Remuneration of related rights for press publishers and agencies: the Autorité fines Google up to 500 million euros for non-compliance with several injunctions

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Remuneration of related rights for press publishers and agencies: the *Autorité* fines Google up to 500 million euros for non-compliance with several injunctions issued against it in April 2020.

It orders, moreover, to comply with injunctions 1 and 2 in all points issued by its initial decision, under periodic penalty payment.

Background

In a decision issued today, the *Autorité* fines Google up to 500 million euros for having disregarded several injunctions issued in the context of its interim measures' decision of April 2020 (decision 20-MC-01 of 9 April 2020 regarding requests for interim measures presented by Syndicat des éditeurs de la presse magazine, Alliance de la presse d'information générale e.a. and Agence France-Presse).

The *Autorité* also orders Google to present a remuneration offer for the current use of their protected content to press publishers and agencies that have referred the case to the *Autorité* and to provide them with the necessary information for evaluating such offer, under periodic penalty payment of up to 900,000 euros per day of delay, if Google has not done so within two months.

The *Autorité*'s President Isabelle de Silva stated, regarding today's decision:

"When the Autorité imposes injunctions on companies, they are required to apply them scrupulously, respecting their letter and their spirit. In this case, unfortunately, that was not the case.

At the end of an in-depth investigation, the Autorité found that Google had not complied with several injunctions issued in April 2020. First of all, Google's negotiations with press publishers and agencies cannot be regarded as having been conducted in good faith, while Google imposed that the discussions necessarily take place within the framework of a new partnership, called Publisher Curated News, which included a new service called Showcase. In doing so, Google refused, as it has been asked on several occasions, to have a specific discussion on the remuneration due for current uses of content protected by related rights. In addition, Google unjustifiably restricted the scope of the negotiation, by refusing to include content from press agencies included in publications (pictures for example) and by excluding all the non-IPG press from the discussion, even though it is undoubtedly affected by the new law, and its content is also associated with significant revenues for Google. These breaches were aggravated by the non-transmission of information that would have allowed fair negotiation, and by the violation of obligations aimed at ensuring the neutrality of the negotiation vis-à-vis the display of protected content and existing economic relations elsewhere between Google and publishers and news agencies.

The fine of 500 million euros takes into account the exceptional seriousness of the infringements observed and how Google's behaviour has led to further delay the proper implementation of the law on related rights, which aimed to better take into account the value of content from press publishers and agencies included on the platforms. The Autorité will be extremely vigilant on the proper application of its decision, as non-execution can now lead to periodic penalty payment."

Several press publishers and agencies have referred the case to the *Autorité*, alleging non-compliance by Google with interim measures issued by the *Autorité* in April 2020

Syndicat des éditeurs de presse magazine (SEPM), Alliance de Presse d'Information Générale (APIG) and Agence France Presse (AFP) referred, respectively at the end of August / beginning of September 2020, to the ***Autorité de la concurrence*** practices of non-compliance with the injunctions issued by the ***Autorité de la concurrence*** against Google in its decision 20-MC-01 of 9 April 2020 (see press release of 9 April 2020).

As a reminder, in its interim measures decision 20-MC-01, the ***Autorité*** noted that following the adoption of Law No. 2019-775 of 24 July 2019 aiming to create a

related right for the benefit of press agencies and publishers, transposing Directive No. 2019/790 of 17 April 2019 on copyright and related rights in the digital single market, Google had unilaterally decided that it would no longer display extracts from articles, photographs and videos within its various services, unless the editors give it permission free of charge. The *Autorité* considered that this behaviour could constitute an abuse of a dominant position and that it caused serious and immediate harm to the press sector. It had issued, pending a decision on the merits, seven injunctions against Google. This decision was confirmed by the Paris Court of Appeal in a ruling of 8 October 2020, and has become final (Google has not lodged an appeal before the French Supreme Court).

