BARGAINING IN THE SHADOW OF THE PRESS PUBLISHERS' RIGHT

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ULA FURGAL
MARTIN KRETSCHMER

CREATe

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Ula Furgał and Martin Kretschmer*

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Abstract

The press publishers' right (granted under Art. 15 of the EU's 2019 Directive on Copyright in the Digital Single Market) equips publishers with a legal basis for negotiations with digital intermediaries. However, the process of bargaining has not been specified by the EU legislator, who left it at the discretion of EU Member States and the market. This paper constructs the four main approaches to the operationalisation of the press publishers' right in the EU, in contrast with the bargaining framework that evolved in Australia without the underpinning of a new intellectual property right. It analyses those five frameworks in the light of the 'bargaining in the shadow of the law' perspective, to understand the relationship between statutory law and private bargaining as mediated by institutional frameworks. By defining and coding key parameters concerning the bargaining parties, their endowments (bargaining chips), measures to mitigate dependencies and the role played by the authority (such as a regulator), the paper shows that bargaining frameworks sit as complex institutional constraints between pure private ordering and the law. It is the shape of the bargaining framework which matters for the range and the frequency of the agreements between press publishers and digital platforms.

* Ula Furgał is Lecturer in Intellectual Property and Information Law and a member of the CREATe Centre, University of Glasgow; Martin Kretschmer is Professor of Intellectual Property Law and Director of the CREATe Centre, University of Glasgow.

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1. Introduction: A Potted History of the Press Publishers' Right

The introduction of the press publishers' right has grown into one of the most controversial regulatory interventions in the intellectual property field. Provided for in Article 15 of the Directive on Copyright in the Digital Single Market (CDSM),[1] it offers publishers of press publications a primary entitlement on their news content in the shape of a related right. While the beginnings of the press publishers' right were rather modest, linked to a single type of service (news aggregator) of a single company (Google), the discussion gained considerable momentum, with the press publishers' right argued to be a 'matter of life or death' for journalism and democratic debate.[2]

Digitalisation has not been kind to the legacy news media, which continue to seek sustainable business models. Traditional revenue sources such as print circulation and related advertising are drying up, and the losses are not being offset by revenues from digital distribution. This made news organisations weary of third parties using their content without permission, particularly when such uses are by digital platforms enjoying a lion's share of digital advertising revenues and dominating search (Google) and social media (Facebook) markets. At the same time, however, press publishers started to rely on the internet traffic coming from those platforms. The publishers first took their grievances to the national legislators, and when German (2013)[3] and Spanish (2014)[4] interventions bared no fruit, they turned their efforts to the European Union, which at that time was looking to update its copyright framework to embrace the change that digital technologies had brought to the creation, distribution and use of creative content.[5]

With the publishers setting the tone of the public discussion, the European Commission consulted in 2016 on granting a new neighbouring right that should enable press publishers to license and be paid for online uses of their content.[6] The new right, modelled after the German intervention, was included in the 2016 proposal for the CDSM Directive. The positive reaction of

[1] Directive (EU) 790/2019 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending the Directives 96/0/EC and 2001/29/EC OJ L 130/92 2019.

[2] Sammy Ketz, 'Neighbouring Rights: A Question of Life or Death' (AFP.com, 27 August 2018) <https://www.afp.com/en/au-fil-de-lafp/tribune> accessed 21 March 2024.

[3] Achtes Gesetz zur Änderung des Urheberrechtsgesetzes vom 7. Mai 2013, Bundesgesetzblatt 2013 Teil I Nr 23, 1161.

[4] Ley N° 21/2014, de 4 de noviembre, por la que se modifica el texto refundido de la Ley de Propiedad Intelectual aprobado por Real Decreto Legislativo 1/1996, de 12 de abril, y la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil.

[5] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Towards a Modern, More European Copyright Framework COM(2015) 626 Final.

[6] European Commission, Public Consultation on the Role of Publishers in the Copyright Value Chain and on the 'Panorama Exception' (2016).

the legacy news media was met with opposition of not only digital platforms, but also civil society organisations, pointing out that the right goes against basic principles of the internet and would subdue users' ability to share information online.[7] Three years of discussion brought only small changes to the press publishers' right shape, with the EU adopting the right in 2019 as a means to guarantee sustainability, freedom and pluralism of the press sector.[8]

2. Bargaining Frameworks and Bargaining Theory

We have sketched in the introduction how the EU press publishers right was invented as a private law solution to a policy problem: how to channel money from digital platforms to news publishers in order to sustain a quality press that was deemed to be central to democratic societies. The new intellectual property right was to be the lever that would allow press publishers to replace major losses of advertising revenues with licensing deals with the same intermediaries.

But how were such licences for news content to be negotiated in a setting of complex interdependencies? As predicted early on,[9] platform intermediaries may choose not to enter negotiations at all and reduce exposure to news content below the threshold of the press publishers' right (that permitted 'use of individual words or very short extracts' – Article 15(1) CDSM Directive). During licensing negotiations, parties may promise or threaten. For example, publishers can offer APIs[10] to news content or make linking difficult; intermediaries can promote or throttle online traffic to news publishers, potentially reducing online advertising revenues associated with news content of the legacy press even further. In such a setting, platform intermediaries may have the market power to negotiate free licences. Predicted revenue flows therefore appear to depend on a bargaining framework that has not been addressed at all in the private rights regime conceived by Article 15 CDSM Directive.

Enter Australia. In response to the same policy challenge that had driven EU intervention, the Australian Competition and Consumer Commission (ACCC) developed in 2021 a code of conduct

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[7] Ula Furgal, Martin Kretschmer, and Amy Thomas. 'Memes and Parasites: A discourse analysis of the Copyright in the Digital Single Market Directive' (2020) *CREATe working paper 2020/10*, available at: <https://doi.org/10.5281/zenodo.4085050> accessed 8 September 2023.

[8] CDSM Directive, recital 54.

[9] Martin Kretschmer, Séverine Dusollier, Christophe Geiger, P. Bernt Hugenholtz, 'The European Commission's public consultation on the role of publishers in the copyright value chain: A response by the European Copyright Society' (2016) 38(10) *European Intellectual Property Review*, 591-595; Lionel Bently and Martin Kretschmer, *The position of press publishers and authors & performers in the copyright directive*, Study commissioned by European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs (2017), available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU%282017%29596810_EN.pdf.

[10] APIs (or Application Programming Interfaces) are standardised software interfaces that allow computer programs to communicate with each other.

