

Decision 21-D-17 of July 12, 2021

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

Posted on: July 12, 2021 | Sector(s) :

DIGITAL

PRESS / MEDIA

Presentation of the decision

Summary

Under the terms of the present decision, the *Autorité de la concurrence* (hereinafter the "*Autorité*") sanctions the companies Google LLC, Google Ireland Limited and Google France (hereinafter "Google") for failing to comply with the interim measures issued in its Decision 20-MC-01 of 9 April 2020 on requests for interim measures by the Syndicat des éditeurs de la presse magazine, the Alliance de la presse d'information générale and others and Agence France-Presse (hereinafter the "Decision on interim measures"). These interim measures pertain to the modalities of Google's implementation of Law No. 2019-775 of 24 July 2019 to create a related right in favour of press agencies and publishers (hereinafter, the "Law").

The purpose of the Law, which transposes into French law Article 15 of Directive 2019/790 of 17 April 2019 on copyright and related rights in the digital single market, is to lay down the conditions for balanced negotiations between press publishers, news agencies and online public communication services, in order to redefine the sharing of value between these actors. However, on the grounds of complying with the Law, Google unilaterally decided that it would no longer display excerpts from articles, photographs and videos within its various services, unless publishers gave it permission to do so free of charge. In the Decision on interim measures, the *Autorité* found that the practices in question were likely to constitute an abuse of a dominant position and that they were causing serious and immediate harm to the press sector. In the Decision on interim measures, it issued seven injunctions aimed at rebalancing the balance of power between the various press publishers and the digital platforms, and setting out an imperative negotiating framework adapted to the circumstances of the case. These injunctions imposed the following obligations on Google:

- negotiate in good faith with any press publishers and news agencies so requesting (Injunction 1), within 3 months of the request to open negotiations made by a press publisher or news agency (Injunction 4);
- communicate to press publishers and news agencies the information provided for in Article L. 218-4 of the Intellectual Property Code (IPC) (Injunction 2);
- continue, during the negotiation period, to apply the terms and conditions of display in accordance with the parameters chosen by the press publishers or news agencies (Injunction 3);
- take the necessary measures to ensure that the existence and outcome of the negotiations provided for in the Injunctions do not affect the indexing, classification or presentation of the protected content reused by Google within its services (Injunction 5), ensure neutrality in negotiations on related rights in respect of any other economic relationship Google may have with news publishers and news agencies (Injunction 6); and, finally,
- send an initial report to the *Autorité* on its compliance with the Injunctions (Injunction 7).

In a judgement dated 8 October 2020, the Cour d'Appel de Paris (Paris Court of Appeal) upheld this decision, clarifying the wording of injunction No. 5 by adding the following terms (translated):

"This injunction does not prevent improvements and innovations in the services offered by the companies Google LLC, Google Ireland Ltd. and Google France, provided that they do not directly or indirectly result in any adverse consequences for the interests of the holders of related rights concerned by the negotiations provided for in Articles 1 and 2 of the present decision".

The present decision follows the complaint, lodged on 30 August 2020 and 2 September 2020, of the Syndicat des Éditeurs de la Presse Magazine (hereinafter "SEPM"), the Alliance de la Presse d'Information Générale, the Syndicat de la Presse Quotidienne Nationale, the Syndicat de la Presse Quotidienne Régionale, the Syndicat de la Presse Quotidienne Départementale and the Syndicat de la Presse Hebdomadaire Régionale (hereinafter, APIG"), which represent the interests of a significant number of press publishers which publish newspaper and magazine titles in France, and Agence France-Presse (hereinafter "AFP") (hereinafter jointly referred to as the "complainants") regarding Google's failure to comply with the interim measures issued in the Decision.

In the present decision, the *Autorité* considers that Google has failed to comply with Injunctions 1, 2, 5 and 6 issued in the Decision on interim measures.

- **On the failure to comply with the order to negotiate in good faith (Injunction 1):**

The *Autorité* considers that Google has failed to negotiate in good faith with the publishers and news agencies that requested opening negotiations under the Decision on interim measures.

In particular, the *Autorité* notes that Google has consistently linked discussions on the remuneration of related rights for current uses of content protected by the Law to the conclusion of a new global partnership called *Publisher Curated News*, or PCN, which mainly pertained to new services, including the so-called *Showcase* service. Through this partnership, Google sought to obtain a licence for all of the publishers' content, of which the related rights for current uses of the protected content were, at best, only an ancillary component, with no specific financial value.

The *Autorité* considers that Google has also significantly reduced the scope of application of the Law, which is nevertheless unambiguous, by excluding the principle of remuneration for press content from press publishers or news agencies that do not have a "political and general information" (IPG in French) qualification, and by refusing to allow news agencies to earn remuneration for their content reused by publishers during almost all the negotiations.

The *Autorité* also notes that Google has applied an excessively restrictive interpretation of the notion of revenue derived from the display of press content under Article L. 218-4

of the IPC: Google has only taken into account, as part of this basis, the advertising revenue (Google Ads) of the Google Search pages on which protected content is displayed, and has excluded taking into account any other form of indirect revenue generated by the presence of protected content on Google Search, or on other services such as Google News or *Discover*. However, the Decision, as well as the judgement of the Cour d'Appel de Paris (Paris Court of Appeal), stated that the display of protected content on Google's various services contributed to the attractiveness of its services and to their improvement, and could, among other things, provide advantages in terms of prompting visits by Internet users and extending visit times, which leads to access by Google to data that can then be used and monetised.