In particular, Google had been ordered to:

- enter into negotiations in good faith with press publishers and agencies who so desire (**Injunction No. 1**) for a period of three months from the request of the publisher or the press agency (**Injunction No. 4**);

- communicate the information necessary for the transparent assessment of the remuneration provided for in Article L. 218-4 of the Intellectual Property Code (the "CPI") **(Injunction No. 2);**

- ensure that a principle of strict neutrality is respected during negotiations, so as not to affect the indexing, classification and presentation of protected content taken up by Google on these services (**injunction No. 5**); the decision stated in this regard that: "*This is to prevent publishers from suffering unfavourable consequences on the usual conditions of display, indexing and ranking of their content on Google, because or related to ongoing negotiations".* The Paris Court of Appeal in its ruling of 8 October 2020 clarified the scope of injunction No. 5, indicating that: *"This injunction does not prevent improvements and innovations in the services offered by Google LLC companies, Google Ireland Ltd and Google France, provided that they do not lead, directly or indirectly, to any prejudicial consequence to the interests of the holders of related rights concerned by the negotiations provided for in Articles 1 and 2 of this decision*";

- ensure respect for a principle of strict neutrality of negotiations on any other economic relationship that may exist between Google and press publishers and

agencies (**injunction No. 6**); the decision specified in this regard that: "*This is to prevent Google from voiding negotiations on related rights by offsetting the remuneration paid to publishers for related rights on other activities. It is also to prevent Google from using its dominant position in the market for general search services to force, during negotiations with press publishers and agencies, the use of some of its services*";

- send the *Autorité* regular reports on the modalities of implementation of the decision (**Injunction No. 7**).

Non-compliance with injunctions by Google

To reach its decision, the *Autorité* relied on a thorough contradictory investigation which led it to take into consideration a large number of exhibits produced by the parties relating to the progress of the negotiations (emails, minutes of meetings, etc.). The observations produced during the procedure carried out before the *Autorité* in respect of the interim measures, the declarations and exhibits collected from publishers or third-party press agencies, and finally the discussions held in front of the Board during the meeting of 5 May 2021 led the *Autorité* to consider that Google has disregarded, in several respects, several injunctions of the decision and in particular, injunction No. 1, the most important, relating to the obligation to negotiate in good faith.

Injunction no. 1: the obligation to negotiate in good faith under the conditions established by article l. 218-4 of the cpi and according to objective, transparent and non-discriminatory criteria

Moving the negotiation towards the new Showcase service

Google unilaterally imposed that discussions with publishers and AFP focus on a global partnership called *Showcase* devoted mainly to the offer of new services by publishers, and in which related rights under current uses of protected content were only an ancillary component with no separate financial valuation.

The *Autorité* thus noted that while the complainants have consistently requested that the negotiations relate in a specific and transparent manner to the remuneration due for the current use of content protected by related rights,

Google has systematically imposed a global discussion focusing on the subscription of publishers and news agencies to a new global partnership, called *Publisher Curated News*, or PCN, which focused, in particular, on a new service called *Showcase*.

Google also unjustifiably reduced the scope of the negotiation with regard to the scope of income derived from the display of protected content: according to Google, only advertising revenue from *Google Search* pages displaying content should be taken into account to establish the remuneration due. The *Autorité* considered that this position, leading to the exclusion of income derived from other Google services and all indirect income related to such content, was contrary to the Law and to the Decision; This is all the more so since the Decision noted the importance of press content for Google, which plays a role in triggering Internet users' visits and in extending consultation times, thus strengthening Google's position and the data available to it.

The refusal to negotiate with press editors who do not have a Political and General Information (*Information Politique et Générale* "IPG") certification

Google has deliberately circumscribed the scope of the law on related rights by excluding the principle of remuneration for press content from titles that do not have a Political and General Information certification and, for this purpose, relying on to make, on a bad faith interpretation of Article L. 218-4 of the French Intellectual Property Code (Code de la propriété intellectuelle), which is yet unambiguous. This negotiating position appears to be contrary to the decision of the *Autorité de la concurrence*, confirmed by the Paris Court of Appeal. This breach is all the more serious given that, according to Google's own assessments, the direct revenue it derives from "non-IPG" content is greater than those it derives from "IPG" content.

Google's refusal to negotiate remuneration for related rights with press agencies

In addition, Google informed AFP and the Fédération Française des Agences de Presse, on several occasions, that as press agencies, they could not benefit from being remunerated for their content taken over by third-party publishers in their publications.

