's attention to the media monitoring operations that use, for business-related purposes, press content referring to natural or legal persons (business information or "*adverse media monitoring*"). Said operations, while not being daily press reviews, entail the reproduction of press articles in the set of economic and legal information referring to natural or legal persons. Adverse media services are provided to business or institutional clients through online platforms by specialised operators, or operators working in the business information sector. It therefore claims that said operations undoubtedly fall within the definition of media monitoring, and therefore within the scope of article 43-bis of the copyright law (LDA) and of the regulation. To this end, it asks the Authority to conduct an appropriate, in-depth analysis in order to identify specific criteria for identifying fair compensation.

Another party agrees with the Authority's decision to make a distinction between the position of media monitoring and press review enterprises ("reviewers") and that of other information society service providers ("providers"). However, it points out that the second "RECITAL", at page 11 of the Draft Regulation, fails to respond to the facts where it states that the services provided by the reviewers "do not give rise to online reproduction and disclosure". Actually, it points out, media monitoring and press review services do give rise to reproduction forms; indeed, press publications are archived on servers by the reviewers, and (albeit temporarily) on the devices of end users, who may save them and permanently archive them locally; as for communications to the general public, even via the Internet (online disclosure), said publications are made available to the end users of the press review through web platforms and can be further shared (including with third parties, outside the contractor's organisation) for example via hyperlinks to Web pages. As a matter of fact, the foregoing has already been acknowledged in factual terms by the Authority too, with Resolution no. 169/20/CONS. From a legal standpoint, such acts fall within the exclusive prerogatives of publishers – holders of the rights of economic use of magazines and newspapers, and therefore the only parties that may authorise their exploitation, including online by Reviewers – owing to the combined provisions of articles 13, 16 and 38 of the copyright law (LDA), as also stated by the Authority in the aforesaid Resolution. Therefore, this party agrees with the definition of "media monitoring and press review enterprise", on the assumption that the list of operations the service they provide may consist of is not exhaustive. Frequently, in fact, the services of the reviewers take the form of the conduct enumerated under article 1(f) of the Draft Regulation, but not only: as noted above, these include, as a general rule, forms of reproduction and communication to the general public. The absence of a specific mention of such forms in the text of the proposed definition, however, does not appear problematic (i) based on the merely explanatory nature of the list and (ii) based on the fact that extending the list of required operations would entail the risk that certain media monitoring enterprises could be left out of the definition.

Two parties point out that the rationale of article 43-bis is that of better protecting publishers from the online use (by third parties) of their publications. Online services that allow an enterprise, body or association to make their own press review "in-house" have been available for a while now. Hence, should the publishers not be given fair compensation for the "self-produced" press reviews (possibly for the thousands of employees of a large bank), article 43-bis would not ensure the anticipated protection,

introduced not only for the major news publishers, but also for several “niche” publishers. That said, regarding the definition set forth under letter (f), since media monitoring operations (specifically, press review) by no means rule out news publishers that are available only in hard copy (since they are media too), the two parties propose the following amendment to the definition of “media monitoring and press review enterprise”, also suggesting the inclusion of the relevant Italian acronym, “IMMRS” [equivalent to MMPRE, Media Monitoring and Press Review Enterprise, translator’s note]: *“media monitoring and press review enterprise (MMPRE): any type of enterprise – or part of it – that provides or makes available the tools for enjoying an information society service, consisting – not exclusively – of the selection, indexing and collection of articles that appeared in press publications (hardcopy or online) concerning a given topic over a given period, usually on a daily basis, organisation, collation, extraction, transmission, making available of publishing content, typically upon payment, remotely, including via digital processing and data storage means. and, upon individual request of a service recipient, even via hard copy, to be digitalised subsequently”*.

Another party does not agree with the definition of “media monitoring and press review enterprise” since, according to the current definition, any enterprise, body or association may act as a media monitoring and press review enterprise without being qualified as such, even though it conducts other major operations. It therefore suggests the following definition, which, it believes, is more suitable for protecting publishers from all forms of media monitoring: *“media monitoring and press review enterprise: any enterprise (or part of it) that provides or makes available the technical tools for making or using a press review, meaning an information society service that consists, not exclusively, in the selection, indexing, organisation, collation, extraction, transmission, making publishing content available, typically upon payment, remotely, even via digital means for processing and storing data and upon individual request of a service recipient, including via hard copy to be digitalised subsequently”*.

One party reckons that the definition of “media monitoring and press review enterprises” is formulated too generically, to the extent that it could in principle also include services that give rise to forms of online reproduction and disclosure that are not provided for the benefit of “contractors” and their “end users” (as defined in the regulation). The Resolution clarifies that *“media monitoring and press review enterprises provide, typically upon payment, their services to customers who sign contracts for the provision of the relevant customised services, which benefit a number of end users belonging to the contractor’s organisation and which do not give rise to forms of online reproduction and disclosure”*. Therefore, the definition of “media monitoring and review enterprise” should be amended accordingly, as follows: *“media monitoring and press review enterprise: an enterprise that provides an information society service consisting, not exclusively, in the selection, indexing, organisation, collation, extraction, transmission, making publishing content, typically upon payment, remotely, including via digital data processing and storage means and at the individual request of a recipient of services, including hard copies subsequently digitised, which benefit end users belonging to the contractor’s organisation and that do not give rise to forms of online reproduction and disclosure”*.

Another party claims that the definition of “media monitoring and press review enterprise” should focus more on the characteristics of the service than on those of the enterprise providing it. This appears to be more consistent with the business model considered and suitable for including more innovative operations, less attributable to traditional “press reviews”. It also suggests specifying that the content covered by reviews

must be of a “press content”, namely, concerning information on current events, to the exclusion of other types of content, such as, in particular, entertainment content in any form. To this end, it therefore suggests that the definition be amended as follows: “*media monitoring and press review enterprise*”: ~~an enterprise providing an information society service consisting, not exclusively, of one or more of the following operations: selection, indexing, organisation, collation, extraction, transmission, making press publication content available, typically upon payment, remotely, including via digital data processing and storage means and at the individual request of a recipient of services, including by means of hard copies, subsequently digitalised~~”.

Finally, another party, while agreeing with the proposed definition, suggests that the sentence “at the individual request of a recipient of services” should be repositioned, as follows, since what particularly characterises media monitoring and press review services is precisely the provision at the request of a given recipient: “*media monitoring and press review enterprise: an enterprise that provides an information society service at the individual request of a recipient of services, consisting, not exclusively, in the selection, indexing, organisation, collation, extraction, transmission, making publishing content available, typically upon payment, remotely, including via digital data processing and storage devices and at the individual request of a recipient of services also by means of hard copies, subsequently digitalised*”.

Remarks by the Authority

Regarding the definition of “information society service provider” or “provider”

The Authority reckons that the definition of “information society service provider” or “provider” can be confirmed, since it is consistent with the provisions set forth under recital 54 of (EU) Directive 2019/790, where it acknowledges that “*The wide availability of press publications online has given rise to the emergence of new online services, such as news aggregators or media monitoring services, for which the reuse of press publications constitutes an important part of their business models and a source of revenue. Publishers of press publications are facing problems in licensing the online use of their publications to the providers of those kinds of services, making it more difficult for them to recoup their investments [...]*” and with the national transposition rules. Furthermore, we stress that “online use” of press publications means the use made through electronic communication networks.

Regarding the definition of “information society service”

With reference to the proposal of explicitly defining “information society service” as “*any information society service, namely, any service normally provided upon payment, remotely, via electronic means and at the individual request of a recipient of services*”, the Authority considers it preferable to confirm the current reference to rules to be complied with pursuant to any amended primary legal source.

Regarding the definition of “publishing product”

With reference to the request, submitted by some parties, of removing the definition of “publishing product” – since it is not mentioned the text of Directive (EU) 2019/790, nor in the text of the transposition decree, which refer only to the online use of press publications, the Authority reckons it can accept this request.

Regarding the definition of “press publication”

As for the remarks concerning the definition of “press publication”, the Authority points out, above all, that recital 56 of Directive (EU) 2019/790 states that “[...] *Periodical publications published for scientific or academic purposes, such as scientific journals, should not be covered by the protection granted to press publications under this Directive. Neither should that protection apply to websites, such as blogs, that provide information as part of an activity that is not carried out under the initiative, editorial responsibility and control of a service provider, such as a news publisher*”. Article 2 of the aforesaid Directive therefore establishes that “*Periodicals that are published for scientific or academic purposes, such as scientific journals, are not press publications for the purpose of this Directive*”, just as established, with the same terms, under article 43-bis(2), last paragraph, of the copyright law (LDA), which indicates that, for the purpose of this regulation, “*periodicals for scientific or academic purposes are not considered press publications*”. Regarding the remarks claiming that the proposed definition of “press publication” (in the parenthetical element stating “*published in any means of communication*”) appears to include all forms of press content, including hardcopy only news publishers, the Authority points out that – consistent with the principle of the Directive and of the national transposition regulation – the right to fair compensation is granted only for the online use of the publications in point. That said, the Authority reckons it can partially accept the submitted remarks concerning the definition of “press publication” and may consider, for such definition, the parameters and exceptions set forth under Directive (EU) 2019/790 and under article 43-bis of the copyright law (LDA), explicitly envisaging that periodical publications for scientific and academic purposes shall not be considered press publications. In the light of the national and European regulations, while not specified in the definition in point, websites or blogs that provide information within the scope of an activity not taking place under the initiative, the editorial responsibility and the control of a news publisher shall not be considered press publications.

Regarding the remarks concerning the need to draft an accurate list of parties that may qualify as publishers – which suggest amending the text so as to include, for the purpose of this regulation, only the communication operators registered with the Communications Operators Register (“ROC”), the Authority points out the following: the number of publishers is not limited to those present in our country. As clarified in the explanatory report to the mentioned Legislative Decree, the definition of “publisher” includes the news publishers that meet specific requirements, or those registered with the tribunal and a manager in charge, in compliance with Italian laws concerning the press (registration with the tribunal and with the Communications Operators Register, kept by the Authority). The broader definition set forth under article 43-bis of the copyright law (LDA) derives from the need to ensure the enforcement of the rule, including with reference to publishers operating in another EU Member State that turn to the Italian

audience, whose national laws governing the publishing industry may entail different requirements.

Regarding the definition of “press publication publisher” or “publisher”

The Authority reckons it cannot accept the proposal of including non-registered news publishers – in addition to registered news publishers – in the definition of “press publication publisher” or “publisher”, since this regulation cannot apply to those who provide information within the scope of an activity that is not performed under the initiative, editorial responsibility and control of news publisher.

Regarding the definition of “very brief excerpt”

With reference to the remarks concerning the definition of “very brief excerpt”, the Authority reckons it must comply with the national lawmaker’s decision to adopt a qualitative criterion, based not on an assumed and preventive quantification, but on the intrinsic features of the information provided in the excerpt. The Authority, consistent with the provisions laid down by the lawmaker, reckons it cannot accept the proposal that the definition of “very brief excerpt” should explicitly exclude individual photographs or video fragments.

Regarding the definition of “collective management organisation”

Regarding the request made by one party to clarify the definition of “collective management organisation” so as to also include the most representative trade associations of the sector, the Authority does not accept it and hereby confirms the current reference to rules to be complied with pursuant to any amended primary legal source and scope.

Regarding the definitions of “contractor” and “end user”

As for the Authority’s comments on the proposed changes to the definitions of “contractor” and “end user”, reference is made to the arguments set out at length under article 6. The Authority considers that it can accept the proposal, submitted by two parties, to remove the reference to “legal person or unrecognised association” from the definition of “end-user”.

Regarding the addition of new definitions

As for the proposal to add a specific definition of “online content-sharing service provider”, the Authority reckons it cannot be accepted, since it is not relevant to the scope of this regulation.

Some parties also suggested adding the following new definitions: “article”, “press review” and “individual user”. The first two new definitions proposed are deemed unnecessary, since the definitions of “press publication” and “media monitoring and press review enterprise” are already suitable for the scope of this regulation. Instead, with reference to the proposal of adding the definition of “individual user”, in order to exclude, from the scope of the regulation, the entities and enterprises that internally distribute

newspaper articles quoting their own organisation, the Authority reckons that the notion of “end user”, as amended, is satisfactory. Furthermore, for the purpose of the application of these rules, it is not considered necessary to add a specific definition of social networks or social media because these are parties covered by the definition of information society service providers.

Regarding the definition of “media monitoring and press review enterprise”

With reference to the remarks made on the definition of “media monitoring and press review enterprise”, the following should be noted. The proposal to include the acronym IMMRS (MMPRE) in this definition can be accepted. The term “online” already covers the “remote” reproduction and communication of press publications, regardless of their format (hard copy/digital and online). Business-related information or “adverse media monitoring” is included, and therefore already falls within the definition of media monitoring operations. With regard to the indication that the second “RECITAL” on page 11 of the Draft Regulation does not correspond to the factual situation in the part where it states that the services provided by the reviewers “do not give rise to forms of reproduction and online disclosure”, it should be pointed out that this expression refers to the free accessibility of such services on the Internet. However, the Authority considers that it can accept the remark by reformulating the relevant sentence.

With reference to the proposed amendment that seeks to include parts of enterprises in this definition, the Authority reckons it cannot be accepted, since media monitoring and press review operations performed by parts of enterprises are relevant only for the purpose of determining the relevant turnover, pursuant to Article 6 of this regulation.

As for the proposal of including services that allow an enterprise, body or association to produce its own press review “in house”, it is noted that the subjective scope of application of Article 43-bis – which is the primary reference rule for the purpose of adopting this regulation – exclusively includes media monitoring and press review enterprises. Without prejudice to the fact that the list of operations that characterise MMPREs, indicated in the definition in point, is an example and non-exhaustive list, it is hereby noted that any kind of reproduction and communication to the general public that is not authorised by the rights-holder constitutes an infringement of rights, and as such is punishable under the provisions of the copyright law (LDA). The Authority therefore reckons that the proposed amendment cannot be accepted.

Regarding the remark that this definition is too broad and also risks including services that result in forms of online reproduction and disclosure that are not provided for the benefit of contractors and end users, the Authority reckons it can replace “recipient of services” with “contractor”, in the definition, for the sake of greater clarity. Similarly, the Authority reckons it can accept the proposed amendment concerning content subject to media monitoring and press review operations, replacing the term “publishing content” with “press publications”, so as to avoid including purely entertainment-related content.

Article 2 (Scope and purposes)

Main positions of the parties involved

Several parties deem the scope of the Regulation compliant with that of article 43-bis of the copyright law (LDA).

Two parties deem it compliant provided that the proposals of amending and supplementing the Definitions be accepted (the clarification of the definition of “media monitoring and press review enterprise” and the addition in the definition of “single user”). Another party too reckons that the definition of “single user” should be more accurate.

One party reckons that, in general terms, the scope is fully compliant with that of article 43-bis of the copyright law (LDA). However, it points out that such compliance does not go for the reference to press publications intended for the Italian public, nor for the criteria that classify a publication as press publication, as set forth under article 2(1). In fact, pursuant to article 43-bis of the copyright law (LDA) and article 15 of Directive (EU) 2019/790, the provision of press publications to the public of the Member State transposing the Directive is irrelevant for the purpose of acknowledging the publishers’ rights. Hence, it suggests removing all references to the intended use of press publications with the Italian public or to classify as intended for the Italian public even press publications that are relevant to the contractors or used by information society service providers to the benefit of end users on the Italian territory. One party is perplexed by the vagueness of the criteria the Authority apparently wants to adopt to classify publications intended for the Italian public. Firstly, it is not clear whether the criteria indicated as an example are to be considered cumulative or alternative, or if the absence of current revenues in Italy is itself an excluding factor. Secondly, it claims that the definition of the criteria should be mandatory, thus reducing the Authority’s discretion in terms of enforcement.

Another party too agrees with the scope outlined by the Draft Regulation. However, according to the respondent, it is necessary to clarify, in the articles, that the right granted under article 43-bis of the copyright law (LDA) does not alter the regulatory framework in force before the amendment introduced by Legislative Decree no. 177/2021, but expands the sphere of the publisher’s individual rights. Indeed, the new relevant law governs the remaining hypotheses, such as the online use, by reviewers, of press articles that are not covered by restricted reproduction, hence previously freely reproducible: now, in the case in point, the publisher holds a relevant right for the online use of the press publication by Providers and Reviewers. Other parties suggest amending paragraph 2 of this article, claiming that intellectual property rights should be explicitly mentioned. One party, assuming that the safeguard of the parties’ contractual freedom is crucial in relations between publishers and platforms, reckons that the role of the Authority and the scope of this Regulation should be limited to the cases where the parties have already agreed they want to negotiate a monetary compensation agreement but, despite the efforts made by both parties in good faith, no deal was reached as to the total amount to be paid. The Draft Regulation and the Authority should therefore not interfere, supersede or replace the parties’ intentions. Regarding the territorial scope, one party agrees with limiting press publications intended for the Italian public, which prevents the risk of

having national laws of Member States overlap, as well as the double counting of the payments owed for the online use of press publications available in several Member States. It stresses that accessibility alone to the domain of a newspaper from the Italian territory should not be sufficient to entail the enforcement of article 43-bis of the copyright law (LDA). Regarding paragraph three of the article in point, one party points out that it should reflect what was confirmed in the Resolution and in the explanatory report to Legislative Decree no. 177/2021 with reference to the content published by publishers. In its opinion, said content is not covered by the scope of article 43-bis of the copyright law (LDA), nor by the Draft Regulation. Another party stresses that, with reference to the scopes ruled out by the Regulation, that paragraph three should better reflect the scope and wording of article 43-bis of the copyright law (LDA), explicitly including in the rule's provisions, among the ruled-out scopes, the exceptions and limitations provided for under EU law, in addition to private or non-business use. Regarding paragraph four, one party would like to clarify the data therein indicated since the law transposing the Directive was approved on 12 December 2021, when the Draft Regulation still had not been enforced. Society reckons it would be more reasonable for the Draft Regulation not to apply to press publications published the for first time prior to the effectiveness date of said Draft Regulation.

In this regard, another party asks to remove or modify it, owing to the provisions set forth under the Decree transposing the Directive and owing to logical and legal reasons too: indeed, the rights provided for under article 43-bis(14) of the copyright law (LDA) “*are extinguished two years after the publishing of the press publication*”, hence referring to 6 June 2019 would be useless and potentially misleading, since – when the Regulation was published – press publications dated 6 June 2019 would not be relevant.

One party claims that the scope is not compliant; actually, it states that, starting from the transposition Legislative Decree and, consequently, the Draft Regulation in point, the perimeter outlined by the Copyright Directive has been overstepped, limiting the editors' flexibility and freedom of choice, which is crucial for a fruitful development of the entire digital publishing ecosystem. Nevertheless, the party appreciates the fact that, under the Resolution, the Authority has explicitly acknowledged the need to preserve the parties' bargaining freedom in order to enter into agreements that are mutually beneficial, including in view of the strong dynamism of business models and of the structural differences existing between the stakeholders.

Another party reckons that the Regulation should apply to the works “that are able to reach” the Italian public, not only to the works “intended” for it. It also deems restrictive subjecting the enforcement of the rule to “obtaining profits in Italy”. Finally, it suggests introducing guarantees for monitoring certified data traffic, so as to make sure the Authority can take effective measures.

Many parties made no remarks as to the article in point.

Remarks by the Authority

As for the scope of the Regulation, the Authority reckons it needs not specify, under article 2, that there is never any prejudice to the parties' bargaining freedom, since said guarantee is indicated under articles 4 and 6 and extensively clarified under the Resolution. Furthermore, there is no doubt that the Regulation does not apply to the contents published by the publishers themselves on platforms, since – as provided for

under paragraph 1 of the article in point – it applies to the online use of press publications by information society service providers.

Regarding the Authority possibly accepting the amendment proposals concerning the definitions of “media monitoring and press review enterprises” and “single user”, please refer to the remarks made concerning article 1. Once again, for the purpose of classifying a publication as intended for the Italian public, it is believed that the topic addressed is not relevant, nor is the fact that the publication deals with current affairs that are relevant for Italy. Hence, the request to accordingly amend paragraph 1 of the article cannot be accepted, just as the one calling for the removal of the reference to making profits in Italy, since it is a particularly relevant parameter in terms of classifying the publication as intended for the Italian public. On the contrary, the Authority reckons it can accept the proposal calling for the removal of the criterion concerning the “achievement of a significant number of contacts on the Italian territory”, which may lead to uncertainty in terms of its enforcement. As for the accessibility to a press domain from the Italian territory, the Authority shall check, case by case, whether this may be an element that is suitable for classifying press publications as intended for the Italian public.

The proposal of adding, under paragraph 2, a mention of copyright and related rights should be accepted. On the contrary, it is not necessary to point out, under paragraph 3, that the Regulation does not apply should there be exceptions and limitations to copyright, since said provision is already indicated under paragraph 2 of the same article.

Regarding the request for clarifications as to the date indicated under paragraph 4, the Authority reckons said paragraph should be reformulated so as to duly stress that the rights set forth under this Regulation shall extinguish two years after the publishing of the press publication and that the term is calculated starting from 1 January of the year that follows the publishing date of the publication.

