Summary of Commission Decision
of 20 March 2019
relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union
and Article 54 of the EEA Agreement
(Case AT.40411 – Google Search (AdSense))
(notified under document number C(2019) 2173)
(Only the English text is authentic)
(2020/C 369/04)

On 20 March 2019, the Commission adopted a decision relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement. In accordance with the provisions of Article 30 of Council Regulation (EC) No 1/2003 (1), the Commission herewith publishes the names of the parties and the main content of the decision, including any penalties imposed, having regard to the legitimate interest of undertakings in the protection of their business secrets.

1. INTRODUCTION

(1) The Decision establishes that inclusion of the Exclusivity Clause, the Premium Placement and Minimum Google Ads Clause and the Authorising Equivalent Ads Clause, by Google Inc. (“Google”) in its Google Services Agreements (“GSA”) concluded with its large customers of online search advertising intermediation services (“Direct Partners”) infringed Article 102 TFEU and Article 54 of the EEA Agreement.

(2) The Decision orders Google to stop applying the abovementioned clauses to the extent that it has not already done so and to abstain from implementing any measure that has an equivalent object or effect. The Decision imposes a fine in relation to the abusive conduct upon Google Inc. with respect to the period 1 January 2006 to 6 September 2016 and upon Alphabet Inc. (“Alphabet”) with respect to the period 2 October 2015 to 6 September 2016.

2. MARKET DEFINITION AND DOMINANCE

(3) The Decision concludes that the relevant product markets for the purpose of this case are the market for online search advertising and the market for online search advertising intermediation.

(4) The Decision concludes that the provision of online search advertising constitutes a distinct relevant product market because it is not substitutable with: (i) offline advertising; (ii) online non-search advertising and (iii) paid specialised search results. The Decision concludes that, given the linguistic and cultural specificities that inform the conduct of operators in this market, the geographic scope of this market is national.

(5) The Decision concludes that the market for online search advertising intermediation constitutes a distinct relevant product market because there is limited substitutability with: (i) direct online sales; and (ii) intermediation services for online non-search ads. The Decision concludes that the market for online search advertising intermediation is EEA-wide in scope, given that operators in this market are able to adapt their services according to the linguistic and cultural specificities of the EU Member State or EEA Agreement Contracting Party in which they are operating.

Google’s dominant position in the national markets for online search advertising

(6) The Decision concludes that Google held a dominant position in at least the following national markets for online search advertising in the EEA and during at least the following periods:

— between 2006 and 2016 in Austria, Belgium, Cyprus, Denmark, Estonia, France, Germany, Greece, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Spain and the United Kingdom;
— between 2007 and 2016 in Norway and Poland;
— between 2008 and 2016 in Hungary, Romania and Sweden;
— between 2009 and 2016 in Finland and Slovenia;
— between 2010 and 2016 in Bulgaria and Slovakia;
— between 2011 and 2016 in Czechia; and
— between 1 July 2013 and 2016 in Croatia.

(7) This conclusion is based on the market shares of Google and competing online search advertising providers, and evidence demonstrating that the national markets for online search advertising in the EEA are characterised by significant barriers to entry and expansion. Such barriers to entry and expansion include the substantial investments necessary to enter the market, the existence of network effects and the lack of countervailing buyer power.

Google’s dominant position in the EEA-wide market for online search advertising intermediation

(8) The Decision concludes that Google held a dominant position in the EEA-wide market for online search advertising intermediation between at least 2006 and 2016.

(9) This conclusion is based on the market shares of Google and competing online search advertising intermediaries, and evidence demonstrating that the EEA-wide market for online search advertising intermediation is characterised by high barriers to entry and expansion. Such barriers to entry and expansion include the substantial investments necessary to enter the market, the existence of network effects and the lack of countervailing buyer power.

3. ABUSE OF A DOMINANT POSITION

(10) The Decision concludes that from 1 January 2006 to 6 September 2016 Google infringed Article 102 TFEU and Article 54 of the EEA Agreement by engaging in three distinct types of conduct, which together amounted to a single and continuous infringement.

