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Google and the French Neighbouring Rights Saga: The French Competition Authority Pulls Out All the Stops to Force Google to Better Remunerate Press Publishers and Agencies

Michel Debroux (University Paris 2 Panthéon-Assas) · Thursday, April 18th, 2024

Among the many investigations and decisions targeting Google worldwide, the sanction of EUR 250 million imposed by the French Competition Authority (the Autorité) on 15 March 2024 (see here) in what is now arguably the 'saga' of neighbouring rights, has a number of eye-catching features in several respects.

Breaking news (unfolding when this post was finalised): Google's behaviour pattern in the French case is very similar to events unfolding in California since April 15th. Faced with the prospect of *California's Competition and Preservation of Journalism Act*, announced on April 15th, which would require digital advertising giants to pay news organizations a "journalism use fee" when they sell advertising alongside news content, Google has simply blocked links to several press organizations.

This is yet another reason to study the lessons of the French case.

Firstly, with regard to the practices themselves, Google was criticised for failing to comply with a specific sectoral regulation (in this case, the French law of July 2019 that implemented – unusually quickly – the EU Directive on copyright and related rights of 17 April 2019). This failure led the Autorité, upon a complaint lodged by several press agencies and publishers, to identify a strong suspicion of abuse of a dominant position. Although the practices are different, this approach echoes another, probably better-known, saga; that of the Facebook decision by the Bundeskartellamt in connection with breaches of the GDPR.

The Autorité's decision is also interesting because this saga presents a wide range of proceedings, leading to no less than four decisions in four years: interim measures and injunctions in April 2020, a penalty of EUR 500m for non-compliance with these injunctions in July 2021, a decision on the merits in June 2022, accepting commitments proposed by Google, and finally the present penalty decision, for partial non-compliance.

The third reason to take an interest in this decision is that at least one of the breaches of which Google is accused is unusual since it relates to the characteristics of the Bard conversational agent (renamed Gemini by Google in February 2024). However, Bard was launched in July 2023, whereas the undertaking on the basis of which it was criticised dated from June 2022. This

demonstrates the flexibility that the Autorité is capable of, by applying to a recent development an analysis based on an earlier commitment. This flexibility is certainly welcome in the extraordinarily fast-evolving environment of the digital economy, but it is also a source of uncertainty for large platforms. Flexibility v. legal certainty, a familiar tune…

Finally, the case is unusual for a fourth reason (… and the list is likely not exhaustive), which has to do with the nature of the sanctions. Despite the size of the financial penalty of 750 million euros imposed in two decisions, Google was not "technically" sanctioned for an abuse of a dominant position. In the two decisions (July 2021 and March 2024), it is the failure to comply with, respectively, injunctions and commitments, that is sanctioned. However, even though the Autorité did not formally conclude the existence of abusive practices, in its March 2024 decision it established a link between the seriousness of the breaches observed and their impact on "*the competition that the commitments were intended to preserve*".

Let's have a look at these issues in more detail before attempting to summarise the (many) takeaways of this saga.

"Neighbourhood Watch": Strong Antitrust Concerns on Several Fronts (unfair trading conditions, discrimination, circumvention of the act supposed to protect the neighbouring rights of press publishers and agencies)

First act (2019-2020): France's fast-track Directive transposition, Google's immediate circumvention strategy and the Autorité's rapid reaction

The act begins with an exceptionally quick transposition of a European Directive into French law (for once). The Directive on copyright and related rights of 17 April 2019, which had to be transposed into national law by 7 June 2021, was transposed in France in a law of 24 July 2019 (the 2019 Law), almost two years before the deadline! Lobbying by press publishers is likely no stranger to this speed. As a brief reminder, this law aims to restore the balance of power between digital platforms on the one hand, and publishers and news agencies on the other hand, when it comes to the sharing of value between these actors. Needless to say: in favour of publishers and news agencies.

However, Google was equally swift to circumvent this new law. It unilaterally decided to stop displaying article extracts, photographs, infographics, and videos within its various services (Google Search, Google News, etc.), unless the publishers granted them the authorisation to use them… free of charge. In addition, the zero-fee new licences granted under Google's new display policy allowed it to display more content than before the entry into force of the very legislation that was supposed to favour the publishers and news agencies. In short: extract more value and pay nothing. So long for rebalancing the powers.