Article 3

(General principles)

Main position of the parties involved

Some parties fully agree with the proposal of having the Authority promote the lawful offer. Regarding the proposal of promoting codes of conduct in order to increase cooperation between right-holders and information society service providers, they acknowledge the soundness of the proposal. However, with reference to the press reviews segment, they point out that: *i*) a qualified presence of “client – contactors”, through their Associations, should be envisaged, so as to ensure greater compliance with said codes by all stakeholders and prevent “non-aligned” relevant requests; *ii*) their predisposition (to be updated on a yearly basis) to unanimity should be regulated, and – were that not achieved – there should be a six-month postponement, aimed at reaching an agreement; should permanent difficulties remain, there will be need for an arbitration, to be submitted to the Authority, to settle disputes.

Another party too agrees with the proposal of promoting codes of conduct, stressing that their usefulness is strictly linked to the necessary participation of all stakeholders (in the

case in point: publishers, small and innovative, major national press publication groups and consumer associations). One party agrees and hopes there will be an initiative promoting the Authority's lawful offer, especially in a sector and market such as the one of press reviews, marked by great uncertainty and unfair competition. It also suggests to possibly create, with the Authority's support, a list (available online) of the trade operators that have signed licensing agreements and provide press review services in compliance with the laws, and the publishing of guidelines for public administration offices that award press review and media monitoring contracts. It also hopes that the Authority may promote codes of conduct also by encouraging forms of collective bargaining.

One party agrees with the proposal of the Authority promoting a lawful offer of works, provided that said proposal be made respecting and balancing the interests of all trade operators. For the sake of greater clarity, it reckons that the Authority should better stress its role within the sphere of the lawful offer. It also agrees with the proposal of promoting codes of conduct that aim to assist the Authority in facilitating cooperation between right-holders and information society service providers.

One party agrees with the proposal of promoting the lawful offer of works and suggests listing in detail the instruments the Authority makes available for such purpose, and also suggests highlighting its surveillance role. As for the codes of conduct that aim to favour cooperation between the parties, it reckons sanctions should be imposed if said codes are not complied with.

Other parties agree with the proposal of having the Authority promote the lawful offer of works. With reference to the proposal of the Authority promoting codes of conduct, while claiming that it is praiseworthy, they suggest avoiding an overlay with other codes of conduct previously adopted or to be adopted soon at a European level (in particular, they refer to article 35 of the DSA and of the new Code of Practice on Disinformation).

One party agrees with the proposal of having the Authority promote the lawful offer of works and stresses the opportunity of an appropriate promotion of lawful demand too, for example in the market of media monitoring and press review services. It reckons that it is appropriate, in terms of promoting codes of conduct, for said demand to be associated with the conduct of the parties using media monitoring and press review services.

Another party reckons that the Authority's activity promoting a lawful offer should be detailed more accurately in the regulation. It shares the proposal of promoting codes of conduct and deems it crucial that, following the possible adoption of said codes, the modalities for checking the stakeholders' proper compliance with it be promptly identified.

One party agrees with the Authority's proposal of promoting a lawful offer but, to this end, suggests involving consumer associations.

Another party agrees with the proposal of promoting the lawful offer of works, but it reckons that such offer should be clarified and be subjected to the exercise of and compliance with the exclusive prerogatives of the right-holders (the publishers, in the case in point) who may authorise or forbid the use (in this case, online use by Providers and Reviewers) of their works (in this case, press publications). It is undoubtedly appropriate to point out that said offer is "lawful", meaning that it must comply with the law. One party points out that, regarding the proposal of promoting codes of conduct, we should make sure that said codes do not generate confusion or uncertainty as to the scope of application or the function of the Draft Regulation.

Two parties agree with both the proposal of promoting the lawful offer of works and the

proposal of promoting codes of conduct. Another agrees and considers fundamental and highly desirable the action of the Authority as promoter and guarantor of the lawful offer of content and of cooperation between right-holders and service providers, thus favouring the promotion of codes of conduct.

One party, while acknowledging that the proposal of promoting a lawful offer is praiseworthy and that it is willing to cooperate in this regard, points out that it is not strictly related to the purposes of Article 15 of the Directive and Article 43-bis of the copyright law (LDA) and that it therefore should not fall within the scope of this Regulation. The proposal of promoting codes of conduct, despite being praiseworthy, also goes beyond the scope of Article 43-bis of the copyright law (LDA) and the Authority's powers thereunder. Hence, while codes of conduct may, in principle, be a useful tool to promote cooperation between the different stakeholders, they should not fall within the scope of this Regulation.

One party doubts that the promotion of lawful offers can be particularly useful in the area of media monitoring, whereas it certainly considers the promotion of codes of conduct to be useful.

Several parties did not comment on this article.

Remarks by the Authority

Firstly, it should be noted that the Authority considers it necessary to specify, in this article too, that there is no prejudice to the bargaining autonomy of the parties, but that it intends to encourage forms of self-regulation, including in order to favour cooperation between all stakeholders, for the purpose of determining fair compensation.

In particular, the Authority intends to promote the adoption – by all stakeholders – of self-regulation forms, but it may, following a first phase of enforcement of the Regulation, call for its adoption, including by drafting guidelines, should it be necessary. In particular, regarding applicative and methodological aspects specifically concerning Articles 4 and 6, the Authority may envisage initiatives aimed at stimulating discussion with stakeholders in order to identify and solve any problems emerging from the enforcement of the Regulation on matters concerning fair compensation. With reference to the proposal of creating an online list of trade operators that have signed licensing agreements and provide press review services compliantly with the law and the publishing of guidelines for enterprises and public administration offices awarding contracts for press review and media monitoring services, it is stressed that this objective lies outside the scope of the law. Nonetheless, the forms of voluntary participation set forth under the article in point could well include, if necessary, initiatives concerning the contracts of press review and media monitoring services. With particular reference to the conduct of the users of media monitoring and press review services, it should be noted that they will necessarily have to be assessed in terms of compliance with copyright law, which includes this Regulation and is deemed sufficiently comprehensive, even with reference to end users.

Finally, regarding the proposed amendment to paragraph three, it is emphasised that, as argued at length below, in the context of the disclosure of the lawful offer, the bargaining autonomy of the parties shall be preserved under all circumstances.

Chapter II

Online use of press publications by information society service providers other than media monitoring and press review enterprises

Article 4 (Criteria for determining fair compensation)

Main positions of the parties involved

Regarding the determination of fair compensation: general remarks

Almost none of the respondents, agreeing with the overall approach of the calculation model set forth under Article 4 of the Regulation, made any specific comment on the articulation of the proposed method, nor a calculation basis a modulated rate can be applied to, within a range of presumably consistent values, based on the characteristics of the different publishers expressed by the benchmark criteria.

Some respondents, on the other hand, expressed misgivings about this approach, due to the complexity of its implementation and its rigidity, which would be ill-suited to the different types of providers and publishers involved, both because of the practical difficulties in implementing the model (due to the different operating mechanisms of the providers' services) and because of the costs that may arise – especially for smaller publishers – from the use of complicated bargaining schemes. These parties, on the other hand, suggest removing the reference to the rate and defining an overall calculation basis for each provider, intended for the entire pool of eligible publishers and to be then distributed directly among them, according to the benchmark criteria (see below).

The respondents then made further generic remarks.

In particular, some parties, for the purpose of the enforcement of Article 4, emphasised the importance of the principle according to which fair compensation is, firstly, “the subject of free negotiation between the parties that, fully exercising their contractual autonomy, may come to an agreement that “can” take into account “also” the criteria indicated by the Authority. The parties, therefore, pointed out that it is crucial for both publishers and providers to be free to reach agreements or not, and freely negotiate their terms.

Moreover, several respondents emphasised the need to calibrate the parameters of the calculation model, duly taking into account certain differences that exist both between providers (in particular between search engines, aggregators and social networks), and within the publishers' sphere, with particular reference to the categories of news agencies, specialised press, digital native publishers, small publishers and local publishers. One party considers, in particular, that the model applicable to news aggregators should be separated from the one applicable to social media, given their different operating methods. Another party argues that the Regulation should not govern differently the several types of providers depending on their business models, for such a distinction is

not provided for either under Article 15 of the Directive or under Article 43-bis of the copyright law (LDA) and, indeed, would be contrary to the scope and rationale of the aforesaid rules.

Specifically, regarding the differences between providers, one party points out how the structure of incentives can be very different between the different types of providers. Indeed, while the common interest of all providers is generally to draw and retain users on their respective platforms in order to increase their value, the extent to which said value is exchanged between provider and publisher differs. This exchange typically tends to be greater in the case of search engines, which benefit from information content insofar as that are able to keep users on the platform; conversely, publishers gain value from the visibility that passes through redirect traffic, which moves from the platform to publishers' websites. In the case of social networks, on the other hand, the platform has less incentive to retain users through the attractiveness exerted by information content, even considering the high substitutability between the different types of content circulating on the social media; concurrently, the publisher has more direct control over its own content and visibility, owing to the very nature of social network services. Hence, the exchange of value can be considered lower.

Another party emphasises how each provider may operate differently, intervening on content more or less significantly. In particular, news aggregators, including search engines, proactively collect content and sort it according to its relevance (gauged through certain parameters - number of input links, correspondence between terms retrieved and terms included in the documents, technical performance of the sites, or, in terms of the user's search, based on the historical series of searches carried out by all users), whereas social networks do not take into account the relevance of one content over another; it's actually algorithms that select and sort the content (including, but not only, press content) appearing on each user's homepage according to the user's preferences.

One respondent notes that in identifying and assessing the benefits for both parties (publishers and providers), one should bear in mind the peculiarities of the social media, which relate to several aspects: the incidence of so-called "third-party" content (the only content relevant for the purpose of fair compensation) on the overall content; the substitutability of the different types of content circulating on the platform; the traffic that can derive to the publisher from the conversations and interactions that develop on the social network; the benefits of the provider that also derive from the information enrichment that allows users to intervene in the public debate and feel part of it.

Another party points out that, while in theory it is useful to differentiate the calculation model based on the different types of providers, this actually seems to be very complex and risks becoming rapidly obsolete, considering how fast business models evolve.

As for the differences between types of publishers, some respondents mentioned the need of smaller publishers, often local ones, and of digital natives, to have a calculation model that not only must be easy to use (for the sake of cutting transaction costs), but also flexible – given the different characteristics of publishers – in order to protect freedom of negotiation and the evolution of business models. Furthermore, one respondent called for a detailed description of the model for determining fair compensation that makes a distinction between publishers and news agencies, recognising the latter's specific role as producers of primary information, reused by the publishers themselves, as well as by providers. As for the specialised press, one party, pointing out that specialised publishing differs from generalist publishing in terms of target audience (professionals, enterprises, sector experts), production and organisational models (e.g. it resorts to specialised

journalists) and the characteristics of its publishing content (the specialised nature and the complex substitutability of contents for providers), hopes that the model for calculating fair compensation may acknowledge these peculiarities and duly take them into account. Finally, some parties pointed out the usefulness of streamlining the various elements that form the model for determining fair compensation and of adopting a methodology that is as objective and rigorous as possible, based on specific data and values, that rewards the authoritativeness and quality of content capable of safeguarding the public interest in impartial, truthful, correct and objective information that can adequately contribute to the cultural, social and political education and growth of citizens. In particular, one party points out that this simplification can be achieved by adopting a calculation basis consisting of shared elements, an essential grid of criteria, unambiguous in meaning and easy to use, and a rate that is consistent and comparable to similar market experiences. Regarding the desired simplifications, one respondent points out that these would also make it possible to promote framework agreements guaranteeing a minimum remuneration, in which individual and specific negotiations may be included. Another respondent, on the other hand, pointed out that a model that can be implemented easily could reduce interpretation problems during negotiations.

In addition to the general comments concerning the overall design of Article 4, respondents made specific remarks as to the individual paragraphs of the article itself, to which the constituent elements (to be analysed below) of the calculation model for determining fair compensation correspond.

Regarding the calculation basis

Several respondents observed that the calculation basis should be based on the provider's advertising revenues directly derived from press publications, which can be accurately identified and calculated, and removing any reference to indirectly obtained advertising revenues. The reasons for this exclusion are to be found, according to the respondents, in a number of complex factors:

i) neither the Directive nor the transposition decree mention indirect revenues or provide a definition of them; *ii)* from a conceptual standpoint, it is unclear what exactly they encompass; *iii)* while acknowledging that the provider obtains several indirect benefits from the press content, quantification is extremely complex, if not impossible – in the opinion of some parties – since it must also take into account the revenues obtained from user data, which often derive from a cross-section of data taken from different sources, and in any case, it is traced back to the press publications of the individual publisher; *iv)* even if it were possible to quantify them, the complexity of the calculation would risk hindering negotiations and triggering numerous disputes, undermining the very purpose of the Regulation.

One party in particular also points out that, regarding the value of user data, which may be considered an indirect benefit for the provider, it has already been included, de facto, in the calculation basis, since advertising revenues are partially based on user data – hence including them as “indirect” revenue could lead to double counting. Besides, from a legal standpoint, it is not possible to accept a payment greater than the amount the right-holder could obtain in the event of a legal dispute, namely greater than the damage, and therefore than the consequences the violator would suffer (see Court of Cassation ruling no. 39762/2021). “Indirect” revenues violate said principle. Still, should they be considered, then the publishers' ones should be considered too. Lastly, they should be calculated

based on protected content only, therefore excluding hyperlinks and very brief excerpts, which are irrelevant from a quantitative standpoint.

A different position regarding the inclusion of revenues indirectly derived from press publications was expressed by several parties, many of whom did not make specific remarks, accepting the proposal set forth under in Article 4(1) of the Draft Regulation. Some of them, on the other hand, explicitly claim that the inclusion of revenues indirectly deriving to the provider from the online use of press publications is appropriate, since it allows to correctly represent the value the provider obtains from the online use of press content. Specifically, these parties provide clarifications as to which revenue categories should be referred to and suggestions as to how they could be included in the calculation model.

According to one respondent, revenues from the sale of user data should also be included, in order to take into account those providers who do not turn to the traditional advertising market; concurrently, in the respondent's opinion, systems of transparency and control of "indirect" revenues should, in any case, be included. Two other parties point out that the sources of revenue indirectly attributable to press publications should include the economic benefits the provider obtains from profiling users and, according to one party, this could be implemented by means of estimates based on a correlation ratio between direct and "indirect" revenues; this should be quantified by the Authority, which possesses adequate expertise and holds a third-party status.

A further point was made by another respondent, who suggested an enlargement of the calculation basis, which should include not only advertising revenues, but also "indirect" revenues, through the implementation of a specific rate, as well as revenues deriving from the advertising intermediation performed by the provider. Finally, another respondent considers that the calculation basis should be broadened by including compensation for the loss of direct traffic suffered by the publisher, connected with the difficulty of intercepting the user accurately because of the intermediation performed by the provider, only partially offset by redirect traffic.

As for other components to be taken into consideration when determining the calculation base, several parties point out the need to also take into account the benefits the publisher enjoys through the use of the provider's services, owing to the visibility these services give to press publications. The greatest benefit, according to the respondents, derives from the monetisation of the redirect traffic that the provider brings to the publisher's website, which becomes advertising revenue for the publisher and/or new subscriptions and online sales of news content. Respondents point out, with reference to this aspect, that it is essential to integrate the calculation basis by subtracting the publisher's redirection revenues from the provider's advertising revenues while also removing them from the list of criteria (see Article 4(2)(b) of the Draft Regulation) and thus restoring fairness and correctness to the value gap measure. In this regard, one party specifically points out that the rebalancing of the calculation basis, aimed at a solution that restores fairness to remuneration, is one of the crucial elements for the correct enforcement of the regulatory framework, consistent with the goals pursued by European lawmakers.

However, according to the respondents, there apparently is inconsistency between the Authority's reasoning in the resolution accompanying the Draft Regulation and its text: in the resolution, the Authority correctly identified – to quickly measure the value gap – the difference between the economic benefits deriving to both parties (provider and publisher), but then, still in the Draft Regulation, it included revenues from redirect traffic in the benchmark criteria that contribute to defining the value of the rate, thus diluting its

impact. In particular, some parties observe that including revenues from redirect traffic in the calculation basis encourages providers to direct traffic to the publishers' sites, which entails benefits for the latter, especially for smaller publishers and digital natives, who benefit significantly from the visibility obtained through the provider's services. Conversely, the inclusion of this item among the criteria that contribute to defining the rate may, in the respondents' opinion, discourage the provider from directing traffic towards the publishers' sites, with very negative consequences for the latter. Moreover, according to some parties, the inclusion of redirect traffic revenue in the calculation basis would also result in a fair proportioning of the remuneration amount among publishers, by giving higher remuneration to those for whom the value gap is greater, namely, those who bring more value to the provider, and rewarding qualified publishers too.

Contrary to the positions summarised above, some respondents consider that revenues from redirect traffic should not be included in the calculation basis, since they are not significant for the publisher, who does not derive any particular value from the traffic brought by the provider. More specifically, some respondents point out that redirect traffic usually does not provide for a stable link with the user and therefore cannot ensure an economic flow to the publisher in the form of subscriptions, nor is the economic benefit that derives from it (in terms of subscriptions or advertising revenue) comparable to the benefits obtained by the provider. Moreover, some respondents point out that this figure is difficult for the publisher to quantify.

As for the determination of the calculation basis, some parties consider that this should be the algebraic sum of the providers' and publishers' revenues (direct and indirect), from which the relevant costs should be subtracted. In this context, one party presented a specific proposal, consisting not in the valuation of the provider's advertising revenue alone, but rather in the valuation of the provider's "net revenue". The calculation basis, therefore, would be the advertising revenues, directly and indirectly attributable to press publications, from which we would then subtract both the economic benefits (direct and indirect) of the publisher – i.e. deriving from redirect traffic and from the increased visibility and content circulation owing to network effects – and the costs incurred by the provider for technological investments for the reproduction and disclosure of press publications, including a share corresponding to the costs incurred by the provider to comply with best practices for promoting quality information. The proposal therefore entails shifting certain benchmark criteria within the calculation basis, in particular those set forth under letters (b), (h), (i) of Article 4(2). The calculation basis thus composed should be determined by the individual provider with reference to the entire pool of eligible publishers, so as to identify the total amount each provider should make available to the publishers, to be then distributed among them based on the benchmark criteria (see below). According to the proponent, such a scheme would be easier to implement, for it determines, upstream, the fair compensation amount, while simplifying the list of criteria and eliminating complicated rate-related mechanisms.

Such a proposal entails, as mentioned, the provider defining a calculation basis for the entire pool of publishers and not for the individual publisher. This approach is also suggested by some other respondents, who – while confirming that the calculation basis should be based on the direct (for some, also indirect) advertising revenues of the provider (for some, net of revenues proceeding from redirect traffic) – stress the advantages in terms of ease of use of the calculation of an aggregate sum, compared to a model whereby the calculation basis is determined in relation to the press publications of the individual publisher. According to the approach supported by these parties, the aggregate sum should

then be shared out among the publishers (following the application of a rate, according to some) or without the application of a rate, but directly using the benchmarks as distribution factors (according to others) (see below).

A final issue that emerged with reference to the calculation basis concerns the possibility, expressed by some respondents, of supplementing the formulation of the calculation basis by explicitly taking into account the different business models of the providers and the different ways the related services operate, which affect not only the extent of the value exchange between providers and publishers and the nature of the benefits for both parties (see above), but also the way the advertising revenues associated with press publications are calculated, which may differ depending on advertising-allocation mechanisms.

Regarding the rate

Almost all of the respondents agree with the proposal of the Draft Regulation, Article 4(2), which envisages the application of a rate to the calculation basis, within a range of values of presumed appropriateness.

Some respondents, on the other hand, consider that reference to the rate should be removed, since it is not easy to identify the rate value or the range of it should fall into, even due to the diversity of the provider's business models. Moreover, its application would introduce a mechanism that is too rigid and complex to be actually implemented, since it would require individual negotiations between provider and publisher, which may, in some cases, result in high transaction costs.

One party also expresses perplexity as to the use of the rate, for it would link the publisher's remuneration to the business risk of the provider and the efficiency of the transparency and monitoring systems of the revenue data the provider would have to provide. Alternatively, according to the party, fair compensation could be divided into two components: a fixed component, associated with the costs incurred by the publisher, the years it has operated in the market and the number of journalists employed, and a variable component that could be graded to take into account the different types of providers, using the parameters of Article 17 of the Directive (Article 102-*octies* of the copyright law (LDA) so as to facilitate start-ups.

Regarding the possibility of establishing a range of presumed rate values, some parties emphasised that this would allow to direct and facilitate negotiations, especially in the presence of publishers with less bargaining power, and also help reach a compromise should the parties disagree. Others noted that identifying a range of values for the rate also guarantees a flexibility that can help take into account the provider's specific characteristics and business model.

Several respondents also indicated the possible values of the rate and the parameters that could be used to define its extreme values. In general, all proposals indicate benchmarking, namely, reference to the contract terms and conditions typically used in comparable market environments, as the method of identifying the rate.

Some parties believe that the range of values of the rate should be inspired by what already takes place, in the digital sphere, in relations between carrier and producer, or between concessionaire/intermediary and publisher in the online advertising market, [omitted]. Other parties reckon it is necessary to refer to the rates previously used for similar deals struck in markets comparable to the Italian one, where the Directive has already been transposed, or in neighbouring European and international market areas; in this regard, the mentioned values range between [omitted] to be applied to the calculation basis, which

includes direct advertising revenues only.

According to one respondent, we could adopt the percentages already in use in Italy in the agreements reached between publishers and media monitoring and press review enterprises, using them as the upper limit of the range, where, in fact, the object of negotiations is the use of the articles in full.

