CPI EU News Presents:

Google AdSense for Search: Fines Always Come in Threes

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April 2019

CPI COMPETITION POLICY INTERNATIONAL

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On June 26, 2017, the European Commission fined Google €2.42 billion for abusing its dominance as a search engine by giving illegal advantage to its own comparison shopping service.[2] On July 18, 2018, the European Commission fined Google €4.34 billion for having illegally strengthened the dominance of Google's search engine via Android mobile devices.[3] Thirdly and lastly, on March 20, 2019, the European Commission fined Google €1.49 billion for having illegally imposed restrictive clauses to third-party websites through AdSense for Search.[4] Whereas the Commission sent the Statement of Objections simultaneously on July 14, 2016 for both the Google Shopping case and the Google AdSense case, the latter required more time for the Commission to issue the fine for "illegal misuse of its dominant position in the market for the brokering of online search adverts" said Commissionner Margrether Vestager.[5]

AdSense for Search's dominance in online search adverts

The Commission investigated the agreements between Google and its partners relating to its online search advertising intermediation programme, AdSense. The Commission found that Google restricted the ability of certain third-party websites, both existing and potential competitors, to display search advertisements, henceforth "cement[ing] its dominance in online search adverts and shield[ing] itself from competitive pressure [...]."[6] Considered to be "illegal under EU antitrust rules," Commissioner Vestager condemned these practices for having "lasted over 10 years and denied other companies the possibility to compete on the merits and to innovate."[7] AdSense for Search enjoyed, according to the Commission, a market dominance in online search advertising intermediation spanning from 70 percent in 2006 through 2016, up to 75 percent since 2016 in national markets.

Anticompetitive supply obligation clauses

The alleged anticompetitive practices consisted in exclusivity clauses included from 2006 until 2009, thereby requiring exclusivity for Google search adverts in third-party websites. From 2009 onwards, Google introduced "Premium Placement" clauses according to which Google search adverts were assured the most visible (thus most profitable) placements over rivals' search adverts. Finally, these practices included Google's veto power over any changes in the display of search adverts by third-party websites.

According to the European Commission, these practices are illegal under EU law because Google had abused its market dominance for online search advertising intermediation, these practices being tantamount to both "*exclusive supply obligation*" (as for the practices from 2006 to 2009) and a "*relaxed exclusivity*" *strategy* (from 2009 onwards). According to the Commission, Google failed to show efficiencies capable of justifying these practices, which therefore "harmed competition and consumers, and stifled innovation."[8] The fine imposed is not so much intended to end ongoing illegal practices, since these had already stopped in July 2016 at the time when antitrust investigations started, but rather to prevent the adoption of similar practices and provide a legal basis for potential subsequent civil actions for damages brought by competitors or consumers against Google.[9]

Beyond leveraging abuse: supply abuses

Based on the press release of the European Commission, the alleged anticompetitive practices differ greatly from the two previous Google cases. In *Google Shopping*, the alleged abuse consisted in the illegal leveraging of market dominance by Google's general search engine onto shopping comparison services in order to cement Google's search engine's dominance and to become dominant on the shopping comparison services not because of its own merits, according to the Commission. In *Google Android*, the Commission blamed Google for imposing illegal restrictions on Android device manufacturers and network operators to cement the dominance of the Google search engine. In both cases, leveraging abuses (be it tying, bundling, or any new type of lock-in effect) were at the heart of the fining decisions against Google.[10] With the *Google AdSense* decision, leveraging theory is absent and the alleged abuses are said to take place in the online search advertising intermediation market as such: the abuse of dominance was exerted on this market, where Google is a dominant player, irrespective of Google's dominance on the search engine market.[11]

The identified abuses are two-fold: (1) an exclusivity supply clause from 2006 to 2009; and (2) a "relaxed exclusivity" clause, similar to a prominent placement clause, from 2009 onwards. The abuses are only, according to the press release, to fall within the remit of Article 102 TFEU which prohibits abuses of dominant position[12] – therefore reneging on the possibility of finding Article 101 TFEU abuse for vertical agreements.