'to address bargaining power imbalances between Australian news media businesses and digital platforms, specifically Google and Facebook' (the Code).[11] Drawing on competition law concepts, the Code mandated bargaining directly, resulting in remuneration agreements between digital platforms and news businesses. The Australian compulsory bargaining approach became a factor in the national implementations of the EU's Article 15 CDSM Directive right.[12] Considerable national variations in bargaining emerged against the background of the same statutory (intellectual property law) provision. This is of considerable theoretical interest.

In this chapter, we construct four different bargaining frameworks that have been operationalised in EU Member States following the adoption of Article 15 CDSM Directive, as well as the bargaining framework that evolved in Australia (and recently Canada) without the underpinning of a new intellectual property right. We then analyse these frameworks in the light of the 'bargaining in the shadow of the law' perspective. We intend to draw wider lessons on the relationship between statutory law and private bargaining as mediated by institutional frameworks.

Before setting out these four (plus one) bargaining frameworks in detail, we sketch the theoretical assumptions underpinning our bargaining analysis.

The idea that private bargaining takes place 'in the shadow of the law' has a long history. It is the preferences, expectations and uncertainties that (rational) parties bring to negotiations that result in different outcomes. The law intervenes in multiple ways. It may grant endowments, such as rights, that may function as bargaining chips. It may regulate enforcement which enables parties to bind each other. It may condition process and who sits around the table. Some shadows are cast directly by legislators or judges; others, such as collective bargaining, are forms of private ordering that are indirectly permitted or facilitated.

The classic expression of the 'shadow' theory focuses on dispute settlement in divorce cases.[13] The law provides a framework under which a married couple can negotiate their future responsibilities as a flexible (but enforceable) private ordering arrangement. A court may not adjudicate but 'rubberstamp' distributional arrangements concerning marital property, alimony,

[11] The ACCC had identified the issue in its Digital Platform Inquiry, published in 2019: https://www.accc.gov.au/about-us/publications/digital-platforms-inquiry-final-report. The code was given a statutory basis by the T*reasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021*. For context, see: https://www.accc.gov.au/by-industry/digital-platforms-and-services/news-media-bargaining-code/news-media-bargaining-code

[12] Ula Furgał, 'The Emperor Has No Clothes: How the Press Publishers' Right Implementation Exposes Its Shortcomings' (2023) 72(77) *GRUR International*, 650–664.

[13] Robert H. Mnookin and Lewis Kornhauser 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88(5) *The Yale Law Journal* 950-997.

child support, and custody. Negotiating parties implicitly attribute probabilities to certain outcomes.[14]

In this chapter, we first set out four different bargaining settings that have developed in the EU in the shadow of the same CDSM Directive's press publishers' right. We also explain the Australian bargaining framework that developed during the same period without an underlying statutory right. It influenced the national operationalisation of the press publishers' right in the EU. We then advance an analysis of the frameworks under four criteria taken from bargaining theory: who are the bargaining parties; what endowments have they been given; what procedural mitigations are available; and what is the function of the regulatory authority. We conclude with reflections on the relationship between law and private ordering in the shadow of the press publishers' right.

3. An Empirical Exploration of Negotiation Frameworks

While not exhaustive, the bargaining settings selected for exploration represent the main approaches to the operationalisation of the new press publishers' right in the EU. These European case studies are supplemented by the influential Australian solution.[15]

The frameworks are constructed on the basis of the national implementations of the press publishers' right, including preparatory documents, decisions of relevant public bodies, stakeholders' press releases and public statements, as well as news reports. The enquiry focuses on the structure of the frameworks, not on the particular agreements signed by publishers' and digital platforms, which as a rule are not available to the public.

Each negotiation framework is examined through rich descriptions, capturing its facilitator, beneficiaries and relevant uses, opening of the negotiations, criteria taken under consideration while determining the amount of remuneration, transparency obligations, and enforcement mechanisms, including the mode of distribution of licensing fees.

[14] Mnookin and Kornhauser (at 978) give the example of bargaining over child custody where different standards create different endowments to the parties: 1. A maternal-preference rule creates a strong presumption in favor of giving custody to a mother, with the father having limited visitation rights. 2. The best interests of the child standard calls for a highly individualized determination, confers broad discretion on the judge, and gives no automatic preference to either parent simply on the basis of the parent's or the child's sex. 3. A joint-custody rule provides that in disputed cases each parent will have care and control of a child for half the time. "Each of these three custody standards creates its own set of bargaining endowments. Because different rules give various amounts of bargaining chips to the parties, changing the standard would affect each party's relative bargaining power and would therefore influence the range and frequency of possible negotiated outcomes."

[15] This chapter reflects the state of the bargaining frameworks as of 31 December 2023.

3.1. Competition Law Commitments in France

France was the first Member State to implement the press publishers' right,[16] and to date the only one to see a competition authority's decision on it.[17] In June 2022, the French Competition Authority (AdLC) approved a set of commitments proposed by Google, creating a framework for negotiations.[18] This decision follows from the proceedings initiated by the AdLC due to the complaints by the General Information Press Alliance (APIG), Agence France-Presse (AFP) and the Syndicat des Éditeurs de la Presse Magazine (SEPM) asserting that Google has abused its dominant position by refusing to bargain pursuant to the press publishers' right.[19] After the imposition of an obligation to negotiate in good faith via interim measures, a failed appeal and a sizable fine of €500 million,[20] in December 2021 Google submitted a set of commitments to put an end to the competition law concerns regarding its behaviour. Pursuant to Article L 4464-2 of the French Competition Code, the AdLC accepted Google's commitments as means to halt its anticompetitive practices.

The framework created by the commitments was designed to perpetuate and complete the provisional measures ordered by AdLC in April 2020. The negotiations carried out by the parties are overseen by a Monitoring Trustee, a person or an entity designated by Google from the candidates approved by the AdLC. The Trustee's task is first and foremost to verify Google's compliance with the commitments and to report back to the AdLC. For this reason the commitments include extensive provisions on the potential conflict of interests between the Trustee and Google.[21] Next to its supervisory and reporting roles, the Trustee also plays an active role in settling of the disagreements between the parties, including, to some degree, the

