COMPETITION FORUM
LAW & ECONOMICS

October 29th 2020

Interim measures confirmed against Google in the press publishers' case

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To quote this paper: V. GIOVANNINI, "Interim measures confirmed against Google in the press publishers' case", *Competition Forum,* 2020, art. n° 0004, https://www.competition-forum.com/.

Context. In its decision[1], the French Competition Authority (hereinafter FCA) granted the requests for interim measures filed by the *Syndicat des éditeurs de la presse magazine* (hereinafter SEPM), *Agence France-Presse* (hereinafter AFP) and the *Alliance de la presse d'information générale* (hereinafter APIG) against Google LLC, Google Ireland LTD and Google France (hereinafter Google) on the grounds of a probable abuse of dominant position.

This decision came in a context where the press sector is experiencing serious difficulties. Essentially, publishers and press agencies have two main sources of profits: the contents they sell and advertising. However, with the growth of free access to information on the Internet, these players have seen the sale of their contents decrease, whether it is paper or digital contents. As for advertising revenues, search engines and social networks, first and foremost Google and Facebook, have taken the lion's share. In particular, Google displays news contents as part of its generalist online search service (Google Search) and those dedicated to news (Google News and Google Discover), which benefits it in terms of traffic without remunerating the actors behind these contents. Indeed, the Google Search, News and Discover services display, in addition to the title of the article and the name of the publisher, a thumbnail image illustrating the article, a text extract called "snippet", and even a short video.

The threat to publishers and news agencies is particularly problematic when we know that they contribute to the freedom and pluralism of the press and thus to the functioning of our democratic society. This is why the directive of 17 April 2019 creating a related right for press publishers[2] was adopted and subsequently transposed into national law by

[1] FCA, 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*.

[2] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, [2019] OJ L130/92. In particular,

the law of 24 July 2019[3] (hereinafter the law). Google reacted and declared that it would no longer display overviews of this protected contents unless it was authorized to do so. In order to obtain this authorization, Google used several tags to allow publishers to authorize or prohibit the resumption of their contents and, in the affirmative, to set the extent of its display concerning the size of the text, the size of the image and the duration of the video, respectively. In the end, 87% of publishers decided to allow Google to resume their contents without financial compensation. Among them, a very large majority also chose to authorize the transfer of protected content with no size limit for article excerpts and a wide parameter for the display of photos and videos. As for the others, those who refused to allow Google to display their protected contents, their traffic on their site dropped significantly.

The FCA suspecting Google of abusing its dominant position for imposing unfair transaction conditions, treating all publishers identically and circumventing the law, considered that there was a serious and immediate harm on the press sector. Therefore, the FCA ordered interim measures against it, enjoining it in particular to negotiate in good faith the contours of a remuneration package with publishers and press agencies according to transparent, objective and non-discriminatory criteria[4]. However, Google has decided to appeal against this decision before the Paris Court of Appeal (hereinafter CA). Its decision, which is the subject of this commentary, confirms almost entirely the FCA's decision.

Among the pleas raised by Google, the contradiction of the law to Article 26(2) of the 2019 Directive[5] and the failure to notify the law to the Commission in violation of the 2015/1535 Directive[6] do not call for any particular comment on our part. We will focus exclusively on the means that are directly relevant to competition law.

On the relevant market. First of all, Google challenges the delineation of the relevant market that has been made by the FCA[7]. For its part, the CA validates the relevant market for general search defined by the FCA and therefore Google's ultra-dominant position in it. The court recalls, as a preliminary point, the role of the delimitation of the relevant market concerning the abuse of dominant

Article 15 provides for the creation of a related rights for the benefit of press publishers which enables them to authorize or prohibit the reproduction, communication and making available to the public of their publications.

[3] LOI n° 2019-775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse (1). This exclusive right granted to publishers and press agencies is now governed by Articles L. 218-1 to L. 218-5 of the French Intellectual Property Code (hereinafter IPC).

[4] CA Paris 8 October 2020, pôle 5, ch. 7, n° 20/08071, para 35.

[5] Ibid, paras 44-56.

[6] Ibid, paras 57-65.

[7] Ibid, para 70.

position as well as the watered-down standard applicable in this matter with regard to interim measures[8].