In turn, Agence France-Presse (AFP) and several unions representing press publishers did not waste time in lodging a complaint with the Autorité on November 15th, 2019, seeking both a decision on the merits and interim measures aimed at forcing Google to engage in negotiations in good faith for the remuneration of the re-use of their content.

In slightly less than five months, the Autorité investigated the case, held hearings and found, in its

interim measure decision 20-MC-01 of April 9th, 2020, that Google may have abused its dominant position in the market for general search services by (i) imposing unfair trading conditions on publishers and news agencies, (ii) circumventing the 2019 Law and (iii) discriminating between publishers through a uniform zero-fee policy, irrespective of their different situations.

It, thus, imposed on Google a number of injunctions (the "Injunctions") including most notably the obligation to negotiate the remuneration of the publishers and press agencies, under strict supervision by the Autorité and within a timeframe of three months, in good faith and according to transparent, objective and non-discriminatory criteria. Interestingly, the negotiation had to result in an effective remuneration agreement, also retroactively covering the period beginning at the entry into force of the 2019 Law. This noteworthy and somehow innovative obligation was supposed to have substantially the same consequences as an *ex post* (private) damage action.

Second act (2020-2021): Non-Compliance with the Injunctions and First Penalty (EUR 500m.)

Just over a year later, the Autorité found in its decision 21-D-17 of 12 July 2021 that Google had not complied with the Injunctions, imposed a fine of EUR 500 million and ordered Google to comply, under penalty payments, with the initial injunctions.

In unusually strong words, the Autorité insisted in its press release on what it called a "*deliberate, elaborate and systematic strategy of non-compliance with* [the injunction to negotiate in good faith]", which "*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*". By that standard, the EUR 500 m. appears almost lenient. Google appealed this decision but subsequently withdrew it, so it became final.

Third Act (2022): Decision on the Merits and Commitments Accepted by Google

In the meantime, the investigations on the merit of Google's practices continued and, in its decision 22-D-13 of 21 June 2022, the *Autorité* accepted, for a period of five years, seven commitments proposed by Google to put an end to the identified competition concerns. The Autorité also approved the appointment of a monitoring trustee.

Unsurprisingly, the commitments largely mirrored and expanded upon the Injunctions imposed in the interim measure decision of April 2020. First and foremost, Google committed (again) to negotiating in good faith in a transparent, objective, and non-discriminatory way, and with a binding obligation to reach an agreement within three months. Absent any such agreement, an ICC arbitration procedure would be set up, all costs (except the other parties' lawyers' fees) being borne by Google.

Other commitments imposed on Google to, inter alia, ensure that negotiations would not affect other economic relationships it has with press agencies and publishers, and to provide press agencies and publishers with the information needed to transparently assess their remuneration for related rights, modelled after the French intellectual property code. This latter point resulted in a rather complex methodology based on the notion of "*protected content*" and designed to take into

account four categories of revenues: the display of protected content on (i) Google Search, (ii) Google Discover, (iii) Google News and a fourth category based on "other" indirect revenues generated for Google by the attractiveness brought to its services by the display of protected content. These indirect revenues represented the biggest share of revenues derived from the display of protected content on Google's services.

Last but not least, Google committed to withdrawing the appeal it had directed against the non-compliance decision of July 2021, which therefore became final.

Fourth Act (2024): Partial Non-Compliance with the Commitments and Second Penalty (EUR 250m.) … and a special focus on AI crawling

Final act (so far): on March 15, 2024, the Autorité found that Google had failed to comply with four of the seven commitments made compulsory in the decision of June 2022. In particular, it identified the following breaches: insufficient cooperation with the monitoring trustee, several accounts of non-compliance with the commitment to negotiate in good faith: an opaque methodology, a lack of (or partial) information on the calculation method necessary to quantify the revenue owed to publishers with respect to the "indirect" revenues, discrimination between publishers, a lack of (or partial) update or regularisation of the remuneration in the majority of the contracts signed with publishers, etc..

One of the breaches is arguably a little more specific as it directly deals with the problems raising the issue of the use of AI in internet search services.

In July 2023, Google launched a service called "Bard" (renamed Gemini in February 2024), that is fundamentally an AI trained to provide an answer to questions asked by users on Google Search. Like any generative AI, Bard/Gemini is founded on a massive collection of data used to train it. The Autorité found that Google used content from the domains of press publishers and news agencies when training the foundation model of Bard, for the grounding (i.e. when a query is sent by the AI to Google Search, in order to answer it) and for displaying it to the user. Google did not inform either the press agencies and publishers or the Autorité of these uses.