[16] LOI n° 2019-775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse 2019 (2019-775).
[17] On 28 March 2023 the Spanish National Markets and Competition Commission has initiated the disciplinary proceedings against Google for possible anti-competitive practices affecting Spanish publishers as a result of a complaint filed by CEDRO. As of December 2023 the case is still pending. See 'S/0013/22 - Google Derechos Conexos' (CNMC, 28 March 2023) <https://www.cnmc.es/expedientes/s001322> accessed 21 March 2024.
[18] AdLC, Décision 22-D-13 du 21 juin 2022 relative à des pratiques mises en œuvre par Google dans le secteur de la presse.
[19] The complaints were launched after Google changed its display policy to opt-out system in September 2019. See Richard Gingras, 'Nouvelles règles de droit d'auteur en France : notre mise en conformité avec la loi.' (Le blog officiel de Google France, 25 September 2019) <https://france.googleblog.com/2019/09/comment-nous-respectons-le-droit-dauteur.html> accessed 21 March 2024.
[20] AdLC, Décision 21-D-17 relative au respect des injonctions prononcées à l'encontre de Google dans la décision n° 20-MC-01 du 9 avril 2020.
[21] See Annex 3 – Designation and missions of the Monitoring Trustee, sec. 2 Conflict of interest.

interpretation of the substantive law. While the Trustee's involvement is optional, their opinions are binding for Google.[22]

The framework is open to press publishers and news agencies who benefit from the new right pursuant to Article L 218-1 of the Intellectual Property Code (IPC), whose authorisation is required prior to the use of their 'protected content'.[23] As such, the commitments do not refer to a press publication as an object of protection, but adopt a new concept of 'protected content' which includes 'texts, photos and videos' of press publishers and news agencies.[24] Rather uniquely, Article L. 218-1 IPC refers to already existing definitions of a news agency and an online press service to designate the beneficiaries of the new right.[25] If parties disagree whether a particular entity or content meets the definition, they can refer their disagreement to the Trustee.

A publisher, a news agency or a collective management organisation triggers the negotiation by sending a 'Complete Negotiation Request' using an online form or other means determined by Google. The contents of the request and a confidentiality agreement template are specified in the commitments, and their completeness is assessed by Google under the supervision of the Trustee. The commitments make a distinction between existing uses (Google Search, News and Discover) and Google News Showcase and other future uses, with the negotiations covering only the former. What constitutes use itself is not specified beyond a general statement that it is reproduction and communication to the public of protected content.

Google is required to make an offer of remuneration that envisages at least an annual update. If the parties cannot reach an agreement on remuneration within three months, they can refer the case to the arbitral tribunal,[26] which will then set a price per impression, a minimum remuneration which ought to be paid by Google. While determining the price, the tribunal takes account of the factors enumerated in Article L 218-4 IPC, the same the parties are obliged to consider during the negotiations. They take account of both direct and indirect revenues from the use of protected content, including i.e. the human, material and financial investments made by publishers and press agencies, the contribution of press publications to political and general information and the importance of the use of press publications by online public communication services. Google is obliged to make information which allows the assessment of those factors available to the other party, pursuant to Article L 218-4 IPC and the commitments. The mode of

[22] See Commitments para. 245
[23] Commitments para. 6.
[24] Ibid.
[25] This link possibly limits the scope of the framework compared to Article 15 CDSM Directive.
[26] While theoretically both parties can make a reference, practically Google cannot refer a case to the tribunal against the wishes of a press publisher or a news agency.

payment of the agreed remuneration remains unaddressed, and thus it lies within the parties' discretion.

AFP, APIG and SEPM,[27] the three organisations who launched complaints with AdLC, concluded licensing agreements with Google on press publishers' rights prior to the AdLC decision on merits. The text of the agreements is not available to the public. Additionally, Société des Droits Voisins de la Presse (DVP), a collective management organisation dedicated to the press publishers' rights, concluded its own agreement with Google in October 2023.[28]

3.2. Collective Management and Licensing with Extended Effect in Denmark

A number of Member States explicitly or implicitly allow for collective management of the press publishers' right. In some cases, this includes extended collective licensing, where a collective management organisation (CMO) representative of a considerable number of rightholders can act on behalf of its non-members.[29] The extended collective licensing is characteristic for the Nordic countries, and the most notable example of its application to the press publishers' right comes from Denmark.

The Danish implementation of Article 15 CDSM Directive, adopted in June 2021, builds on section 50 of the Danish Copyright Act, providing for a general contractual licence.[30] It is an open-ended extended licensing provision, which allows a representative CMO approved by the Ministry of Culture to conclude licensing agreements within a specific well-defined area, authorising the use of works of its members and non-members where they are of the same nature. The rightsholders who do not wish for their works to be covered by the scheme, are able to opt out and conduct (or not) their own licensing negotiations.

Shortly after the implementation of the press publishers' right, on 2 July 2021, the Danish Press Publishers' Collective Management (*Danske Pressepublikationers Kollektive Forvaltningsorganisation*, DPCMO) was established. The news was widely reported as the DPCMO brought together a considerable number of Danish press publishers.[31] As of July 2023, it had 37

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[27] 'Droits voisins du droit d'auteur: Google trouve un accord avec la presse magazine' (France 24, 15 April 2022) <https://www.france24.com/fr/info-en-continu/20220415-droits-voisins-du-droit-d-auteur-google-trouve-un-accord-avec-la-presse-magazine> accessed 6 September 2023.

[28] Sulina Connal, 'Google signe un accord avec la Société des Droits Voisins de la Presse' (Google, 17 October 2023) <https://blog.google/intl/fr-fr/nouvelles-de-lentreprise/impact-initiatives/google-signe-un-accord-avec-la-societe-des-droits-voisins-de-la-presse/> accessed 14 March 2024.

[29] See Thomas Riis and Jens Schovsbo, 'Extended Collective Licenses and the Nordic Experience – It's a Hybrid but Is It a VOLVO or a Lemon?' (2010) 34 Columbia Journal of Law & Arts, 471-498.

[30] Danish Copyright Law s 29a and s 50.

[31] Molly Killeen, 'Publishers Eye Collective Bargaining as Way to Take on Platforms' (www.euractiv.com, 8 July 2021) <https://www.euractiv.com/section/digital/news/publishers-eye-collective-bargaining-as-way-to-take-on-platforms/> accessed 21 March 2024.

members, including well-established media houses, local and regional publishers, and public service radio and television stations, purportedly representing 97 per cent of all press publishers in Denmark.[32] To become a member of the DPCMO, an organisation needs to be registered with the Danish Press Council (*Pressenævnet*), an independent public body competent to decide on ethical complaints about media conduct. According to the Danish Media Liability Act, domestic periodicals and stations automatically fall under the Press Council's jurisdiction, but any other printed or digital news reporting content need to seek registration.[33] At the time of writing, the Press Council website lists more than 2800 registered websites.[34] Not all registered outlets are, however, eligible for the DPCMO membership, but only those 'who aim to provide the public with news or other media content published on the publisher's initiative and under the publisher's control and responsibility'.[35]

The DPCMO has begun pursuing the licensing agreements with intermediaries even before it acquired the approval of the Ministry of Culture in September 2023 for its extended collective licensing scheme.[36] It had success with Microsoft (Bing), Google, upday, Yahoo!, DuckDuckGo, Ecosia and Qwant,[37] less so with Facebook, with whom the negotiations will now be facilitated by the Ministry of Culture appointed mediator pursuant to section 52 of the Danish Copyright Act.[38] Neither the text, nor the details of the agreements signed by the DPCMO are made available to the public. What is also not publicly available, even though it should be accessible on each CMO's website pursuant to section 22 of the Danish Act on Collective Management of Copyright, is a general policy for the distribution of amounts due to rightholders. As such, it is not possible to assess how is the remuneration determined, collected and distributed by the DPCMO.