Finally, another party observes that the Authority could define a minimum rate that should be a percentage equally distributed between the parties, namely 50 per cent, which may reach 60 per cent, considering that content-production costs are borne entirely by the publisher. In fact, according to the party, the partnership between provider and publisher is based on the pooling of assets, aimed at obtaining common profit, which is to be shared: the publisher supplies the content and the provider supplies the technology and the structure for selling and collecting advertising revenue.

Regarding benchmark criteria

All parties generally agree with the criteria identified under Article 4(2) of the Draft Regulation. Several parties, however, made general remarks on such criteria. Some respondents argue that the mechanism for applying the criteria should be simplified as much as possible, by reducing the number of criteria themselves and identifying criteria that can be easily applied and that are objective, clear, transparent and measurable. One party also points out that the criteria should be as consistent as possible with those identified under Article 43-bis. Two respondents also draw attention to the need to exclude or make optional the criteria not related to the value of the news and the publisher's investment, even to avoid incompatibility with EU law, in the light of the reasoning of the Court of Justice of the European Union, which has ruled out the admissibility of private levy schemes that use calculation criteria unrelated to the damage suffered by right-holders, contrary to the preamble of the InfoSoc Directive concerning the private copying exception. Moreover, one party claims that anything other than quality and quantity of the news content should not be considered, so that all criteria concerning the publishing company be excluded (see below), since they are totally unrelated to the object of the partnership with the provider and the joint revenues to be shared. Two respondents also point out that the criteria system should emphasise the quality of the offer and the efforts of the publisher to support the development of the sector, as well as the authoritativeness, the variety of the offer and the constant updating of the content. Some parties highlight the need for the criteria to be defined and/or ordered taking into account the specificities of certain categories of publishers – in particular, news agencies, digital native publishers and small publishers, specialised publishing enterprises – to prevent them from being penalised when determining fair compensation. Other respondents observe that the criteria should be detailed in such a way as to take into account the business models of the several types of providers, chiefly search engines, aggregators and social media; such diversities are reflected in particular in the metrics through which the criteria are gauged.

One party requested clarifications as to how certain criteria (e.g. years of activity) are measured, pointing out that there may be difficulties in implementing them. In this regard, one respondent would like the regulation to provide specific indications concerning the scope of application of the criteria, clarifying whether there are specific numerical coefficients, perhaps flexible but mandatory, to be applied, or whether there are general indications as to how they should be implemented. On this point, one respondent, believes

that the list of criteria should be flexible, meaning that it should be considered non-exhaustive and discretionary. In addition to the general comments, more specific indications were received from a number of parties, in particular on the following aspects: (i) specific remarks and criteria-amending proposals; (ii) proposals for removing specific criteria; (iii) proposals for including new criteria; (iv) the sorting of criteria. A summary of the main positions that emerged, with reference to each aspect, is presented below.

i. Specific remarks and criteria-amending proposals

Regarding the criterion set forth under Article 4(a) of the Draft Regulation, concerning the number of online consultations of press publications, some parties, while recognising the relevance of this criterion (though one party claims that this criterion is included, albeit indirectly, in the calculation basis through advertising revenues) express concern as to the effects it may have on stimulating publishers to produce excess content, for the sole purpose of remuneration, or content that is particularly attractive but of poor quality, thus leading to *clickbaiting* practices, disclosing content that has no real informational value and that could possibly convey bad or false information. Two parties maintain that such potentially distorting effects can be mitigated by adding indicators measuring the actual involvement of users in the public debate, at least for the social media, and balancing criterion *a*) with effective information quality protection mechanisms.

Further remarks and suggestions received on criterion (*a*) concern, in particular, the sources, the indicators that should be used and how the data should be collected. In this respect, some respondents pointed out that the data concerning the number of online consultations comes from the provider, the only one that actually has it, hence accurate metrics and impartial and verifiable monitoring systems should be put in place, or alternative tools provided by third parties should be identified/created, or it should be established that providers always make the data available to publishers. Regarding this aspect, another respondent notes that it is the platform that determines how traffic is distributed among publishers, hence the asymmetry of bargaining power – which differs from one publisher to another – must be considered too. One respondent suggests that the criterion should be measured in terms of unique users as per Audiweb certified data, using the average of the last five years as benchmark value, to prevent a criterion based on consultations-per-article from producing an opportunistic approach aimed at increasing traffic to the detriment of quality. Furthermore, one party believes that we need feedback that is more accurate than views and interactions; it would give a sort of independent “rating” of the publisher’s authority. One party suggests that this criterion should be assessed in relation to homogeneous categories of publishers (e.g. generalist publishing should be distinguished from sectorial publishing, news agencies should be distinguished from other publishers). And, according to some respondents, criterion (*a*) should be measured, where appropriate, with engagement metrics specific to the social media, so as to consider the differences in the functioning of the relevant services and the specific ways through which news is disclosed.

As for the criterion set out under Article 4(b) of the Draft Regulation, relating to “revenues from redirect traffic of the publisher’s press publications and its impact on overall revenues”, one party points out that this can only be calculated using traffic detection tools made available by the provider, namely, the negotiating partner, and that alternative means of identifying the data, provided by third parties, should therefore be envisaged – or that providers should always make such data available to publishers. Some respondents

also note that revenues from redirect traffic are difficult to quantify and are not particularly significant, since redirect traffic does not allow the publisher to establish a stable relationship with the user and to adequately value its content from an editorial and advertising standpoint. In any case, one respondent emphasises that the publisher's revenues to be referred to should be those strictly related to publishing activity, as resulting from the most recent financial statement.

Regarding the criterion set out in Article 4(c) of the Draft Regulation, concerning the relevance of the publisher on the market, two parties point out that, while the criterion refers to online activity only, and while the survey is carried out by third, autonomous and independent bodies, this criterion could equally penalise local publishers and small publishers and sector publishing, which inevitably have audiences that are not comparable to those of larger publishers. One party therefore reckons it is necessary for such surveys to be conducted with transparent, non-discriminatory criteria and that they be monitored by the Authority. According to another party, the criterion should be broken down into homogeneous categories of publishers or in relation to the specific reference sector, so as to avoid undue penalisation and irrelevant comparisons. As to the indicators and sources for measuring the criterion, some parties propose that the criterion under (c) be measured by referring to the data provided by the industry survey body (JIC). Another party proposes, on the other hand, to refer to the publisher's circulation figures of the last five years, certified by ADS [*Accertamenti Diffusione Stampa* – Press Circulation Verifications] for hard copy and online newspapers and the average total turnover of the last five years.

With reference to the criterion set forth under Article 4(d) of the Draft Regulation, concerning the number of journalists, some parties reckon it should be made explicit that only the resources used for the production of digital publications should be taken into account; consequently, the definition of publishing product should also be amended, to clarify that the concept refers to publications disclosed online only, or it should be removed altogether and replaced, under Article 4, with the wording “press publications disclosed online” (see above).

Two respondents argue that the criterion should include, in addition to journalists, all other resources used by the publisher for the production of press publications. Another party claims that the entire workforce should be considered, including not only employees but also external assistants, as resulting from the publisher's financial statement and self-certification, and that the criterion should include all publications (digital and hard copy) while also taking staff costs into account. Some parties also proposed making additions to the criterion, suitable for taking into account the different types of publishers and avoid penalising small publishers, digital natives and sector publishers. Specifically, the proposals are about the inclusion in criterion *d*) of journalists belonging to other national collective agreements (e.g. USPI-CISAL and CCNGE), external assistants and those on fixed-term and part-time contracts, as well as professional figures with non-press related tasks. Finally, one respondent proposes to merge the number of journalists mentioned under criterion *j*) concerning the number of years of activity, placing the newly formulated criterion at the bottom of the criteria list, thus making it less important; this in view of the fact that these two criteria seem to be excessively linked to a traditional publishing model that is not to be found in the digital information market.

Regarding the criterion under Article 4(e) of the Draft Regulation, concerning the *number of publications on original topics published in advance*, one party notes that it could be expanded so as to value, in addition to investigative journalism (which is undoubtedly

costly in terms of time and resources employed) even technical-specialist publications that typically do not reuse news produced by other publishers. Another party suggests modifying the criterion by reinterpreting it as a criterion describing the journalistic relevance of the publication, meaning how it contributes to public debate and to the proper functioning of a democratic society, consistent with the European Directive; from this standpoint, the respondent argues that the reformulated criterion could reward the publisher's initiatives aimed at increasing the credibility of its publications, such as the choice to disclose the newspaper and/or the name of the author of the articles. Some parties, on the other hand, stress the difficulty of providing an objective quantification for criterion (e), to the point of suggesting it should be excluded from the criteria list (see below).

With reference to the criterion set forth under Article 4(f) of the Draft Regulation, “*quantifiable economic benefits for the publisher also in consideration of the territorial distribution area of the corresponding hardcopy publications*”, one party observes that the wording of the Draft Regulation may be misleading, since it appears to refer to the benefits publishers enjoy as a result of the visibility given by the provider because of the network effects, in this case at territorial level, in relation to the distribution area of the corresponding hardcopy publications. The party, on the other hand, reckons that the criterion should refer to the economic benefits enjoyed by the service provider (emphasis added) thanks to the publisher, in view of the territorial circulation basin of the corresponding hardcopy publications. Such a formulation would, in the respondent's opinion, enhance local information and reward publishers who operate in closer contact with local communities, thereby facilitating the people's access to said important sources of information.

Regarding the criteria set forth under letters (g) and (h) of Article 4 of the Draft Regulation concerning the *costs incurred by the publisher and the provider for technological investments*, one party points out that the assessment of the costs and the attribution to specific operations or products is itself rather complex, considering that technological and infrastructure costs are generally fixed costs, thus independent, in this case, from the volumes of press publications produced or the traffic generated; moreover, they are costs shared among several operations. The calculation can therefore become complex and expensive and result in high transaction costs. In any case, to avoid creating unjustified asymmetries between the parties, according to the respondent, the same criterion should be adopted for both parties, in defining the scope of the costs to be considered, as well as attribution rules. One respondent also points out that the criteria under (g) and (h) should also include the costs for infrastructure investments, as mentioned under Article 43-bis. Some respondents also suggest enlarging the perimeter of the costs incurred by the publisher: according to one respondent, this should include the costs of the related personnel and should refer to the last three years; according to another respondent, the criterion should also include the costs for infrastructure investments, as well as operating costs for the creation of content and for the related personnel, with reference to the last five years. In addition, another respondent suggests that the criterion under (h), referring to the provider's costs, should be modified so as to include costs arising from the use of the counterparty's publications only. Finally, some respondents reckon it should be clarified – in relation to both criteria (g) and (h) – that they only refer to press publications disclosed online which are the subject of fair compensation; consequently, the definition of publishing product should be amended too, to clarify that the concept only refers to publications disclosed online, or it should be removed altogether and

replaced, under Article 4, with the wording “press publications disclosed online” (see above).

Regarding criterion (i) of Article 4 of the Draft Regulation “*compliance of each party with the most widely recognised codes of conduct, codes of ethics and international standards for information quality and fact-checking*”, one party points out that, while adequate, the criterion is difficult to apply practically, given the difficulty of defining shared standards, and should therefore not be a priority criterion (see below). Another respondent also suggests including, in the criterion, the use of information quality and fact-checking tools that the publisher itself has defined and adopted within its organisation. Another respondent also suggests including, as an indicator for “measuring” the criterion, the editorial decision to indicate the name of the journalist who is the author of the publication, instead of a generic reference to the editorial team or management, in order to promote greater accountability with regard to the truthfulness of the news reported and its quality, given the direct traceability of the article to a natural person.

Again, one respondent suggests distinguishing the criterion to be applied to publishers from that applicable to providers. In relation to the latter, it suggests incorporating into the calculation basis the efforts made by the provider to adopt best practices in order to favour information quality, such as compliance with internationally recognised codes of conduct, codes of ethics and quality standards and fact-checking tools. Inclusion in the calculation basis could take place by acknowledging a reduction in the sum to be allocated to publishers, on account of the costs incurred for such initiatives, which should reach a maximum of 15 per cent.

Finally, one party suggests introducing some additions and changes to the criterion under (i). In particular, it considers that the reference to codes of conduct and codes of ethics, with regard to journalists, is too generic and should be replaced with a more specific reference mentioning the codes of ethics adopted by the National Council of the Order of Journalists. In addition, it claims that a clearer distinction should be made between the compliance, with codes of conduct, of providers and publishers, since said instruments have a different origin and value in the two cases. Furthermore, criterion (i), according to the respondent, should also assess possible breaches of codes of conduct and the consequent disciplinary sanctions imposed, on journalists, by the Disciplinary Boards of the Order of Journalists. In fact, in addition to abstract compliance, concrete compliance with the codes cannot be overlooked. The party reckons that these considerations should also apply to the determination of the fair compensation owed to publishers by media monitoring and press review enterprises (see below).

With reference to the criterion in Article 4(j) of the Draft Regulation relating to the publisher’s years of activity, some parties observe that the criterion does not appear to be suitable for the purpose of determining fair compensation, since, on the one hand, it does not reflect the relevance and value of the publisher’s publications, and, on the other, it is not suitable for “gauging” the authoritativeness of a party in the digital world, and also unfairly penalises digital native publishers and, in any case, the most recently established newspapers. One party also reckon that clarification is required as to how the criterion should be calculated, whether by reference to the enterprise or the newspaper, and how transactions involving the sale of a newspaper, the closure of an enterprise and the start-up of a new one, or the founding of a new newspaper by an existing publisher should be treated. One party proposes that the years should be counted starting from the year the publisher started doing business, as certified by official documents (e.g. a registration report of the Chamber of Commerce). In addition, the number of years that have passed

since the creation of the first website attributable to the publisher should also be taken into account for the purpose of determining fair compensation. Some parties suggest amending the criterion, which should not be limited to the years of activity in digital publishing, but should rather consider the total years of activity. In particular, according to one party, reference should be made to the “historical significance” of the publication, summing up the years, starting from the first publication, of all the newspapers in the enterprise’s portfolio. Another respondent suggests modifying the criterion to include the publisher’s years of activity spent on the provider’s platform: such an element could impact the perceived value of publications by users.

Finally, as mentioned in the paragraph above, one party suggests merging the criterion concerning the years of activity with that concerning the number of journalists and moving it down to the bottom of the list, so as to mitigate perplexities as to the significance of both items for the purpose of determining fair compensation (see above).

ii. Proposals for removing specific criteria

Initially, some respondents expressed doubts as to the inclusion of criteria that seem to be unrelated to content value and are therefore irrelevant for the purpose of determining fair compensation; some of them also risk creating imbalances by discouraging newly arrived publishers and favouring the less efficient players. In particular, some of these respondents reckon that the main criterion to be maintained is the one under letter (a) of Article 4 of the Draft Regulation, concerning the number of online consultations, and the one under letter (b) concerning revenues from redirect traffic, which should in any case be included in the calculation basis; otherwise, all criteria that are linked to the enterprise rather than to press content should be removed or made optional and non-binding for remuneration-related bargaining.

Specific requests for the removal of certain criteria were also made.

With regard to the criterion in Article 4(b) of the Draft Regulation “*revenues from redirect traffic of the publisher’s press publications and relevant impact on overall revenues*”, as already highlighted in the section on the calculation basis (see above), several respondents thought this criterion should be eliminated and introduced in the calculation basis, for it to duly take into account the benefits the publisher obtains from the circulation of publications through the provider’s services, in order to determine the value gap fairly. One respondent believes that the criterion should be removed from the fair compensation calculation model altogether.

Regarding criterion under letter (e) concerning publications on original subjects, some respondents reckon it should be removed in view of the problems in defining the concept of “originality” and quantifying it objectively (see above). One respondent, in particular, opposed the inclusion of such a criterion because it would introduce discretionary elements of assessment, including the lack of a system to track quotes, meaning there would be no certain feedback as to who published specific content first. Moreover, according to this party, the proposed criterion would assess originality in relation to the subject matter dealt with, whereas news must first and foremost allow the reader to take part in the public debate, regardless of the subject matter, hence we should rather assess quality, in terms of the variety of the offer and the presence of multimedia content, whereas originality should be understood as the publisher’s effort and ability to offer news that is constantly updated. As for the criterion under letter (f) “*quantifiable economic benefits for the publisher also*

in consideration of the territorial base for disseminating the corresponding hard copy publications”, some parties argue that it should be removed from the list, since it is contrary to the purpose of Article 15 of the Directive, namely to bridge the value gap; this criterion would therefore give rise to interpretation doubts, thus fuelling disputes without being relevant to the information content value.

Some respondents suggest removing criterion (h) concerning the costs of the provider, as they lie outside the direct control of the publisher and are also inconsistent with the purpose of the European Directive. In addition, one respondent suggests removing both criteria concerning costs – those borne by the publisher (criterion g)) and those borne by the provider (criterion h)) – with the aim of simplifying the calculation model as much as possible while avoiding excessive tasks associated with the definition of the relevant values.

Another proposed removal concerns criterion under letter (i) “*compliance of each party with the most widely recognised codes of conduct, codes of ethics and international standards for information quality and fact-checking*”. According to one respondent, in fact, while the intention of rewarding information quality is praiseworthy, assessment of this aspect lies outside the scope of the copyright law.

Finally, some respondents suggest removing the criterion under letter (j) concerning the publisher’s years of activity, since these have nothing to do with content value and the quality of the activity performed.

iii. Proposals for including new criteria

Several parties have made proposals for including new criteria.

Some suggest including a specific criterion gauging the relevance of the publisher (in terms of audience) on social media platforms.

Other parties suggest including a criterion that measures the range of the publisher’s offer, understood as the number of articles published in the publisher’s hard copy and online publications.

One respondent also suggests replacing criterion (e) concerning the number of publications on original topics with another criterion expressing the number of the publisher’s press publications protected by the copyright law.

A further proposal is about including a criterion that measures the relevance of local historical publishers in their respective territories.

One respondent suggested including, among the criteria, a specific reference to the portion of text used (instead of the full text), which would be useful for remunerating all the text excerpts that are, however, not considered brief excerpts.

Finally, according to one respondent, the criteria should include one addressing the economic value of the use of trade rights, taking into account the nature and scope of the use. This criterion would be consistent with the provisions of EU Directive 2014/2 (Article 16 and recital 31) on licensing, also ensuring an alignment between individual and collective negotiations, and with what emerges from EU law on the issue of remuneration owed for the use of protected content. The criterion, according to the proponent, could be implemented using a number of indicators: the number of alphanumeric symbols of the publication the provider is allowed to use; the scope of use of the publication (unrestricted/with exceptions); the economic value generated by the publication (involves/does not involve redirect traffic); the value of the rights in the trade emerging from agreements for similar uses/ products or for the same use in other

territories.

iv. Sorting of criteria

According to some subjects, no sorting of the criteria, nor different importance should be envisaged, whereas it would be appropriate for them to be used freely and flexibly during negotiations, even cumulatively, always reducing their number and always based on the parties' needs. In particular, according to one party, we should take into account the discrimination that may result from the sorting, to the detriment of small and medium-sized publishers in particular. Therefore, different importance should possibly be attributed to each criterion based on the size of the publisher, the aim being that of encouraging them to provide quality and verified information and rewarding those that invest in original content and make real efforts in terms of technological innovation. Another respondent points out that the Authority itself should be able to implement the criteria somewhat flexibly. One respondent, on the other hand, considers that paragraph 3 of Article 4 of the Draft Regulation should be removed altogether.

Some respondents express doubts regarding the prominent position attributed in the Draft Regulation to the *number of online consultations* (criterion set forth under Article 4(a)). In fact, while agreeing with the Authority's view that this criterion is intended to grant a higher level of remuneration to publishers with more readers, it nevertheless entails the risk of placing too much emphasis on the quantitative aspect, which, if not mitigated by qualitative aspects, may give rise to opportunistic behaviour, to the detriment of information quality. For this reason, one party in particular suggests balancing this potentially negative effect by placing higher, in the ranking, under letter (c), the criterion set forth under letter (i) concerning the "*compliance of each party with the most widely recognised codes of conduct, codes of ethics and international standards for information quality and fact-checking*". In the opinion of one party, however, the criterion under letter (i) should be given less relevance, owing to the absence of shared standards ensuring its "gauging".

Besides, some parties argue that the sorting must be revised because it should give priority to criteria dealing with production quality, hence criteria such as the number of journalists, the publisher's costs and the years of activity should be placed at the top. Other respondents consider that the criterion relating to the number of publications on original topics (criterion set forth under letter (e)) should be given more relevance in the sorting system.

Finally, some respondents point out that the publisher's costs (criterion set forth under letter (g)) and the provider's costs ((h)) should be placed on an equal footing as regards their position in the sorting system and, furthermore, they should be given greater relevance, being placed first or second in the list.

Regarding sources and periodicity of information

Several parties point out that the information that feeds into the fair compensation calculation model should be certified by third, verifiable and impartial sources (e.g. financial statements, the Registry of Communication Operators, Chambers of Commerce, audience or circulation survey organisations such as Audiweb and ADS).

Specifically, one party expresses concern as to the online audience survey required to gauge the relevance of the publisher, since this is data that can be obtained from Audiweb or Comscore, which, however, are very costly for the publisher wishing to join in; furthermore, they adopt different methodologies, which would make it difficult to use them alternatively. Plus, it points out that even certified information on the type of collective agreement that journalists have joined is difficult to obtain.

