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Strike three

Another infringement from Google in the *AdSense* case

by **Marjolein De Backer** and **Maria Loudjeva**

On 20 March 2019 the European Commission (Commission) announced its decision in the *AdSense* case, imposing a fine of €1.49bn and requiring Google to cease its infringing practices.[1] The Commission faulted Google for imposing restrictive clauses in contracts with third-party websites which prevented rivals from placing search adverts on these sites. The rationale behind these restrictive clauses was to cement Google's dominance in the online search advertising intermediation market.

This was the third largest Commission fine ever in Article 102 proceedings; smaller only than the record fines on Google in the *Shopping* and *Android* investigations. Unlike in those cases, in *AdSense* the abusive conduct had already terminated (in 2016) so that there was less potential for controversy as to Google's compliance. Google has appealed against both the *Shopping* and the *Android* decisions and has announced its intention to do so with respect to *AdSense* too.

Background

Google funds its services not only by offering advertising on its own search page but also through brokering advertising space on other platforms. Websites such as newspapers, blogs, or travel site aggregators often include a search box. A search using such an embedded function not only returns search results but also advertisements. Google's AdSense for Search service plays the role of a broker between the advertisers providing the search ads and the owners of the websites where searches are performed.

The *AdSense* investigation, although substantively distinct, forms part of a wider probe into Google's conduct in the European Economic Area (EEA) including the favourable treatment by Google, in its general search results, of its own other specialised search services (*Shopping* case), and the illegal restrictions Google was imposing on manufacturers of mobile devices (*Android* case). Commissioner Almunia identified the *AdSense* issues as being of concern already in 2014 when inviting Google to propose commitments. However, it was only in July 2016, when the Commission sent a Statement of Objections to Google, that it became official that there was a separate case about Google's search advertisement practices. The probe covered the period from 2006 to 2016, when Google removed the unlawful clauses from its contracts.

At the time of writing, the Commission's full decision has yet to be published, and this comment is therefore based on the press release only.

Google's dominance

As explained above, AdSense for Search is a brokering service between advertisers and website owners. In light of this, the Commission found that the relevant market was the market for online search advertising intermediation in the EEA. According to the Commission, Google had a market share above 70% from 2006 to 2016. In 2016 Google also held market shares generally above 90% in the national markets for general search and above 75% in most of the national markets for online search advertising.

When describing the particularities of the online advertising market, the Commission noted that high barriers to entry exist. Google's competitors in online search advertising, such as Microsoft and Yahoo, are not able to sell advertising space in Google's own search engine results pages. Therefore, competing suppliers have relied on the opportunity to broker advertisements for third-party websites as a way to enter the online search advertising intermediation market. Google's control of such important entry points and the strong network effects characterising the online search advertising market meant that Google's rivals were unable to grow and compete.

The abusive conduct

At the heart of the *AdSense* investigation are individually negotiated agreements between Google and the owners of websites with an embedded search function. According to its press release, the Commission reviewed hundreds of such agreements which revealed that, starting in 2006, Google imposed exclusive supply clauses prohibiting website owners from carrying search ads that were brokered by Google's competitors.

In 2009, Google changed these explicit exclusive supply clauses with more subtle means of achieving the same

result, ie the so-called "relaxed exclusivity" clauses. The newly imposed "premium placement" clauses obliged website owners to:

(a) Reserve the most profitable space on their search results pages for the adverts brokered by Google;
(b) Purchase a minimum number of adverts provided by Google; and
(c) Seek written approval from Google before introducing any changes to the way in which the ads brokered by Google's competitors were displayed.

Google's preferential placement and its control on the positioning of ads brokered by competitors assured Google a *de facto* control over the volume of clicks that competitors received. Any competing provider of online search advertising intermediation services relies on such clicks to fund and grow its offerings. Indeed, the *Google Shopping* decision confirms that user traffic is essential to the ability of specialised search services to compete. There appears to be no reason why this should be different for online search advertising intermediaries. Traffic generates not only revenue but also allows online search advertising intermediaries to improve their offering by improving the relevance of the ads they place alongside search results.

The core of the theory of harm against Google is that it made it impossible for businesses to compete on the merits, by either prohibiting the placement of competing ads or by artificially ensuring that the online search advertisements brokered by its AdSense service received preferential placement, to the detriment of competitors. Such a strategy on Google's part is familiar from the *Google Shopping* and the *Android* cases: Google used its dominance to illegally favour its own products through a variety of abusive strategies. While in *Google Shopping* there may have been discussions around self-preferencing and the nature of the abuse, there is nothing novel or controversial in the infringement in the *AdSense* investigation. *AdSense* involved the imposition of classic exclusivity clauses. Such exclusionary restrictions have been sanctioned numerous times by the Commission and cases such as *Van den Bergh Foods*[2] have established that Article 102 applies to exclusivity obligations imposed either legally or *de facto*. Moreover, exclusive supply restrictions are expressly identified in the Commission's guidelines as specific forms of abuse.[3]

Although data collection does not feature explicitly in the Commission's press release, it will be interesting to read in the published decision whether the Commission looked into the effects of Google's conduct on competitors' access to customer data. As discussed further below, the role of data collection in the market for online advertising is very much on the radar of the antitrust authorities.

