DRAFT

EXAMPLES OF COMPETITION ISSUES FACED BY NEWSPAPER AND MAGAZINE PUBLISHERS IN REGARD OF DOMINANT DIGITAL MEGA-PLATFORMS
Increasingly, market dominant platforms decide if, where and how citizens can use and access journalistic and editorial offerings. Network effects, automated and data-based learning effects and high switching costs have led to the emergence of market dominant, almost monopolistic platforms, that have entrenched their position on the market. This is the case, for instance, for search engines, search tools, advertising services, video-sharing, browsers and mobile operating systems (which are dominated by Google and Apple), but also social networks and instant messaging services (dominated by Facebook). These three companies have now secured permanent and exclusive access to a vast majority of citizens by establishing and enjoying quasi-monopolies in key areas of our digital daily lives.

If and when such market dominant platforms also provide editorial media services, host and curate them, they wield considerable power over citizens’ opinions and the formation of opinion in the European Union. In fact, in the end, these platforms decide which media or content is accessible and under which conditions. They determine, if and how the selected media or content is available, visible, findable and accessible.

In this situation, it is absolutely necessary to safeguard the freedom of journalistic and editorial media against market dominant platforms, already before any proven harmful market abuse or abuse of dominant position has been determined by competent competition regulators.

Saturation and absorption of markets by platforms represent a significant risk for financing professional quality journalism. Network effects and user engagement provide access to massive amounts of bundled and concise user data, which in return gives these market dominant companies relevant and obvious advantages – especially in the advertising market. One of the consequences is an enormous gap in the creation of value with professional digital journalism.

The following non-exhaustive list of examples illustrate the competitive issues faced by newspaper and magazine publishers in regard of dominant digital mega-platforms.

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Google Search (Shopping)

(Case AT.39740 — Google Search (Shopping))

In early 2010, the German Newspaper and Digital Publishers’ Association (BDZV), formerly the German Newspaper Publishers’ Association, and the Association of German Magazine Publishers (VDZ) filed complaints against Google Inc. (‘Google’) before the German Federal Cartel Office (Bundeskartellamt) on the issues of “Fair Search” and “Fair Share”. The “Fair Share” complaint pertained to Google’s commercial use of publishers’ journalistic and editorial content without any remuneration. In their “Fair Search” complaint, German publishers accused Google of unfavourable treatment of their services in Google’s search engine coupled with an alleged preferential placement of Google’s own services.

Following the German publisher organisations’ complaints before their national competition authority and complaints by search service providers about unfavourable treatment of their services in Google's unpaid and sponsored search results, in November 2010, the European Commission decided to open an antitrust investigation into allegations that Google Inc. had abused a dominant position in online search in violation of European Union rules. The European Commission intended to investigate whether Google had abused a dominant market position in online search by allegedly lowering the ranking of unpaid search results of competing services which are specialised in providing users with specific online content such as price comparisons (so-called vertical search services) and by according preferential placement to the results of its own vertical search services in order to shut out competing services.

Description

In Europe, Google holds a de facto monopoly in the market for general search – its market share is mostly well above 90%. Next to its general search, in 2002, Google launched its own CSS under the name “Froogle”, later renamed to “Google Product Search” and “Google Shopping”. It was initially set up as a standalone website, but as such never gained any substantial traffic. Quotes from Google executives show that they were aware that “Froogle simply doesn't work” and “[Pages from Froogle are] unlikely to appear high in the search results.” As a reaction, Google decided to gradually introduce a second CSS called “Product Universal”, (later renamed to “Shopping Universal”, today “Shopping Unit”) and put it on top of its Search Results Page (SERP) regardless of its usefulness to users and without applying any of the standards imposed on rival CSSs for ranking high on Google’s SERP. This on-SERP CSS was powered using the offers obtained by Google Shopping. In addition, Google demoted rival CSSs in the generic (unpaid, i.e., ‘real’ and allegedly unbiased) search results, making them less visible to the user and hence less visited by them.

Results on top of the SERP attract most attention and hence have the highest potential for profits. In the Shopping Unit even more so as it displays images, prices and other concrete product information in a way which allows for product comparison - unlike any other search result (see illustrations below):

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1 Decision, para. 327.
2 Decision, para. 490.
3 Decision, para. 381.
5 Decision, para. 343.
6 Decision, para. 349.
“Google Search” results page for a product-related search before introduction of the “Google Shopping” service

“Google Search” results page after introduction of the “Google Shopping” service

By virtue of these changes, Google has shifted consumer attention and traffic to its own CSSs and over time secured the biggest share in the CSS market. Until December 2016, rival CSS had lost up to 99% of traffic to Google, as illustrated by the graphs below.7

7 Decision, graphs 45-52.
Hence, Google abuses its monopoly in one market (general search) to promote its offering in another market (comparison shopping) – and in some countries has managed to successfully exclude rival CSSs almost entirely from getting search traffic from Google.