As per the exclusivity clause, these vertical restraints can fall not only within the remit of Article 101 TFEU but, most interestingly for the case here discussed, altogether within the remit of Article 102 TFEU[13]. Indeed, the Article 102 Guidance[14] provides insights into the antitrust analysis to be carried out for exclusive dealings which include exclusive purchasing obligations and conditional rebates[15]. Here, exclusive supply obligations such as in the present *Google AdSense* decision are part of exclusive dealing. Indeed, the Commission states that:

the notion of exclusive dealing includes exclusive supply obligations or incentives with the same effect, whereby the dominant undertaking tries to foreclose its competitors by hindering them from purchasing from suppliers. The Commission considers that such input foreclosure is in principle liable to result in anti-competitive foreclosure if the exclusive supply obligation or incentive ties most of the efficient input suppliers and customers competing with the dominant undertaking are unable to find alternative efficient sources of input supply.[16]

It therefore appears that illegal foreclosure arising out of exclusive supply obligations is possible when (i) such obligations tie in efficient input suppliers; and (ii) when no alternative efficient sources of supply exist.[17] As for the latter condition, in the *Google AdSense* case, since Google's search engine prohibits competitors in online search advertising from selling advertising space in Google's own search engine result pages,[18] it appears that this condition is satisfied.[19] As for the former condition of tie-in, it would be challenging to argue that Google's search engine, which is tied-in with Google AdSense, is not the "efficient input supplier" given its efficiency and appeal to consumers. The main question should rather be on the reality of the harm allegedly imposed on consumers from using such an efficient search engine compared to less efficient search engines. For, under current EU antitrust rules, exclusive supply obligations from a dominant firm would likely lead to form an abuse under Article 102 TFEU.[20]

The difficulty of apprehending the complexity of digital platforms pares down to the economic reality of any consumer harm due to either the exclusive supply obligations enforced initially, and the "relaxed exclusivity" strategy enforced subsequently. At para.36

of the Article 102 Guidance, the Commission refers to the concept of "unavoidable trading partner": [i]f the dominant undertaking is an unavoidable trading partner for all or most customers, even an exclusive purchasing obligation of short duration can lead to anti-competitive foreclosure." It is this notion that is implicitly referred to in the press release whereby Google's search engine is considered to be an unavoidable trading partner, tantamount to an essential facility for search engines. Based on an ad-financed business model, Google has invested massively in order to provide free services for consumers but also, and relevant for the present case, for third-party websites. The flawed application of an essential facility doctrine on Google partakes to the criticism of the absence of a neutral ranking of search advertising (or, elusively, the so-called "*search neutrality*") whilst the absence of discrimination between advertisers can hardly be imposed because Google's entire business model relies on the profitability of its search advertising results.[21]

Be it through exclusive placements or through premium placements, Google's search advertising results are the necessary condition for the viability of the business' two-sided model whereby customers (Google's advertisers or the rivals' advertisers) are selected in a discretionary manner in order to provide free services (search toolbar on third-party websites).[22] This business model should not cause antitrust concerns as long as competing search toolbars are available for third-party websites, wherein alternative search engines can offer third-party websites different services. Indeed, the freely available ad-financed toolbar offered by Google could face competition from payable, ad-free toolbars offered by competing search engines.

The reasoning of the Commission, furthermore, brushes away the efficiencies which could justify exclusivity clauses and, *a fortiori*, privileged placements. Indeed, whilst para.46 of the Article 102 Guidance provides for an efficiency defense of exclusive supply obligations – namely in "transaction-related cost advantages" and "certain relationship-specific investments" – it is obvious that Google invests specifically in each and every website where the toolbar is present. Not only does this represent a cost advantage to consumers because the services are offered free of charge, conditional to Google's ad-financed business model, but the relationship-specific investments are uncontestable. Google has to create, invent, and maintain the dedicated toolbar for one single individual website. The feasibility of replicating these toolbars easily on other websites is highly dubious, since each website requires specific maintenance from Google. These efficiencies have been cast away by the Commission without further consideration. The excessively formalistic legal analysis on which the Commission seems to rely is weakened by the economic analysis pitfalls of both the presence of efficiencies as justifications and ignorance of the intrinsic nature of Google's business model, whereby non-discriminated search advertising results are both vaguely enforceable as well as probably detrimental to final consumers.