Has the market already tipped?

Following the *Google Shopping* decision, Google needed to come forward with a solution ensuring equal treatment of its rivals. In *Android* the Commission required Google to end the tying of apps, end the prohibition of Android forks and remove any financial incentives tied to Google apps exclusivity. By contrast, in *AdSense* the unlawful clauses were removed shortly after the adoption of the Statement of Objections in 2016. In principle it would seem that the barriers to entry in the online advertising intermediation market, caused by Google's AdSense practices, were removed as from then. However, at her press conference Commissioner Vestager stated, in response to a question, that the Commission has seen no pickup from other advertising brokers in this market and that this is an area of concern. This raises the question whether the time taken since Mr Almunia's attempts to settle the cases starting in 2014, and the 10 years of restrictive clauses, have allowed Google to entrench itself so effectively that it was able to remove the unlawful clauses without feeling any effect. In the words of the Commissioner herself, "the risk is still that the market would have moved on and it is very difficult to restore competition as it were."[4]

This of course reflects similar concerns about the real prospects of restoring competition on the markets for comparison shopping and general search services. More generally there have been calls for greater speed and enforcement action in the fast moving digital markets before they tip irretrievably.

Increased scrutiny of the online advertising market

As mentioned above, the online advertisement market has been attracting increased scrutiny by antitrust authorities. Most prominently the French and German competition authorities have opened investigations into the online advertising market. Unlike the Commission's investigation into Google's AdSense exclusivity arrangements as an online search advertisement intermediary, the French and German probes appear to focus more on the privileged access to market data enjoyed by large single companies with considerable market relevance like Google or Facebook. It has been reported, for example, that Google and Facebook contribute to 90% of the growth in online advertising.

The current French investigation follows the authority's sector-specific inquiry focused on online advertising, which concluded in March 2018. In its final report the French Competition Authority considered access to data as a critical asset for competing in the online advertising space. In addition, the French authority described the market as fragile due to the presence of only two significant global players. The ability of these players to vertically integrate their data collection and advertising services allows them significant market power which, when accompanied by (for example) strategies involving exclusivity, tying or leveraging effects, can be potentially detrimental to completion.

In addition to the access to and processing of data, the German sector investigation also appears to examine the

so-called "walled gardens" effect, ie operating a closed platform on which producers or operators impose user restrictions and which makes it very hard to measure advertising coverage and impact.

Most recently, in March 2019, the UK Digital Competition Expert Panel issued its report on digital competition. Among others, the report calls for the Competition and Markets Authority (CMA) to conduct a review of the digital advertising market. This recommendation stems from the report findings that there may be anti-competitive practices and potential for abuse in parts of the market which is dominated by two players and suffers from a lack of transparency. According to the report, businesses present at multiple points in the digital advertising market may be tying or granting preferential treatment to traffic channeled through their own services, to the disadvantage of third-party competitors. If the CMA proceeds with a market inquiry, it will have the powers, *inter alia,* to impose remedies and/or call for government intervention. Previous sector inquiries by the CMA have indeed led to the adoption of sectoral regulation – for example, following the CMA's recommendations in its market investigation into the supply and acquisition of energy, Ofgem undertook a series of measures to amend the regulatory framework. More recently, the UK government has endorsed the CMA's recommendation for legislation breaking up the "big four" audit firms.

Conclusion

The announcement of the *AdSense* decision marks the ending of the last formally running proceedings against Google and undoubtedly one of Commissioner Vestager's most high-profile battles. The Commission is continuing to assess other concerns, notably areas of specified search such as Local and Jobs (which she mentioned at her press conference) for which *Shopping* has not proved to provide a precedent, given the way that Google has constructed its remedy.

In any event, the Commission's *AdSense* investigation may not have been the last headache for Google in the online advertising market. Given the interest from the national competition authorities in Google and Facebook's market power in online advertising, it is also possible that the Commission turns to the sector again, but this time with a stronger focus on access to customer data.

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Endnotes

1. Commission Press Release, "Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising", 20 March 2019.
2. Cases IV/34.073, IV/34.395 and IV/35.436 *Van den Bergh Foods*, OJ 1988 L246/1.
3. Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, at para 33.
4. Vasant, K, "Vestager flags concerns over 'no pickup' from Google rivals in online ad market", PaRR, 20 March 2019.

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