(11) First, the Decision concludes that Google abused its dominant position in the EEA-wide market for online search advertising intermediation by including the Exclusivity Clause in GSAs with Direct Partners whose entire advertising inventory was covered. That clause required those Direct Partners to source all or most of their search ads requirements from Google.

(12) Second, the Decision concludes that Google abused its dominant position in the EEA-wide market for online search advertising intermediation by including the Premium Placement and Minimum Google Ads Clause in GSAs with Direct Partners. That clause required Direct Partners to reserve the most prominent space on their search results pages covered by the relevant GSA for a minimum number of Google search ads.

(13) Third, the Decision concludes that Google abused its dominant position in the EEA-wide market for online search advertising intermediation by including the Authorising Equivalent Ads Clause in GSAs with Direct Partners. That clause required Direct Partners to seek Google’s approval before making changes to the display of competing search ads on websites covered by the relevant GSA.
Abuse of Google’s dominant position: Exclusivity Clause

(14) The Decision concludes that, between 1 January 2006 and 31 March 2016, the inclusion of the Exclusivity Clause in GSAs with Direct Partners whose entire advertising inventory was covered constituted an abuse of Google’s dominant position in the EEA-wide market for online search advertising intermediation.

(15) First, the Decision concludes that the inclusion of the Exclusivity Clause in GSAs with Direct Partners whose entire advertising inventory was covered constituted an exclusive supply obligation. The Decision explains that the Exclusivity Clause required Direct Partners to source all of their search ads requirements from Google for the websites included in the GSAs and that Direct Partners could not remove websites from the scope of a GSA without Google's consent.

(16) Second, the Decision concludes that the inclusion of the Exclusivity Clause in GSAs with Direct Partners whose entire advertising inventory was covered was capable of restricting competition, because it: (i) deterred those Direct Partners from sourcing competing search ads; (ii) prevented access by competing providers of online search advertising intermediation services to a significant part of the EEA-wide market for online search advertising intermediation; (iii) may have deterred innovation; (iv) helped Google to maintain and strengthen its dominant position in each national market for online search advertising in the EEA, except Portugal; and (v) may have harmed consumers.

(17) Third, the Decision concludes that Google did not demonstrate that the inclusion of the Exclusivity Clause in GSAs with Direct Partners whose entire advertising inventory was covered was objectively justified or that its exclusionary effect was counterbalanced, or outweighed even, by advantages in terms of efficiency gains that also benefit consumers. In particular, the Decision concludes that Google did not provide sufficient evidence that the inclusion of the Exclusivity Clause was necessary to support its customer-specific investments in those Direct Partners and to justify the investment necessary to run, maintain and improve the quality of its online search advertising intermediation platform.

Abuse of Google’s dominant position: Premium Placement and Minimum Google Ads Clause

(18) The Decision concludes that between 31 March 2009 and 6 September 2016 the inclusion of the Premium Placement and Minimum Google Ads Clause in GSAs with Direct Partners constituted an abuse of Google’s dominant position in the EEA-wide market for online search advertising intermediation.

(19) First, the Decision concludes that the inclusion of the Premium Placement and Minimum Google Ads Clause in GSAs with Direct Partners required Direct Partners to reserve the most prominent and therefore most profitable space on their search results pages for Google search ads, and to refrain from placing competing search ads in a position immediately adjacent to or above Google search ads. The Decision explains that the profitability of a search ad depends upon its positioning on a search results page, with the space above the organic results constituting the most profitable position, because consumers are more likely to click ads positioned above the organic results.

(20) Second, the Decision concludes that the inclusion of the Premium Placement and Minimum Google Ads Clause in GSAs with Direct Partners obliged Direct Partners to fill the most prominent space on their search results pages with a minimum number of Google search ads. Consequently, Direct Partners who wanted to source only a limited number of search ads were obliged to source all of them from Google.