**Prohibition Decision**

On 27 June 2017, the Commission adopted a Decision (Case AT.39740 — Google Search (Shopping)). The Decision establishes that the more favourable positioning and display by Google, in its general search results pages, of its own comparison-shopping service compared to competing comparison-shopping services, infringes Article 102 TFEU and Article 54 of the EEA Agreement. The Decision ordered Google and its mother company Alphabet Inc. (‘Alphabet’) to immediately bring the infringements to an end and imposed a fine on Google for the abusive conduct in the period from 1 January 2008 to date.

The Decision established that Google has abused its market dominance as a search engine by giving an illegal advantage to at least one other Google product, its comparison-shopping service. Google has systematically given prominent placement to its own comparison-shopping service and has demoted rival comparison-shopping services in its search results. The EC decided that Google infringed Article 102 “by positioning and displaying more favourably, [its] own CSS” and has to treat “competing CSS no less favourably than its own CSS within general search results pages.”

The Decision defines a CSS as “specialised search services that: (i) allow users to search for products and compare their prices and characteristics across the offers of several different online retailers (also referred to as online merchants) and merchant platforms (also referred to as online marketplaces); and (ii) provide links that lead (directly or via one or more successive intermediary

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8 Decision para. 642.
9 Decision, para. 699.
pages) to the websites of such online retailers or merchant platforms.” The Shopping Unit fulfills these criteria as they contain several offers from various merchants matching the search query, allowing the user to compare products and prices. In the Decision, the EC did not have to decide whether the powering of Shopping Units constitutes a CSS (in absence of any corresponding standalone website). However, the entire reasoning of the Decision hardly allows any other conclusion as it cannot make any difference whether the comparison happens on a standalone website or within a smaller interface such as Shopping Units.

The Commission Decision required Google to stop its illegal conduct within 90 days of the Decision and refrain from any measure that has the same or an equivalent object or effect. In particular, the Decision orders Google to comply with the simple principle of giving equal treatment to rival comparison shopping services and its own service: Google has to apply the same processes and methods to position and display rival comparison shopping services in Google’s search results pages as it gives to its own comparison shopping service.

Google since devised a number of remedies. However, doubts as to the effectiveness of the remedy remain. Arguably, the changes do currently not give sufficient prominence or detail to rival search results.

Effectiveness of the Compliance Mechanisms

In reaction to the Decision, Google created an entity called Google Shopping Europe11 (“GSE”) that runs the standalone Google Shopping website and implemented an auction mechanism by which GSE has to bid for displaying product offers (Product Listing Ads, “PLAs”) in Google’s Shopping Unit. It has then allowed other CSSs to also bid for PLAs, which allegedly constitutes equal treatment as GSE and rival CSSs are participating in the same auction. Rival CSSs, however, get less than 2% of Shopping Unit traffic through this Compliance Mechanism (“CM”) as the users are referred from the Shopping Unit directly to the merchants’ websites. Only a very small fraction (less than 2%) of users land on rival CSSs websites by clicking on a “by <CSS>” link. Furthermore, their demotions in the SERPs have not improved. Altogether, Google is effectively allowing rival CSSs to give their data in return for a minority share of the revenue.

As of today, Google’s compliance mechanism (CM) has not led to any substantial improvement as compared to the situation before the Decision. Google continues to divert traffic from rival Comparison-Shopping Services (CSS) to Google’s on-SERP-CSSs. The EC has not yet initiated any proceedings against Google for non-compliance with the Decision. Instead, the EC announced to continue monitoring the CM.

CSSs serve consumers by allowing them to discover and compare products from multiple online shops at one glance. They then refer informed users to the respective shops to buy the products. CSSs can only do that, however, if consumers visit their websites. But Google’s misconduct - also under the CM - prevents that. This has already led to the bankruptcy or marginalization of formerly successful players. If the CM prevails, rival CSSs will continue to exit the business, giving Google the chance to reap monopoly rents from the e-commerce industry.

10 Decision, para. 191.
As a reaction to the Prohibition Decision, Google carved out GSE as a standalone legal entity (100% Google-owned), which runs the Google Shopping standalone website. It also allowed rival CSSs to feed offers into the Shopping Unit and claims that this constitutes “equal treatment” as rival CSSs are now treated equally to GSE. This, however, does not comply with the EC’s Decision. There are plenty of aspects proving that, most importantly: (1) The Shopping Unit is a CSS in itself and must hence be subject to the prohibition of self-favouring. (2) the CM does not solve the problem of increasing traffic to Google’s own CSSs at the expense of competitors.