To conclude, the *Google AdSense* decision fits perfectly within a line of decisions issued against Google wherein its business model – i.e. ad-financed free services – casts doubt onto the classical analysis of the Commission on pricing strategies and the discrimination principle (i.e. the debatable search neutrality[23]). These decisions prevent inventiveness, not only in products and services, but in business models that compete with one another in a beneficial competitive process oft-claimed and relied upon by the Commission but too often hampered by zealous antitrust interventions. If fines always come in threes with Google in the EU, appeals may finally also come in threes.[24]

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[2] European Commission (2017) *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service*. Press Release IP/17/1784. See the prohibition decision: European Commission (2017) Google Search (Shopping). Case AT.39740. . For a discussion, see Portuese, A. (2018) When Demotion is Competition: Algorithmic Antitrust Illustrated. ***Concurrences Review*** (https://aurelienportuese.com/2018/01/17/when-demotion-is-competition-algorithmic-antitrust-illustrated/). N°2-2018, http://www.concurrences.com/en/authors/aurelien-portuese; Portuese, A. (2017) Symposium on Google Search (Shopping) Decision · Fine is Only One Click Away, *European Competition and Regulatory Law Review*. Volume 1, Issue 3, pp. 198 – 203, DOI: https://doi.org/10.21552/core/2017/3/6 ; Zingales, N. (2018) Google Shopping: beware of 'self-favoring' in a world of algorithmic nudging, *Competition Policy International. CPI's European Column, February 2018*; Eben, M. (2018) Fining Google: a missed opportunity for legal certainty? *European Competition Journal* (https://www.tandfonline.com/doi/abs/10.1080/17441056.2018.1460973).

[3] European Commission (2018) *Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine.* Press Release IP/18/4581. The prohibition decision is not available yet. Morris, J. (2018) The European Commission's Google Android decision takes a mistaken, ahistorical view of the smartphone market. *Truth on the Market, 23rd July 2018*; Akman, P. (2018) Will the European Commission's Google Android Decision Benefit Consumers? *Truth on the Market, 19th July 2018*; Manne, G. (2018) The EU's Google Android antitrust decision falls prey to the nirvana fallacy. *Truth on the Market, 18th July 2018*; Schrepel, T. (2018) Why the EU's Google Android Antitrust Fine May Harm R&D and Innovation. *Truth on the Market, 18th July 2018*; Auer, D. (2018) Why the Commission's Google Android decision harms competition and stifles innovation. *Truth on the Market, 18th July 2018*; Picker, R. (2018) Google Android Antitrust: Dominance Pivots and A Business Model Clash in Brussels. *Competition Policy International. CPI Antitrust Chronicle*. December 2018.

[4] European Commission (2019) *Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service*. Press Release IP/17/1784.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] See Directive 2014/104 (2014) of the European Parliament and of the Council of 26 November 2014 on "*Certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union,*" L349/1.

[10] See, generally, on leveraging theory: Langer, J. (2007) Bundling, in G. Amato & C-D. Ehlermann (Eds.) *EC Competition Law: A Critical Assessment*, pp.297-331.

