Confirmation of competition authority decision requiring Google to negotiate with press publishers in good faith

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Amélie Blocman
Légipresse

The dispute between Google and representatives of press publishers and the France Presse agency has entered round 2. The press representatives had appealed to the French competition authority complaining about Google's implementation of the Act of 24 July 2019 creating a neighbouring right for press publishers and agencies. A month before the Act entered into force, Google had decided to stop posting article excerpts, photographs and videos within its various services unless publishers allowed it to do so free of charge. In practice, the vast majority of press publishers had therefore granted free licences to Google, allowing it to use and display their protected content without any negotiation with or payment from Google. The press representatives had considered Google's practices an abuse of a dominant position. In parallel with their main action, they had also requested provisional measures aimed at requiring Google to negotiate with them in good faith.

On 9 April 2020, the competition authority ruled that Google had instigated practices that could represent an abuse of a dominant position in so far as its refusal to pay the publishers was an unfair trading condition. The authority therefore ordered Google to negotiate the requested remuneration with the press publishers and agencies in good faith, in accordance with transparent, objective and non-discriminatory criteria. Google appealed.

In a judgment of 8 October 2020, the Paris appeal court rejected the requests for the referred decision to be annulled. It noted, first of all, that although the assignment of neighbouring rights to press publishers did not guarantee a right to remuneration in the sense that these rights were not designed to compel Google to pay for the licence as requested by the rightsholder, it nevertheless entitled the rightsholder to demand fair remuneration for the reproduction of its protected content, and implied that this should be negotiated in advance by the parties. Therefore, in accordance with Article L. 2184 of the Intellectual Property Code, Google was required to disclose all relevant information concerning the use of press publications by its users.

Google told the court that it was not acting in an anti-competitive manner. However, the court noted, firstly, that the relevant market was the general online search engine market, in which Google held a dominant position with a market

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share of around 90%. It considered that Google's behaviour in this market could be deemed exploitative abuse through the imposition of unfair trading conditions, without the need, at this stage, to balance the interests at stake, which would be a matter for the court examining the merits. The court believed this was sufficient to establish the probable existence of an anti-competitive practice, justifying the issuing of interim measures.

The court deemed that Google's refusal to negotiate remuneration with the publishers and its decision to make access to its service subject to unfair conditions were likely to distort normal competition for both the publishers and its competitors, since Google had nothing to fear from the latter on account of its ultra-dominant market position and would put those wanting to negotiate with neighbouring rightsholders at a clear disadvantage because, unlike the market leader, they would have to pay for the rights.

Moreover, the court ruled that the competition authority had been right to consider that the press sector could be seriously and immediately harmed in a way that might damage the long-term survival of the sector and of the appellants in particular.

The court therefore confirmed that the interim measures imposed by the competition authority, especially the requirement for Google to negotiate in good faith, were necessary and proportionate. In particular, it agreed that, during the negotiation period, Google should maintain the search result display mechanisms introduced with the entry into force of the Act of 24 July 2019. Finally, it upheld, under certain conditions, the injunction according to which the negotiations must not affect the indexation, order or presentation of the protected content to which Google provided access. However, this injunction should not stand in the way of improvements and innovations in the services offered by Google as long as these did not harm the interests of the neighbouring rightsholders concerned.

On 7 October 2020, the day before the appeal court's decision was issued, Google announced that it had accepted the principle of neighbouring right remuneration. Therefore, the discussions it had held with the *Alliance de la presse d'information générale* (French general press alliance – Apig), "could enable us to agree the key principles of an agreement based on audience size, non-discrimination and contribution to political and general news production." Google confirmed that its offer "covers neighbouring rights as defined by law, as well as participation in News Showcase", a new product recently launched by the firm.

Cour d'appel, Paris, (pôle 5 - chambre 7), 8 octobre 2020, Google LLC et a. c / SPEM, AFP et autres

https://www.autoritedelaconcurrence.fr/sites/default/files/appealsd/2020-10/ca_20mc01_oct20.pdf

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Paris appeal court (division 5, chamber 7), 8 October 2020, Google LLC et al. v SPEM, AFB et al.

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