At (1): The CM ignores the fact that the Shopping Unit is a CSS in itself and that for equal treatment, rival CSSs would have to be treated equally to both of Google’s CSSs - the Google Shopping website and the Shopping Unit - regarding their role as a CSS. Hence, either rival CSSs also get to power and compile similar boxes on top of the SERP or Google’s CSSs have to compete for rankings like rival CSS – without being put on top of the SERP regardless of merit. The CM, however, treats rival CSSs only equally to Google Shopping with regard to its role as a provider of offers - within the Shopping Unit.

At (2): The Decision found that Google’s conduct does relevant harm to competition as it “[i] decreases traffic from Google’s general search results pages to [CSSs] and [ii] increases traffic from Google’s general search results pages to Google’s own [CSS]”.12

Regarding [i], the Decision refers to the traffic from Google’s SERP to the website of a CSS. It is not concerned about traffic to the webpages of merchant customers of CSSs. Under the CM, however, traffic to rival CSSs makes up less than 2% (see above), which can hardly remedy the abuse.

Regarding [ii], the Decision defines this traffic as “the sum of the clicks on: (i) both links that lead the user to the standalone Google Shopping website and (ii) links that lead the user directly to the website of one of the merchants whose offer is displayed in the Shopping Unit”.13 This follows the logic that Shopping Units are a CSS, according to the Decision’s definition.14 Accordingly, the Decision found that “in six of the thirteen EEA countries in which the Conduct takes place, Google Shopping existed only in the form of the Shopping Unit without an associated standalone website”.15 Hence, for compliance, Google’s CM would either have to remove Google’s Shopping Unit or allow rival CSSs to power and display similar boxes on the SERP. In addition, demotions in generic search need to be reverted.

As a result, under the CM, rival CSSs can only feed product offers into the Shopping Unit by entering an auction for having them displayed in it.16 Clicking on such a result takes the consumer directly to the shop. The only exception is the “by <CSS>” link below the offer, which gets hardly any attention nor clicks. As a result, Google retains ~99% of all user interaction before the shop visit and ~87% of the profits from referring a user (see the following real-life example based on data from the EC and LadenZeile.de, an OIP member):

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12 Decision, page 123.
13 Decision, footnote 603, 604 and para. 614. See also para. 31 defining Google’ CSS as “both the standalone website and the Universal”.
14 Decision para 191.
15 Decision, para. 422.
16 Depending on the bid, the PLA gets shown in the Shopping Unit or not. If shown and clicked, rival CSSs charge the corresponding shop a fee but pass on the majority to Google (71% in the real-life example shown). Google does not pay anything for its listings the Shopping Unit, since it is both auctioneer and bidder.
EC officials have been cited saying “the remedy is working” and “we don’t have a non-compliance issue as it is now.” This finding of the EC is based on the observation that 70% of Shopping Units display at least one offer from a rival CSS and that 40% of clicks go to such offers. This assessment, however, ignores the fact that fewer than 1.4% of the clicks in the Shopping Unit go directly to the merchant and bypass rival CSSs; see example above. Hence, only 1.4% of clicks go to rival CSSs, not 40%.

The Decision does not supply such proof because it is not about a denial of access but about self-favouring by a monopolist. Hence, a lack of an objection against the CM strengthens Google’s appeal: Would the EC accept an ‘access remedy’ to end the abuse, the abuse must have been about access to the Google Shopping Unit. If the ECJ follows this argument, the EC will lose the case. Vice versa, objecting to the CM would strengthen the EC’s case.

Lately, however, the EC recognized this shortcoming of the CM and uttered dissatisfaction about the fact that “we may see a pickup when it comes to clicks for merchants. But we still do not see much traffic for viable competitors when it comes to shopping comparison.”

Implications for competitors: Rival CSSs are being systematically deprived of traffic from Google by means of the Shopping Unit and demotion of their websites in the generic search results. This leads to rival CSSs exiting the business or at least being marginalized, as examples from markets show, where Google is most aggressive:

In the UK (99% of traffic diverted to Google[22]), there is no CSS of considerable size left. Today’s biggest active price comparison site (“pricespy.co.uk”) showed less than three million visits in May 2020 – very little for a big internet savvy market like the UK. In France (95% of traffic diverted to Google[2]), former local champions like “LeGuide” and “twenga” today show only a few clicks.

