

CLIENT ALERT

The European Commission Fines Google EUR 1.49 Billion for Practices Relating to its AdSense Online Search Advertising Intermediation Activities

March 26, 2019

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On 20 March 2019, the European Commission (the “Commission”) handed down a EUR 1.49 billion fine against the U.S. tech giant Google, under Article 102 of the Treaty on the Functioning of the European Union (“TFEU”), for abusive practices relating to its online search advertising intermediation activities, known as “AdSense for Search,” with respect to which it was found to be dominant.¹

Google discontinued the relevant practices in 2016, shortly after it had received the Commission’s Statement of Objections in this case, so this decision does not involve any complex forward-looking decisions on how Google should comply with the Commission’s findings.

This decision is part of wider antitrust scrutiny of online advertising activities in Europe, including a recent challenge by the Commission of brand-bidding restrictions in online advertising in its fining decision against the fashion retailer Guess at the end of 2017.

¹ Case 40411, *Google Search (AdSense)*, European Commission decision of 20 March 2019 (not yet published).

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Google's AdSense service and characterization of dominance in the market

Google generates revenues in different ways, largely in connection with its search engine, one of which is its so-called “AdSense for Search” service. In this context, Google essentially plays the role of an intermediary between websites that have a search function embedded (e.g. newspapers, travel websites, etc.)—which attract viewers, generate search results and display search adverts—and advertisers who wish to place search adverts on those websites. In other words, “AdSense for Search” works as an online search advertising intermediation platform, from which Google derives significant revenues.

Google was found to be dominant in this market, with a market share in the European Economic Area (“EEA”) of more than 70 percent between 2006 and 2016 (i.e. the period covered by the fine), exceeding 85 percent for most of that period. The Commission also noted that the market is characterized by high barriers to entry, in the form notably of very significant investments required to develop the required search technology and advertising platform, and the necessity to acquire a sufficiently large portfolio of publishers (i.e. websites) on the one hand and advertisers on the other.

The practices found to be abusive by the Commission

While market dominance is, in itself, not illegal under EU antitrust rules, the Commission underlines that “*dominant companies have a special responsibility not to abuse their powerful market position by restricting competition.*”² The Commission established that Google had implemented abusive practices towards the most commercially important publishers via agreements that were individually negotiated with them. In particular, the Commission found that:

- 1) starting in 2006, Google included exclusivity clauses in its contracts following which publishers were prohibited from placing any search adverts from competitors on their search results pages;
- 2) as of March 2009, Google gradually began replacing these exclusivity clauses with so-called “Premium Placement” clauses, which required publishers to reserve the most profitable space on their search results pages for Google’s adverts and requested a minimum number of Google adverts. This, according to the Commission, had the effect of preventing Google’s competitors from placing their search adverts in the most visible parts of the websites’ search results pages; and
- 3) as of March 2009, Google also included clauses requiring publishers to seek written approval from Google before making changes to the way in which any rival adverts were displayed.

² European Commission press release of 20 March 2019 (IP/19/1770).

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The Commission considered that, via these practices, namely an exclusive supply obligation followed by a so-called “relaxed exclusivity” strategy, Google “*aimed at reserving for its own search adverts the most valuable positions and at controlling competing adverts’ performance.*”³ The Commission stated that Google’s practices harmed competition and consumers, and stifled innovation as Google’s rivals (such as Microsoft and Yahoo) were unable to grow and offer alternative online search advertising intermediation services, while owners of websites had limited options to monetize the advertising space on their websites (they were forced, in practice, to rely almost exclusively on Google).

As a result, Google’s competitors were not able to compete on the merits and such practices were found to be in violation of Article 102 of the TFEU.

The EUR 1.49 billion fine imposed on Google

The fine imposed by the Commission on Google is, more precisely, of EUR 1,494,459,000, representing approximately 1.29 percent of Google’s 2008 turnover. To be recalled, the maximum fine that the Commission can impose on a company that has infringed EU antitrust rules is 10 percent of the global turnover of that company in the preceding business year.⁴

The Commission notes that this amount takes into account the long duration and gravity of the abusive practices, namely that Google’s practices covered over half the market by turnover throughout most of the period, which lasted for about 10 years (2006–2016). In that regard, the Commission underlines that Google had ceased the practices at stake a few months after the Statement of Objections it had issued in July 2016.

The Commission also specifies that the fine was computed on the basis of the value of Google’s revenue from online search advertising intermediation services in the EEA, in accordance with the Commission’s 2006 Guidelines on fines.⁵

As usual, the Commission also recalls that Google is liable to face private actions for damages, before national courts, by any company affected by such practices, pursuant to the EU Antitrust Damages Directive,⁶ as now transposed in the different Member States.

³ European Commission press release of 20 March 2019 (IP/19/1770).

⁴ Article 23(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty.

⁵ Guidelines of 1 September 2006 on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003.

⁶ Directive 2014/104/EU 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.

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The fine comes in the context of increasing pressure against Google (and other tech companies) in Europe

This fine comes in the context of previous sanctions taken by the Commission against Google.

First, the Commission had fined Google EUR 2.42 billion, in June 2017, for abusive practices relating to its comparison shopping service, its so-called “Google Shopping” service.⁷ Google was found to have unduly favored its own comparison shopping services, to the detriment of rivals, by giving them prominent placement in its Google search results.

Second, Google subsequently received a record-breaking fine of EUR 4.34 billion, in July 2018, still under Article 102 of the TFEU, for abusive practices relating to its Android mobile operating system (“OS”).⁸ The Commission had found that Google had used Android to unduly favor its own products and services, namely its “Google Search” app and “Chrome” browser app. In particular, the company required manufacturers of Android devices to pre-install those apps as a condition for licensing Google’s app store (“Google Play Store”) and granted illegal payments conditional on exclusive pre-installation of “Google Search.”

Google appealed both decisions before the General Court of the EU, with appeals still pending.⁹ Google now has two months to also appeal the *AdSense* decision.

The 2019 fine also comes in a context of active discussions among European governments on the introduction of a new tax on digital services, targeting essentially U.S. tech companies such as Google, Amazon, Facebook and Apple (sometimes referred to as the “GAFAs”). France has made the first move and is currently passing a law that would tax tech giants active in France on the basis of 3 percent of their French turnover, provided that the company would achieve a “digital” turnover of at least EUR 750 million worldwide, including at least EUR 25 million in France.

⁷ Case 39740, *Google Search (Shopping)*, European Commission decision of 27 June 2017.

⁸ Case 40099, *Google Android*, European Commission decision of 18 July 2018.

⁹ Cases T-612/17 for *Google Search (Shopping)* and T-604/18 for *Google Android*.

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