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[32] 'Danish Media Continue to Battle Big Tech for a Fair Playing Field' (International News Media Association (INMA), 13 September 2022) <https://www.inma.org/blogs/conference/post.cfm/danish-media-continue-to-battle-big-tech-for-a-fair-playing-field> accessed 28 July 2023.

[33] See ss. 1 and 8 of the Danish Media Liability Act. For comment see Søren Sandfeld Jakobsen and Sten Schaumburg-Müller, Media Law in Denmark (Second edition, Wolters Kluwer 2019) 57.

[34] 'Hvem kan man klage over' (Pressenævnet, 28 July 2016) <https://www.pressenaevnet.dk/hvem-kan-man-klage-over/> accessed 28 July 2023.

[35] 'We Take Democracy, Culture, and Community Seriously' (DPCMO) <https://dpcmo.dk/en/we-take-democracy-culture-and-community-seriously/> accessed 6 September 2023.

[36] Kultur Ministeriet, Godkendelse af Danske Pressepublikationers Kollektive Forvaltningsorganisation i medfør af ophavsretslovens § 50, stk. 4, jf. § 29 a (26 September 2023) <https://kum.dk/fileadmin/_kum/2_Kulturomraader/Ophavsret/Aftalelicensgodkendelser/Specifikke/123Afgoerelse_om_aftalelicensgodkendelse_.pdf> accessed 15 March 2024.

[37] See subsequent reports by Karen Rønde on DPCMO website available at: <https://dpcmo.dk/nyheder/> accessed 21 March 2024.

[38] Karen Rønde, 'Minister of Culture Approves Mediation between Meta and DPCMO' (DPCMO, 8 June 2023) <https://dpcmo.dk/minister-of-culture-approves-mediation-between-meta-and-dpcmo/> accessed 28 July 2023.

While subjecting the press publishers' right to extended collective licensing, Danish legislator decided to make only one addition to the general contractual licence scheme: a possibility for the parties to refer a question to the Copyright Licensing Board, in case the contractual conditions offered by an authorised CMO are unreasonable.[39] The Board is an administrative body set up by the Ministry of Culture to address, among others, remuneration disputes with regards to collective management of rights.[40] Following the reference, the Board assesses the terms offered, and if it finds them unfair, it makes determination on remuneration and appropriate terms. The fairness determination is based on the overall assessment of case circumstances, i.e. public policy and competition law considerations.[41] The decision of the Board provides a basis for an agreement between the parties, and it cannot substitute it.

3.3. Final Offer Arbitration and the Key Role of a Regulator in Italy

Not unlike Australia, a selection of member states opted for creating a negotiation framework in which a public body, a ministry or a regulator plays a key role, including making a decision on the level of remuneration due to publishers. Italy was the first to take this route. It granted considerable competences to the Authority for Communications Guarantees (AGCOM), its communications regulator, making it responsible for determining the criteria for assessing whether the remuneration agreed between the parties is fair, and making a selection between parties' remuneration offers in case they cannot reach an agreement (so-called final offer arbitration).[42] While the Italian example is not short of controversy, with its compatibility with the CDSM Directive being currently considered by the Court of Justice of the European Union,[43] it was quickly followed by others, Belgium (Institute for Postal Services and Telecommunications),[44] Greece (Hellenic Telecommunications and Post Commission)[45] and Czechia (Ministry of Culture) included.[46]

Article 43-bis of the Italian Copyright Act settles the core of the Italian negotiation framework, with the AGCOM Regulations on the identification of reference criteria for determining fair

[39] S. 29a(3) of the Danish Copyright Act.
[40] S. 47 of the Danish Copyright Act.
[41] Kultur Ministeriet, Bemærkninger til lovforslaget (26 March 2021) 12. <https://www.ft.dk/ripdf/samling/20201/lovforslag/l205/20201_l205_som_fremsat.pdf>
[42] Decreto Legislativo 8 novembre 2021, n. 177 Attuazione della direttiva (UE) 2019/790 del Parlamento europeo e del Consiglio, del 17 aprile 2019, sul diritto d'autore e sui diritti connessi nel mercato unico digitale e che modifica le direttive 96/9/CE e 2001/29/CE.
[43] See the request for a preliminary ruling in case C-797/23, Meta Platforms Ireland Limited v AGCOM.
[44] Code de droit économique art. XI.216/2.
[45] Νόμος 2121/1993 Πνευματική Ιδιοκτησία, Συγγενικά Δικαιώματα και Πολιτιστικά Θέματα art. 51B.
[46] Zákon č. 121/2000 o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů (autorský zákon) s. 87b.

compensation (AGCOM Regulations) filling in the details.[47] The framework is open to all publishers who benefit from the press publishers' right.[48] In its resolution approving the Regulations, AGCOM emphasises that as a default, press publishers and intermediaries should negotiate and agree on the remuneration unaided.[49] The remuneration should cover reproduction and communication to the public of press publications,[50] which goes beyond very short extracts. Here, quite uncommonly, Italy provides a definition of such extract, building on the notion of a substitution effect: it is a portion of a press publication which 'does not dispense with the need to consult the journalistic article in its entirety'.[51]

In case the parties do not reach an agreement within 30 days, either can ask AGCOM to determine fair remuneration due. This option is an alternative to launching a case with a judicial authority and cannot be used when a court case is pending. When asking AGCOM for an intervention, a party needs to submit the basic documentation and an offer of remuneration they consider to be fair. Since the AGCOM can declare an application inadmissible, it indirectly decides on the scope of the right. In particular, it determines whether a platform is an information society service provider and if yes, what type. The type matters, as the AGCOM Regulations distinguish between media monitoring and press review companies, and other intermediaries, providing for the two sets of criteria for determining *fair* remuneration. In devising those criteria, AGCOM was restricted by Article 43bis(8) of the Italian Copyright Act, providing an open list of factors that need to be taken under consideration, including 'the number of online consultations of the article, the years of activity and the market relevance of the publishers [...] and the number of journalists employed, as well as the costs sustained for technological and infrastructural investments by both parties, and the economic benefits deriving, for both parties, from the publication in terms of visibility and advertising revenues'. This list, with an addition of the compliance with the codes of conduct and codes of ethics, was adopted for intermediaries other than media monitoring and press review companies.

