Press Publishers' Right: the French Competition Authority orders Google to negotiate with the publishers

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Overview

After fierce lobbying, European press publishers, backed by the French government, obtained the much criticized press publishers' right (see e.g. here; here; and here) in Article 15 of Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (CDSM Directive).

The objective of this new right is to allow the media to be paid when their publications are reused online by information aggregators such as Google News, or social networks like Facebook.

France was, of course, the first EU Member State to implement the new press publishers' right in the Act of 24 July 2019, which became effective on 25 October 2019. In response, Google immediately announced that it had no intention of paying any remuneration whatsoever to press publishers, and decided unilaterally that it would no longer display article extracts, photographs, infographics and videos within its various services (Google Search, Google News and Discover), unless the publishers granted the authorisation free of charge. Google claimed that this decision complied with the new copyright law.

This strategy – to create a Cornelian dilemma for press publishers to force them to grant gratuitous authorisations – and more generally this show of strength, were very effective from pure business and copyright law perspectives. Many commentators on the press publishers' right had noted the previous Spanish and German legislative failures in this field (see e.g. here). Nevertheless, Google's warrior language and behaviour opened an angle of attack – competition law – which the publishers exploited intelligently by filing a successful request for an injunction against Google (Decision 20-MC-01 of 9 April 2020).

1. The press publishers' right under French law

We will not discuss here the criticisms of the new French press publishers' right (see Emmanuel Derieux, *Droit voisin des agences et éditeurs de presse*, No 163, August 2019; Elodie Rançon, *Le nouveau droit voisin des éditeurs de presse: un droit exclusif sur les publications de presse limité dans son application*, Revue Lamy Droit de l'Immatériel, No 163, October 2019). We will simply present – in a neutral manner – the relevant new legislative provisions.

The new press publishers' right was implemented in articles L.218-1 *et seq.* of the French intellectual property code ('IPC'), in a chapter entitled 'The rights of press publishers and news agencies'. In accordance with the provisions of Article 15 of the CDSM Directive, article L.211-4 IPC provides that the right expires two years after 1 January of the year following the date on which the press publication is published.

Article L.218-1 IPC provides that the beneficiaries of the new right are the press publishers and news agencies established in the territory of a Member State of the European Union. The press publisher is the person or legal entity who publishes a press publication or an online press service.

Article L.218-2 IPC provides that the authorisation of the press publisher or the news agency is required before any reproduction or communication to the public, in whole or in part, of its press publications in digital form by an online public communication service. And article L.218-3 IPC specifies that these rights may be assigned or licensed by the holders of the rights, who may also entrust the management of their rights to one or more collective management organisations.

Article L.218-4 IPC states that the remuneration due for the reproduction and communication to the public of press publications in digital form is based on the revenues derived from the exploitation, whether direct or indirect. Moreover, this remuneration must take into account elements such as human, material and financial investments made by publishers and news 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. Finally, article L.218-4 states that online public communication services – Google in our case – are required to provide press publishers and news agencies with all information relating to the use of press publications by their users as well as any other information necessary to make a transparent assessment of said remuneration.

Article L.218-5 IPC states that the journalists and other authors of the works featured in the press publications are entitled to an appropriate and fair share of the remuneration mentioned in article L.218-4.

2. Google's position, and the press publishers' counterattack

As noted above, following France's implementation of the Article 15 press publishers' right, Google announced that it would not pay any remuneration to press publishers based on the newly created right, and unilaterally decided that it would no longer display article extracts, photographs, infographics and videos within its various services, unless the publishers granted Google authorisations free of charge.

Google justified its position by explaining that, in Europe alone, it is responsible for more than 8 billion visits per month to the websites of press publishers, which represents more than 3,000 visits every second. Publishers can thereby attract a new audience and increase their turnover through advertising and subscriptions. Google added that the law does not impose remuneration for the display of links.

In practice, as explained by the French Competition Authority in its ruling of 9 April 2020, the vast majority of press publishers have granted Google licences to use and display their protected content, without negotiation and without receiving any remuneration from Google. The Authority added that as part of Google's new display policy, the licences it has been granted by publishers and news agencies offer it the possibility of using more content than previously. Moreover, the Authority found that the publishers who did not allow Google to display protected content were exposed to significant traffic declines (§111 *et seq.*).

In November 2019, complaints were lodged before the French Competition Authority by several unions representing press publishers (Syndicat des éditeurs de la presse magazine, Alliance de la presse d'information Générale – APIG and its members) and by the news agency Agence France-Presse (AFP) (the Authority joined the procedures into a single procedure). This action is widely supported: in France by public and private television and radio stations (France Télévisions, Radio France and M6); at the European level by ENPA (European Newspaper Publishers' Association); and at an international level by the WAN - IFRA (World Association of Newspapers and News Publishers).

In their complaint, the press publishers argued that Google's terms of implementation of the Act of 24 July 2019 creating the press publishers' right constitute an abuse of a dominant position, contrary to 102 of the TFEU, as well as an abuse of economic dependence. Google's behaviour would indeed constitute a deviation from the purpose of the Act of 24 July 2019, with the aim of imposing unfair trading conditions on publishers, under the threat of being de-indexed from Google's services. Alongside the main complaint (case on the merits), the plaintiffs requested interim measures aimed at ordering Google to enter into good faith negotiations with them.

3. The interim decision handed down by the French Competition Authority

Competition law is very interesting, as its objective is to ensure the big players play fairly, even though at first glance they seem to comply with the rules of the game (in the present case, the rules of copyright law, which allow the rights holders to grant gratuitous licences).

In its decision of 9 April 2020, the French Competition Authority ordered interim measures against the companies Google LLC, Google Ireland Limited and Google France, enjoining them to enter into good faith negotiations with the press publishers and news agencies. To do so, the Authority found that Google is in a dominant position, and that the practices denounced are likely to be qualified as anti-competitive, in particular for the following reasons:

- Google may have imposed on publishers and news agencies unfair trading conditions within the meaning of articles L. 420-2 of the French commercial code and 102 a) of the TFEU, by avoiding any form of negotiation and remuneration for the use and display of content protected under the new Act;
- Google may have abused its dominant position to circumvent the new Act, in particular (i) by using the possibility left to publishers and news agencies to grant free licences to systematically impose a principle of non-remuneration for the display of protected content on its services, without any possibility of negotiation; (ii) by refusing to communicate the information necessary for determining the remuneration; and (iii) by displaying titles of articles in their entirety by deeming that such use was not within the scope of the new right granted to press publishers.

The Authority noted that Google's behaviour, in the context of a major crisis in the press sector, is likely to deprive publishers and news agencies of a resource vital to ensure the sustainability of their activities.

The Authority therefore ordered Google:

- to negotiate in good faith with the publishers and news agencies who request it, according to transparent and non-discriminatory criteria, it being specified that these negotiations will retroactively cover the period since the entry into force of Act no 2019-775, i.e. 24 October 2019;
- to conduct negotiations within three months from the request of a press publisher or a news agency to open negotiations, and to give the information mentioned in article L. 218-4 IPC (see above, 1) to publishers and news agencies;
- to provide the Authority with monthly reports on how it is complying with the decision.

Moreover, the Authority ruled that the indexing, classification and presentation of the protected content used by Google on its services should not be affected by the negotiations.

This decision may of course be appealed, and the interim measures are applicable until the publication of the Authority's ruling on the merits.

To be continued...