The Autorité concedes that the question of whether the use of press publications as part of an AI service qualifies for protection under related rights regulations has not yet been settled (this echoes the complaint brought by the New York Times for copyright infringement against OpenAI and Microsoft in December 2023), but it nevertheless considers "*at the very least*" that Google breached its commitment to negotiate in good faith by failing to inform publishers of the use of their content for their Bard software. Another breach consists, according to the Autorité, of failing to offer press agencies and publishers a technical solution allowing them to object to the use of their content by Bard/Gemini, without affecting the display of this content on other Google services.

Takeaways of a complex web of decisions and findings

It's not easy to sum up the lessons of such a saga. But let's give it a try.

On the practices themselves

Not much to say in this respect, even though the qualification of abuse by "*circumvention of the law*", while arguably not totally unprecedented (think of the case law on pay-for-delay in the pharma sector) remains somehow unusual.

On the variety of procedures and tools used by the Autorité

Much more interesting, in my view, is the vast arsenal of procedures and tools used over four years by the Autorité, sometimes in innovative ways (injunctions in summary proceedings, commitments, penalties). For instance, the injunction to conduct negotiations with the obligation to reach an agreement within a given timeframe, with a partially retroactive scope, is particularly interesting. Of course, the Autorité fell short of conducting these negotiations and drafting the resulting agreements itself, but the strong pressure it exerted all the way through was of course no stranger to the final result. In particular, it is worth noting, as already highlighted, that the retroactive aspect of these injunctions is designed to amount, *de facto*, to essentially the same result as private damage litigation.

On the breach of a commitment resulting from the launch of Google's AI service

Also of particular interest is the finding of a breach of a commitment given in June 2022, due to the launch of a new service in July 2023 (Bard/Gemini). While the complex interaction between IP law, antitrust law and the use of AI services trained on billions of sources remains open, the Authority has dealt with this issue in an original and particularly flexible way. Google's practices were analysed as a failure to implement an obligation to negotiate in good faith and to communicate relevant information in this respect. This approach is, of course, specific to the context of the commitments made in this particular area of neighbouring rights and does not seem to be "replicable" in other contexts.

Yet, it proves how flexible commitments can be… Too flexible?

This brings to mind the recurring debate on the delicate balance to be struck between the need for flexibility in the action of antitrust authorities (all the more in the digital ecosystems) and the no less necessary commercial freedom that must be left to companies when they develop and launch new products. Thanks to -inter alia- the DMA, we know that in recent years the balance has tipped more in favour of flexibility in the actions of regulators. That is what the "regulatory dialogue" is supposed to be about, and Google still seems to struggle with that new reality. But how far can it go?

On possible private damage actions

A final comment (for now…) on the relationship between the Authority's various decisions and any potential private damage actions for compensation for damage.

Technically, the two penalties imposed by the Autorité, in July 2021 and March 2024 respectively, are what might be termed “procedural” penalties, since they relate to practices involving non-compliance with injunctions and non-compliance with commitments. In a narrowly formalistic approach, it could be argued that Google’s practices were not expressly qualified as an abuse of dominant position. This could, in turn, complicate the task of future plaintiffs wishing to obtain compensation for damage suffered as a result of the breaches attributed to Google.

I don’t think so. Reading the March 2024 decision, one cannot help but have the feeling that the Authority anticipated this possible criticism. After insisting on the intrinsic gravity of the breaches as such, a section of the decision (paras. 323 et seq.) is devoted to assessing the impact of these breaches on the competition that the commitments were intended to preserve and the Autorité states that “*Google’s behaviour had a significant impact on the competition which the commitments were designed to preserve*“. Other, more circumstantial difficulties might be identified in a potential damage action (for example, the scope and enforceability of any settlements understood to have been included in the agreements signed between Google and the publishers). However, there does not seem to be any real doubt that Google’s alleged breaches did constitute actual abusive practices.

The saga might not be over, after all.

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* The author was not involved in any of the various proceedings described in this post. He advises various clients on DMA- and antitrust-related matters involving Google and other gatekeepers. All views are personal and do not necessarily reflect those of clients he works for or the institutions in which he is a lecturer.

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