While the factors look beyond the mere use of press publications, the basis for calculating the fair remuneration due is the direct advertising revenue an intermediary generates due to such

[47] Regolamento in materia di individuazione dei criteri di riferimento per la determinazione dell'equo compenso per l'utilizzo online di pubblicazioni di carattere giornalistico di cui all'articolo 43-bis della legge 22 aprile 1941 n.633 (19 January 2023) Delibera n. 3/23/CONS.
[48] The addition of the 'economic activity' to the definition echoes recital 56 CDSM Directive.
[49] Ibid. 8.
[50] As in France, Italian implementation does not adopt right of making available as prescribed in art. 15 CDSM Directive.
[51] Legge 22 aprile 1941, n. 633 Protezione del diritto d'autore e di altri diritti connessi al suo esercizio (Italian Copyright Law) art. 43-bis(7).

use, minus the publisher's revenue from the referential traffic.[52] Following the last offer arbitration logic, AGCOM will chose the offer which better reflects the criteria, and if none do, set the remuneration itself. AGCOM is able to assess the remuneration's fairness due to the transparency obligation included in Article 43bis of the Italian Copyright Act and detailed by the AGCOM Regulations, safeguarded by its competence to impose pecuniary fines in case of non-compliance. The AGCOM's decision on fair remuneration does not replace an agreement between the parties, who can if they do not agree with AGCOM's determination, seek a resolution by a court or abandon the negotiations.

3.4. Extended News Previews (ENP) Program

The Extended News Previews (ENP) program was unilaterally created by Google and launched in May 2022.[53] While it is not the first licensing framework Google has offered to the publishers, it is the only one which concerns solely the press publishers' right. The main focus of the Google News Showcase, a global licensing framework predating ENP, has always been a dedicated news product of the same name.[54] Even though the agreements made with the European publishers for the News Showcase have also provided for remuneration for the press publishers' right,[55] this remuneration has rather been ancillary. As claimed by the European Publishers Council, by incorporating the press publishers' right into the News Showcase agreements, Google tried to 'dictate terms and conditions' for negotiations, pre-empting publishers' separate claims for remuneration under the new right.[56] The growing dissatisfaction of the publishers with bundling of the new right with other Google products, and especially the News Showcase, has lead some of the member states to speak against such pairing.[57] Consequently, the ENP program was born.

Google provides basic information on the ENP on a dedicated support website.[58] It declares that ENP is open to all press publishers who 'meet the criteria established in national laws

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[52] Art. 4(1) of the AGCOM Regulations.

[53] Sulina Connal, 'Google Licenses Content from News Publishers under the EU Copyright Directive' (Google, 11 May 2022) <https://blog.google/around-the-globe/google-europe/google-licenses-content-from-news-publishers-under-the-eu-copyright-directive/> accessed 21 March 2024.

[54] Sundar Pichai, 'Our $1 Billion Investment in Partnerships with News Publishers' (Google, 1.10.20200) <https://blog.google/outreach-initiatives/google-news-initiative/google-news-showcase/> accessed 21 March 2024.

[55] See agreements made by Google in Czechia, prior to the implementation of the CDSM Directive Tania le Moigne, 'Google News Showcase Is Launching in Czechia' (Google, 20 April 2021) <https://blog.google/products/news/google-news-showcase-launch-czechia/> accessed 21 March 2024.

[56] EPC, 'Google's News Showcase Challenges EU Publisher's Right' (epceurope, 1 October 2020) <https://www.epceurope.eu/post/google-s-news-showcase-challenges-eu-publisher-s-right> accessed 21 March 2024.

[57] As mentioned, such bundling is not allowed under the commitments in France.

[58] 'The Extended News Previews Program - Search Console Help' <https://support.google.com/webmasters/answer/11317369> accessed 28 July 2023.

implementing Article 15',[59] but the ultimate assessment of who is eligible to participate in the ENP belongs to Google. A publisher can enter the ENP framework either online, using Google's Search Console, or offline. The Search Console is an online tool providing access to information on the website performance in Google search, allowing optimization of its visibility.[60] Publishers who have already claimed a website which qualifies as a press publication in the Google Search Console on the day the ENP was launched, were to receive an invitation to the program automatically. Those who did not, are asked to register their website with the Search Console, and then enrol with the program. While the ENP website refers to the publishers who 'signed up for ENP offline', it does not explicitly explain how such offline enrolment works. The ENP was designed to cover all EU member states, but as of October 2023 it covered only 16 countries.[61]

While the publishers enrolled with the ENP sign standardised agreements, the standard text is not available to the public. Publishers themselves can access and download the text of an agreement they have signed using the Search Console, or by contacting a Google representative when enrolled offline. As indicated on the ENP website, the program covers 'the use of preview content in search results that goes beyond [...] short extracts and hyperlinks'. This general declaration mirrors the text of the CDSM Directive, even though it recognises its 'uncertainty'.[62] After enrolling into the ENP, a publisher receives an offer from Google. The remuneration is calculated on an annual basis, following 'consistent criteria which respect the law and existing copyright guidance, including how often a news website is displayed and how much ad revenue is generated on pages that also display previews of news content'.[63] Offers could also account for national differences, but it is not specified what differences are those, e.g. in law, in the press market or other.[64] Publishers can 'give feedback' on the offer to the 'responsible team', but it is not clear whether and how an offer would be adjusted. It seems that if a publisher does not agree with Google's offer, the publication will still be included in the search results free of charge, unless a publisher opts out from Google search entirely. As such, the offers seem to come on

[59] ibid.
[60] 'Google Search Console' <https://search.google.com/search-console/about> accessed 21 July 2023.
[61] Sulina Connal, 'An Update on Google's Compliance with the EU Copyright Directive' (Google, 17 October 2023) <https://blog.google/around-the-globe/google-europe/an-update-on-googles-compliance-with-the-eu-copyright-directive/> accessed 13 December 2023.
[62] Connal, 'Google Licenses Content from News Publishers under the EU Copyright Directive' (n 56).
[63] Gerrit Rabenstein, 'Google macht Verlagen über neues Web-Tool Angebote nach dem neuen Leistungsschutzrecht' (Google, 11 May 2022) <https://blog.google/intl/de-de/unternehmen/engagement/web-tool-fuer-verlage-leistungsschutzrecht/> accessed 12 March 2023.
[64] See The European Copyright Directive: How Google Is Supporting Europe's Digital Future (Directed by Google News Initiative, 2023) <https://www.youtube.com/watch?v=CZ-ozRgzI1A> accessed 21 July 2023. The video remarks: 'While every country will be different.'

take-it-or-leave-it basis. The agreed annual remuneration is distributed to the publishers in monthly equal instalments by a third party service.[65]

Since agreements are not made public, and Google does not report on the number of the agreements concluded except in occasional press release, we do not know how successful the negotiation framework is, how much revenue does it generate for publishers and whether there are any material differences between legacy, digital and local publishers. According to Google's June 2023 press release, more than 1500 agreements were signed, a 50 per cent increase compared to its November 2022 update. Still, no information on the amount of money paid to publishers under the scheme has been made public.