Some respondents point out that certain data, in particular those relating to the number of online consultations and redirect traffic, can only be obtained through the tools made available by the providers, who are, however, the counterparty in the negotiations; consequently, it would be best to use third-party sources, which are subject to the Authority's control. In this regard, some respondents propose that the Authority should perform data checks at the request of a party.

As for the availability of data, some respondents point out that some information is exclusively available to publishers, who would then have to share it in order for negotiations to carry on (see below, Articles 5 and 7, reporting and communication obligations).

Regarding the periodicity of the information fuelling the fair compensation calculation model, some respondents believe that the data period of reference should be the medium term, namely, the last 3-5 years, in order to give stability to the value of fair compensation and to facilitate investment planning. According to other respondents, the periodicity should change according to the relevant specific criterion and should in always be flexible and take due account of specific situations, as well as the availability of data itself, which may vary. It should, in any case, be taken into account that the duration of rights is two years. Finally, according to other parties, it is useful to identify a time frame for the data; some respondents reckon this could coincide with the twelve months prior to the start of negotiations.

Remarks by the Authority

Regarding the determination of fair compensation: general remarks

In the light of the general observations made by the respondents as to the modalities of determining fair compensation, provided for under Article 4 of the Draft Regulation, the Authority agrees with and accepts part of the proposals submitted.

In particular, it is worthwhile pointing out that the purpose of Article 4 is first and foremost to illustrate and clarify – *ex ante* and transparently, to all the market players involved – the constituent elements of the Authority's logical-legal procedure, should it be called upon to define fair compensation if the parties fail to reach an agreement. The calculation model on which the provisions set forth under Article 4 are based, therefore, represents first and foremost a conceptual scheme to be applied to the specific case, with the inevitable adaptations due to the peculiarities of the parties involved from time to time. Moreover, in line with the facilitating role attributed by Article 43-bis to the Authority, for the purpose of the conclusion of voluntary and mutually beneficial agreements between publishers and information society service providers, the model underlying Article 4 may also constitute a guide, when deemed useful by the parties, for

defining fair compensation through negotiation. That said, we reassert what has already been pointed out under Resolution no. 195/22/CONS, namely, that *“fair compensation is, preliminarily, the subject of free negotiation between the parties who, in the full exercise of their bargaining autonomy, may reach an agreement that “can” take into account “also” the criteria indicated by the Authority under the Regulation*”, consistent also with the rationale underlying the wording of Article 15 of the Copyright Directive.

A further clarification concerns the choice of the model for determining fair compensation. The model underlying Article 4 is based on the revenue sharing mechanism, which is generally used in negotiations between private parties, even in contexts similar to that where fair compensation is included, where, in this case, the object of remuneration is the right to reproduce and communicate to the public the press publications used online by information society service providers, including media monitoring and press review enterprises.

Besides, the revenue-sharing model (as well as profit-sharing or earnings-sharing models) is a method that is not unknown to economic regulation. Indeed, this mechanism is used especially for regulating public utilities in specific situations, often instead of incentive models such as price caps. In the regulatory context, the model sets that the regulated enterprise is to give up a portion of its revenue (or profit) by transferring it to consumers through lower service prices. The portion of revenues that is “subtracted” from the enterprise is determined according to economic efficiency rules that aim to reduce consumer welfare loss resulting from the market power of the regulated enterprise.

In particular, choosing revenue sharing as the benchmark method is justified by the role attributed to the Authority by the law in relation to the determination of fair compensation. In fact, from a regulatory standpoint, the task of the Authority, as provided for under Article 43-bis, consistent with the rationale of the European Directive, does not consist in the enforcement of economic regulatory measures, to prevent fair compensation from being considered on a par with a regulated price imposed by the Authority. Nor would such action be appropriate in the presence of market failure, which requires public action in the mechanism for determining and controlling prices in order to achieve economic balance, or of an essential facility – access to which must be guaranteed on economically viable terms for several parties. Rather, the subject matter is the publisher’s right to receive, within the framework of private voluntary agreements, fair compensation for the online use of its publications by information society service providers.

Public action, in this regard, is justified – in terms of social welfare – by collective interest in protecting a free and pluralist press, which *“is key to guarantee quality journalism and the citizens’ access to information and gives a fundamental contribution to public debate and the proper functioning of a democratic society”*. If this is the goal, the Authority fits into this context in order to provide assistance to the private negotiation system, where market imperfections may be taken into account, such as the imbalance of bargaining power between the parties (though the perimeter of regulatory action is still the protection of copyright).

In the light of these remarks it is, therefore, evident that the implementation of this model (used, as mentioned, in both the private and the regulatory spheres, albeit with different purposes and modalities) requires, for the purpose of determining fair compensation, certain adaptations to meet the purposes of the law in this context. In particular, the Authority’s approach should be inspired by the market practices in use in agreements between private parties, where, from a methodological standpoint, the logic of classic price regulation is not applicable – the purpose of which, as mentioned above, is typically

the restoration of economic efficiency conditions through market power control.

What emerges, therefore, is the need to balance public law interests deriving from the relevance of information as a constitutionally guaranteed asset, with the (private) interest of the parties to freely negotiate mutually advantageous agreements, hence the benchmark model of revenue sharing must necessarily be adapted. To this end, while the overall structure of the model is similar to that used in the context of private agreements (meaning that it is determined through the application of a rate to a calculation basis – which usually coincides with the revenues of the party responsible for paying), some adjustments are introduced to adapt it to the specific case. Concurrently, the rate is defined based on a set of criteria, identified by law, to be addressed – as will be discussed below – by considerations that aim to protect copyright, also in terms of public interest and protection of information pluralism.

As for the comments made by the parties on the advisability of calibrating the calculation model in accordance with the existing heterogeneity among publishers, we can accept what has been highlighted, making clarifications and additions to Article 4, which take into account the differences that have emerged between generalist publishers and sector publishers, between news agencies and other types of publishers, between small and/or local publishers and large publishing groups, between digital native publishers and “traditional” publishers. These differences can be adequately taken into account when determining fair compensation in individual cases, given the model’s implementation flexibility, by intervening on all its constituent elements: on the composition of the calculation basis, on the rate value, on the definition of the criteria and on the identification of appropriate indicators for measuring them, as discussed below.

Regarding the differences between service providers, highlighted by the respondents, while it is clear that there are structural differences between different types of service providers (in particular as to how their services and business models operate, which may reasonably affect the size of the value gap), nevertheless – on a substantive level, rather than on a legal-formal level – the differences are not deemed such as to require a radical differentiation of the methods for determining fair compensation. Nonetheless, a certain flexibility must be acknowledged with regard to the methodologies for determining the calculation basis, which must be adapted to the specificities of the functioning of the provider’s services and, in particular, those concerning the mechanisms for allocating and buying/selling online advertisements. Further clarifications are also needed in terms of the gauging indicators for certain criteria – the details of which are addressed in the paragraphs below.

Regarding the need to simplify the calculation model called for by the respondents and the requests for an objective and rigorous methodology, based on certain data and values, which rewards authoritativeness and content quality, we consider these requests to be entirely acceptable and consider it possible to make the due additions and amendments to Article 4. However, it should be noted that the modalities for determining fair compensation must take into account a number of complex factors: the different and delicate interests at stake, the heterogeneity of the players involved, the difficulties of quantifying the amounts underlying the determination of fair compensation, the need to systematise various indicators from a number of sources.

As for the proposal made by some parties for an alternative calculation model, consisting in the definition of an overall calculation basis for each provider, intended for the entire pool of eligible publishers and to be then distributed directly (or following the application

of a rate) among them on the basis of the benchmark criteria, this model, while it might seem easier to use for the purpose of determining the basis – given that it involves identifying an aggregate sum rather than a sum for each individual publisher, and does not envisage any rate, thus enabling the criteria to be used more easily in the first instance – is considered suited only to the case of collective agreements or framework agreements, excluding agreements between individual service providers and individual publishers. The model for determining fair compensation, on the other hand, should remain sufficiently general to be potentially applicable to any type of agreement freely chosen by the parties. On this point, given the comments received, an attempt will be made to provide any useful specification that may allow the model under Article 4 to be adapted to the several possible negotiation situations.

Moreover, it is noted that the Authority's implementation of the alternative model proposed by the respondents, should it occur as provided for under Article 43-bis, would always entail complexities. In fact, more components would add to the calculation basis: in addition to the revenues of the provider ("direct" and "indirect"), the costs of the provider and possibly also the revenues ("direct" and "indirect") of the publishers would have to be taken into account. In this regard, determining the publishers' benefits in an aggregate form would not allow to duly consider the distribution of such benefits among the publishers' audience, which is rather composite and includes enterprises that differ under several aspects (e.g. size and business model), affecting fairness of payment. In relation to the criteria, each one would have to contribute to the distribution of fair compensation among publishers and, therefore, parameters would still need to be established to divide publishers into groups, entailing problems somewhat similar to those of the model outlined under Article 4.

Finally, it should be emphasised that providers and publishers may decide to freely conclude framework or collective agreements (possibly also resorting to the alternative model discussed here), which in some cases can have several benefits, especially for smaller players, who bear the heaviest transaction costs and have less bargaining power.

Regarding the calculation basis

In view of the different positions that have emerged with reference to the breakdown of the calculation basis, the Authority reckons it can accept the remarks of the majority of respondents regarding the appropriateness of limiting the perimeter only to the provider's advertising revenues that can be "directly" attributed to the publisher's press publications used online, in order to simplify the determination of the calculation basis and to give greater certainty to the definition of fair compensation and, ultimately, to pursue the objectives set by the European and national rules, respectively through article 15 of the Directive and article 43-bis of the copyright law (LDA).

On this point, it should be clarified that there undoubtedly are benefits, including non-monetary, both direct and indirect, that the provider enjoys from the online use of the publishers' information content. Direct benefits refer, in particular, to the advertising revenues that the provider obtains thanks to the publishers' content attracting users (which, in terms of advertising, results in an economic return from advertisers). The indirect benefits, on the other hand, are linked to the direct and indirect network effects generated by the publishing content that enlarge the platform's user-base and therefore allow the provider to acquire big data, in turn producing a series of benefits (such as, *inter alia*, revenues from the sale of data to third parties, economies of scale and scope connected to

the volume and variety of big data, improvements in the quality of the services offered at all levels, greater efficiency of advertising intermediation services).

Regarding data-driven benefits, the European regulatory scenario concerning digital platforms, which is currently being defined (consider the DSA, the DMA and other pending legislative initiatives such as the Data Act), acknowledges the existence of such benefits. In the DMA, in particular, data-based advantages constitute one of the elements to be taken into account when assessing the purposes of the designation of gatekeepers (recital 25 and Article 3(8) of the DMA), since they may affect how contestable the basic platform services and the fairness of business relationships (see recital 2 of the DMA) may be.

With specific reference to the national system, as regards revenues from the sale of data, it should be noted that Article 1, paragraphs 35 to 50, of Law no. 145/2018 (as amended by Article 1, paragraph 678, of Law no. 160/2019) introduced the digital services tax. This rule was followed by the provision of the National Revenue Agency of 15 January 2021 and said Agency's circular letter no. 3 of 23 March 2021, which defined the income statement form, providing details clarifying the subjective and objective scope of the rule. With regard to the objective scope, there are three relevant cases associated with taxation: online advertising (meaning the conveying, on a digital interface, of advertisements targeting the users of the interface itself); intermediation services between users (meaning the provision of a multilateral digital interface that allows users to be in touch and interact with each other, including for the purpose of facilitating the direct supply of goods or services); and the transmission of data collected by users and generated by the use of a digital interface. Precisely in relation to the third case, the National Revenue Agency points out that the reference is to the "*transmission of user data for valuable consideration*", thus disclosing the value user data have for the service provider (data acquired, through use, by the very users of the services offered, and which then constitute the object of negotiations for valuable consideration). Taxation therefore provides a clear indication of the value of data as a source of revenue. Nevertheless, in view of the abstract relevance of the benefits deriving from the acquisition and possible use of user data, it must be pointed out that, for the purpose of the Regulation in point, quantifying them is particularly difficult and burdensome. In fact, while these types of revenues are potentially relevant for the purpose of determining fair compensation, it must be stressed that it is extremely complex to identify a method for attributing them to the publishers' publications, which entails – as previously mentioned – the risk of incurring excessive transaction costs and being a source of potential litigation.

Furthermore, if we also consider the scientific studies on the value of network externalities and on the value of data, the preliminary in-depth studies have shown that, at present, these do not offer sufficient indications for developing a robust and shared method for estimating the indirect benefits associated with the disclosure of online news. It should be noted, however, that the evolution of business models, also associated with the advent of new types of providers, may over time require an adjustment of the calculation basis, for example due to the emergence of other categories of revenues, including those coming from direct payments by users, or due to the possibility of quantifying certain types of indirect benefits. Bearing this in mind, Article 4 should be updated, if necessary, as provided for under Rule 14 of the Regulation.

As for the comments made by several parties on the association of the calculation basis with the criterion set forth under Article 4(b) concerning the revenues from the publisher's

redirect traffic, we reckon that the relevant indications received can be accepted, by modifying the composition of the calculation basis and expressing it, therefore, as the difference between the advertising revenues of the provider, deriving from the publisher's press publications, and the latter's revenues from redirect traffic. This avoids distorting the incentive structure of the provider in traffic distribution, favours that coming from its own services and avoids penalising the publishers themselves, especially those for whom redirect traffic constitutes a significant part of the overall traffic generated. The group of publishers, from this point of view, appears to be extremely heterogeneous, and the inclusion of revenues from redirect traffic in the calculation basis makes it possible to take due account of this diversity.

In this regard, it is worth noting that redirect traffic is considered by some publishers a loss of opportunity for direct contact with the user and, therefore, a subtraction of direct traffic to the detriment of the publisher itself; in their view, the visibility offered by provider's platforms can never be comparable to what publishers could obtain without them, hence redirect traffic constitutes a net benefit.

While no unambiguous evidence has emerged to date with reference to this highly controversial point, it must be emphasised that the provider, in redirecting traffic to the publisher's website, acquires data that represents value, all the more so since it refers to a very specific target of users. Moreover, the monetisation capacity of redirect traffic is highly variable within the publishers' audience, also because of the different business models adopted and the content exploitation strategies. In particular, even where publishers adopt policies that provide for access to content upon subscription (paywall) or, alternatively, granting consent to the installation of cookies and other personal data tracking tools (cookie wall), the publishers' data exploitation capacity is not comparable to the value of the big data available to the provider, which is also related to their very exploitation capacity. Plus, the data capture capacity of the provider is far greater, since it is able to obtain upstream consent for processing all user data, including in relation to the different services that make up the platform.

Regarding the quantification of revenues from redirect traffic for the purpose of determining fair compensation, it should be noted that this must take into account the publisher's several revenue-monetising methods. In particular, it seems appropriate to limit advertising revenues related to redirect traffic generated by press publications used online by the provider, since it is difficult and causes uncertainty to estimate any revenues obtained from user subscriptions attributable to redirect traffic; moreover, these currently represent a minority share of the revenues generated online by publishers. In the implementation phase, it is therefore a matter of identifying the online advertising revenues generated by the publisher's website, which come from the traffic redirected by the counterpart provider, with reference to the content associated with fair compensation. Furthermore, the advertising revenue obtained by the publisher from redirect traffic should be valued net of the fee paid to the advertising intermediary – should it be the counterparty provider in the negotiation for the rights connected to the online use of publications – in order to take into account the advantage actually obtained by the publisher from redirect traffic. From a methodological point of view, the calculation of revenues from redirect traffic cannot disregard the use of traffic data that, in the first instance, are available to the provider itself; consequently, the publisher must be able to access such data through the services provided by accredited third parties that adopt correct, transparent and verifiable methodologies. Either way, it is considered good practice for the provider to make the traffic data available to the publisher on an ongoing

basis and without charging too much.

With reference to the calculation of the provider's advertising revenues, it is once again useful to clarify that the calculation methodologies may differ between providers, depending on the business model and the mechanisms for allocating advertising to the provider's services. In this regard, it is useful to note that on social networks, for instance, advertising is sold and allocated not so much in relation to a specific content (as is the case with search engine services), but rather depending on the features of the audience chosen by the advertiser. In this business model, in fact, the user and their preferences, interests, contacts, past choices are central, and it is the value of the user considered as a whole that is monetised through the online advertising system.

From this standpoint, one can picture a scenario in which the provider can identify the counterparty publisher's fairly remunerated content and attribute the relevant advertising revenue to it. If the possibility of matching advertising revenues to the counterparty publisher's fairly remunerated content entails difficulties, the provider would have to find a different estimation method which, for instance, starting from the quantification of the aggregate sum of the total potentially fairly remunerated content circulating on its services, would allocate it to the several publishers present, by means of appropriate attribution drivers (e.g. based on publication usage metrics), in order to calculate the revenues attributable to the counterparty publisher in the negotiation.

In view of the differences that exist among providers, as well as among publishers, even in terms of organisational models and business systems, it is necessary to have flexible methodological details for quantifying the components of the calculation basis, also considering that the parties may choose to enter into collective agreements or framework agreements.

The adopted methodology must always be reasonable, transparent and adequately justified and – in the event of initiation of the procedure by the Authority for defining fair compensation as envisaged by Article 43-bis and governed by Chapter IV of the Regulation – all the information necessary to verify it, retrace its steps, and possibly amend it must be provided to the Authority by the relevant party.

Consistent with the task of “facilitator” attributed by the national lawmaker, and in the context of the provisions set forth under Article 3 of the Regulation, the Authority may hold talks, also outside the procedure set forth under Chapter IV of the Regulation, with the market players involved in the implementation of the provisions concerning fair compensation, aimed at identifying reasonable, transparent and shared methodological solutions.

Regarding the rate

In view of the comments received on the appropriateness of providing for a rate, we reckon it is necessary to confirm the approach of Article 4, albeit with some clarifications. The presence of a rate, in fact, rather than making the system more rigid, actually aims to add flexibility to the scheme for determining fair compensation, adapting it to the different needs of the parties and to the different characteristics of both providers and publishers, while facilitating negotiations. In order for this objective to be achieved, it is deemed necessary to identify a maximum benchmark value of plausible adequacy in order to formulate fair compensation and achieve a balance – in terms of mutual benefits – that takes into account the heterogeneity of the parties involved in the agreement. In this perspective, we reckon there is no need to indicate a minimum value of the rate to ensure

the due flexibility to negotiations, thus preserving freedom of negotiation while also promoting an adequate valorisation of all elements: first and foremost, the value of information, which is relevant for protecting pluralism.

Furthermore, on the basis of the comments expressed in the consultation, it is not considered appropriate to accept the proposal of some respondents of removing the rate in exchange for the identification of a fixed component linked to the publisher's costs, years of activity on the market and number of journalists and a graded variable component to take into account the different types of providers, using the parameters of Article 17 of the Directive (Article 102-*octies* of the copyright law (LDA)). Such a scheme does not seem to be suitable for the context in which the model is to be applied, since it would decouple fair compensation from the value gap and the valorisation of publishing content, pairing it excessively with the publisher's business structure, potentially causing imbalances between the different types of publishers. Moreover, with reference to the business risk remuneration would be exposed to, since it is dependent on the provider's revenues (based on the provisions set forth under Article 4), it is useful to recall that fair compensation is subject to free negotiation between the parties and, in this context, the monetisation of the publisher's publications by the provider is foreseeably one of the preconditions that encourage the conclusion (or renewal) of an agreement for the online use of the aforesaid publications. In the absence of such an incentive, neither the provider nor the publisher itself would reasonably negotiate.

For the purpose of identifying the maximum benchmark value of the rate, the positions expressed by the respondents are rather diversified. As previously stated, from a regulatory standpoint, the Authority's task under the provisions of Article 43-bis, consistent with the rationale of the European Directive, does not consist in the enforcement of economic regulatory measures, hence fair compensation cannot (and must not) be considered as a regulated price imposed by the Authority. This consideration implies that the Authority's approach is inspired by market practices used in agreements between private parties. Concurrently, market imperfections leading to an imbalance of bargaining power between publishers and providers must also be taken into account, as well as public interest in protecting copyright and providing the right incentives for the creation of works and innovation, together with the public interest of ensuring the citizens' access to a free and pluralistic press. Ultimately, a meticulous balancing of interests is required when determining the rate.

In this context, the position expressed by the respondents who suggested adopting the benchmarking method for identifying the values of presumed appropriateness of the rate appears to be generally agreeable. Nevertheless, benchmarking may constitute a reference point that should include the aforesaid public law-related considerations.

Regarding the comments of the respondents concerning the appropriate values of the rate, the reasoning according to which the function of the provider should be assimilated (for the purpose of determining fair compensation) to that of a content carrier or an intermediary in the online advertising chain, is not acceptable. This reasoning does not appear to be entirely applicable to case in point, since the remuneration provided for under the Regulation (fair compensation) concerns the economic exploitation of the publisher's rights of reproduction and communication to the general public of the content, which may fall within broader agreements with the provider. In the aforesaid cases, however, intermediary services are the object of negotiations. Furthermore, it must be said that the role of the provider in the online disclosure of press content has a relevance – for both the publisher and the public – which must be taken into account.

As regards the suggestions made by the respondents concerning the use of the rates adopted in other neighbouring market areas or in similar agreements concluded in markets comparable to the Italian one, the information provided on the contractual terms would place the rate within a range of [omitted] revenues. However, this proposal does not appear to fit the specific case of fair compensation as envisaged by Article 4, because of a different calculation basis. The model proposed in the Regulation provides for a calculation basis that doesn't just provide a measure of the provider's revenue alone, but of the value gap from which it benefits vis-à-vis the publisher. With this in mind, the rate must also be such as to guarantee fair compensation to the publisher.