The *Autorité* considered that this negotiating attitude was contrary to the Decision of 9 April 2020, which was itself based on the terms of the law, to consider that news agencies could claim related rights. The *Autorité* noted, in this decision, as in that of April 2020, that the legislator had clearly expressed its intention to grant the producer of journalistic content a property right, in order to remunerate their investments for the production of quality press content, and to better share value between the producers of press content and online communication services to the public. The French legislator has been very explicit on the need to include in this mechanism the press agencies, which actively contribute to the dynamism of the press sector.

Injunction No. 2: the obligation to communicate to press publishers and agencies the information necessary "for a transparent evaluation of the remuneration due"

The law on related rights required platforms (online communication services to the public) to "*provide press publishers and agencies with all the information relating to the uses of press publications by their users as well as all the information necessary for a transparent assessment of the remuneration* [due for related rights] *and its allocation*" (Article L. 218-4 of the CPI).

Injunction No. 2 required Google to disclose to press publishers and agencies the information required by this provision.

The elements gathered during the investigation show that this communication was

- partial, as it is limited only to direct advertising revenue generated by the Google Search service, excluding all revenue, in particular indirect, related to the use of this content.

- late in view of the time frame imposed, since information relating to the Discover and Google News services was given barely a few days before the end of the deadline set by the injunction;
- and finally insufficient to allow the entry-level companies to make the link between Google's use of protected content, the income it derives from it and its overall financial proposals. In this regard, L'Express stated in particular that "*Google has not provided us with any formulas or data to support its proposal. Google told us that it has a global envelope for publishers as part of Publisher Curated News at the French level.* ". For its part, Liberation also indicated that it did not "[...] *obtain any information on the construction of this remuneration, although we asked for it. We also have no idea how much Google has valued the use of our related rights. There is a wording of the contract which says that it is a global license which includes remuneration for related rights.* ".

Injunction No. 5: the obligation of neutrality on the terms of indexation, classification and presentation of protected content from publishers and press agencies on google services during negotiations relating to related rights

Google violated the obligation of negotiation neutrality imposed on it by the interim measures decision by linking the negotiation on remuneration for the current use of content protected by related rights to the conclusion of other partnerships that may have an impact on the display and indexing of content from press publishers and agencies.

The *Autorité* noted that while nothing prevents Google from launching a new program to improve the visibility of publishers on its services, the fact, in the circumstances of the case, of having conditioned access to this new program with total remuneration, which did not include any specific valuation of related rights under current uses of protected content and risked, in the event of refusal of the agreement, degrading the visibility of publishers on its services, characterised an infringement to Injunction No. 5.

The strategy implemented by Google has thus strongly encouraged publishers to accept the contractual conditions of the *Showcase* service and to renounce negotiations relating specifically to the current uses of protected content, which

was the subject of the Injunctions, under the risk of seeing their exposure and their remuneration degraded compared to their competitors who would have accepted the proposed terms. Google cannot therefore claim to have taken the necessary measures to prevent its negotiations from affecting the presentation of protected content in its services.

Injunction No. 6: the neutrality obligation of negotiations relating to related rights with regard to any other economic relationship that google makes with press publishers and agencies

This injunction was intended to prevent Google from "*voiding the negotiations on related rights of their effects by offsetting the remuneration paid to publishers for related rights on other activities.*" It was also "*to prevent Google from using its dominant position in the market for general search services to impose, during negotiations with press publishers and agencies, the use of some of its services.*"

For most of the negotiation period, Google linked discussions about possible compensation for current use of copyrighted content to discussions about the new *Showcase* program. However, contrary to what Google maintains, *Showcase* is not limited to a new display format for protected content, but constitutes a new service, which did not exist when the interim measures were adopted, and which is also based on new obligations imposed on press editors. They must indeed both provide specific editorial work to select the articles to appear on *Showcase*, but also agree to make available to Internet users content containing large extracts, or even all of the press articles created by press publishers or agencies.

In addition, Google was also able to link participation to the *Showcase* programme to the Subscribe with Google (SwG) service's subscription. Google has thus made a link between the negotiation of related rights and the subscription of new services, these also leading Google to benefit from new advantages or services, the SwG service resulting in particular in a levy, to the benefit of Google, a percentage of all financial flows received by the publisher for subscriptions taken out.