[11] One qualification to this analysis can be drawn from the press release where, despite not resorting to leveraging theory, the Commission's analysis reveals the importance of Google's search engine's dominance. Indeed, after having outlined Google's market share in online search advertising intermediation, the Commission considered it useful to state that "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, where it is present with its flagship product, the Google search engine, which provides search results to consumers." Most importantly, one can deduce from the Commission's analysis that Google's practices in the online search advertising intermediation market heightened the harm to competition because "third-party websites represent an important entry point" for competitors to online search advertising, since "it is not possible for competitors in online search advertising such as Microsoft and Yahoo to sell advertising space in Google's own search engine result pages." Should such advertising space in Google's search engine result pages be made available to competitors, the restrictiveness of these practices could have been deemed less anticompetitive due to the presence of alternative entry points for competitors.

[12] *Id.*

[13] See European Commission (2010) *Guidelines on Vertical Restraints*, 2010/C 130/01.

[14] See European Commission (2009) *Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, 2009/C 45/02.

[15] *Id.* at paras. 32-46. See also case T-65/98 *Van den Bergh Foods v. Commission* [2003] ECR II-4653

[16] *Id.* para. 32 ftn.4.

[17] Google's practices are not equivalent to refusal to deal with advertisers, despite exclusivity clauses. Refusal to deal is seminally addressed by the Bronner cumulative criteria stated in case C-7/97 *Oscar Bronner GmbH Co KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG* [1998] ECR I -7791. Furthermore, refusal to deal is inappropriate in the present case because it requires the characteristics of an essential facility, not portrayed by Google. Indeed, see Advocate General Jacobs's Opinion in Bronner case, where he said, regarding the essential facility, "according to that doctrine a company which has a dominant position in the provision of facilities which are essential for the supply of goods and services in another market abuses its dominant position where, without objective

justification, its refuses access to those facilities," in Opinion delivered in Case 7/97 Oscar Bronner, quoted above, at para.34. Consequently, not only is refusal to deal inapplicable in the present case, but this type of abuse requires one to demonstrate that Google is an essential facility - another insurmountable legal and economic obstacle.

[18] See above ftn 9.

[19] However, it could be convincingly argued that Google self-favoring of advertisement in Google AdSense against rivals' adverts could be deemed not to be as having an appreciable effect on the national markets. This argument has precisely been the reason for UK Court to close the case of Google's self-favoring of Google Maps at the expense of the rival Streetmap in general search results. See England and Wales High Court (2016) *Streetmap. EU Limited and Google Inc., Google Ireland Limited, Google UK Limited*. EWHC 253 (Ch), para 97.

[20] In that regard, see the leading case of T-66/01 (2011) *Imperial Chemical Industries Ltd v. Commission*, 4 CMLR 3 where the General Court argued that "It is clear from settled case-law that an undertaking which is in a dominant position on a market and ties purchasers – even if it does so at their request – by an obligation or promise on their part to obtain all or most of their requirements exclusively from the undertaking abuses its dominant position within the meaning of Article [102 TFEU], whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate." at para.315.

[21] For a discussion on the relevance of search neutrality principle derived from non-discriminated search results, see Jamison, M. A., (2012) "Should Google Search Be Regulated as a Public Utility (http://ssrn.com/abstract=2027543); Crane, D. A. (2014), "After Search Neutrality: Drawing a Line between Promotion and Demotion," *I/S: Journal of Law and Policy for the Information. Society,* Vol. 9, No. 3, pp. 397-406, at 400; Falce, V. and M. Granieri (2015), "Searching a Rationale for Search Neutrality in the Age of Google" (http://eale.org/content/uploads/2015/08/falce-granieri-eale-2015.pdf); Geoffrey A. Manne & Joshua D. Wright, *If Search Neutrality is the Answer, What´s the Question?*, (Int´l Ctr. for Law & Econ. Antitrust & Consumer Prot. Program, White Paper Series, 2011; Langford, A. (2013), "gMonopoly: does search bias warrant antitrust or regulatory intervention?," *Indiana Law Journal*, Vol. 88 No. 4, pp. 1559-1592 ; And Mays, L. (2015), "The Consequences of Search Bias: How Application of the Essential Facilities Doctrine Remedies Google's Unrestricted Monopoly on Search in the United States and Europe," 83 *Geo. Wash. L. Rev.* 721; Ammori, M. and L. Pelican (2012), "Competitors' Proposed Remedies for Search Bias: "Neutrality" and Other Proposals," 15 No. 11 *J. Internet L.* 1.