As for the possibility of referring to the rates in use in agreements between publishers and media monitoring and press review enterprises, it should be pointed out that while these agreements concern the same rights, the calculation basis is different, as is the market context in which fair compensation is recognised, both with reference to the reproduction right and to the extent of circulation of publications and, therefore, the intensity of their use. In fact, while the latter may refer to portions of text, on the web as a whole is certainly far greater than the use made within the organisation of the media monitoring and press review enterprise's client. Consequently, the rates used in such agreements can, at the most, be taken into account as a starting point for defining a lower limit of the presumed fairness value.

A further element concerns the nature of the agreement between provider and publisher. On this point, we agree with the remarks made by the respondents on the partnership-like characteristics of the agreements between providers and publishers, underpinned by the acknowledgment of an exchange of value with reference to the online use of press publications. From this point of view, we can agree with the underlying idea whereby the publisher makes the publishing content available and the provider its capacity of disclosing said content; however, it should be pointed out that there is a substantial asymmetry of bargaining power in favour of the provider, which may vary, depending on the publisher. This too is a qualifying point that underlies the provisions of Article 43-bis and the Directive itself.

All this considered – and also taking into account that it is impossible, at least at present, to accurately quantify the indirect benefits, which are by all means real and are chiefly to the benefit of the provider – we reckon it is possible to identify a maximum value of the rate equal to 70% of the calculation basis. This value may constitute the benchmark for the Authority should it be called upon to intervene pursuant to the procedure set forth under Chapter IV of the Regulation.

It should be noted that the identified value may be updated over time, on the basis of the provisions set forth under Article 14 of the Regulation, as may the other elements forming the calculation model, taking into account how the Regulation was implemented in the past, as well as the evolution of national and international market practices.

Regarding benchmark criteria

In view of the remarks made and the positions expressed by the respondents on several aspects affecting the benchmark criteria set forth under Article 4(3), the Authority reckons it can preliminarily agree with the requests regarding the simplification of the system. Moreover, we reckon we can accept the positions of those who pointed out that this simplification should take place by prioritising the criteria that are more clear, transparent,

objective and measurable. We also agree with the suggestion that criteria exemplifying the quality of press publications should be given prominence. These observations are acceptable, since they are intended to improve the effectiveness of the regulation, which aims, among other things, to provide the clearest possible framework for stakeholders as to the process to be followed to determine fair compensation. Furthermore, many observations on the relevance of information quality are consistent with what was set forth under Resolution no. 195/22/CONS, which launched the public consultation.

On an operational level, it should be noted that clarifications, simplifications and additions are possible, as will be discussed below. Either way, we reckon we can confirm that the criteria are to be implemented cumulatively and with decreasing relevance, since they constitute a system of elements that, even considering the order assigned, makes it possible to balance the various interests and to manage, with greater balance, potential disadvantages associated with a discretionary use of the criteria considered individually. Moreover, their combined use makes it possible to make remuneration fairer, taking into account the characteristics of the publisher's production.

In this regard, it is useful to emphasise that the criteria of Article 4 are, above all, drafted based on Article 43-bis; moreover, they describe fundamental dimensions that indicate the value of online publishing production: (i) the circulation of the publisher's publications, both on the provider's services and, more generally, online (see the criterion related to the number of online consultations of the publications and the relevance of the publisher); (ii) certain characteristics pertaining to the publishing company (such as the number of journalists and the years of activity); (iii) the efforts made by the publisher (and the provider) for innovation and quality of the information system. In this framework, even the criteria that appear to be most related to the organisation of the publishing company (and, partially, to that of the provider), must be seen as proxies for content value. Therefore, the Authority cannot accept the requests of excluding the criteria concerning the publishing company. It should also be pointed out that the parties are free to use the criteria scheme as defined under Article 4 of the Regulation or, where otherwise agreed, to adopt alternative schemes that may also include further and/or different criteria. However, should no agreement be reached, Article 4 shall be the Authority's benchmark in the procedure set forth under Chapter IV of the Regulation.

Finally, we can confirm, even in relation to the enforcement of the criteria, what was mentioned with reference to the determination of the calculation basis, namely that the Authority may liaise – also outside the procedure set forth under Chapter IV of the Regulation – with the market players involved in the implementation of the provisions on fair compensation, aimed at identifying reasonable, justified, transparent and shared methodological solutions.

Below we will examine the specific comments received from respondents on the benchmark criteria, with the aim of consolidating the list of criteria under Article 4 and clarifying certain aspects of application, also with a view to responding to the requests included in the remarks concerning the need to take account of the differences that exist within the groups of providers and publishers.

i. Regarding specific remarks and criteria-amending proposals

Regarding the criterion set out under Article 4(a) concerning the *number of online consultations of press publications*, we believe that the wording of the Draft Regulation should be confirmed, with some additions to the text that clarify the perimeter within

which the criterion should be measured. While the positions expressed by the respondents regarding the potential disadvantages of this criterion are understandable – when related to the risk of encouraging the production of excess content for the sole purpose of remuneration, or content that is particularly attractive but of poor quality – it should be noted that Article 43-bis itself includes it among the benchmark criteria. In addition, we must consider that this criterion appears fitting when determining remuneration for rights of reproduction and communication to the general public, since it can measure the circulation of the publisher’s works on the services of the counterpart provider and the intensity of use, as well as indicating the appreciation by users and therefore, indirectly, content value. On the other hand, it is part of a system of criteria that are applied cumulatively, precisely with the aim of balancing the potential disadvantages associated with its isolated application. These disadvantages are further mitigated by the fact that, for the purpose of the implementation of fair compensation, the audience is limited to “professional” publishers and that revenues from redirect traffic, which represent the main economic return of all clickbaiting practices, are included in the calculation basis.

In relation to the origin of the information for calculating the indicators gauging criterion (a), we can agree with the need, expressed by the respondents, to have alternative sources to the provider for retrieving data on online consultations. Indeed, it should be clarified that, for the calculation of the number of online consultations, providers should use data from accredited third-party sources, which make use of fair, transparent and verifiable methodologies. Moreover, it is good practice for such data to always be available to publishers without excessive costs.

As to the indicators for measuring criterion (a), appropriate audience metrics should be considered in relation to the type of provider, whereby in addition to views, engagement indicators, such as user interaction with the content – through clicks, reactions, comments, shares – should be considered, in particular for the social media. As for the search function of a search engine, what should be taken into account, among other things, is the presence in the results and thus publication views.

With regard to the criterion relating to the *relevance of the publisher in the market*, the Authority considers it appropriate to confirm the wording of the Draft Regulation, with the addition required to clarify that – where publisher data are not available from survey organisations best representing the entire reference sector (i.e. JIC) – other third-party sources may still be used, provided that the survey methodologies are correct, transparent and verifiable and the organisation of the data provider also complies with the principles of impartiality, autonomy and independence.

It should also be noted that the Authority confirms the approach stating that the criterion shall be limited to the audience obtained by the online publisher. Indeed, this perimeter is consistent both with the scope of the Regulation, which is pertinent to press publications used online, and with the motivation underlying the inclusion of the criterion, namely, to measure the circulation and appreciation of the publisher’s online production, which complements and to a certain extent “offsets” the criterion on the number of online consultations, focused on the circulation of the publisher’s publications in the context of the provider’s services alone. For these reasons, the respondents’ proposal of using the circulation figures of the publisher’s hard copy and digital newspapers as a measure of the publisher’s market relevance cannot be accepted.

As far as the practical application of the criterion on publisher relevance is concerned, we reckon we should accept what the respondents expressed as to the need to consider the

differences between publishers. In this regard, it is useful to clarify that the audience must be assessed with reference to internally homogeneous categories of publishers, in order for the comparison to become significant. For the purpose of a comparison that avoids unfair penalisation, we can identify several dimensions in which publishers differ, such as (i) the local/national circulation base, bearing in mind that this differentiation must be made for the publisher's online production, i.e. by referring to the relevance of the topics in relation to the territory and/or the online audience in relation to the territory where it is predominantly generated; (ii) the size of the publisher, which can be assessed through the number of employees; (iii) the generalist/specialist nature of the content the publisher produces, which allows sector publishing to be distinguished from other types of publishers (iv) the nature of primary producer of information, which ensures distinction between news agencies and other types of publishers.

In the light of this categorisation, the comparison could be made between the online audience of the publisher party to the negotiation and a benchmark value for the category it belongs to (e.g. an average value), or by using the distribution position indices (median, quartiles, deciles and percentiles) to obtain corresponding rankings within the category it belongs to.

As for the criterion relating to the *number of journalists*, the Authority confirms (and better clarifies) that the criterion refers only to journalists employed in the production of press publications distributed online, since this is consistent with the scope of the Regulation.

On the other hand, the Authority agrees with the comments expressed by the respondents concerning the types of journalists to be taken into consideration. In this regard, we consider that the criterion should be amended to include not only journalists on permanent contracts, but also those on fixed-term and part-time contracts, as well as external assistants. Furthermore, the benchmark reference contract may be any national collective agreement for the category. These changes are deemed appropriate in order to avoid the exclusion or improper penalisation of publishers that adopt different contracts or have editorial staffs that are formed and organised differently, while preserving the rationale of the criterion, namely, to recognise the value of professional publishing production in terms of expected quality and credibility.

With reference to the respondents' proposals of including other types of non-journalistic professional figures and personnel costs in the criterion concerning the number of journalists, the Authority cannot accept the indications received. Indeed, it is important to emphasise that the purpose of the criterion in this context is to recognise the value of the publishing content, essentially linked to the journalist's activity, which constitutes the qualifying and discriminating element with reference to the provider's activity. While recognising that editorial offices increasingly consist of specialised non-journalistic staff, whose contribution is significant, especially for online production, this does not appear to be central in determining fair compensation. The inclusion of personnel costs seems inappropriate too, because it could be redundant with the criterion of the number of journalists (since it could be considered the specification, in economic terms, of the same criterion) and because it would further complicate the calculation and increase the risk of opportunistic behaviour and inefficiency.

As for the application of the criterion of the number of journalists for the purpose of contributing to the definition of the rate, it should be emphasised that – given the heterogeneity of publishers in terms of the size of editorial office structures – the number

of journalists should be considered by taking into account the entire sorted distribution of publishers and by identifying classes in relation to which a comparison should be made between the value assigned to the specific publisher and a benchmark value (e.g. an average value) calculated within the class to which it belongs.

Regarding the criteria concerning the *costs incurred for technological investments* by the publisher and the provider, the Authority can accept that these criteria should include infrastructure investment costs, as provided for under Article 43-bis. The Authority also considers it appropriate to amend the reference to the concept of publishing product, clarifying that the costs must refer to the production (for the publisher) and reproduction and communication (for the provider) of press publications disclosed online.

As for the possible additions to the criterion of the publisher's technological and infrastructure costs, the proposals to include the costs of the relevant personnel and operating costs too are considered unacceptable. In fact, the underlying rationale of this criterion is to assign a "premium" to the publisher (and, simultaneously, a premium to the provider, meaning a "discount" on fair compensation) in relation to investments in technological innovation in the sector, namely, the allocation of economic resources for the purchase of technological or infrastructural tangible and intangible capital goods used in the production process.

As for the comments on limiting the provider's costs to those stemming from the use of the counterparty's publications only, we reckon that, while this proposal may be reasonable, it would be relevant if the costs were included in the calculation basis and should therefore, in such case, be defined precisely in relation to the counterparty publisher. In the case in point, instead, the cost criterion becomes a discount factor (incremental for the publisher) of the rate and is intended to recognise the effort made to support the innovation of the entire sector through technological and infrastructural investments. Consequently, we confirm the indication establishing that the cost is to be limited to the total of press publications disclosed online, for both parties (publisher and provider).

Furthermore, from a methodological point of view, this choice simplifies the system, insofar as the allocation of costs for technological and infrastructural investments, in particular of the provider, to all press publications (as was also emphasised by the respondents), is itself an operation that entails complexities due to the nature of fixed costs and the presence of shared costs. In this regard, conceptually, it can be stated that, for the publisher, it is important to limit the costs for the technological and infrastructural investments sustained to produce press publications disclosed online, thus excluding potential investments in the company's non-publishing operations. For the provider, on the other hand, the attribution process is more complex considering the multiplicity of services it offers and the global scale on which it operates, and the need, therefore, to limit the criterion to the costs for technological and infrastructural investments incurred for the online disclosure of press publications in Italy.

There are several possible parameters for attributing costs to news publications disclosed online. For example, the provider could adopt the portion of online traffic generated by news in Italy, while the publisher the portion of online articles of the total press production.

This is without prejudice to the fact that, should the procedure be initiated before the Authority, the parties must prove that they have incurred such costs, prove said costs fall within the perimeter identified under Article 4 and detail the calculation methodology. In

this regard, it is worth noting that, as is done for determining the calculation basis and criteria implementation aspects, for the cost-determination methodology too, the Authority may liaise – also outside the procedure set forth under Chapter IV of the Regulation – with the market players involved in the implementation of the provisions on fair compensation, aimed at identifying reasonable, substantiated, transparent and shared methodological solutions.

With regard to the implementation of the cost criterion, it should also be pointed out that, as far as the provider is concerned, the criterion should be measured by means of relative indicators that take into account the incidence of the aforesaid costs on the total technological and infrastructural costs incurred by the provider; moreover, this information can be supplemented by the incidence of advertising revenues deriving from press publications on the relevant costs for technological and infrastructural investments. This would make it possible to assess both the specific contribution to the information sector and investment efficiency.

With regard to the publisher, on the other hand, it is possible to assess the overall amount of the costs of technological and infrastructural investments of press publications disclosed online, considering that the typical activity of the publisher is producing information; the assessment of this indicator should, in any case, also be accompanied by an indicator of investment efficiency, such as the incidence of the revenues deriving from press publications disclosed online on the relevant costs for technological and infrastructural investments.

The contribution to the rate of the cost criteria, with reference to both provider and publisher, should be defined by comparing the growth rates of the indicators, with a view to giving relevance to the intensity of the parties' effort to support the sector's development.

With reference to the criterion relating to *compliance with the most widely recognised codes of conduct, ethical codes and international standards on information quality and fact-checking*, the Authority accepts the proposals calling for clarification and additions, aimed at including in the criterion an explicit reference to both the deontological codes adopted by the National Council of the Order of Journalists and to the compliance, by publishers and providers, with the codes of ethics and conduct, where sanctions are imposed in the event of infringement. The criterion is thus reformulated, whereby in addition to compliance, it will be possible to assess violations or non-compliance with the system of rules and standards which the subject has joined.

As for the proposal of also including instruments implemented in-house by the publisher, suitable for guaranteeing information quality and fact-checking, we agree with the underlying observation that some publishers have adopted, over time, procedures suitable for ensuring information quality and fact-checking and have also invested resources to improve credibility; however, the criterion focuses not so much on organisational instruments and procedures, but on the “compliance” with best practices of said instruments and procedures.

With regard to the comments made on the difficulty of identifying information quality standards, it should be noted that, for providers, an important reference is the Strengthened Code of Practice on Disinformation of 2022 and that further standards may arise from the implementation of new relevant European regulations (such as the DSA) and ongoing legislative initiatives in the European and national spheres on the issues of information pluralism and the fundamental rights of citizens connected to it. For publishers, on the other hand, in addition to the clearly identifiable codes of ethics and

conduct, reference can be made to those standards that are shared and recognised by the world of journalism itself at an international level.

Regarding the proposals of distinguishing the criterion applicable to the provider from that applicable to the publisher, we reckon that they can actually be merged into a single criterion since the function is the same, although for the publisher it is reasonable to assume full involvement in many initiatives supporting information quality, for it produces news and is primarily responsible for it.

With regard to the comments made on the criterion relating to the publisher's years of activity, it should be noted that this criterion is set forth under Article 43-bis itself and may in any event constitute an indicator, included in a composite system of criteria, of the historical significance of the publisher's brand and its reputation, representing, in the eyes of the general public, the authoritativeness of the press source. On this basis, we reckon the criterion cannot be excluded from the list in Article 4(3). In this regard, precisely because of its specific function, we believe it should be an individual criterion and that it cannot be merged with the number of journalists, as proposed by some respondents. Furthermore, we reckon that it cannot refer, as proposed by the respondents, only to the years of activity in the services of the service provider, since it is intended to be an indicator that acknowledges the publisher's history and experience gained in the information system as a whole.

Consistent with the underlying rationale of the criterion of years of activity, we agree with the observations stating that historical significance should not be limited to the activity carried out online but should consider the overall activity performed by the publisher, including hard copy publications. Indeed, brand reputation and historical significance as such are values perceived by users regardless of the means of communication through which the publisher's publications are disclosed. In particular, in the implementation of the criterion, the historical significance of the publication should also be taken into account with reference to the territory it is connected to, giving due value to those that, at a local level, represent points of reference for communities.

Regarding the calculation of the criterion, in light of the received requests for clarification, the idea according to which they should be calculated taking into consideration the newspaper's year of foundation is considered acceptable. In the case of a portfolio of newspapers belonging to a specific publisher, we reckon it is reasonable to consider the oldest newspaper's year of foundation, since the purpose of the indicator is to identify a representative point of reference of the historical significance of the brand, which contributes to the determination of the fair compensation a specific publisher is entitled to. With regard to the calculation criteria in the event of extraordinary corporate transactions involving a change in the portfolio of newspapers or the creation of a new enterprise or newspaper, in order to determine whether the newspaper(s) or the new enterprise/newspaper should be taken into account for the purpose of calculating the years of activity, we should only consider the transactions that have actually been concluded during the period of reference of the criterion (see below).

ii. Regarding proposals for removing or including criteria

With regard to the criterion concerning the *number of publications on original topics published in advance*, a variety of positions emerged, including proposals to amend and or to remove the criterion, as well as objections of a conceptual and methodological nature. In this regard, while we acknowledge that the value of a work should in principle

also be assessed by analysing its content, the doubts expressed by the respondents as to whether such a criterion can really be gauged objectively, also given the absence of systems enabling the tracking of citations, seem crucial. The doubts expressed as to the possibility of limiting the concept of “originality” to the thematic area alone can be shared too, given the multidimensional nature of the concept itself. Finally, given the need to create a calculation model that is effective and reduces possible disputes, we reckon that the criterion “*number of press publications concerning original topics published before other newspapers whose content is quoted subsequently or mentioned by other publishers*” should be removed.

As for the criterion concerning the “*quantifiable economic benefits enjoyed by the publisher also in consideration of the territorial base of circulation of the corresponding hard copy publications*”, the interpretative perplexities mentioned by the respondents are acceptable and the criterion would in any case need to be reformulated so as to clarify its purpose and implementation. The intention is to enhance local information and reward publishers who work more closely with local communities. In this regard, a number of positions emerged during the consultation, mentioning the need to take into account the specificities of the several categories of publishers: small and local publishers, sector publishers and digital native publishers. In this regard, we reckon that such heterogeneity can be more fairly represented and protected through a fair compensation calculation system based on measurable criteria applied in such a way as to take account of diversity, thus making assessments, where appropriate, “through homogeneous categories” (see above), rather than through the introduction of one or more specifically intended criteria, which risk being misleading, controversial or difficult to implement. In light of these considerations, we believe that the aforesaid criterion should be removed.

With reference to the criterion concerning the costs for technological and infrastructural investments borne by the provider, the proposal made by the respondents as to whether this criterion should be removed cannot be accepted in view of the fact that it would not be under the direct control of the publisher, nor be consistent with the rationale of the Directive. In fact, Article 43-bis, while including this criterion, specifies that it refers to both parties, and this does not seem to be inconsistent with the Copyright Directive, since it is true that the structure of Article 15 is based on the acknowledgment of the existence of a value gap that benefits the provider, and, therefore, on the awareness of the asymmetry of the parties’ positions; however, it is equally true that the underlying objective of the Directive is to adapt copyright law without limiting technological development, which both providers and publishers contribute to, albeit through different roles and contractual power (see below).

Furthermore, at a time when Legislative Decree 177/2021 identifies the Authority as the “facilitator” of negotiations, should the parties fail to find convergence, the Authority can only begin to provide assistance if the parties are willing to do it, therefore starting from a contractual basis. Nevertheless, the Authority (if called upon to define, in the final instance, the value of fair compensation) can only base its reasoning on the balancing of the interests at stake – also related to public law, including innovation – as well as the economic sustainability of the sector, to ensure information pluralism. In light of these considerations, the criterion concerning the provider’s costs for technological and infrastructural investments is confirmed in the list under Article 4(3). In this regard, the proposal of removing both cost criteria (relating to publisher and provider) owing to calculation difficulties and the associated costs, is not acceptable. Indeed, it is true that

the calculation of the costs may prove complex and costly; however, it is necessary to reiterate the concepts expressed above regarding the appropriateness of retaining these criteria, it being understood that the methodology for their determination must be reasonable in terms of the effort required to calculate them in relation to the use of the criterion itself, relying as much as possible on values that can be deduced from the enterprises' financial statements and on attribution drivers that can be obtained from easily accessible sources.

