Google proposes commitments as part of the investigation into the merits of the related rights case. The Autorité submits them for public consultation

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Background

Following on from the interim procedure that led to the adoption of interim measures in April 2020, the Autorité continued its investigation into the merits of the case relating to the conditions of implementation by Google of the Law of 24 July 2019 aimed at creating a related right for the benefit of press agencies and publishers. As part of this examination on the merits, the Investigation Services considered that Google was likely to have abused its dominant position in the generalist search services market by imposing unfair and discriminatory settlement conditions on publishers and news agencies, and by circumventing the law on related rights. On this basis, the Investigation Services raised competition concerns, which were addressed to Google.

In response to these competition concerns, Google offered to make various commitments. The *Autorité* is subjecting these proposed commitments to a market test. Interested third parties, publishers and news agencies, are invited to submit their comments before 31 January 2022.

Following this consultation, the *Autorité* will hold a hearing with all the parties to the proceedings, at the end of which it will decide whether the commitments proposed by Google address the competition concerns.

A reminder of the decisions taken by the Autorité in the context of cases relating to related rights

- *The Decision on interim measures (20-MC-01)*

Referred to in November 2019 by several trade associations representing press publishers[1] as well as *Agence France-Presse* (AFP)[2] about practices implemented by Google when the law on related rights came into force, the *Autorité* issued an initial decision, as a matter of urgency, on 9 April 2020.

In this Decision 20-MC-01 (see press release of 9 April 2020), the *Autorité* noted that following the adoption of the Law of 24 July 2019 to create a related right for the benefit of press agencies and publishers, transposing the European Directive of 17 April 2019, Google had unilaterally decided that it would no longer display excerpts of articles, photographs and videos within its various services, unless the publishers gave it authorisation to do so free of charge. The *Autorité* considered that this behaviour was likely to constitute an abuse of a dominant position and that it caused serious and immediate harm to the press sector. As a result, it issued seven injunctions against Google pending the decision on the merits.

Among these injunctions was the obligation, within three months, to conduct negotiations in good faith with publishers and press agencies on the remuneration for the re-use of their protected content. It also included the obligation for Google to communicate the information necessary for a transparent evaluation of the proposed remuneration, as provided for in Article L.218-4 of the French Intellectual Property Code (Code de la propriété intellectuelle). The decision on interim measures also included neutrality obligations on Google to allow the negotiations to take place in a balanced manner.

This decision was substantially upheld by the *Cour d'appel de Paris* (Paris Court of Appeal) in a ruling dated 8 October 2020, which only clarified the injunction on

the neutrality of the negotiations on the indexing, classification and display of protected content in Google's services[3].

- *The decision not to comply with the interim measures (21-D-17)*

In July 2021, following a new complaint from SEPM, APIG and AFP, the *Autorité* found that Google had failed to comply with several of the injunctions issued in the above-mentioned decision 20-MC-01 and consequently imposed a penalty of 500 million euros on Google (see Decision 21-D-17, press release dated 12 July 2021). It also ordered Google to comply with the injunctions by presenting a remuneration offer to the publishers and press agencies that had referred the matter to the *Autorité* for the re-use of their protected content and providing them with the information necessary to evaluate such an offer, failing which it would be subject to periodic penalty payments.

Competition concerns expressed by the Investigation Services

The *Autorité* continued its investigation into the merits of the case, in parallel with the interim measures proceedings, the purpose of which is to allow emergency intervention to prevent serious and immediate damage to the economy, a sector, the consumer or a company. In this context, the Investigation Services raised several competition concerns with Google in a preliminary assessment.

- *Unfair and discriminatory settlement conditions*

It appeared that, through the behaviour it adopted from the entry into force of the Law of 24 July 2019 that would create a related right for the benefit of press agencies and publishers, Google was likely to abuse its dominant position on the market for generalist search services by imposing unfair settlement conditions, both with regard to the level of remuneration and the information communicated to the publishers and agencies involved in the determination of that level.

