



The Google Cases Sequel of the European Commission

In three consecutive years, 2017-2019, the European Commission fined Google a total of €8.25 billion for abuse of dominant position, with its Decisions in the respective Google shopping, Google Android and Google AdSense (online advertising) cases.

A. Google AdSense 2019 (AT. 40411): Brokering of online search advertisements; anticompetitive contractual restrictions to websites

In Google AdSense, the most recent case of March 2019, the European Commission imposed €1.49 billion to Google for abuse of dominance in the market for the brokering of online search advertisements. According to the Commission's Decision, Google imposed restrictive clauses to third-party websites which prevented Google's competitors from placing their search adverts on these websites. Websites were also obliged to reserve the best spots in the website for Google. Thirdly, Google could control the appearance of competitors' advertisements.

Google acts as an intermediary between advertisers and website owners and provides search adverts to publisher websites (newspaper websites, blogs, travel sites aggregators) that want to profit from space around their search results. 'AdSense for Search' has an embedded function, which delivers search results and adverts. It functions as an online search advertising intermediation platform.

For many years, Google held a market share above 70% in the EEA market for online search advertising intermediation. Competitors could not sell advertising space in Google's own search engine results pages, thus, third-party websites were a crucial entry point for them in order to compete with Google.

In particular, the following practices were found to be restrictive:

1) Exclusive supply obligation through exclusivity clauses in contracts with Google

Google included exclusivity clauses in its contracts and publishers could not place any search adverts

from competitors on their search results pages (since 2006).

2) "Relaxed exclusivity" strategy

Since 2009, Google began replacing the exclusivity clauses with "Premium Placement" clauses which required publishers to reserve the most profitable and visible space (most clicked-on space) on their search results pages for Google's adverts. They were also requested to have a minimum number of Google adverts. Moreover, Google required websites to seek written approval before making changes to the way in which rival adverts appeared.

Therefore, Google first imposed an exclusive supply obligation, which prevented competitors from placing search adverts on the most significant, from a commercial aspect, websites. Then, it introduced a strategy aimed at reserving for its own search adverts the most valuable positions and at controlling competing adverts. According to the Commission, Google's competitors were not able to compete on the merits, either because there was an outright prohibition for them to appear on publisher websites or because Google reserved for itself the most valuable commercial space on those websites. Website owners had limited options for monetizing space on these websites and were dependent on Google.

B. Google Android 2018 (AT. 40099): Bundling and restrictions to manufacturers

In July 2018, the Commission fined Google €4.34 billion for illegal restrictions imposed to Android device manufacturers and mobile network operators in order to strengthen the dominance of Google's search engine with regard to Android mobile devices. Android mobile operating system (OS) is licensable, a feature which distinguishes it from other non-licensable operating systems exclusively used by vertically integrated developers (e.g. Apple iOS). According to the Commission's Decision, the latter are not part of the same market.

Context and dominance: Google search engine is Google's leading product, from which Google obtains the vast majority of its revenues. In terms of strategy, Google realized early on the shift from desktop PCs to mobile internet and bought the original developer of the Android mobile operating system. Today, about 80% of smart mobile devices operate with Android. The Commission found Google to be dominant in the markets for general

internet search services in all 31 EEA Member States, and also for licensable smart mobile operating systems and app stores for the Android mobile operating system, worldwide (excl. China).

According to the Decision, Google engaged in three main types of practices, with the aim of consolidating Google's dominance in general internet search:

1) *Tying of Google's search and browser apps*

Google required manufacturers to pre-install a) the 'Google Search' app and b) 'Chrome', its browser app, as a condition for licensing the Play Store (Google's app store); namely, Google offered its mobile apps and services to device manufacturers as a bundle including Google Play Store, Google Search app and Google Chrome browser. On the basis of its licensing conditions, it was impossible for manufacturers to pre-install only some of the Google apps.

According to the Decision, pre-installation can create a *status quo* bias, in the sense that users who find search and browser apps pre-installed on their devices are likely to stick to these apps.