As to the alleged appropriateness of removing, from the list of criteria, the one concerning “*compliance of each of the parties to the most widely recognised codes of conduct, codes of ethics and international standards on information quality and fact-checking*” since it goes beyond the scope of copyright, we cannot agree with the comments received to that effect. The reasoning is, in fact, similar to that set out above concerning the cost criterion: information quality responds to a public law-related interest that is not in conflict with the Directive or Article 43-bis. Information quality is functional to the full unfolding of freedom of expression and the protection information pluralism.

Regarding the proposals to remove the criterion concerning the *publisher's years of activity*, the reasoning set out in the previous section applies; namely, we reckon that the criterion cannot be removed from the list under Article 4(3) not only because it is indicated under Article 43-bis itself, but also because it represents an indicator of the historical significance of the publisher's/newspaper's brand and its reputation; from this standpoint, we consider it appropriate to represent, together with the other criteria, the value of publishing production. Regarding the proposals of including further criteria, we reckon that the proposal to add a criterion gauging the relevance of the publisher on social media platforms cannot be accepted, since this is already expressed in the criterion relating to the number of online consultations of the publisher's press publications on the provider's services.

Regarding the proposals for including criteria that describe the quantity of the publisher's production (hard copy and online) or the number of press publications protected by copyright (the latter as part of a criterion “measuring” the originality of publications), we consider it inappropriate to add criteria of such nature, which – aside from any reasoning connected to the perimeter of the criterion (online/offline) – tend to privilege the quantitative aspect and risk giving rise to possible inequalities between publishers of different sizes and types of production (e.g. sector publishing and news agencies).

The proposal of including a criterion that measures the *relevance of local historical publishers* in their respective territories is accepted and implemented through the criterion concerning the publisher's market relevance, which is in turn implemented taking into consideration comparable categories of publishers, including local publishing companies (see above). In addition, the criterion concerning the publisher's years of activity, as reformulated, also takes into account the publisher's historical significance in the sector. Regarding the proposals to include, among the criteria, a specific reference to the *portion of the text used* online by the provider as opposed to the full text of the press publication or the number of alphanumeric symbols of the publication the provider is allowed to use, we reckon that, while such parameters may be useful within contractual schemes between private parties, they are difficult to implement when determining fair compensation, as envisaged in Article 4, thus further complicating the system.

Finally, the proposal to include a criterion expressing an economic value of trade rights is reasonable, but this criterion already inspires the calculation model underlying Article 4, in particular where indicators (such as the economic value generated by the publication

and the value of the trade rights emerging from agreements for similar uses/similar products or for the same use in other territories) are taken into account in the basis for calculation and in the reasoning based on which the rate is determined, respectively.

iii. Regarding the sorting of criteria

Regarding the sorting of criteria, the proposals for not having an order of relevance cannot be accepted. In fact, the sorting of the criteria makes it possible, on an operational level, to establish a clear and more transparent scheme for the market. Furthermore, it makes it possible to balance the various interests at stake (protection of copyright, pluralism, information quality and development, including the technological evolution of the sector) and to create a system of counterbalances in terms of the risks associated with an isolated and discretionary use of individual criteria.

It is worth reiterating that the parties may also identify schemes for defining fair compensation other than the one set forth under Article 4 and, therefore, use the criteria (those under Article 4 and/or others) in a different manner. On the other hand, should no agreement be reached between publisher and provider and the procedure under Chapter IV consequently be initiated – if it is not possible to define fair compensation on the basis of the proposals of the parties involved – it shall be inevitable, even in terms of administrative efficiency, for the Authority to resort to a scheme for determining compensation defined as much as possible *ex ante*.

With regard to the proposals of giving more prominence to the criteria concerning the publishers' costs, number of journalists and years of activity (being more indicative than publishing production quality), we believe that the sorting proposed under the Draft Regulation should be confirmed. The criteria are, in fact, sorted according to a reasoning that privileges the ones more specifically addressing copyright protection, namely, the number of online consultations of publications, which is a measure of the intensity of use of the publishing production on the services of the provider, along with the relevance of the publisher on the market, expressed in terms of audience, which measures the circulation and appreciation of the publisher's press content across the entire online system. Each of the following criteria – more general and relating to the organisation of the publisher primarily – describe, on the other hand, one aspect of the value of press content: the professional and qualifying nature of the press production, the costs borne for investing in the sector's technological innovation, the adoption of recognised behavioural measures and information quality standards, the historical significance of the publishing brand.

With regard to the concerns expressed about the pre-eminence attributed to the number of online consultations, we reckon that while they are abstractly understandable, they do not appear sufficient to justify a decreased relevance of the criterion. Indeed, in light of the above, it should be noted that: *(i)* the number of online consultations performed on the provider's services is balanced by the immediately subsequent inclusion of an indicator measuring the audience of the entire online ecosystem; *(ii)* the criterion seems to be adequate in the context of the definition of fair compensation; *(iii)* the indicators for its measurement can be easily obtained from third-party sources while the data are certified and also subject to the Authority's supervisory powers in relation to audience indices *(iv)* the criteria are used in a cumulative way, together constituting a system; *(v)* the Authority always exercises penetrating regulatory and supervisory functions, which

enable it to identify and remedy any problems that may emerge regarding fairness and information pluralism, especially since fair compensation applies to publishers and not to any online information site.

As for the possibility, which emerged in the public consultation, of reducing the relevance of the criterion concerning compliance with codes of conduct in view of the difficulty of identifying shared benchmark standards, based on what has already been expressed in the last two sections, we reckon that this indication cannot be accepted and that the position of the aforesaid criterion should be confirmed.

With respect to the requests of considering the impact of the criteria on small publishers, it can be noted that the concerns expressed are actually addressed by the identified sorting system, which in fact places the more objective criteria at the top, measurable also via third party sources, which, besides, do not depend directly from the publisher's organisational structure.

Furthermore, it is useful to specify that the risk of distorting effects deriving from the model for determining fair compensation provided for under Article 4 and burdening smaller publishers, local publishers, sector publishers, news agencies, and digital native publishers are mitigated by means of a series of mechanisms: the introduction of revenues from redirect traffic into the calculation basis; the range of the rate; and the way the criteria are implemented. The latter, in particular, establish that the increase in the rate from the minimum value takes place by algebraically adding up the (decreasing) contribution made by the different criteria, which thus act as incremental (or discount) factors. Each criterion is then gauged through one or more indicators that are measured for the specific publisher (provider). Finally, in order to define the criterion's contribution to the rate, benchmark values of indicators (positioning indices, average values, growth rates) are used, which are then compared with the value measured for a specific publisher (provider). Therefore, it is precisely the determination of the benchmark value that ensures that the heterogeneity of publishers is taken into account. In fact, this value is determined, as discussed in the previous sections, by using the (sorted) distribution of the indicator for the potential audience of publishers, within value classes or within homogeneous categories of publishers.

Finally, the proposals to put on the same level the costs for technological and infrastructural investments of the publisher and the provider cannot be accepted. In fact, while both contribute to innovation in the sector, the directive is based on the acknowledgment of an asymmetry between providers and publishers. Furthermore, they are structurally different players: providers invest in infrastructures and technologies that are not comparable, in terms of size and type, to the investments of publishers; at the same time, they benefit from economies of scale and scope that, again, are not comparable to those of publishers.

Regarding sources and information periodicity

We agree with the observations that the data sources required for determining fair compensation should be third-party, verifiable and impartial. This is certainly something we can agree on and applies in particular to the data feeding the indicators that measure the criteria, with the exception of those relating to costs, which, in fact, require estimates that reasonably start from public sources (such as financial statements) but which cannot be immediately found on such sources, since they have to undergo an attribution process.

With reference to the economic data necessary for the calculation basis and for the

determination of the aforesaid costs associated with technological and infrastructure investments, providers and publishers must provide the Authority – if the procedure under Chapter IV is initiated – with the details of the methodology adopted (see above) and indicate the sources of the underlying data.

Generally speaking, the parties should provide the Authority with specific indications as to all the sources used for the definition of the elements outlining Article 4.

As to the need, called for by the respondents, for publishers to share data that they exclusively hold, it should be in the publishers' own interest to ensure such sharing, as also pointed out under the following section concerning Article 5 of the Regulation.

Finally, regarding the reference period of the information, we agree with some of the comments made by the respondents and believe it is not possible to identify an equal periodicity for all the indicators and quantities involved in the calculation, which differ, in terms of nature and use, within the scheme. Some general indications can, however, be formulated: *(i)* typically, the data should at most refer to the year preceding the start of the negotiation, to avoid being obsolete; *(ii)* in particular, the audience data feeding the criteria should also refer to more recent periods than the year preceding the start of the negotiation, since surveys are continuous; *(iii)* the calculation basis could be determined by using the average values of the last 2 or 3 years, also depending on the duration and structure of the agreement between provider and publisher; *(iv)* data concerning the costs for technological and infrastructural investments should refer to the year preceding the start of the negotiation while the growth rates used as benchmark values should refer to the last three years.

Article 5 **(Communication and information obligations)**

Main positions of the parties involved

Two parties point out an asymmetry with reference to the obligations under Article 5 and consider that all parties should be equally obliged to share the data necessary to establish the fair compensation amount. They point out that most criteria are based on data available to publishers, such as revenues from redirected traffic, number of journalists, investments, without which calculation of payment is impossible. They consider it appropriate to provide for the Authority performing – if necessary or at the request of the parties – some sort of data audit and verification.

One party reckons that data sharing requests made by publishers should be duly reasoned, specific, justified and proportionate, so as to avoid abusive requests and ensure the other party's right to defence. Requests should only concern data relating to the specific act of exploitation relevant for copyright purposes and not hyperlinks and very brief excerpts. It emphasises that appropriate measures are needed to ensure the protection of confidential information, balancing the interests connected to access to the relevant information with information confidentiality, in accordance with the applicable laws on the protection of

trade secrets.

Another party too considers it appropriate for such obligations to be made reciprocal and apply to publishers as well, since many of the criteria are based on data owned by the publisher. It also considers that clarification is needed as to how existing laws (such as Resolution 173/22/CONS and Law no. 481 of 1995) coexist with the new powers of the Authority, in particular with reference to the power to gather documentation and the power to inspect premises. It asks for further indications as to how information is to be communicated. In particular, it emphasises the need to acknowledge the principles of proportionality and reasonableness, as well as the technical, practical and legal constraints about information disclosure. It suggests, therefore, that requests for information should be limited to the information held by the provider in the normal course of its operations, that technical constraints be taken into account, and that under certain circumstances the disclosure of information may constitute a violation of laws, court orders or other administrative measures, as well as obligations relating to confidentiality or privacy.

Finally, it considers that such requests can only be fulfilled when the identity and requirements of the requesting party have been properly verified and the requesting party has confirmed that the data will be stored and used only for the purposes related to the negotiation between the publisher and the platform.

Several parties did not comment on Article 5.

Remarks by the Authority

With reference to the alleged asymmetry that some parties have pointed out in relation to the obligations set forth under the article in point, it should be noted that communication and information obligations are assigned to information society service providers, including media monitoring and press review enterprises, by virtue of the provisions set forth under paragraph 12 of Article 43-bis. Nonetheless, in the event that data exclusively held by publishers are required for negotiation purposes, it will be in the publishers' interest to make them available for a correct determination of fair compensation.

It is worth emphasising, in this regard, that sharing information necessary for the conclusion of agreements between the parties is a key element for negotiations in good faith, whereby, clearly, willingness to negotiate is a prerequisite.

It should be noted that the Authority's requests for information will be processed in compliance with the regulatory framework of reference and as specified under Article 5(2), the fulfilment of the obligation does not exempt publishers from respecting the confidentiality of commercial, industrial and financial information.

As regards the relationship between this Regulation and the pre-existing rules, please note that the general powers entrusted to the Authority as a supervisory authority remain unaffected. That said, in the event of violation of the obligations provided for under Article 5, the pecuniary administrative sanction established therein will be enforced, i.e. up to one per cent of the turnover resulting from the domestic market in the last financial year closed prior to the notification of the dispute, in accordance with the sanctioning apparatus envisaged under paragraph 12 of Article 43-bis of the copyright law (LDA).

Chapter III

Use of press publications by media monitoring and press review enterprises

Article 6 (Criteria for determining fair compensation)

Main positions of the parties involved

General remarks

One party, with regard to the definition of fair compensation owed to publishers by MMPREs, appears to agree with the positions expressed by the Authority. It emphasises that, owing to this, when it comes to newspaper articles subject to a ‘reproduction rights reserved’ clause, ownership of the rights remains with the publisher, which may, upon request, authorise their reproduction and disclosure, typically following payment of a fee, with a special licence that will also specify the limits of use by MMPREs and end users; as to freely reproducible newspaper articles, the fair compensation provided for in Article 43-bis shall apply. It also emphasises that the provision of an obligation to remunerate publishers with fair compensation cannot give rise to the right of MMPREs to an online use of the articles covered by the ‘reproduction right reserved’ clause in the absence of a licence issued by the relevant copyright-holders.

One party agrees with the methodological approach followed by the Authority in the Draft Regulation, where it has kept the category of media monitoring and press review enterprises separate from that of other information society service providers. It suggests that, in order to overcome an oversimplified interpretation of the rule, it should be made explicit that fair compensation for the online use of press publications owed to publishers by media monitoring and press review enterprises covers both hard copy and online sources. It claims it is necessary that, pending negotiation for the renewal of a licence, publishers should be prevented from unilaterally suspending the flow of content to press review and media monitoring enterprises, envisaging a provision similar to the one already provided for under the Draft Regulation to protect publishers when they negotiate as a “weak” party with OTTs (Over-The-Top media enterprises) because it reckons there is bargaining power imbalance between the parties.

Furthermore, it hopes that AGCOM, while enhancing the contractual autonomy of the parties, will incentivise and favour collective bargaining between the most representative associations of publishers and the corresponding associations of media monitoring and press review enterprises. It stresses that the agreement previously reached by the majority of the reviewers and a significant part of the Italian publishers in FIEG-Promopress is an important market practice.

One party claims it is important for the regulations to be adopted to fit consistently within the various regulations governing copyright within our legal system. Said party welcomes the adoption of regulations aimed at enhancing those who invest in the production of quality content, believing, however, that in the specific sector of the provision of media monitoring and press review services, this shared objective must be balanced with the equally important objective of ensuring the constitutionally guaranteed right to information. This is all the more so when the exercise of this right is functional to a more

efficient performance of business operations.

It also emphasises that the use of publishing content by enterprises providing press review services has features that by no means can be assimilated to those that characterise the use of the same content by information society service providers. Press reviews, in the majority of cases, relate to a more or less extensive set of content of interest to the contracting enterprise and are therefore not suitable for meeting the information requirements of individual end users. It points out that the law itself expressly provides, under Article 65 of the copyright law (LDA), that the right to prepare press reviews is independent (unless there is an explicit reservation) from the prior acquisition of the right-holder's consent to the information content. In this context and in line with the orientation of the law on this point, it considers that the first criterion to be taken into account is whether the press review service that the enterprise provides to its customers replaces or is capable of replacing the need for information that leads ordinary newspaper readers to purchase newspapers. It also considers that one of the main elements for assessing this aspect is certainly the number of articles reproduced within the press review in relation to the total number of articles published within each magazine monitored by the enterprise. According to this party, the use of a reduced range of content could not, by its very nature, be a substitute for the reader's desire to have the newspaper or magazine entirely available and, in such a scenario, end users, while reading the review, would not change their habits by continuing to buy newspapers.

A further proposal by this party concerns the appropriateness of specifying that the fair compensation owed by enterprises providing press review and media monitoring services shall in no case be applied to articles for which the publisher has not envisaged reserved reproduction. In addition, in order to counter the practice through which many publishers have indeed stripped Article 65 of the copyright law (LDA) of its effectiveness, it suggests that the ratio between the number of articles labelled "reproduction rights reserved" and the total number of articles published by each individual publisher should also be taken into account when determining fair compensation, favouring those publishers where such percentage ratio is lower and who therefore make a more proportionate and appropriate use of the reservation right granted by law.

One party agrees with the overall approach of the article.

One party has no particular comments because it has not had the opportunity, in the course of its business, to collect sufficient data with reference to this particular activity.

One party considers it appropriate not to make any remarks on this issue, as it is not directly related to its activity.

Several parties did not comment on Article 6.

Regarding the calculation basis

Several parties suggested clarifying that the relevant turnover should refer to media monitoring and press review operations, so as to also include enterprises operating in other sectors but that perform such operations. In particular, one party agrees with taking the enterprise's relevant turnover as the basis for calculating fair compensation, specifying that the relevant turnover should be understood as the turnover from revenues for media monitoring and press review services, excluding any turnover from revenues for different services or performances. It emphasises that this turnover is only partly attributable to the publishing production used, most of it being attributed to the selection work performed by the enterprise.

One party considers it appropriate to clarify what is meant by the relevant turnover on which fair compensation is to be calculated, pointing out that it corresponds to the turnover generated by the economic exploitation of press reviews and monitoring.

In this regard, another party suggests adding an explicit reference to the media monitoring and press reviews operations under paragraph 1 in relation to the relevant turnover of enterprises, so as to include enterprises operating in other sectors but performing such operations.

Another party considers that the basis for calculating fair compensation for media monitoring and press review enterprises should include research and delivery services, which are an integral part of media monitoring and press review operations and are often separated from these services in the financial statement of such enterprises. It therefore proposes to amend Article 6(1) to include turnover from related services.

One party considers it necessary to clarify that “relevant turnover” means turnover directly derived from press review and media monitoring services from the use of press publications in press review operations. This clarification makes it possible to precisely gauge the turnover figure that is actually relevant for the purpose of remuneration of fair compensation and to avoid including in the turnover revenue items that are totally irrelevant to the use of press publications.

Another party, with reference to the definition of fair compensation owed to publishers by media monitoring and press review enterprises (MMPREs), points out, first of all, that the Resolution defines the “value gap” as the unequal distribution of the value (generated by the exploitation in the digital environment) of a protected content between the owner of the right (publisher) and the service provider (MMPRE) that conveys this content online and claims that the gap between the revenues earned by the intermediaries that distribute the contents and the value recognised to the rights owners bridges the so-called value gap. With reference to such concept, it intends to stress that the revenues earned by MMPREs, being based on press material whose rights are held by publishers, certainly bridge the value gap but are not its only preponderant component. It considers that an important component is the loss of revenue for the publisher resulting from reduced sales of press review products. It points out that calls for tenders for press review services often ask for a selection of articles prepared according to the requesting party’s profile (which is already frequently very large), as well as the possibility to view all articles of a newspaper publication. This delivery method leads, among the enterprises that enjoy MMPRE services, to a decrease in newspaper purchases. As for web publications, the phenomenon is even more marked. MMPREs are often asked to include in their reviews, instead of the abstract with the link to the online article, the screenshot of the web page or the full text of the article. This methodology makes it unnecessary to visit the publisher’s website in order to read the full article and consequently takes away traffic, generating less advertising and sales revenue as it bypasses subscription management paywall rules. It highlights, therefore, that the value gap has two important components: the lost revenues from lower sales and web traffic that burden publishers and the revenues earned by MMPREs from the sale of their services.

It then points out, with reference to the identification of the turnover of MMPREs as the basis for calculating the fair compensation owed by them, that turnover can only be the basis for calculating one of the two components of the value gap, namely, the revenue earned by MMPREs from the sale of their services. It also emphasises that turnover does not represent a measure of the loss of revenue from lower sales and traffic, which weighs

on publishers. It therefore considers that this second component of the value gap should be paid by MMPREs to publishers in addition to the first one concerning revenue.

Another party points out that no benefit is enjoyed by publishers for the use of their press publications from the service provided by the reviewers. Therefore, it deems correct the Authority's decision not to provide for any "abatement" criteria for fair compensation – as is the case for the payment owed by providers.

One party reckons, with regard to the relevant turnover, that other revenue parameters should be taken into account, such as revenues from the sale of data and from any other form of exploitation of the data generated by remunerated use. It considers that fair compensation should be applied at a fixed rate, regardless of subjective qualitative criteria and weightings.

Regarding the definition of the rate

One party disagrees with the rate system and proposes to adopt an "article-based" fair compensation, i.e. based on the actual number of articles made available by each individual newspaper, according to an unspecified "method generally used abroad". Alternatively, it suggests envisaging a system with a single rate that is equal for all MMPREs, but that includes fair compensation for the entire Italian daily and periodical press only, not for the individual newspaper. An amount to be paid perhaps into a fund managed by the DIE or AGCOM, which would then subdivide it among the assignees. It believes that, on the contrary, the possibility of creating different rates will result in the need for a large number of rates; rates that are necessarily different for each media monitoring enterprise and to be revised every year, because, as the customer-base changes, so does the interest in the various newspapers/magazines. The complexity of predicting one's own costs, then, might lead customers to reduce the panel of newspapers to be monitored.

Another party considers rational the principle of commensuration of fair compensation at a rate of the relevant turnover and emphasises that the total amount owed by an enterprise for fair compensation-related costs cannot be considered a variable cost without limits, since there is always not just a fairness threshold but also a sustainability threshold for the enterprise, which is determined by several factors, such as profit margins and maximum customer willingness to accept price increases for services.

In a system where rates are differentiated on a publisher-by-publisher basis, there would be a logical need for all rates to be determined at the same time, which is impracticable, because the criteria that could be used for differentiating fair compensation from publisher to publisher can only be known *ex post*. The need for fair compensation to be sufficiently stable over time is imposed not only in the context of the individual relationships between the enterprise and the various publishers, but also in the general framework of the relationship between the enterprise and the publishing industry as a whole, in order to allow the enterprise to adequately plan its business policy. A system of differentiated rates, on the other hand, is inherently incapable of ensuring stability over time.