(21) Third, the Decision concludes that the inclusion of the Premium Placement and Minimum Google Ads Clause in GSAs with Direct Partners was capable of restricting competition because it: (i) deterred Direct Partners from sourcing competing search ads; (ii) prevented access by competing providers of online search advertising intermediation to a significant part of the EEA-wide market for online search advertising intermediation; (iii) may have deterred innovation; (iv) helped Google to maintain and strengthen its dominant position in each national market for online search advertising in the EEA, except Portugal; and (v) may have harmed consumers.
Fourth, the Decision concludes that Google did not demonstrate that the inclusion of the Premium Placement and Minimum Google Ads Clause in GSAs with Direct Partners was objectively justified or that its exclusionary effect was counterbalanced, or outweighed even, by advantages in terms of efficiency gains that also benefit consumers. In particular, the Decision concludes that Google did not provide sufficient evidence that the inclusion of the Premium Placement and Minimum Google Ads Clause in GSAs with Direct Partners was necessary to justify its customer-specific investments in Direct Partners and to maintain the relevance of Google's search ads.

Abuse of Google's dominant position: the Authorising Equivalent Ads Clause

The Decision concludes that between 31 March 2009 and 6 September 2016 the inclusion of the Authorising Equivalent Ads Clause in GSAs with Direct Partners constituted an abuse of Google's dominant position in the EEA-wide market for online search advertising intermediation.

First, the Decision concludes that the inclusion of the Authorising Equivalent Ads Clause in GSAs with Direct Partners required Direct Partners to seek Google's approval before making any change to the display of competing search ads.

Second, the Decision concludes that the inclusion of the Authorising Equivalent Ads Clause in GSAs with Direct Partners was capable of restricting competition, because it: (i) deterred Direct Partners from sourcing competing search ads; (ii) prevented Google's competitors from having access to a significant part of the EEA-wide market for online search advertising intermediation; (iii) may have deterred innovation; (iv) helped Google to maintain its dominant position; and (v) may have harmed consumers.

Third, the Decision concludes that Google did not demonstrate that the inclusion of the Authorising Equivalent Ads Clause in GSAs with Direct Partners was objectively justified or that its exclusionary effect was counterbalanced, or outweighed even, by advantages in terms of efficiency gains that also benefit consumers. In particular, the Decision concludes that Google did not provide sufficient evidence that Direct Partners should be responsible for competing ads' compliance with Google's quality standards in the first place, and did not provide sufficient evidence that the Authorising Equivalent Ads Clause was necessary to avoid deceptive practices on sites that also displayed Google search ads.

Effect on Trade

The Decision concludes that Google's conduct had an appreciable effect on trade between EU Member States and between the Contracting Parties to the EEA Agreement.

Duration

The Decision concludes that the duration of the single and continuous infringement was 10 years, eight months and six days. As regards Google, the starting date of the single and continuous infringement was 1 January 2006 and its end date was 6 September 2016. As regards Alphabet, the starting date of the single and continuous infringement was 2 October 2015 and its end date was 6 September 2016.

Remedies

The Decision concludes that Google and Alphabet must bring to an end the conduct to the extent that it has not already done so, and refrain from any act or conduct which would have the same or similar object or effect.

Consequently, Google and Alphabet cannot: (i) make the sourcing of Google search ads conditional on written or unwritten requirements that require Direct Partners to reserve the most prominent space on their search results pages covered by the relevant GSA for Google search ads; (ii) make the sourcing of Google search ads conditional on written or unwritten requirements that require Direct Partners to fill the most prominent space on their search
results pages covered by the relevant GSA with a minimum number of Google search ads; (iii) make the signing of a GSA conditional on a Direct Partner’s acceptance of written or unwritten conditions that require Direct Partners to seek Google’s approval before making any change to the display of competing search ads; and (iv) punish or threaten Direct Partners that decide to source competing search ads.

4. FINE

(31) The fine imposed on Alphabet Inc. and Google Inc. for the abusive conduct is calculated on the basis of the principles laid out in the 2006 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003. The Decision concludes that the final amount of the fine imposed on Alphabet Inc. and Google Inc. is: EUR 1,494,459,000, of which EUR 130,135,475 jointly and severally with Alphabet Inc.