Google argued that tying Google Search app and Chrome was necessary in order to monetize its investment in Android. The Commission rejected this argument on the basis that Google achieved high annual revenues with the Google Play Store alone, collects data valuable to Google's search business from Android devices, and would still have a significant revenue from search advertising without the restrictions.

2) *Payments conditional on exclusive pre-installation of Google Search*

According to the Commission's Decision, between 2011 and 2014, Google made payments to large manufacturers and mobile network operators on condition that they exclusively pre-installed the Google Search app across their entire portfolio of Android devices, thus significantly reducing their incentives to pre-install competing search apps. To that effect, the Commission considered the conditions under which the incentives were granted, their amount, the share of the market covered by these agreements and their duration.

3) *Obstructing development and distribution of competing operating systems*

Google was found to have prevented manufacturers wishing to pre-install Google apps from selling any smart mobile device which run on alternative versions of Android, not approved by Google (so-called "Android forks"). The European Commission found that since 2011, when Google became dominant, manufacturers were bound not to develop or sell devices running on an Android fork in order to be able to pre-install on their devices Google's proprietary apps such as the Play Store and Google Search. The Commission found evidence that this conduct prevented a number of large manufacturers from developing and selling devices based on Amazon's Android fork called "Fire OS"; hence, an important channel for competitors to deliver their apps and services was foreclosed. Google's conduct was found to have an impact on users, denying them access to mobile devices based on alternative versions of the Android operating system. According to the Commission, these restrictions of Android forks were not necessary to ensure that Android devices using Google proprietary apps and services were compliant with Google's technical requirements.

C. Google Search (Shopping) 2017 (AT. 39740): Favorable positioning and display of own comparison shopping service

In June 2017, the Commission fined Google €2.42 billion for abusing its dominance as a search engine by giving an illegal advantage to Google's own comparison shopping service.

Almost 90% of Google's revenues are generated from adverts, *inter alia* those displayed to consumers in response to a search query. In 2004 Google entered the market of comparison shopping in Europe, with what is now called "Google Shopping". It allows consumers to compare products and prices online and find deals from online retailers of all types (shops, platforms and other re-sellers). From 2008, Google began to implement a strategy to promote its comparison shopping service. However, in this context, according to the European Commission decision:

1) Google systematically provided prominent placement to its own comparison shopping service

According to the Decision, Google positioned and displayed more favorably (with enhanced features, at or near the top of the search results) in its general search results pages, its own comparison

shopping service compared to competing comparison shopping services, when a consumer entered a query into the Google search engine.

2) Google demoted competing comparison shopping services in its search results on the basis of algorithmic criteria

Competing comparison shopping services appear in Google's search results on the basis of Google's generic search algorithms (Google's own comparison shopping service was not subjected to said algorithms). Google included a number of criteria in these algorithms, as a result of which rival comparison shopping services were downgraded. According to evidence of the case, even the highest ranked rival service appears on average on page four of Google's search results.

Consequently, Google's comparison shopping service is much more visible to consumers, and thus clicked on. According to the Decision, Google gave its own comparison shopping service a significant advantage and reduced competition in comparison shopping markets. These practices allowed Google's comparison shopping service to make significant gains in traffic, on a lasting basis, to the detriment of its competitors and European consumers. Traffic to competing comparison shopping services dropped significantly. Generic search traffic from Google's general search results pages represents a large proportion of competing comparison shopping services' traffic and cannot easily be replaced.

Inter alia, the Decision analyzed the actual evolution of traffic to competing comparison shopping services, influence of the ranking of generic search results on the click-through rates, and the evolution of the visibility of competing comparison shopping services.

The European Commission ordered Google to comply with the principle of equal treatment to rival comparison shopping services and its own service. In particular, Google has to apply the same processes and methods to position and display competing comparison shopping services in Google's search results pages as it applies for its own comparison shopping service.

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