3.5. Australian News Media Bargaining Code

Unlike the EU, Australia followed a competition law route when intervening into the relationship between news media and digital platforms. The Australian Code creates a mandatory bargaining framework without awarding new rights, relying on the obligation to bargain and non-discrimination requirements instead. The Code applies to those news businesses registered with the Australian Communications and Media Authority (ACMA), which fulfil the four tests (revenue, content, targeted audience and professional standards), and to those digital platforms which are designated by the responsible minister. While the Code was created with Google and Facebook in mind, formally designated platforms should be those which benefit from a significant bargaining power imbalance towards Australian news businesses. To date, no platform was designated, as both Google and Facebook 'made a significant contribution to the sustainability of the Australian news industry through agreements relating to news content of Australian news businesses' by signing licensing agreements outside of the framework to avoiding designation.[66]

Pursuant to the Code, a digital platform is under an obligation to bargain in good faith with all registered news businesses that notify it of their desire to do so. The remuneration for making news content available is the main issue the parties can bargain about, but not the only one. The Code defines making available as all situations when news content or an extract of it is present or linked to on a service.[67] Thus, the Code's 'making available' is broader than 'the right of making available' known to copyright. The parties have three months to reach an agreement, and if they fail to do so either can refer the case to the mediation facilitated by an ACMA-appointed mediator. By default the mediation lasts two months, unless parties agree to its extension. If it

[65] As of July 2023 it was Payoneer <https://www.payoneer.com>.
[66] The Code s. 52E(3)(b).
[67] The Code s. 52B.

terminates without the agreement, a media organisation can request arbitration on the remuneration, but only when digital platform consents to the procedure.[68]

As already mentioned, the Code's arbitration is a so-called final offer arbitration, where an arbitral panel composed of an ACMA-appointed chair, potentially accompanied by two members, makes a choice between the final remuneration offers submitted by the parties. To prepare those offers, each party can make reasonable information request to the other, whose reasonableness in case of a disagreement is assessed by the panel.[69] The offers should include a lump sum payment for a period of two years. In making its choice between the offers, the panel takes account of the monetary and other benefits enjoyed by both parties due to the availability of news content on a platform, the reasonable costs incurred by media organisation and digital platform for producing the content and making it available to the Australian audiences respectively, as well as whether a particular remuneration amount would place an undue burden on the commercial interests of the digital platform service.[70] The panel can opt for making adjustments to one of the offers only when neither of them is in the public interest.[71] The panel's decision on remuneration is final, and a case can be referred back to arbitration only after the period of two years. The compliance with the Code is subject to general provisions of the Competition and Consumer Act 2010, of which the Code is a part, with some adjustments. The Australian Competition and Consumer Commission can impose pecuniary penalties for the circumvention of the Code's provisions in a sum up to 600 penalty units, which currently stand at 313 AUD.[72]

As up to date no platform has been designated, the Code does not apply in practice. This, however, does not discourage other countries to follow suit. In June 2023 Canada adopted the Online News Act,[73] which essentially copies the Australian Code. It does so, however, with some notable modifications. First, digital platforms do not require designation for the negotiation obligation to apply. It is sufficient for a platform to self-identify as a 'digital news intermediary' as defined by the Act. Secondly, the Act introduces a transparency element, where an independent auditor is tasked with the preparation of an annual report on the effects of the agreements made by news media and digital platforms on the Canadian news market. Among others, the report published on the website on the Canadian Radio and Broadcasting

[68] The Code s. 52ZL(2).
[69] The Code ss. 52ZT and 52ZU.
[70] The Code s. 52ZZ.
[71] The Code s. 52ZX(7).
[72] 'Fines and Penalties' (ACCC, 29 July 2023) <https://www.accc.gov.au/business/compliance-and-enforcement/fines-and-penalties> accessed 11 August 2023.
[73] Online News Act S.C. 2023, c. 23.

Commission, a body responsible for safeguarding the act, is supposed to disclose an aggregate value of the agreements made.

4. Analysis

Having assembled the institutional details of the operationalisation of bargaining in a variety of settings in the EU, as well as in Australia (and Canada), we now proceed to code the key parameters of variation under four dimensions we take from bargaining theory. The coding is based on the same set of documents we used for the construction of the negotiation frameworks, which includes, among others, statutes, preparatory documents, stakeholders' press releases and public statements, as well as news reports.

Under 'Bargaining Parties', we code who has a seat at the bargaining table and on what basis. Here, by a group of media organisations, we mean a formalised or informal grouping of media organisations able to partake in a single negotiation, referred to for example as acting 'in association or consortium' (Italy). A CMO stands for a collective management organisation, regardless of an explicit reference to a statutory definition of such organisation, for example a 'collective society or association' (France).

Under 'Endowment', we code what parties are bargaining with: what are the 'bargaining chips' they have been given by the legislator. We consider both entitlements stemming from the statutory provisions, as well as those provided for in the executive acts and agreements. The right to have news media organisation's content carried could be phrased as a digital platform's obligation to refrain from 'arbitrarily restricting' its service so that it no longer falls within the scope of the press publishers' right, which would give a digital platform a reason for abandoning the negotiations (Czechia).

Under 'Dependency Mitigation Measures', we code how power imbalances are being addressed procedurally. We look at both general behavioural directives, and specific procedural norms, for example those which provide negotiation parties with the right to appeal the original settlement or lack thereof to a higher, or simply a different body. Such recourse can be phrased as a right to request a relevant body to make a decision after a set period of time passes without an agreement between the parties (France) or simply as a right to appeal an unsatisfactory settlement to a competent court (Australia).