Moreover, it is based on the Commission's decision-making practice which recognizes that the general search market is an economic activity and therefore a relevant market distinct from that of contents providers and social networks because of the specificity of this service[9]. This reminder is hardly surprising insofar as the functionalities of digital products or services affect their degree of substitutability. In other words, while it is possible to access news contents on both search engines and social networks, their modalities diverge, which justifies the definition of separate relevant markets.

The court also refers to the close links between the services offered by a search engine and a plurality of actors (Internet users, advertisers and contents providers) which, in the words of the court, "pursue a common and interdependent profit goal"[10]. This assessment seems to correspond to Google's economic model, which is called a "two-sided" market and whose users and advertising sides are interconnected.

On the unfairness of the terms of the transaction. Then, Google challenges each of the three cases considered by the FCA as an abuse of dominant position[11]. The CA considers that the imposition of unfair transaction terms is sufficient to justify the existence of a probable anti-competitive practice and, therefore, the granting of interim measures, without it being necessary to consider the other abuses envisaged by the FCA[12]. On this point, it seems that it does not wish to embarrass itself and is content to only focus on the imposition of unfair trading conditions. Indeed, this practice is the most likely to be the source of a probable abuse of dominant position. As regards to the discriminations referred to in article 102 c) of the TFEU and article L. 420-2 of the French Commercial Code (hereinafter C.com.), these may be of a "first line"[13] or "second line"[14] nature. However, it is the latter that are targeted by the FCA and they are "extremely rare"[15]. Respecting the abuse that would result from the mere misappropriation of the purpose of a law, this qualification is

[8] Ibid, paras 73-75.
[9] Ibid, para 77.
[10] Ibid, para 80.
[11] Ibid, para 68.
[12] Ibid, para 109.
[13] This discrimination, also referred to as "principal" discrimination, concerns the discriminatory conduct undertaken by the dominant firm towards its customers, which may create exclusionary effects on its horizontal competitors. See Andrea Giannaccari and Roger Van den Bergh, 'Unilateral conduct of dominant firms' in Roger Van den Bergh Peter Camesasca and Andrea Giannaccari (eds), *Comparative Competition Law and Economics* (Edward Elgar Publishing 2017), 356.
[14] Such discrimination, also referred to as "ancillary" discrimination, occurs when the dominant undertaking engages in price discrimination with its trading partners, thereby producing adverse effects for the latter. The effect of the discriminatory practice manifests itself between the dominant firms' customers in the downstream market. See ibid.
[15] Case C-525/16 *MEO – Serviços de Comunicações e Multimédia SA contre Autoridade da Concorrência* EU:C:2017/1020, Opinion of AG Wahl, para 80.

astonishing. The *AstraZeneca*[16] decision of the CJEU to which the FCA refers does not explicitly recognize such abuse. If this were the case, this qualification would open the way to mass litigation, which is undesirable[17]. In our opinion, the misappropriation of the purpose of a law should not be considered as an autonomous abuse of dominant position, but rather as an indication that other abusive practices may be established, such as the imposition of unfair conditions in this case[18]. In this regard, it is appropriate to await the decision on the merits before making a final determination, but we hope that the FCA will change its approach and leave the circumvention of the law as a dead letter, at least as an autonomous basis for abuse of dominance.

On the causal link with Google's dominant position. Google also considers that there is no causal link between its dominant position in the general online search market and the practices of which it is accused[19]. Contrary to what one might think, this classic requirement of the law of abuse of dominance does not consist in showing a true "causal link" between these elements, i.e. that the abuse is caused by the dominant position. Rather, it is rather a question of demonstrating a "connectedness", in that the abuse could not have occurred in the absence of this situation of economic power[20]. In this case, the CA, adopting the FCA's reasons, finds this connection in the irreplaceable nature of Google's search engine traffic compared to other alternative sources of traffic such as social networks. It relies on economic studies provided to the FCA by the firms, including Google itself, but also on Google's notoriety and its market shares close to the monopoly[21]. The weight of its traffic is also confirmed by the fact that newspaper publishers who have refused to take over their protected contents have experienced a significant drop in traffic[22].

On anti-competitive effects. Google also criticizes the FCA for not having demonstrated how the alleged practices are likely to have actual or potential effects on publishers and its competitors[23]. In this regard, the judges uphold the FCA's decision, which begins by stating that the demonstration of anticompetitive effects is not required for the imposition of unfair

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16 Case C-457/10 P *AstraZeneca v Commission* EU:C:2012:770.