- **On the failure to comply with the obligation to communicate to publishers and news agencies the information provided for in Article L. 218-4 of the IPC (Injunction 2):**

Injunction 2 was intended to ensure the effectiveness of Injunction 1, by providing the publishers and news agencies entering into negotiations with the necessary elements for a transparent evaluation of the remuneration due.

The *Autorité* notes that the information communicated by Google was either partial, in terms of the scope of Google's services and revenues, or late in relation to the deadline for negotiations, or not specific to the protected content of the entity to which the information was communicated. These disclosures were insufficient to allow the publisher or news agency to make the connection between Google's use of protected content, the revenue it earned from it, and its financial proposal.

The *Autorité* notes that the data provided by Google during most of the negotiation period was limited to the online search engine Google Search, to the exclusion of other Google services and any other indirect revenues that Google earns from the exploitation of such content, which illustrates Google's excessively restrictive approach to the concept of revenues derived from the display of press content.

The *Autorité* further notes that, from the outset and throughout the negotiations, Google had received requests for information which it chose to ignore, even though these were relevant and complied with the requirements of the applicable statutory provisions and the Decision on interim measures.

- **On the failure to comply with the obligation of neutrality in negotiations on related rights in respect of any other economic relationship Google may have with news publishers and news agencies (Injunction 6):**

For almost the entire negotiation period, Google conditioned access to the *Showcase* global partnership programme on acceptance by publishers and news agencies of overall remuneration, without any specific remuneration for the actual use of content protected by related rights, in violation of Injunction 1 as stated above. However, the *Autorité* notes that access to the *Showcase* programme had significant consequences in terms of visibility for publishers and news agencies. The mechanism put in place by Google was therefore likely to give these publishers and news agencies a strong incentive to accept the conditions imposed by Google or else have their conditions of visibility impaired in relation to other publishers and press agencies that had agreed to take part in the programme.

The *Autorité* specifies that, while Google was free to propose new partnerships, such as *Showcase* or *Subscribe With Google* (SwG), to publishers and news agencies, Google should have allowed the latter to negotiate a separate remuneration for the current uses of protected content.

- **On the failure to ensure that the existence and outcome of the negotiations provided for in the Injunctions do not affect the indexing, classification or presentation of the protected content reused by Google within its services (Injunction 5):**

The *Autorité* notes that by linking the negotiations on the remuneration of related rights for current uses to the negotiations on the remuneration of new partnerships such as *Showcase*, which could have significant consequences for the visibility of publishers and news agencies on Google's services, Google violated the obligation of neutrality in the negotiations on the presentation of protected content on its services.

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In light of the foregoing, the *Autorité* considers that Google has failed to comply, both in regard to their letter and their purpose, with Injunctions 1, 2, 5 and 6 within the time frame set by these Injunctions. Negotiations that took place after the three-month deadline set by the injunctions do not change this finding in any way.

The *Autorité* notes the exceptional seriousness of these shortcomings, in particular in view of the deliberate, elaborate and systematic strategy of non-compliance with Injunction 1 applied by Google. It considers that Google's behaviour has undermined the objective of the Decision, as set out in the Law, of allowing publishers and press agencies to negotiate with Google within a balanced framework with a view to laying down both the modalities for selecting and displaying their content and any associated remuneration. The *Autorité* notes that linking the remuneration of related rights for current uses of protected content to participation in new Google services constitutes a departure from the aims of the Injunctions to the benefit of Google, which is likely to further enhance its dominant position on the market for generalist search services.

The *Autorité* considers it appropriate to impose a penalty of €500 million.

To ensure full compliance with the injunctions issued in the Decision on interim measures, the *Autorité* orders Google:

- as regards the enforcement of Injunction 1, to make an offer of remuneration that meets the requirements of the Law and the Decision for the current use of protected content on Google's services to those complainants who make a formal request to re-open negotiations;
- as regards the enforcement of Injunction 2, to include in this offer the information provided for in Article L. 218-4 of the Intellectual Property Code. This information must include an estimate of the total revenue it generates in France by displaying protected content on its services, indicating the share of revenue generated by the publisher or news agency that has requested the offer of remuneration. This estimate must detail a number of revenue items detailed in the present decision.

To ensure the effective enforcement of these injunctions, a periodic penalty payment of €300,000 per day's delay shall be imposed upon expiry of the two-month period from the formal request for the reopening of negotiations, where appropriate, by each of the complainants. As such, this periodic penalty payment will be assessed separately for each negotiation that may be reopened by each of the complainants after the notification of the present decision.

Google is also obliged to demonstrate compliance with this Decision in the context of the monthly monitoring reports submitted pursuant to Injunction 7 of the Decision on interim measures.

The *Autorité* reiterates that Google remains bound by the Injunctions as validated by the Cour d'Appel de Paris (Paris Court of Appeal) in its judgement of 8 October 2020 until the publication by the *Autorité* of the decision on the merits of the case. Compliance with these injunctions remains subject to the control of the *Autorité* de la concurrence, which may be referred to again by any publisher or news agency in accordance with Article L. 464-3 of the French Commercial Code (Code de commerce), until the date on which the *Autorité* issues its decision on the merits of the case.

Information about the decision

Origin of the case

Syndicat des éditeurs de presse magazine (SEPM), Alliance de Presse d'information Générale (APIG), Agence France Presse (AFP)

Decision

Astreinte

Failure to comply with the injunctions

Company(ies) involved

Google LLC

Google Ireland Ltd

Google France

Related decisions

Interim Measure 20-MC-01 of 9 April 2020

20-MC-01 (French version)

PDF - 1 684.01 Ko

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Full text of the decision (in French)

1.19 MB

Full text of the decision (in English)

1.39 MB

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