

**Final Report of the Hearing Officer <sup>(1)</sup>**  
**Google Search (AdSense)**  
**(AT.40411)**  
(2020/C 369/03)

## Introduction

- (1) The draft decision concerns conduct of the undertaking that includes Google LLC (formerly Google Inc. <sup>(2)</sup>) and Alphabet Inc. <sup>(3)</sup> (together or interchangeably as required by the context, 'Google') with regard to certain clauses in its agreements with relevant third party websites (publishers) requiring them (i) to source all or most of their search advertising ('search ads') requirements from Google; (ii) to reserve the most prominent space on their search results pages for a minimum number of search ads from Google; and (iii) to seek Google's approval before making changes to the display of competing search ads.
- (2) This case arose out of several complaints <sup>(4)</sup>. The Commission initially proceeded by means of the procedure under Article 9 of Council Regulation (EC) No 1/2003 <sup>(5)</sup>, before reverting to the procedure under Article 7 of that regulation <sup>(6)</sup>.

## The Statement of Objections

- (3) On 14 July 2016, the Commission addressed a statement of objections (the 'SO') to Google Inc. and Alphabet Inc. setting out its preliminary conclusions that the clauses described in paragraph (1) above constitute separate infringements of Article 102 TFEU and Article 54 of the EEA Agreement and also constitute a single and continuous infringement of Article 102 TFEU and Article 54 of the EEA Agreement <sup>(7)</sup>.
- (4) Google obtained access to the bulk of the accessible investigation file on 26 July 2016 by means of an encrypted CD-ROM/DVD <sup>(8)</sup>. The Directorate-General for Competition ('DG Competition') organised a data room procedure in September 2016 for certain sensitive information that the Commission had obtained from third parties. Google addressed a series of requests to me under Article 7(1) of Decision 2011/695/EU seeking further access to documents which had been provided to Google in redacted form. In this context, Google indicated its readiness to accept restricted disclosure, where necessary, by means of data room procedures or confidentiality rings <sup>(9)</sup>. Following my intervention, less redacted or full versions of many of these were disclosed, in some cases by means of a data room procedure or confidentiality ring procedures. In relation to a limited number of the documents requested by Google, I rejected Google's request considering that access to the redacted parts of the documents was not necessary for the purposes of the effective exercise of Google's right to be heard.

<sup>(1)</sup> Pursuant to Articles 16 and 17 of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings (OJ L 275, 20.10.2011, p. 29) ('Decision 2011/695/EU').

<sup>(2)</sup> In September 2017, Google Inc. changed its legal form and became Google LLC.

<sup>(3)</sup> A holding company that was created as part of a reorganisation of the undertaking, and which wholly owns Google LLC (formerly Google Inc.) since 2 October 2015.

<sup>(4)</sup> A full list of the relevant complainants can be seen at paragraph (6) below.

<sup>(5)</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

<sup>(6)</sup> On 30 November 2010, the Commission had already initiated proceedings against Google Inc. pursuant to Article 2(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (OJ L 123, 27.4.2004, p. 18) ('Regulation (EC) No 773/2004'), in relation to a number of practices under case number AT.39740, from which the current case was split.

<sup>(7)</sup> Simultaneously, the Commission also initiated proceedings against Alphabet Inc.

<sup>(8)</sup> Access-to-file in respect of Case AT.39740 had been previously provided.

<sup>(9)</sup> Google subsequently withdrew its requests for approximately a quarter of the relevant documents.

- (5) Google responded to the SO on 3 November 2016 <sup>(10)</sup>. It did not request an oral hearing.

### Participation of Complainants and Interested Third Persons

- (6) The Commission received complaints relevant to the present proceedings from Ciao GmbH ('Ciao') <sup>(11)</sup>, Microsoft Corporation ('Microsoft'), Expedia Inc. ('Expedia'), the Initiative for a Competitive Online Marketplace ('ICOMP'), Tradecomet.com Ltd and its parent company Tradecomet LLC ('TradeComet'), Deutsche Telekom AG ('Deutsche Telekom') and Kelkoo SAS ('Kelkoo') <sup>(12)</sup>. Google provided comments on each of these complaints. In accordance with Article 6(1) of Regulation (EC) No 773/2004, the complainants involved have been provided with a non-confidential version of the SO.
- (7) I admitted to the proceedings two interested third persons that demonstrated a sufficient interest for the purposes of Article 27(3) of Regulation (EC) No 1/2003, Article 13(1) of Regulation (EC) No 773/2004, and Article 5(1), (2) of Decision 2011/695/EU <sup>(13)</sup>. DG Competition informed them, in accordance with Article 13(1) of Regulation (EC) No 773/2004, of the nature and subject matter of the proceedings, giving them the opportunity to make their views known in writing.