The only rational and easily feasible solution therefore appears to be the identification of a single, "general" rate (total amount owed to publishers as fair compensation by each enterprise on each annual turnover) and the subsequent apportionment of the corresponding monetary amount for each enterprise among all publishers whose content was used by the enterprise in the reference year, proportionally to the percentage incidence of the number of reproductions of the respective articles on the total number of

reproductions of articles carried out in the year. This system is very easily implementable, it ensures an equal basis for parameterising fair compensation for all publishers and all enterprises, it provides a parameter for differentiating fair compensation between one publisher and another, it ensures effective equality of treatment, and it also guarantees a precisely proportionate evaluation of publishers and a premium both for the largest and best supply of content expressed by an individual publisher and for the greater demand for its publications earned through reputation acquired over time, since it directly measures the actual use of each publisher's production by the enterprise. Furthermore, such a system ensures an automatic, exact adjustment, year by year, of the fair compensation owed by the enterprise to each publisher for each variation, in the extent to which the enterprise uses its production; it provides publishers with a tangible measure of the interest received through their production in a market (that of media monitoring and reviews) characterised by a qualified user base; it therefore contributes to incentivising the publishers' development of information that is as "socially adequate" as possible. Finally, this model may provide for mechanisms of interim payments calculated on the basis of the previous year's data and is the system adopted by Promopress, the only model accepted by all enterprises in the sector.

According to this party, the main parameters that can be used to determine the rate are the profit margins of press review and media monitoring services, and the maximum willingness of the services' customers to accept and absorb increases in their prices. It emphasises that the sector's overall annual turnover has long been around 40 million, distributed among 19 enterprises, and this highlights an overall contribution capacity of the sector that is certainly not high. In fact, the rate applied by Promopress has been 8% of the relevant turnover since 2015.

Finally, it deems unavoidable the need to moderate the rate in order for it not to lead to undue imbalances to the detriment of enterprises that prioritise service quality and therefore resort to a manual selection of publishing content.

One party considers it appropriate to identify the minimum threshold depending on the categorisation of the article (reproduction rights reserved, reproduction rights not reserved, exclusively online) on the basis of market practice (Promopress system), establishing a range between 4% and 8% for articles featuring reproduction prohibited, between 2% and 4% for articles not featuring reproduction rights reserved and between 1% and 2% for online source articles. As for the economic valorisation of articles from online sources, it points out that the lower valorisation stems from the relevance of the hard copy source, which, though the market is heading towards digital copies, is still preponderant in terms of authoritativeness and publisher commitment.

Another party points out that a turnover-based rates system would be complex and that the rate could not be the same for all MMPREs. Instead, it would be simpler, clearer and more rewarding to calculate fair compensation depending on the number of articles taken from each newspaper and made available to customers. It argues that once Agcom decides on the fee per article for a given newspaper, this could become a useful parameter for any MMPRE, easy to apply and automatically adaptable over time. It believes it is more convenient and immediately understandable for all parties to envisage a fair fee per article for the newspapers that request it. It considers that a differentiated rate approach would lead to a reduction in the number of newspapers monitored and thus in the circulation of information. It points out that the fee per article, which may vary depending on the newspaper – but would be the same for all MMPREs – is the main method adopted abroad. According to said party, a fee per article would avoid the need to update (even several

times a year and probably requiring AGCOM arbitration) the rate owed by each MMPRE to an individual newspaper. Furthermore, fair compensation per article would favour the signing of agreements without requiring Agcom arbitration, since it is an easily replicable system. Recourse to Agcom would be limited because a fee per article would make the conditions always FRAND (i.e. fair, reasonable and non-discriminatory). It would guarantee homogeneity and adequacy, even amid the diversity that characterises publishers and MMPREs.

It wonders whether an initial solution might be the introduction of an equal rate for all MMPREs, of 8%, as under the Promopress system. Even in the latter system, however, the amount actually paid to Promopress is proportional to the articles of the member publishers in the Directory compared to the total number of articles reproduced by the individual MMPRE. A system with differentiated rates, on the other hand, entails numerous rates, necessarily different for each media monitoring enterprise and to be reviewed annually, as the number of articles included by each media monitoring enterprise in the press review changes with each change in the customer base. The difficulty in predicting one's own costs could also lead clients to reduce the panel of newspapers to be monitored by limiting the monitoring request to those that are "crucial" and those that would rather not request fair compensation. A system of differentiated rates would also force the parties to resort more often to Agcom arbitration.

One party specifies that the regulation relates only to the online use of press publications and emphasises that the publishing product has an intrinsic objective value regardless of the turnover of the media monitoring and press review enterprise. However, in view of the well-established practice of giving the press publications publisher a part of the revenues generated by media monitoring and press review operations, it points out that, unlike the wording under Article 4(2) of the Resolution and the considerations set out in the introduction, Article 6 does not feature an explicit reference to a rate to be applied for determining fair compensation for media monitoring and press review enterprises. It therefore considers it appropriate to include an explicit indication of this. Considering that, in countries where shared or collective management of publishers' rights is adopted, the share of turnover passed on by media monitoring and press review enterprises is approximately 30%, indicating a similar rate would be useful too. Another party points out, with reference to the identification of a rate to be applied to turnover as a calculation criterion for fair compensation, that the rate is a simple calculation method and as such can be effective. However, the application of the criterion (and thus the rate) must take into account two factors: (i) the identification and payment of both value gap components. In this respect, in order to understand the two components of the value gap, the rate – very probably – cannot be marginal but must be such as to identify a significant amount when compared to turnover. It assumes that, in relation to the overall press review services market turnover, the share to be allocated to all publishers to offset the value of both value gap components should be around 20%. This is likely to induce MMPREs to shift part of the new cost to the end user; (ii) the differentiation of the rate itself depending on the relevance of the publisher. In this regard, the criteria identified under the Resolution in Annex A, Chapter III, Article 6.1 certainly serve the purpose of linking the rate to the importance of the publisher. [omitted]. In addition to the values identified above, which pertain to the granting of the licence for using the materials, it reckons that fair compensation should also be supplemented with a fixed component to cover the costs for preparing and making the newspapers available to the ARS during night hours. This cost could easily be quantified by adding the daily newsstand price of all the newspaper

editions that the individual ARS wishes to receive, supplemented with a percentage for the night-time preparation and dispatch service.

Taking cue from question 6.4, it suggests an alternative methodology for identifying fair compensation. This methodology is the one used in the agreements that are in place between the respondent and almost all MMPREs in the Italian market. Fair compensation is determined by the sum of two components: (i) a fixed component that covers technical services (preparing text flows and making them available to MMPREs at night). This amount can be easily quantified by summing the daily newsstand price of all the newspaper editions that the individual MMPRE intends to receive, supplemented with a percentage for night-time preparation and dispatch service; (ii) a component linked to the licence for using the materials identified by multiplying the number of articles distributed by the individual MMPRE at a cost per unit.

The unit cost is then determined on the basis of two components: (i) a base cost per article included in reviews, which could decrease in slots as the total number of articles in reviews in one year increases; (ii) a marginal rate, to be multiplied by the basic cost, which takes into account publisher relevance. It considers that the criteria for determining this rate could be the circulation share of the (leading) publisher determined on the public ADS data and criteria “d”, “c” and “e” identified in the Resolution under Annex A, Chapter III, Article 6.1. ADS data are available for the determination of the publisher’s market share.

This methodology involves an initial effort in determining the basic cost per article but provides for the use of a deterministic and easily indexable mathematical model.

One party agrees with the proposal to identify the rate for determining fair compensation as speculated, since there are no elements to be taken into account for a payment reduction in the case of reviewers.

Another party emphasises that the rule establishes neither a minimum/maximum limit for the rate, nor criteria for determining it on the basis of the indicated criteria.

Regarding the criteria for determining fair compensation

One party confirms that the basic benchmark criterion for determining the fair compensation owed to publishers from media monitoring and press review enterprises should tend to provide, as much as possible, a measure of the value gap; it considers that the proposed definition of fair compensation is consistent with the positions expressed by Agcom under Resolution no. 195, where it states that the new “related right” publishers are entitled to is included in the body of the copyright law (LDA) “*an additional right that expands the legal sphere of publishers themselves and that has a limited duration (two years as from the publishing) and a scope limited to the ‘online use’ of press publications*”, applying to newspaper articles that can be freely reproduced pursuant to article 65(1) of the copyright law (LDA) (insofar as they do not bear the reservation clause) and leaving the regulatory framework prior to the amendment unchanged.

Another party, with reference to the criteria for determining fair compensation, proposes to amend the criterion under letter (a) as follows: “number of articles communicated once within each of the press reviews also through a collation of articles or media monitoring service”, and the criterion under letter (b) as follows: “actual number of end users featured in the contract”. It considers criterion (c) to be useful and meaningful and that it could be used to establish fair compensation per article. It considers that the criteria under (d) and (e) are not relevant, but, since they are provided for under Article 43-bis, it agrees with

the Authority's position. Finally, it agrees with the order of relevance of the criteria and with the idea of giving them different weights.

One party, with reference to the criterion under letter (a), considers it acceptable if used not for measuring the enterprise's revenues and for determining the rate of fair compensation, but solely (provided that the 'number of articles' means the number of reproductions of every single article in all of the reviews provided by the enterprise) for measuring the enterprise's use of each publisher's production and the incidence, on such use, of the factors mentioned in the criteria under letters (c), (d), (e). The latter criteria, in addition to being unusable – according to the enterprise – for measuring the enterprise's revenues and for determining the rate of fair compensation, and usable only for measuring the use of each publisher's production operated by the enterprise, must be considered to be absorbed by the criterion under letter (a). This party does not agree with the criterion under letter (b), since the number of end users depends exclusively on the initiative and actions of the customers, with no possibility of control or regulation by the enterprise; it is irrelevant for the purpose of the enterprise's revenues, and cannot therefore explain any impact in terms of the value gap; nor can it be valid as an indicator of the enterprise's actual use of the each publisher's contents, because the *intra moenia emptoris* circulation of the reviews and their content is configured as a use that is referable exclusively to the client and completely foreign to the enterprise; the enterprise is normally not aware of it, or only slightly aware.

It points out that the provision in the first part of paragraph 9 of Article 43-bis seems to be transposable only in a compulsory way, that is, decreeing a necessary, mandatory addition – in the framework of the negotiation benchmark parameters – of the criteria established by the Authority to the various criteria autonomously identified or identifiable by the parties, and not transposable by merely allowing such an addition or alternative choice between one and the other criteria. Indeed it is difficult to find a logical basis for such a provision if it were to be transposed in a merely permissive sense; whereas transposition in a preceptive sense is perfectly consistent with the moderating role that the law assigns to the Authority.

According to this party, any criteria-relevance sorting problem is ruled out *a priori*, since the criteria under letters (a), (c), (d), (e), are configured as unusable for determining the rate, and usable for the sole purpose of modulating, or rather proportioning, fair compensation among publishers; for this purpose, those under letters (c), (d), (e) must be considered absorbed by the criterion in letter (a). As for criterion under letter (b), it is considered unusable under all circumstances.

Another party agrees with the decision of opting for a decreasing order of relevance of the criteria indicated. With regard to criterion under letter (a), it emphasises that it should be pointed out that the number of articles refers to the individual publisher in respect of which the criteria for defining fair compensation are to be applied and that these articles are counted for the year of reference.

As for the criterion concerning the number of end-users in letter (b), it is necessary to point out that a relevant market practice does not consider the number of end-users in determining the remuneration owed by reviewers. In the experience of Promopress, when there are more than ten end-users, remuneration is paid directly by the contractor. It would therefore like to see a general approach that assigns to the Contractor a part of the remuneration owed to the publishers (depending on the number of end users) as an element that fairly balances the costs incurred for the preparation and use of the review service.

With regard to the criterion set forth under letter (c), it points out that this cannot be valued uniformly for all publishers, since it is not representative of industry practice, not concretely applicable and already included in the criterion set forth under letter (a). The “relevance” of the Publisher, with reference to the Contractor’s specific interests, is in fact represented by the circumstance that it is the Contractor (namely, the reviewer’s client) who indicates a particular newspaper among the sources to be reviewed in the context of the press review and media monitoring service.

It considers that the criteria under (d) and (e) have no specific relevance, seen as they are part of the production cost and are already included in the preceding points.

It agrees with the idea of assigning a higher value according to well-defined thresholds in terms of total number of articles sent per Publisher, the number of journalists regularly employed and the seniority of the newspaper, the benchmark parameter being the use of the percentage range referring to the share of turnover of each individual Publisher defined according to the number of articles sent for the relevant newspapers.

It believes the Authority must promote the establishment of an entity the actual calculation and reporting should be entrusted to, so as to avoid burdening media monitoring and press review enterprises and ensuring an objective reporting system, as well as simple and transparent ways of applying the criteria for defining fair compensation.

Another party agrees with the criterion under letter (a) but considers the following wording preferable: “number of articles reported at least once within each press review”. It reckons this criterion should be the pivotal one of the entire fair compensation system, in the interest of publishers and especially of smaller papers.

Regarding the criterion under letter (b), it should be specified that end-users must be featured in contracts, in writing, order to avoid legal disputes between publishers, MMPREs and customers. This is because only the end client is aware of the number of users of its review; all foreign experiences state that the bulk of the revenue connected with press reviews must be directly associated with customers; only featuring them in written contracts with customers shall make end-users take responsibility. If this were not the case, Agcom would introduce a sort of strict liability on the part of MMPREs for conduct attributable to employees of organisations and enterprises. On the other hand, it would be appropriate that, for fair compensation relating to internal users featured in contracts in writing, the Agcom Regulation makes the review provider and the Enterprises/Bodies that are its customers jointly and severally liable.

With reference to the criterion under letter (c), it states that this is a criterion that can be shared in abstract terms but that would become unmanageable were it to result in a fee determined on a paper-by-paper basis, especially since it refers to contractors/customers, which change considerably over a maximum period of twelve months.

It agrees with the positioning of criteria under letters (d) and (e), albeit deeming them irrelevant, since not used by customers when focusing their interest on a certain newspaper. It recognises, however, that they are criteria established by primary legislation.

It agrees with the order of importance of the criteria and the idea of giving each a different weight. With regard to criteria under letters (f), (g) and (h), it notes an information confidentiality issue, in particular with regard to business sensitive information that may not be disclosed.

With reference to the criteria’s order of relevance, it considers that more emphasis should be placed on criterion “d” concerning the number of journalists employed, which should

be second in order of importance after the number of articles reproduced in the review. Regarding criterion “c” it is difficult to identify the publisher’s relative relevance with reference to the contractor. Relative relevance could be replaced by an index of the publisher’s absolute relevance to the market. The absolute relevance of the publisher can be measured with public data such as ADS circulations by determining the “circulation shares” of each publisher. In addition, it considers that national newspapers could be given more importance than local newspapers and that an additional incremental correction factor should be applied for national newspapers that also have local editions and for those that deal with specific topics (e.g. economics).

Regarding the criteria identified to determine the basis of fair compensation, another party considers it useful to supplement them with parameters that allow due consideration to be given to the reliability and authoritativeness of the publisher, through elements such as the number of journalists and the years of activity, but also the extent of the press publication and how it circulates. These factors are particularly indicative for newspapers primarily aimed at a specialised or professional audience. In this context, the fact that the circulation of the press publication occurs more steadily (subscriptions), as opposed to the sale of individual copies of the newspaper, is an indicator of the value of the publication that is useful for the purpose of determining the remuneration due for its use. The aforesaid parameter is particularly important to fully appreciate the measure of value extracted by reviewers from press publications such as those of the respondent enterprise. In addition, the use of such publications by Reviewers generates the concrete risk for the publisher that the end user may meet its information needs through the press review service offered to the organisation the user is a member of: consequently, the subscription undersigned with the publisher may no longer be required.

It agrees with the criteria identified by the Authority to determine the calculation basis for fair compensation. However, it suggests adding to the criteria one that takes into account the authoritativeness of the publisher, e.g. linked to the number of subscriptions in the total circulation, but also to compliance with codes of conduct. For a correct determination of the basis of fair compensation, it considers it essential to give value to a press publication through an indicator of its authoritativeness such as that offered by the number of subscriptions out of the total number of copies sold. In this regard, it suggests verifying the figure in the circulation declared by the publisher to ADS, which certifies and discloses data on hard copy circulation and/or distribution, comparing the sum of the items that group the number of subscription copies with the total circulation of the relevant newspaper (both hard copy and digital).

It agrees with the decision of giving an order of relevance to the criteria and the idea of giving each criterion a different weight so as to reflect the proposed order of relevance and help define the amount of the rate and thus the idea criteria-weighting. However, it suggests dividing fair compensation into a “fixed” part (linked to long-term elements, such as indicators of the publisher’s authority, compliance with codes of conduct, number of journalists employed), and a “variable” part (more dynamic, linked exclusively to the extent of the use of publishing content and the number of end users, as per letters a and b).

Another party, with reference to letter (e), recalls what has been pointed out in connection with letter (j) of Article 4(2). In particular, the parameter “years of activity” relates to the more general element of the reliability of the newspaper and thus the trust readers place in it and in the publishing content it produces. It considers it appropriate, therefore, to refer only to the “historical significance” of the newspaper, which is consolidated after a

fitting number of years of continuous activity. It also points out that the years of activity of the publisher do not necessarily correspond to the years of activity of the newspaper. It proposes, for the reasons stated, to replace letter (e) of Article 6(1) with the following: “(e) years of activity of the newspaper”.

One party, with reference to the criterion under letter (d), emphasises that enterprises operating through online publishing alone employ a very high number of professional figures who do not perform journalistic duties but who are equally fundamental to the success of the publishing product. Hence, regarding journalists, the CCNL USPI-CISAL collective agreement applies, which seems to be excluded from the definition given by the Authority.

Another party agrees with the criteria identified to determine the basis for calculating fair compensation. It considers the parameter identified under letter (c) to be completely arbitrary, since it provides for a qualitative assessment of content based on a definition of relevance of the reference publisher, which it considers to be completely unfitting in such a context. With reference to the number of journalists, it considers that the criterion should also take into account those with part-time and fixed-term employment relationships, albeit with differentiated parameters. It considers that the inclusion by media monitoring and press review enterprises of a newspaper among those observed should result in remuneration, regardless of the articles selected. It agrees with the idea of giving each criterion a different weight, but the weights should be checked against each proposed criterion.

One respondent pointed out, with specific reference to the criterion under letter (b), that this is an irrelevant criterion that should be removed, or alternatively should not be taken into account for legal entities, and each one of them should be referred to as an individual user, regardless of potential access by their employees. According to the respondent, this criterion is not consistent with the use of press reviews. In fact, the number of users can vary considerably on any given day, so it would be a completely variable figure. Nor does this number change or affect the value assigned to the press review, given that the contractual relationship is between the Contractor and the individual media monitoring agency, by no means concerning the actual users who will access the press review on a daily basis.

One party expresses a positive opinion as to the criteria identified by the Authority but disagrees with the decision of sorting the criteria by order of relevance. It suggests implementing the cumulative method, after reducing the number of criteria and simplifying their content. It does not agree with the proposal of giving each criterion a different weight.

One party reckons that the methodology of applying the criteria does not appear to be consistent with the content of Article 43-bis, which does not provide for a different weighting of the various criteria, but seems to indicate that all criteria are placed on an equal footing and none is hierarchically superior to the others. It emphasises that the criteria appear, in equal measure, to indicate the quality and economic and informative value of the material used for the press review. They should therefore be given an equal weighting on a short scoring scale. Each point should correspond to an increase from the lowest rate up to the highest, to the extent of a fraction of a percentage point. It believes that the criterion of the actual number of end-users should be removed, since it is not provided for by the law and is in any case hardly relevant with regard to the value of the material used in press reviews. Alternatively, it should at least be specified that each legal entity should be counted as a single end-user, regardless of the number of

workers/employees/assistants employed that have access to the press review.

Remarks by the Authority

Regarding the general remarks

The Authority reckons it must confirm the distinction made regarding media monitoring and press review enterprises (MMPRE) in the context of information society service providers, since they are characterised by structural differences, first and foremost the nature of the services they offer. In fact, they provide, as a rule for consideration, their services to customers who sign contracts for the supply of the relevant customised services, which benefit a multiplicity of end-users belonging to the contractor's organisation. Nevertheless, MMPREs – albeit through a business model that differs from those of other providers – give rise to forms of reproduction and communication of press publications to the general public. It is worth noting that the reference to Articles 13 and 16 of the copyright law (LDA) made by the Italian lawmaker in introducing the related right referred to under Article 43-bis derives from the provisions of Article 15 of Directive (EU) 2019/790, which introduced, for publishers too, the recognition of rights of reproduction and communication to the general public, already provided for by Directive 2001/29/EC for other categories of right-holders. These rights are of an exclusive and available nature, i.e. the exclusive right to authorise or prohibit reproduction and making protected works available to the public.

With reference to the regulatory framework prior to the amendment, the Authority had already pointed out that while the press review service was not expressly governed by copyright law, publishing articles bearing the reservation clause are protected as intellectual literary works and their economic use (reproduction, pursuant to Article 13, and communication to the general public, pursuant to Article 16, of Law no. 633/1941) is the exclusive prerogative of the publisher and it is therefore necessary for right-holders to grant licences for the use of their works or other materials to entities operating in the field of press reviews. The Authority's approach has been confirmed by both the Regional Administrative Court of Lazio and the Council of State.