Under 'Role of Authority', we code the interventions of the regulator. We look at the powers and actions a regulatory body or its proxy can take during the bargaining process, which is primarily led by the bargaining parties. For example, we investigate whether a regulator might be called

upon when parties disagree on the scope of the transparency obligation imposed on one of them, like in France, where the Monitoring Trustee on request provides an opinion on the feasibility of supplying additional information.

The following table provides an overview of the key coded parameters. 1 indicates that a parameter is present, 0 that it is not. Such coding enables us to see bargaining taking place under an institutional framework. We now summarise the key patterns that emerge.

4.1. Bargaining Parties

The first question to be asked when looking at the negotiation frameworks is that of the parties eligible to bargain. In the EU, the matter is seemingly simple as all entities which (self)identify as a publisher of press publications or an information society service provider pursuant to Articles 2(4) and 15 CDSM Directive, no matter their effect and role in the news media market, are to bargain. There are, however, some notable differences between the frameworks, with some allowing publishers to band together to strengthen their bargaining position. Here, the involvement of collective management organisations sets the Member States-mandated solutions apart from code-based approaches, as well as from Google's privately created Extended News Previews program. A CMO has no place in bargaining frameworks which belong to the competition law domain. Additionally, an authority might be explicitly (France) or implicitly (Italy) authorised to assess a particular entity's eligibility.

The Australian solution requiring a digital platform to be explicitly designated by a ministerial act is unique on the global scale, and to date did not find any followers, with Canada taking the EU route of (self)identification based on a statutory provision. That said, in code-based frameworks only digital platforms with qualified market status and effect on the news market in a given country are to bargain. While the EU frameworks do not include similar requirements, Czechia does support a likely unacceptable bifurcation of press publishers' right regime, imposing stricter obligations on digital intermediaries enjoying dominant market position, during the negotiation process.[74] The CDSM Directive treats all digital intermediaries equally.

[74] Czechia ss. 87b(14) and 87b(15).

			France (commitments)	Denmark (ECL)	Italy (final offer arbitration)	Czechia (final offer arbitration)	Google's ENP	Australia	Canada
Bargaining parties	News media	Single media organisation	1	0	1	1	1	1	1
		Group of media organisations	1	0	1	1	0	1	1
		CMO	1	1	1	1	0	0	0
	Digital platforms	Statutory basis	1	1	1	1	1	0	1
		Designation act	0	0	0	0	0	1	0
Endowments	News media	Exclusive right (copyright)	1	1	1	1	1	0	0
		Entitlement to fair compensation	0	0	1	1	0	0	0
		Right to receive information	1	0	1	0	0	1	0
		Right to have its content carried	1	0	1	1	0	1	1
		Uneven bargaining position influences remuneration	0	0	0	0	0	0	1
	Digital platforms	Right to receive information	0	0	0	0	0	1	0
		Right to abandon negotiations	1	1	1	0,5	1	0	0
Dependency mitigation measures	News media	Recourse to the regulator	1	0	1	1	0	1	1
		Recourse to the judiciary	1	1	1	1	1	1	1
	Digital platforms	Obligation to enter negotiations	1	0	1	0	0	1	1
		Obligation to negotiate in good faith	1	0	1	1	0	1	1
		Non-discrimination requirement	0	0	0	0	0	1	1
		Obligation to make a remuneration offer	1	0	0	0	1	1	1
		Recourse to the regulator	1	1	1	1	0	1	0
		Recourse to the judiciary	1	1	1	1	0	1	1
Role of the authority		Interpretation of framework scope	1	0	1	1	0	1	1
		Interpretation of transparency obligation	1	0	1	0	0	1	1
		Information gathering powers	1	0	1	1	0	1	1
		Arbitration or mediation facilitation	1	1	1	1	0	1	1
		Determination of price	1	1	1	1	0	1	1
		Pecuniary fines	1	0	1	0	0	1	1
		Transparency and reporting obligations	0	0	0	0	0	0	1

4.2. Endowments

When looking at the bargaining chips each of the negotiating parties enjoys, it is clear that the news media side has been better resourced. The basic endowment is that of a press publishers' right itself, an exclusive related right, absent in the code-based frameworks. It is further supplemented by an opaque entitlement to receive fair compensation, as well as the guarantee that the display of one's content will not be altered during the negotiations, which could negatively influence the online traffic and revenues of news media, and the right to receive information from a digital platform on the use of news content and associated revenues, allowing the publishers to better assess the remuneration they might ask for. The transparency requirements are not bilateral, unlike in Australia, and news media are under no obligation to supply digital platforms with information on the benefits they generate from their content being available in platforms' services.

The core endowment of digital platforms is their potential power to abandon negotiations. Here, we were looking at whether a platform can walk away from the bargaining table without needing to cease the use of all news content in their services. In effect it means whether a platform can pick and choose parties they bargain with. While the code-based negotiation frameworks exclude such situations, frameworks concerning the press publishers' right are more lenient. Even in the case of extended collective licensing, in theory, a platform could abandon the negotiations with an authorised CMO, and enter into an individual agreement with any news organisation which opted out from an extended collective licensing scheme. In Czechia, while in general a digital platform can walk away from negotiations, this appears not possible when such platform is a dominant search engine or social medium.

4.3. Dependency Mitigation Measures

The parties do not come to the negotiation table on an equal footing, with news organisations dependent on the intermediary traffic. This dependency makes digital platforms such as Google or Facebook unavoidable trading partners to news organisations, but the same cannot be said about any particular news organisation. Thus, the negotiation frameworks anticipate digital platforms exploiting news media dependency and introduce mitigating measures. The majority of the measures come in the shape of obligations imposed on digital intermediaries, determining how an intermediary should behave procedurally. The most far-reaching is an obligation to enter negotiations, as it imposes an ultimate restriction of the digital platforms' freedom to contract. This obligation lies at the core of code-based frameworks and is now also present in France and Italy. Less invasive, and among the most common measures is an obligation to bargain in good faith, which is not always linked to the requirement to make an offer of remuneration. Thus, a