Without prior negotiation, Google imposed a "zero" price on all publishers and news agencies for their protected content, even though Google earns revenue

from the use of this content. Moreover, the imposition of unfair conditions may not be limited to Google's ability to impose a "zero" price, since Decision 21-D-17 showed that, despite the decision to impose interim measures, Google was able to offer remuneration that did not value, or only marginally valued, the display of protected content, and linked this remuneration to the use by the publisher or news agency of certain ancillary Google services. It also appears that, despite the decision on interim measures, Google was able to frustrate the negotiations with publishers and news agencies by providing them with incomplete or late information, even though such information was necessary to calculate the remuneration.

The conditions imposed by Google are also likely to be discriminatory, since Google's conduct consisted in imposing zero remuneration for all publishers, regardless of an examination of their respective situations and the corresponding protected content.

- *A circumvention of the law on related rights*

Google is also likely to have used its dominant position to circumvent the law on related rights, in particular by placing publishers and press agencies in an even more unfavourable situation after the entry into force of the law, compared to their previous situation, as was pointed out in the decision on interim measures.

Google's proposed commitments

In response to these competition concerns, Google wished to submit for the *Autorité's* consideration a proposal for commitments including the following remedies:

- Google undertakes to "negotiate in good faith" with press publishers and news agencies that so request, the remuneration for any reproduction of protected content on its services in accordance with the modalities laid down in Article L.218-4 of the French Intellectual Property Code (Code de la propriété intellectuelle) and according to transparent, objective and non-

discriminatory criteria.

- Google undertakes to communicate the information necessary for a transparent evaluation of the proposed remuneration, as provided for in Article L.218-4 of the French Intellectual Property Code (Code de la propriété intellectuelle).
- Google undertakes to make a proposal for remuneration within three months of the start of negotiations;
- In the event that the parties are unable to reach an agreement, the negotiating parties will have the option of referring the matter to an arbitration tribunal to determine the amount of remuneration. Google undertakes to pay the fees of the arbitrators and the arbitration proceedings in the first instance;
- Google undertakes to take the necessary steps to ensure that the negotiations do not affect the indexation, ranking or presentation of protected content;
- Google undertakes to take the necessary steps to ensure that the negotiations do not affect any other economic relationship that may exist between Google and the news publishers and news agencies;
- An independent trustee approved by the *Autorité* will ensure the implementation of the commitments made and may, if necessary, call on the services of a technical, financial or intellectual property expert.
- The commitments will apply for a period of five years.

Outcome of the procedure

Having received these proposed commitments, the *Autorité* has decided to carry out a market test to determine whether they adequately address its competition concerns. The *Autorité* invites interested third parties (press publishers, press agencies, etc.) to submit their comments by 5pm on 31 January 2022 at the latest, by e-mail to engagementsDV@autoritedelaconcurrence.fr or by post to the following address:
Autorité de la concurrence
Bureau de la Procédure

Affaire 19/0074F
11 rue de l'Echelle
75001 Paris

At the end of the market test, a hearing will be held before the Board of the *Autorité de la concurrence*, which will examine and decide whether the proposed commitments, possibly supplemented and amended, are likely to meet the expressed competition concerns. In this event, the *Autorité* may close the case and make the commitments binding.

[1] The French Magazine Press Publishers' Trade Association (Syndicat des éditeurs de la presse magazine - SEPM), the French General Information Press Alliance (Alliance de la presse d'information générale - APIG).

[2] AFP withdrew its complaint following a settlement with Google. The Autorité de la concurrence, which was referred to in rem, was not bound by the act of referral and continued its investigation.

[3] See the ruling of 8 October 2020. In addition, Decision 20-MC-01 has become final as Google did not appeal to the French Supreme Court on points of law.

MARKET TEST

of 15 December 2021

See the market test

GOOGLE'S PROPOSED COMMITMENTS

See the proposed commitments

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