[22] Indeed, it is the necessity of this economic transaction which should, in line with the settled case law, exempts Google from being caught under Article 102 TFEU. For, in the case Imperial Chemical Industries Ltd, the General Court added that "Obligations of this kind to obtain supplies exclusively from a particular undertaking, whether or not they are in consideration of rebates or of the granting of fidelity rebates intended to give the purchaser an incentive to obtain his supplies exclusively from the undertaking in a dominant position, are incompatible with the objective of undistorted competition within the common market, **because they are not based on an economic transaction which justifies this burden or benefit** but are designed to deprive the purchaser of or restrict its possible choices of sources of supply and to deny other producers access to the market" (emphasis added), in T-66/01 (2011) *Imperial Chemical Industries Ltd. v. Commission*, 4 CMLR 3 at para.315. Therefore, the two-sidedness of the market for online advertising and the free provision of search services on third-party websites may justify the burden (or benefit) of such economic transaction implying exclusivity (or favored placement) clauses. The necessity element of the exclusivity clauses relates to the notion of ancillary restraints capable of being justified whenever the restriction is objectively necessary for the implementation of the main operation and whenever the restraint is proportionate. The analysis of ancillary restraints under Article 101 TFEU has not been chosen by the Commission for fining Google AdSense but provides, nevertheless, for useful insight on the necessity criterion to justify the economic transaction grounded on exclusivity (or quasi-), hence to evidence efficiencies. See, on the ancillary restraints: T-112/99 (2001) *Métropole Télévision (M6) and others v. Commission*, 5 CMLR 33.

[23] Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 YALE J.L. & TECH. 188 (2006) ; Joshua D. Wright, *Sacrificing Consumer Welfare in the Search Bias Debate, Part II*, TRUTH ON THE MARKET (June 28, 2011), http://truthonthemarket.com/2011/06/28/sacrificing-consumer-welfare-in-the-search-bias-debate-part-ii/ ; Pasquale, F. (2008), "Internet Non-discrimination principles: Commercial Ethics for Carriers and Search Engines," 2008 *U. Chi. Legal F.* 263 ; Wright, J. D. (2011), "Defining and Measuring Search Bias: Some Preliminary Evidence," International Center for Law & Economics, November 2011; George Mason Law & Economics Research Paper No. 12-14 (http://ssrn.com/abstract=2004649) ; Lianos, I. and E. Motchenkova (2012), "Market Dominance and Quality of Search Results in the Search Engine Market," TILEC Discussion Paper No. 2012-036 (https://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles-2-2012). And Hazan, J. G. (2013), "Stop Being Evil: A Proposal for Unbiased Google Search," 111 Mich. L. Rev. 789. Available at: http://repository.law.umich.edu/mlr/vol111/iss5/5 ; Grimmelmann, J. (2011), "Some Skepticism about Search Neutrality," in Szoka, B. and A. Marcus. (eds) (2010) *The Next Digital Decade* 435, pp. 442- 443; Gasser, U. (2006), "Regulating Search Engines: Taking Stock and Looking Ahead," 9 *Yale J.L. & Tech.* 124; Statement of Susan A. Creighton, Partner, Wilson, Sonsini, Goodrich & Rosati (2011) The Power of Google: Serving Consumers or Threatening Competition?: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary, 112th Cong. 35-3620001, available at https://www.c-span.org/video/?458232-1/judiciary-antitrust-competition-policy-consumer-rights.

[24] The casuistic analysis of efficiency defense may very well be more helpful to Google, as the Commission is required to give evidence for all overall net loss of consumer welfare before the Court. On exclusivity rebates, see C-413/14 P (2017) *Intel Corporation v. Commission*, EU:C:2017:632.