Extremely serious practices

The non-compliance with an injunction is in itself an exceptionally serious practice.

Google's behaviour is the result of a deliberate, elaborate and systematic strategy of non-compliance with Injunction No. 1 and appears as the continuation of the opposition strategy of Google, put in place for several years, to oppose the very principle of related rights during the discussion of the directive on related rights, then to minimise its concrete scope as much as possible.

It thus appears that the negotiation strategy implemented by Google with regard to the negotiations conducted within the framework of the Decision was part of a more global strategy, implemented at a more global level, and aimed at avoiding or limiting as much as possible payment of remuneration to publishers, to use the *Showcase* service in order to resolve the basic debate on the allocation of specific rights to publishers and agencies for the reproduction of press content, and, finally, to use negotiations on related rights to obtain the production of new content by press publishers, via Showcase, and subscription by the latter to the SwG service, which allows Google to collect additional income from subscriptions to press titles.

The lack of information communication making Google's proposals transparent has been a major obstacle to holding negotiations in good faith, especially since the information asymmetry is considerable between Google and press publishers and agencies, with regard to both the figures on the consultation of Google pages and services on which content protected by law appears, and the income that Google derives from the current use of protected content. Likewise, the absence of measures taken by Google to ensure the neutrality of negotiations on the way in which the protected content of press publishers and agencies is indexed and presented in its services is likely to place publishers in a constrained situation, which hinders the achievement of the objective of implementing a negotiation in good faith referred to by the Injunctions. In addition, the establishment of links between the remuneration of related rights for current uses of protected content and participation in new services and / or

use of Google services constitutes a diversion of the objective of the Injunctions in favour of Google, which could further increase its position in the generalist search services market.

The fact that APIG, like other individual publishers, signed an agreement after the time frame set by the Injunctions cannot, by itself, preclude the finding of non-compliance with the Injunctions. Indeed, it must be assessed in the light of the terms and subject of the decision on provisional measures. As soon as the *Autorité* finds that the negotiations were not conducted in good faith in compliance with the applicable Injunctions, the fact that agreements were signed cannot in itself demonstrate such compliance, especially since the signatory publishers found themselves in a situation of inferiority and asymmetry in this negotiation. Moreover, although this decision does not in itself render the signed agreements ineffective, it constitutes a circumstance that may justify a request for termination or modification of the contract from the publishers.

The fine and the obligation to comply with the Injunctions under periodic penalty payment

In view of the circumstances of the case, the *Autorité* issued a fine of 500 million euros against Google and further orders it:

- for the execution of Injunction No. 1, to propose a remuneration offer meeting the requirements of the Law and the Decision for the current use of protected content on Google's services to the entering parties who would make it request ;
- for the execution of Injunction No. 2, to supplement this offer with the information provided for in Article L. 218-4 of the French Intellectual Property Code. This information must include an estimate of the total revenues it generates in France by the display of protected content on its services, indicating the share of revenues generated by the press publisher or the agency at the origin of the requested offer of remuneration. This estimate should detail a number of income items detailed in this decision.

Finally, to ensure the effective execution of the injunctions referred to in the previous paragraph, the Authorité has attached them to a fine of 300,000 euros per day of delay at the end of the two-month period starting from the date of the formal request to reopen negotiations made, if necessary, by each of the complainants. Thus, this penalty will be assessed separately for each negotiation process that would be reopened by each of the complainant, after notification of this decision. Google will also have to justify compliance with this decision in the context of the monthly monitoring reports sent in application of Injunction No. 7. In the event of non-compliance with the two-month time limit, Google is therefore exposed to penalties of up to 900,000 euros per day of delay.

The *Autorité* recalls that Google remains bound to comply with the Injunctions as confirmed by the Paris Court of Appeal in its ruling of 8 October 2020 until the *Autorité*'s publication of the decision on the merits. Compliance with Injunctions thus remains subject to control by the *Autorité de la concurrence*, which may be referred again by any press publisher or agency in accordance with Article L. 464-3 of the French Commercial Code, until the date to which the *Autorité* will issue its decision on the merits.

DECISION 21-D-17 OF 12 JULY 2021

regarding the compliance with injunctions issued against Google in decision 20-MC-01 of 9 April 2020

See full text of the decision (in French)

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