17 David Bosco, 'Nouvelle décision contre Google suspecté d'abuser des éditeurs de presse' (2020) 6(101) CCC <https://www.lexis360.fr/Document/abus_de_position_dominante_nouvelle_decision_contre_google_suspecte_dabuser_des_editeurs_de_presse/vuRS1VtUotMWKWfJMl6PfZVsa1AwLDQkskerbRNaUwU1?data=c0luZGV4PTEmckNvdW50PTEm&rndNum=2058191374&tsid=search5_> accessed 28 October 2020.

18 Anne-Sophie Choné-Grimaldi, 'Google enjoint de négocier des licences avec les éditeurs de presse' (2020) 382 Légipresse 289, 293.

19 CA Paris (n 4), para 110.

20 Nicolas Petit, *Droit européen de la concurrence* (2nd edn, LGDJ 2018), para 1041.

21 CA Paris (n 4), para 117.

22 Ibid, para 118.

23 Ibid, para 124.

transaction conditions, but notes that Google's conduct can have anticompetitive effects on both newspaper publishers and its competitors[24].

Moreover, we fully understand that the demonstration of the anti-competitive effects at the stage of the interim measures is not as thorough as it is on the merits. On the other hand, it is more criticizable that the FCA considers, by a bold interpretation of the *Alsatel*[25] decision, that the imposition of unfair transaction conditions does not imply the demonstration of anti-competitive effects and that the CA does not criticize anything on this point. However, it is difficult to understand what justifies recourse to competition law and thus the interference of the FCA in the absence of anti-competitive effects. Indeed, the law on related rights does not have a competitive dimension in itself. Its only objective is to rebalance the distribution of the value chain in the press sector. Thus, its only considerations are related to redistributive or even equity aspects, but not to competition. Thus, through its intervention, the FCA does not protect the competitive process, but a particular category of competitors, because they contribute to media pluralism and the democratic process[26]. While these goals are laudable, on the other hand, it seems to us to be quite far removed from the attributions devolved to a competition authority. Consequently, it is pure considerations of expediency that justify the FCA's intervention in this case. Indeed, as demonstrated by the interim measures and other injunctions pronounced in this case, the FCA has a range of tools more important than in other branches of law. In other words, competition law intervenes to remedy the shortcomings of intellectual property law in this case[27]. This new role attributed to competition law has major implications in this field: from this perspective, it is no longer satisfied with simply restoring competition on the market, it builds it by shaping future markets, following the example of the market for the granting of paid licenses mentioned in this case[28]. In order to clear up any misunderstanding, we do not question the fact that conduct that is reprehensible under a branch of law is also reprehensible under competition law. However, it seems necessary to us that the qualification of abuse of exploitation, more particularly the imposition of unfair transaction conditions, implies the demonstration of an infringement of competition, because otherwise there is a

[24] Ibid, paras 129-132.

[25] Case C-247/86 *Alsatel/Novasam* [1988] ECR 5987.

[26] Jean-Christophe Roda, 'Google contraint de négocier avec les éditeurs de presse : quand la loi sur les droits voisins croise l'abus de position dominante' (2020) 20 Gaz. Pal. 26.

[27] Even if it is tempting to draw a parallel with the *Facebook* case in Germany, the case under consideration is not the same. Even though the Bundeskartellamt also sanctioned Facebook for abusive business conditions, it was more the rules of personal data protection that came to the rescue of competition law. What's more, this was only possible because of a specificity of German law. See Bundeskartellamt, 7 February 2019, B6-22/16, 149-257.

[28] CA Paris (n 4), para 131.

risk of instrumentalisation of competition law which is undesirable. In summary, if the decision on the merits were to confirm this point, this qualification of the imposition of unfair transaction conditions would open the door to all excesses, because any abuse of a contractual nature, and not necessarily competitive, would be prosecuted by the FCA.

On serious and immediate harm to the general economy or the press sector. Pursuant to Article L. 464-1 of the C.com., the FCA may order interim measures when "the practice denounced is seriously and immediately detrimental to the general economy, to the sector concerned, to the interest of consumers or to the plaintiff company". Briefly, the CA considers that Google's behavior, which consists in depriving publishers and news agencies of the benefit of the law, characterizes these conditions of gravity and immediacy[29].

