

Press Publishers' Right: the Court of Appeal of Paris upholds the Competition Authority's order for Google to negotiate with the publishers

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As I posted previously on this blog ([here](#)), French press publishers' unions and the news agency Agence France Presse ('AFP') filed a successful request for an interim injunction against Google before the French Competition Authority, in their battle to obtain remuneration for online uses of their publications (Decision 20-MC-01 of 9 April 2020).



Google had been manoeuvring to avoid having to pay any remuneration to the press publishers and the news agencies on the grounds of the new neighbouring right set out in Article 15 of Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (CDSM Directive). This new right is aimed at ensuring remuneration for publishers when their publications are reused online by information aggregators such as Google News, or social networks like Facebook. In France, where this right was implemented in the Act of 24 July 2019, and became effective on 25 October 2019, Google had 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. Of course, this caused significant decline in traffic for the affected publishers, forcing most of them to accept Google's "offer".

In its decision of 9 April 2020, the Competition Authority examined the complaints of several unions representing press publishers (Syndicat des éditeurs de la presse magazine, Alliance de la presse d'information Générale - APIG and its members) and AFP. The plaintiffs argued that Google's behaviour constitutes an abuse of a dominant position, contrary to Article 102 of the TFEU, as well as an abuse of economic dependence, in that it constitutes a deviation from the purpose of the Act of 24 July 2019 (i.e. the remuneration of press publishers). Alongside the main complaint (the case on the merits which is still pending), the plaintiffs requested and obtained interim measures from the Authority to oblige Google to enter into good faith negotiations with them with regard to their remuneration.

Google LLC, Google Ireland Limited and Google France S.A.R.L. lodged an appeal against the Authority's decision of 9 April 2020, which ordered Google:

- To negotiate in good faith with publishers and news agencies who request it, according to transparent and non-discriminatory criteria, it being specified that these negotiations will cover retroactively 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, and provide the information mentioned in article L. 218-4 IPC to publishers and news agencies;
- To provide the Authority with monthly reports on the manner in which it is complying with the decision; and
- To take the necessary measures to ensure that the indexing, classification and presentation of the protected content used by Google on its services are not affected by the negotiations.

In its judgment of 8 October 2020, the Court of Appeal of Paris upheld the Competition Authority's decision, ruling that Google's behaviour is indeed likely to constitute an abuse of a dominant position in that it imposes unfair transactional conditions (§122), and the Authority could order interim measures, since the reported practice seriously and immediately undermines the sector concerned (§161).

The Court of Appeal also studied the interim measures that were ordered by the Competition Authority, since Google challenged their necessity and proportionality.

The Court of Appeal upheld all the measures ordered by the Authority, except for the last one stated above (the obligation to take the necessary measures to ensure that the indexing, classification and presentation of protected content are not affected by the negotiations). The Court of Appeal deemed that this measure was justified since its objective is to prevent the technical conditions of display, indexing, classification and presentation of protected content that were applied by Google before the dispute from being modified to influence the outcome of the negotiations. The Court however ruled that the wording of the order was too broad, in that it did not limit the measure to what is strictly necessary, and that it could therefore lead to blocking innovation necessary for the performance of the search engine. The Court thus supplemented this measure by specifying that the injunction must not stand in the way of improvements and innovations to Google's services, provided that they do not lead, directly or indirectly, to any consequences that may prejudice the interests of the holders of neighbouring rights in negotiation (§243).

On 1 October 2020 (only a few days before this judgment was handed down), Google announced a \$1 billion investment in partnerships with news publishers, to be paid to publishers throughout the world in the framework of a three-year program called Google News Showcase. Google explained that several important publications from Germany, Brazil, Argentina, Canada, the U.K. and Australia had already signed up. And on the day the judgment of the Paris Court of Appeal was handed down (8 October 2020), Google announced that its 'priority remains the outcome of our discussions with French press publishers and news agencies'. However, it seems that the amount in discussion is around €25 million (a share of the \$1 billion three-year Google News Showcase program). This amount is much lower than that claimed at the start of negotiations, a year ago, by the French rightholders: around €150 million, that is to say half of the €250 million to €320 million of lost advertising revenue estimated at the time by EY-Parthenon in a media-funded study (see [here](#)).

It should be noted that even if the parties enter into an agreement, the French Competition Authority may continue the main procedure currently pending against Google.

I will conclude this post the same way as my previous post: to be continued...