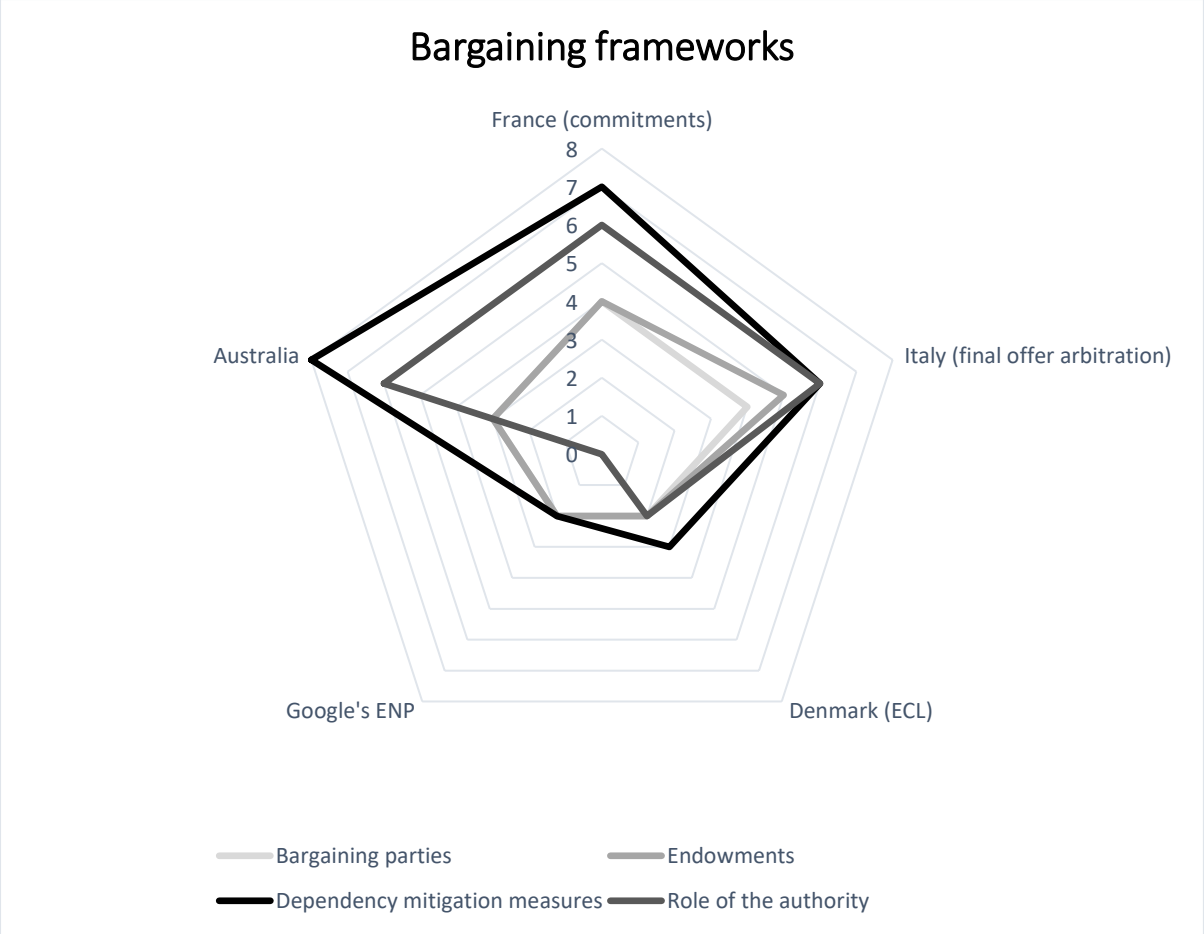
behavioural instruction (good faith) does not necessarily lead to any result (remuneration offer), and even if it does, this result does not need to come at a minimum level (e.g. permissibility of zero offer in France). Since code-based negotiations do not build on intellectual property entitlements, non-discrimination measures, mandating equal treatment of all news media operating in a particular jurisdiction, were included as means to strengthen the bargaining obligation. Similar non-discrimination requirements are absent in the EU.

Interestingly, the measure which is the most used for dependency mitigation is that of recourse to a regulatory body. With the exception of Denmark, it is bilateral, allowing both parties to direct their complaints to a regulatory body, or an agent acting on its behalf (e.g. a Monitoring Trustee in France). Only Google's ENP framework does not envisage such a measure, as would be expected in a private framework.

4.4. Role of Authority

While the negotiations take place between the parties, they are not free from the input of an authority, a regulatory body or its proxy, in whose creation or functioning such body plays a part (Monitoring Trustee in France, Copyright Licensing Board in Denmark or arbitration panel in Australia). The authorities act as facilitators of the negotiations, overseeing the functioning of the frameworks and enabling mediation or arbitration when required. In the majority of settings, they have interpretative powers, and are able to make binding decisions on the frameworks' scope and judge the extent of and adherence to the transparency obligations imposed on the parties. This, however, only happens at the parties' request. The role of the authorities is most pronounced in the code-based frameworks and the European solutions inspired by them, with the authorities not only empowered to make decisions on the level of remuneration due to media organisations but also impose pecuniary fines on digital platforms in case of a non-compliance with its decisions and the framework in general. When the role of the authority is considered, Google's ENP framework stands notably apart, as it does not envisage any role for the regulator or its proxy. This cannot be surprising since Google is both a party and the facilitator in the ENP, with the framework fully relying on the private ordering between the parties.

In the following radar graph, we illustrate a key difference between the bargaining frameworks quantitatively. The values for each framework were calculated based on the table above, and indicate a number of parameters addressed within four dimensions taken from bargaining theory.



The radar graphical representation captures the difference between frameworks that facilitate and those that force bargaining. Under forced bargaining frameworks, procedural rules and the power of the regulatory authority come to the fore (as reflected in the higher scores on these parameters for Australia and France). Respectively, the private ENP framework established by Google remains silent on these points.

5. Conclusions

We know the policy aim of the press publishers' right (i.e. to channel money from digital platforms to legacy, quality news publishers) but how does the intervention work? We have argued that it is important to go beyond the legal language of implementation to the structure that governs the empirical reality of bargaining. This is what we call the bargaining framework.

The bargaining framework is the invisible structure that is formed in the shadow of the statutory 'related' intellectual property right. Having collected the empirical details of bargaining in four EU settings and Australia, we then used bargaining theory to make the structure visible:

identifying (1) bargaining parties; (2) endowments; (3) procedural mitigations; and (4) the function of the regulatory authority.

What have we learned? There are two main lessons.

From a theoretical perspective, we have demonstrated how to identify and make visible different bargaining frameworks that operate under the same, or similar, statutory intervention. This makes an important contribution to the 'shadow of the law' literature. We show that bargaining frameworks sit as complex institutional constraints between pure private ordering and the law.

From a policy perspective, the different bargaining frameworks identified offer an appropriate unit of analysis for assessing the performance of the EU intervention. If it is the institutional translation into bargaining that matters for the range and frequency of outcomes (such as the flow of money), further empirical study should now be able to quantify the effects of the framework types. An independent impact assessment of the press publishers' right is overdue.

Centre for Regulation of the Creative Economy
School of Law / University of Glasgow
10 The Square
Glasgow G12 8QQ
www.create.ac.uk

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