The solution adopted by the CA seems appropriate to us, because the infringement identified by the FCA, and taken up by the CA, differs from the economic crisis that the press sector is going through. Indeed, the infringement for publishers and press agencies does not result from this crisis, but from the dilemma in which Google places them, namely: to authorize the resumption of their protected contents without any particular limit and without financial compensation; or to refuse, but in this case, to expose themselves to a drastic drop in traffic[30]. Moreover, the infringement in question does not date back to ancient facts, but rather to Google's refusal to comply with the law that was precisely adopted to rebalance the distribution of the value chain without delay[31].

On the necessity and proportionality of precautionary measures. The third paragraph of article L. 464-1 provides that interim measures "may include the suspension of the practice concerned as well as an injunction to the parties to return to the previous state. They must remain strictly limited to what is necessary to deal with the emergency". In response to the injunctions taken by the FCA, Google is specifically challenging injunctions 1, 3, 5 and 6, which respectively consist of: negotiating in good faith with newspaper publishers; maintaining the display of protected contents; ensuring that the outcome of the negotiations does not impact the indexing, classification or presentation of the protected contents taken over by Google; and other economic relations between Google and the publishers and press agencies[32].

The CA confirms almost all of the injunctions issued by the FCA. Indeed, despite the infringement of Google's fundamental

[29] Ibid, paras 155-161.
[30] Ibid, para 159.
[31] Ibid, para 174.
[32] Ibid, paras 179-196.

freedoms such as contractual freedom, property right and entrepreneurial freedom, it considers that injunctions Nos. 1, 3 and 6 are proportionate to the infringement of related rights by its conduct, the possible abuse of exploitation and their limited duration[33].

On the other hand, the CA reversed the FCA's decision regarding the injunction 5. It does not consider it proportionate because it can "freeze any innovation necessary for the performance of the search engine" during the negotiations[34].

Generally speaking, all of this reminds us of the need to strictly regulate the use of these interim measures and the recourse to the injunction mechanism that they provide for. Undeniably, interim measures have the advantage of leading to a much faster resolution of the dispute[35]. In fact, this tool makes it possible to avoid that the competitive harm has time to consolidate and facilitates the inoculation of remedies. In doing so, interim measures are seen as a panacea, particularly in the digital sector where the temporality of litigation is incompatible with that of digital markets[36]. However, although these measures may only be provisional, their effects may be irreversible. The interim measures often "prejudge" the merits of the case[37] and place significant constraints on companies, even if the examination of the practices in question is lightened. In summary, a strict framework for these measures and injunctions is necessary.

Conclusion. In the end, while we can only be satisfied that Google's behaviour towards publishers and press agencies has not gone unpunished, doubts remain on certain points which the FCA's decision and the present case law do not answer at this stage of the proceedings. However, we hope that during the examination on the merits, the FCA, in the light of a more thorough analysis, will modify its decision in certain respects; unless it is already prejudged…

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[33] Ibid, paras 230, 237 and 247.

[34] Ibid, para 242.

[35] Emmanuelle Claudel, 'La temporalité des règles de concurrence est-elle adaptée au numérique ?' (2019) 3(21) Cahiers de droit de l'entreprise <https://www.lexis360.fr/Docview.aspx?&tsid=docview2_&citationData={%22citationId%22:%22dossR21%22,%22title%22:%22article%2021%22,%22docId%22:%22PS_KPRE-575058_0KT6%22}> accessed 28 October 2020.

[36] If the European Commission was reluctant to use them until then, the trend seems to have recently been reversed with the Broadcom case (*Broadcom* (Case AT.40608) Commission Decision C(2019) 7406 [2019]). As for France, it is one of the few countries to already actively use these provisional measures. Moreover, the so-called "ECN+" Directive (Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, [2018] OJ L11/3) will further facilitate implementation by allowing the FCA to take up a case ex officio.

[37] Adrien Giraud and Guillaume Blanc, 'Les mesures conservatoires à la française : Un modèle réellement enviable ?' (2018) 3(87231) Concurrences <https://www.concurrences.com/fr/revue/issues/no-3-2018/pratiques/les-mesures-conservatoires-a-la-francaise-un-modele-reellement-enviable> accessed 28 October 2020.