### The Letters of Facts

- (8) On 6 June 2017, the Commission addressed a first 'letter of facts' to Google (the 'First Letter of Facts'). On that date, access to the post-SO file was provided to Google by means of an encrypted CD. A data room procedure was organised in June 2017.
- (9) On 3 July 2017, Google replied to the First Letter of Facts.
- (10) On 11 December 2017, the Commission addressed another letter of facts to Google (the 'Second Letter of Facts'). On the same day, Google was granted further access to file in relation to all documents that the Commission had obtained after the First Letter of Facts until the date of the Second Letter of Facts.
- (11) On 15 January 2018, Google replied to the Second Letter of Facts.

### Notes of Meetings and Other Procedural Remarks

- (12) On receipt of, respectively, the SO and the First Letter of Facts, as well as following the Court of Justice judgment in *Intel v Commission* <sup>(14)</sup>, Google also sought access to notes of meetings with complainants or other third parties that were fuller than those to which it already had access.
- (13) I rejected Google's related first and second requests to me under application of Article 7(1) of Decision 2011/695/EU as, where no more detailed notes existed on the Commission file, there was nothing to be the subject of an access-to-file request.
- (14) Prior to Google's third request for notes of meetings to me, DG Competition had provided, in March 2018 after the above-mentioned judgment in *Intel v Commission*, a number of revised minutes of meetings and calls between DG Competition and third parties, explaining that they had been prepared following contacts by DG Competition with third parties involved. Google complained to me that this response was unsatisfactory. To the extent that Google's request amounted to a request for further access to the file under Article 7(1) of Decision 2011/695/EU as regards

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<sup>(10)</sup> Google stated in the cover letter to its response that it reserved the right to supplement this response following the resolution of the pending (and forthcoming) requests to me under Article 7(1) of Decision 2011/695/EU. Google supplemented its response by letter dated 6 March 2017.

<sup>(11)</sup> Ciao's complaint was reallocated to the Commission from the Bundeskartellamt (Germany) in accordance with the Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.4.2004, p. 43.

<sup>(12)</sup> The complaints from Microsoft and Ciao were withdrawn on 21 April 2016.

<sup>(13)</sup> DG Competition wrote to the interested third persons in Case AT.39740 informing them that they would not be automatically admitted to the proceedings in this case and, if they desired to be admitted, would have to apply showing a sufficient interest. One applicant has not been admitted following the lack of response to an invitation to provide sufficient clarity on its interest in the proceedings in order to allow me to evaluate its application.

<sup>(14)</sup> Judgment of 6 September 2017, C-413/14 P, EU:C:2017:632.

the remaining redactions in the revised notes provided by DG Competition, I arranged for DG Competition to provide access to less redacted versions of two notes of calls <sup>(15)</sup>. Concerning the remaining redactions, I was satisfied that these should be maintained. To the extent that Google's request could be interpreted as seeking further access to other documents in the Commission's possession, I considered such request devoid of purpose after verification with DG Competition <sup>(16)</sup>. Finally, in relation to the question of whether the material provided with DG Competition's response satisfied, to the extent applicable, the requirements of Article 19 of Regulation (EC) No 1/2003 as referred to in the Court of Justice ruling in *Intel v Commission*, I did not have competence to substitute by decision, on behalf of the Commission, another assessment for that of DG Competition. In any event, on the basis of the information available and submissions made to me regarding the provision of records of meetings, it does not appear that there has been a breach of Google's rights of defence tainting the legality of the draft decision.

- (15) Google also alleged that the Commission had breached its rights of defence by preventing it from verifying the market coverage calculations contained in the Second Letter of Facts, failing to adopt a supplementary statement of objections, and failing to provide adequate reasons as to why the Commission reverted to the procedure under Article 7 of Regulation (EC) No 1/2003 in 2014, following earlier attempts to adopt a commitments decision under Article 9 of Regulation (EC) No 1/2003. The draft decision rejects these claims. I have not received any direct complaints from Google as regards these issues, and have no indications that Google's rights of defence have been breached in this regard.

### **The Draft Decision**

- (16) Pursuant to Article 16(1) of Decision 2011/695/EU, I have reviewed the draft decision in order to consider whether the draft decision deals only with objections in respect of which the parties have been afforded the opportunity of making known their views. My conclusion is that it does.
- (17) Overall, I consider that the effective exercise of procedural rights has been respected throughout the procedure.

Brussels, 19 March 2019.

Joos STRAGIER

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<sup>(15)</sup> Google confirmed in an e-mail to DG Competition that it did not plan to make any further submissions with respect to the materials received, since the relevant issues were already covered by Google's prior submissions.

<sup>(16)</sup> DG Competition had confirmed to me that there were no other (non-confidential versions of) documents in the Commission's possession that contained any account of meetings or calls that were conducted for the purpose of collecting information relating to the subject matter of the investigation in this case.