Without prejudice, therefore, to the regulatory framework prior to the amendment, there is no doubt that media monitoring and press review operators play an important role in the institutional, entrepreneurial and productive sector of society, facilitating the circulation of information and publishing content to a specific and predetermined base of customers. In this business model, all sources, whether hard copy or native digital, national and local, generalist and specialised, constitute an important input of the press review service. Likewise, the definition of press publication under Article 43-bis(2), refers to all types of publications, thus including both hard copy and native digital sources, without, inter alia, making any distinction for articles with a 'reproduction rights reserved' clause. In this regard, it should be emphasised that articles bearing the 'reproduction rights reserved' clause constitute the predominant percentage of press publications in the current publishing industry and cannot therefore be excluded from negotiations between publishers and MMPREs, should a publisher decide to license them.

Consequently, the criteria set forth under this Regulation may also be adopted in the event of negotiations concerning articles featuring the ‘reproduction rights reserved’ clause. The foregoing establishes that the possibility is left up to the parties, since the new Article 43-bis does not provide for any obligation to negotiate, nor does it bind the parties to resort exclusively to the criteria established by the Agcom Regulation, as clarified by paragraph 9 of the Article itself. In fact, the rationale of Article 15 of the Copyright Directive, which Article 43-bis of the copyright law (LDA) takes cue from, is not to bind but to encourage negotiation, acknowledging the rights of publishers and complying with the principles of transparency and good faith.

This is without prejudice to the fact that the reproduction and communication to the general public of current affairs articles of an economic, political or religious nature, published in magazines or newspapers, or broadcast or made available to the public that bear the reservation clause pursuant to article 65(1) of the copyright law (LDA), must always be authorised and licensed beforehand by the holder of the economic exploitation rights (which, pursuant to article 38 of the copyright law (LDA) is the publisher, unless otherwise agreed).

As for the proposal to prevent publishers from unilaterally suspending the flow of content to the MMPRE pending negotiations, we stress what has already been said regarding the exclusive and available nature of the rights of reproduction and communication to the general public. Negotiations should always be conducted in accordance with the principle of good faith, especially by publishers when there already is an existing contract and a negotiation for the renewal of the licence is ongoing.

Regarding the calculation basis

With reference to the calculation basis for determining fair compensation, we can accept the proposal to include an explicit reference to media monitoring and press review operations in relation to the relevant turnover of enterprises and, concurrently, to specify that all operations in any event connected with the provision of such services are included in the calculation. The operations connected with the provision of press review and media monitoring services are understood to mean all operations pertaining to the phases of processing, reproducing and disclosing press publications to the public, such as, by way of example but not limited to, press reviews (selection, indexing, organisation, collation, extraction, transmission and making available press publications), monitoring services, media analysis, production, realisation and marketing of press clippings, databases, telematic and IT services, agency monitoring software, supply of software and hardware, delivery. This aims specifically to define the turnover that really counts for the purpose of fair compensation, including all operations related to media monitoring and press reviews but avoiding revenue items that are by no means related to the use of press publications.

As regards the remarks on the costs incurred by both parties, the Authority confirms the structure proposed in the consultation Resolution and will not provide for a reduction in the calculation basis. In this regard, it should be noted that, with reference to both publishing operations and media monitoring and press review services, investments are instrumental to production and, therefore, not relevant for the purpose of determining the calculation base.

Furthermore, we stress once again that no type of revenue can be subtracted from the calculation basis concerning media monitoring and press review enterprises, since no type

of remuneration or economic return derives to publishers from such services, except for the agreed fee for the provision of press publications used by MMPREs.

Regarding the definition of the rate

With regard to the proposal put forward by one party to identify a minimum threshold for the remuneration amount, broken down according to the characterisation of the article (reproduction rights reserved, reproduction rights not reserved and exclusively online), on the basis of market practice, the following should be pointed out: there is no doubt that articles with a ‘reproduction rights reserved’ clause should be given greater prominence than freely reproducible articles. However, the Authority does not consider it necessary to establish a range for defining the rate to be applied to the calculation basis, nor a single rate, since this would excessively constrain the contractual freedom of the parties involved. In fact, there is a well-established and recognised system on the market that is particularly effective in collective bargaining, which, however, is not unanimously complied with. As previously emphasised (with reference to Article 4), the model for determining fair compensation must remain sufficiently general to be potentially applicable to any type of agreement freely chosen by the parties.

That said, it is worth noting that in the Promopress system, which most publishers have joined, the applied rate is 8% of the relevant turnover. Therefore, lower values cannot be considered for determining a minimum fair compensation. As regards, on the other hand, an assessment of the maximum value, it is considered that it must necessarily take into account the overall annual turnover of the sector, which currently stands at around €40 million – as well as its possible evolution over time. Negotiations must therefore be conducted based on criteria of reasonableness and proportionality, as well as in compliance with the principle of good faith.

Regarding the criteria for determining fair compensation

As for the comments made on the criteria set forth under paragraph 2, the following should be noted.

With regard to the criterion set out under letter (a), namely, the number of articles reproduced within the press review also by means of collation of the articles or the media monitoring service, in the light of certain comments we reckon it is necessary to specify that the number of articles means the number of reproductions of each individual article in each review provided by the enterprise and that the articles must be counted for each individual publisher in relation to the year of reference.

Regarding the criterion under letter (b), namely, the actual number of end users – understood as the number of users at the media monitoring and press review enterprise’s client – this is an indicator that provides information on the actual circulation of works within the organisation of the contractor using the press review or media monitoring services.

This Authority has already ruled on the right of communication to the general public in the context of press reviews, pointing out that, while, on the one hand, it is common ground that the press review service constitutes an act of disclosure, since this definition includes all transmissions of protected works, regardless of the means of communication employed used, on the other hand, with regard to the definition of the target audience of

the press review service, based on the criteria developed by the case law of the Court of Justice of the European Union, elements such as the number of persons to whom the communication is addressed or the presence of new customer bases must be considered. MMPREs mostly provide their services to a specific audience, which does not seem to correspond to the general public. Nevertheless, in the Authority's view, it is necessary to take into account the fact that this customer base may consist of an unspecified number of potential recipients.

The Promopress system too – recognised as valid by the majority of respondents – provides for press review consultation for up to ten users and groups for further users, establishing different amounts depending on the group.

As for the changing nature of this criterion and the difficulty of knowing in advance the actual number of end users (pointed out in particular by MMPREs), we consider it possible to envisage a system based on a final balance, with customers reporting the actual end-users who were in a position to resort to press reviews in the reference year, either as employees or belonging to the contracting enterprise or public administration office. In order to establish whether communication to the general public is performed, one must in fact consider the potential accesses to a given piece of work. The foregoing is in light of the clarifications the Court of Justice of the European Union provided in the *Reha Training g ruling* (C-117/15), namely, that the general public consists of a “fairly large number of persons” assessed on the basis of cumulative economic effects, considering the determinateness and/or determinability of the recipients of the communication, as opposed to the generality of the public. The Court emphasised that the concept of “public” covers an indeterminate number of potential recipients, to be assessed in relation to how many people have access to the same piece of work simultaneously and successively.

Finally, taking into account that the same customer base of MMPREs is bound by the general terms and conditions to a strictly personal and confidential use of press reviews, we reckon – in order to ensure greater certainty in this area – that the proposal of specifying that end users must be featured in contracts in writing should be accepted.

With reference to the criterion under letter (c), the Authority confirms that the benefit deriving to media monitoring and press review enterprises from the use of publications is closely linked to the interests of the contractor, since media monitoring and press review services are based precisely on a selection of information content according to the requests formulated by the customer. The relevance of the publisher can only be relative, insofar as it is necessarily parameterised to the compliance of the publisher's production with the specific needs of the contractor, and expressed, inter alia, by the coverage extent of the topics of interest for the contractor or by the publisher's presence in the geographic area where the contractor operates or where its interests are concentrated. As to one party's proposal of adding to the criteria one that takes into account the publisher's authoritativeness (by linking it to the number of subscriptions), the criterion of relevance may well include the authoritativeness of a given publication in a specific field of reference. From this standpoint, the number of subscriptions certainly constitutes a useful indicator of the value of the publication for the purpose of determining the remuneration due for its use, as well as the unique accesses of users to online newspapers, measurements that should be conducted taking into account the data processed by the JIC of reference.

With reference to the number of journalists employed by the publisher, they represent the essential resource underpinning the production of the publications used by the enterprise, which affects the publisher's costs as well as the quantity, variety and quality of the

publications that can be used for media monitoring and press review services and therefore also has a significant impact on the value of this service, with consequent benefits for the enterprise. We do not, however, believe we can accept the proposal of giving greater importance to the criterion under letter (d), since some publishing enterprises do not predominantly employ journalists, but different professional figures, for the purpose of generating the publishing product. On the other hand, we accept to include, as proposed by several parties, journalists with part-time and fixed-term employment relationships. With regard to the proposed amendment concerning the criterion under letter (e), which intends to attribute the years of activity to the individual newspaper and not to the publisher, please note that the provisions set forth under Article 43-bis (which the Regulation stems from) refer to the publisher as the party that is granted exclusive rights of reproduction and communication to the general public. Therefore, we cannot accept this proposed amendment. That said, there undoubtedly is an implicit reference to the newspaper belonging to a particular publisher, especially if one considers that in the collective view, the popularity of a publishing group corresponds to that of the newspaper. Therefore, the Authority considers it necessary to supplement this criterion by specifying that the years of activity of the publisher may also be assessed in relation to the historical significance of the newspaper. As for the observation that the criteria set forth under letters (c), (d) and (e) should be considered absorbed by the criterion set forth under letter (a), please note that Article 43-bis indicates that the different criteria set forth under paragraph 8 of the same Article should be taken into account. The Authority has considered it necessary to identify a separate set of criteria for MMPREs, consistent with the nature of such enterprises, but cannot disregard the law's indications on the whole. Furthermore, the criterion under letter (a) is objective and quantitative in nature, whereas those under letters (c), (d) and (e) predominantly measure the qualitative aspects. As for the proposal that this Authority should promote the setting up of an entity that should be entrusted with calculation and reporting – so as to avoid burdening media monitoring and press review enterprises and have an objective reporting system and simple and transparent modalities in the application of the criteria for defining fair compensation – we stress that Agcom was called upon to intervene only if no agreement between the parties is reached, and one of them turns to Agcom for the purpose of defining fair compensation.

Article 7 **(Communication and information obligations)**

Main positions of the parties involved

A number of parties did not comment on Article 7.

One party emphasises that the provision under Article 7 seems consistent with the role assigned to the Authority pursuant to Article 43-bis. It notes, however, that the only useful documents are the annual financial statements and tables summarising, on a yearly basis, the total number of reproductions of articles performed in the reviews on the whole and the number of reproductions of articles of each individual newspaper. The customer list, requested by some publishers to MMPREs, on the other hand, is unnecessary and

constitutes, aside from the confidentiality limits, a trade secret that the enterprise is entitled to keep as such, even because no relevance as to its revenues and no relevance useful for determining fair compensation can explain the identity of the individual customers. It emphasises that checks on the accuracy of data can also be envisaged through the work of impartial third parties or, preferably, by the Authority itself, by means of inspections.

The same party considers it appropriate to explicitly indicate, in the Regulation, the data and information subject to mandatory disclosure. Lastly, it emphasises that any obligation to communicate and provide information cannot concern anything other than information and data that are actually held by the enterprise and freely available, and that it would be useful, in order to prevent misunderstandings and errors, to provide for standard information content and formats.

Remarks by the Authority

The proposal to detail, under Article 7 of the Regulation, the information to be requested in order to determine fair compensation, is not acceptable, for this can vary considerably from case to case. On the other hand, Article 7 lays down an obligation for media monitoring and press review enterprises to make available the data necessary to enforce the criteria set forth under Article 6 in order to determine fair compensation, thereby identifying clearly enough the kind of information that must be shared.

It is worthwhile pointing that, generally speaking, a *bona fide* negotiation should necessarily entail the sharing of the information required to enter into an agreement, provided, of course, that there is a willingness to start a negotiation.

It is further understood that, as specified under Article 7(2), the fulfilment of the obligation does not exempt a party from compliance with business, industrial and financial information confidentiality. As for the possibility of conducting inspections, it is noted that this is already provided for under paragraph 4 of the same article.

Chapter IV

Procedure for requesting the Authority's action for determining fair compensation

Article 8 (Action modality)

Main positions of the parties involved

One party suggests removing the second paragraph of Article 8, because the law specifies that any “unjustified restriction” of the publishers’ content will be taken into account

when assessing whether a service provider has acted in good faith or not. The current proposal set out under Article 8(2) does not seem to reflect this principle and could even lead to undesirable consequences, since there may be circumstances where, in the normal course of a platform's operation – owing to technical reasons or as a result of decisions taken by publishers themselves – content visibility changes. In the respondent's view, the inclusion of this new, undefined obligation risks leading to unnecessary controversy and lies outside the Authority's scope.

Another respondent also proposed amending paragraph 2, arguing that the provision should be supplemented by envisaging that content visibility must not be limited in search results.

One party considers it appropriate to amend Article 8 so that publishers, given the considerable imbalance of bargaining power, cannot unilaterally cut off access to publishing content by “compelling” resellers to accept economic and contractual conditions they consider unfair.

Several parties did not submit comments on this article.

Remarks by the Authority

We cannot accept the proposal of removing the second paragraph of Article 8, since this provision is consistent with the provisions of Article 43-bis(9) of the copyright law (LDA). On the other hand, we can accept the proposed amendment which aims to stress that – during the course of negotiations – publisher content visibility is not to be limited by information society service providers “in the search results”, since it is more compliant with the primary rule. On the contrary, we cannot accept the proposed amendment to extend the application of paragraph 2 of the article in point to negotiations between media monitoring and press review enterprises and publishers, due to the fact that the rights of reproduction and communication to the general public are exclusive and available rights granted to publishers, as explained at length in the comments on Article 6.

Article 9 (Starting the procedure)

Main positions of the parties involved

One party suggests amending the first paragraph, since certified e-mail addresses are exclusively for Italian natural persons/entities, whereas non-Italian enterprises do not have a Certified E-Mail address.

Regarding paragraph 4, it suggests clarifying what happens should a legal proceeding be

initiated during a procedure involving the Authority and envisaging that the procedure cannot be initiated when a proceeding before a judicial authority is pending for the same reason. With respect to paragraph 5, it should be noted that the Authority will have to reject requests, since they are inadmissible, when:

(i) the requesting party is not a press publisher that meets the requirements provided for by the Law and the Draft Regulations; (ii) the parties have not concluded negotiations or the discussions are not at a stage where the Authority's contribution is necessary or appropriate; (iii) it has not been possible to verify the identity and/or rights of a specific publisher; (iv) the request concerns content uploaded by the publisher on the social media platform; (v) the request is precluded because legal proceedings have been initiated on the same subject matter.

Another party considers that the inadmissibility of cumulative requests, namely submitted in associated form by publishers, provided for under Article 9(2), is not consistent with the provisions set forth under Article 43-bis of the copyright law (LDA).

One party proposes to establish that the thirty days indicated under paragraph 1 should be working days and that the request to initiate negotiations may be transmitted by any other means that guarantees proof of receipt by the recipients.

The same party also proposes to amend Article 9(2), in order to guarantee the other party's right to defence by envisaging that the requesting party must attach, to the request, the data necessary for the implementation of the criteria for determining the actual fair compensation amount available to it. It also suggests that the requesting party should send the other party a copy of the request no later than the working day following the filing of the request.

Finally, out of consistency with Article 43-bis(10) of the copyright law (LDA), it proposes to amend Article 9(4), providing for the dismissal even when legal proceedings are initiated pending the procedure.

Several parties did not submit comments on this article.

Remarks by the Authority

We reckon we can accept the comments regarding the exclusive use of certified electronic mail, specifying that it be used "where possible", or, alternatively, allowing the use of any other means that guarantees proof of receipt by the recipients, such as, for example, registered letter with return receipt, or uploading – on the recipients' platforms – the return receipt issued by the recipients.

With reference to the amendment of the thirty-day time limit for negotiations, after which it is possible to submit a request to the Authority, this time limit is provided for by the law and therefore is not amendable. That said, such deadline should be anchored to a certain date, for the purpose of a subsequent verification by the Authority, which is called upon to exercise its powers only at a later stage, i.e. in the event of the parties' failure to reach an agreement, and always if one of the parties deems it appropriate.

As for the proposed amendments to paragraph 2 of the Article in point, the party that brings the procedure before the Authority is required to file all the documentation relevant

to the determination of fair compensation – not only for the purpose of the request’s admissibility, but also in its own interest. Should that not be the case, the missing data required for determining payment will be the subject of a request for information pursuant to Articles 5 and 7 of the regulation.

On the other hand, we accept the proposed amendment aimed at accepting requests filed in an associated form, though it is understood that requests filed against more than one party will be considered inadmissible.

We also consider it necessary to clarify that the action of the Authority is proposed as an alternative, and not as a substitute, for that of the judicial authority, by providing not only for the non-prosecution of the request if the judicial authority has been resorted to, but also for the dismissal of the administrative procedure if the requesting party appeals to the judicial authority at a later date. In such cases, the requesting party must inform the Directorate. Regarding the considerations on the identity of the negotiation’s object, the Authority considers that it should judge on a case-by-case basis.

With reference to the administrative filing of requests, the requests submitted by parties other than publishers and information society service providers (including media monitoring and press review enterprises, as defined in these Regulations) are deemed inadmissible. Similarly, requests relating to content uploaded by right-holders, since they do not fall within the scope of the Regulation, are deemed inadmissible. On the other hand, requests submitted by parties whose identity is not certain will be filed for lack of basic information. Therefore, we reckon we should not accept the proposed amendments to paragraph 5.

Instead, we consider it appropriate for the requesting party to inform the other party that it has submitted a request to the Authority whenever possible, in order to ensure a speedier settlement of the procedure. In fact, the rights of participation are already guaranteed by the provisions set forth under Article 10, inasmuch as the Directorate informs the parties of the initiation of the procedure within five working days of receipt of the request.

Article 10 **(Forwarding the request to the summoned party)**

Main positions of the parties involved

In order to guarantee the opposing party’s right to defence, one party proposes to amend paragraph 1 by envisaging that the Directorate shall also communicate to the parties any documents and information provided by the party that filed the request, and paragraph 2 by extending the time limit therein to twenty working days.

Another party, with respect to Article 10(2), suggests postponing the deadline for providing the necessary information and data from ten working days to fifteen. The reason for said proposal is to give the defendant sufficient time to identify and prepare the necessary information and data.

Several parties did not submit comments on this Article.

Remarks by the Authority

The Authority reserves the right to make any assessment related to the forwarding, to the parties, of the documentation and information provided by the requesting parties so as to balance respect for confidentiality and protection of the rights at stake. We reckon we have to confirm the procedural deadlines in light of the provisions set forth under Article 43-bis of the copyright law (LDA). However, we believe it necessary to envisage, under Article 11, a suspension of the time limits, not exceeding 20 days, in order to ensure the possibility for the Authority to conduct further investigation, if necessary.

Article 11 (Summoning the parties)

Main positions of the parties involved

Several parties agreed with the proposal to hold a meeting between the parties.

One party suggests that each party be given the opportunity to request a meeting in addition to submitting written comments. Should neither party request an oral meeting, the matter should be decided solely on the basis of written submissions. If one or both parties request a meeting, the Collegiate Body should set a date and time, giving the parties reasonable notice, in order for them to prepare themselves.

Several parties did not submit comments on this article.

Remarks by the Authority

We reckon we can confirm the provisions concerning the summoning of parties.

Article 12 (Determining compensation)

Main positions of the parties involved

One subject emphasises, with respect to the possibility of the Authority's action in determining fair compensation, that there is no prejudice to the fact that the publisher is by no means compelled to negotiate, let alone contract.

One party suggests that the Authority add a provision guaranteeing the confidentiality of sensitive data the collegiate body might refer to in its decisions. To this end, it suggests adding a clause stating that the Authority's decisions will not be published or, at the very least, adding a clause stating that the collegiate body will not make any reference to sensitive data in the public versions of its decisions and establishing a mechanism for the

parties for requesting the modification of any sensitive information before disclosure.

Several parties did not comment on this article.

Remarks by the Authority

We reckon there is no need to stress, even in the Article in point, the absence of any obligation to negotiate or contract, for this is made clear under other provisions. Finally, please bear in mind that the Authority will take into account the confidentiality of trade, industrial and financial information when disclosing its decisions.

CONSIDERING therefore that, in the light of the remarks and comments made during the consultation by the parties involved, the following amendments and additions to the discussed Draft Regulation should be accepted, within the limits and for the reasons stated;

TAKING DUE ACCOUNT of the President's report;

ESTABLISHES THE FOLLOWING

Single article

1. The "*Regulation on the identification of benchmark criteria for determining fair compensation of the online use of press publications, as set forth under Article 43-bis of Law no. 633 of 22 April 1941*" set out under Annex A to this Resolution is approved.
2. The Regulatory Impact Analysis (AIR) report is included in Annex B to this Resolution.
3. Annexes A and B are an integrating and substantial part of this resolution.

This resolution is published on the Authority's website.

Rome, 19 January 2023

THE PRESIDENT
Giacomo Lasorella

Certifying compliance with the Resolution
THE GENERAL SECRETARY
Giulietta Gamba