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[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] See Google’s Vesterdorf/Fountoukakos, JECL, 2018, 3: “[t]he remedy chosen by Google is framed as an ‘access remedy’ in that, through the auction mechanism, Google is giving rival CSSs access to the Shopping Unit [...] (8) having presumably carefully reviewed, debated, and accepted Google’s 60-day and 90-day notifications, arguably the Commission has implicitly endorsed the remedy as a matter of principle”.
[28] Ibid.
few hundred thousand visits per month - a small fraction of what they used to have. Formerly award-winning CSS “acheter-moins-cher” has filed for insolvency. After more than 10 years of service, Spanish CSS “encuentraprecios.es”, as well as Italian service “pagomeno.it” have also closed down.²³

This view is widely shared in the CSS industry. CSSs agree that Google’s abuse continues to this day and express a growing discontent with the situation.²⁴ Because if this development continues, there will soon be only one important CSS left: Google. Rival CSSs will be left with providing offers to the Shopping Unit, i.e., they will become feed providers.

Implications for online shops: A monopoly in the CSS industry will affect online shops in at least two ways. First, their only meaningful way to reach consumers with a serious buying intent (consumers searching for a product) will be Google. Due to Google’s auction mechanism, they will be forced to place higher bids for AdWords and Ads in the Google Shopping Unit. These will decrease their margin or be passed on to consumers through higher product prices, which reduces the quantities sold.

Second, Google will likely continue its abuse of (even higher) market power into the sphere of online shops: Just recently, Google launched its market place feature “Google Action” in France.²⁵ Once successfully tested, Google could roll it out globally and preclude online shops from interacting with consumers directly. As shops depend on Google already, Google will find ways to impose the feature on shops, which makes them more dependent and keeps the interaction with consumers for Google. Shops will become mere product shippers – just as rival CSSs today are mere offer providers.

Implications for consumers: Already today, consumers overpay billions of Euros, a study by Grant Thornton across twelve EU countries suggests: It shows that prices are on average 14% higher in Google’s Shopping Unit than on rival CSSs. Once shops have to increase their bids in the future, consumers will pay even higher prices.²⁶

Implications for other intermediation services: Should the current CM prevail, or should Google successfully appeal the Decision, this will mark a precedent for similar markets, such as flights, hotels, jobs, holidays, rental cars, insurances, utilities, etc. Google could create an intermediation service for any such market and put it on top of its SERP as long as it allows competitors to supply offers to it.

Implications for the European Union’s economy: Innovation will suffer as incumbents in the intermediation markets will get under financial pressure and potential new entrants are discouraged from entering due to Google’s overwhelming dominance. This will result in a loss of the respective local knowledge as European companies will exit the market so that well-trained Europeans or immigrants have a smaller chance to be employed.

²³ Encuentraprecios, https://encuentraprecios.es/
Also, hardware-intensive industries like automotive, machinery and the like might get under pressure as in the future software will likely play a more prevalent role than hardware and a company like Google is in a good position to also conquer these markets (like Google did with Android). Ironically, all this is possible despite the fact that Google pays lower income taxes in the EU than its rivals and hence contributes less to Europe’s thriving.

The case will likely serve as a precedent for other intermediation markets, such as flight, hotel or holiday booking, job search, rental car booking, insurance, utilities, etc. Google could enter these markets in a similar fashion, i.e., secure consumer access by putting its own service on top of the SERP and obtain offers from competitors – with similar implications for their respective competition, downstream markets and consumers.

Application for Annulment

In September 2017 Google launched an application for annulment of the European Commission’s decision before the Court of Justice. (CJEU, Case T612/17). BDZV and VDZ were granted leave to intervene in the case by the Court of Justice in December 2018, as the Court established a direct, existing interest in the result of the case for both associations. The Court of Justice determined that, for BDZV’s and VDZ’s members, whose economic viability is now largely dependent upon their online visibility, the internet has become an essential channel for publishing news and press articles, and that that type of service is one of the services likely to be used by internet users via the general search or specialised search tools available on Google’s search engine, in the same way as those specifically referred to in the contested decision.

However, publishers’ competition concerns in “Fair Search” related to the preferential treatment accorded broadly, via its general search engine, to its own services. In its decision, the Commission addressed a similar issue relating specifically to Google’s search service specialised in comparison shopping results and concluded that such treatment constitutes an abuse of a dominant position. However, the decision does not preclude ongoing and future abuses. A continued examination of Google’s treatment in its search results of other specialised Google search services is warranted. The Decision in the “Google Shopping” case is a precedent which establishes the framework for the assessment of the legality of this type of conduct. At the same time, it does however not replace the need for a case-specific analysis to account for the specific characteristics of each market.

Sources:

European Commission, “Google Search (Shopping)”,


SearchEngineLand, Alphabet to create separate business unit in Europe to run Google Shopping, https://searchengineland.com/alphabet-create-separate-business-unit-europe-run-google-shopping-283325
Job advertisements and classified advertisements are a vital source of revenues of newspaper and magazine publishers – both in print and digitally. Publishing houses commonly operate – or hold shares in – popular job, recruitment and career boards and portals today.

In 2017, Google first launched the “Google for Jobs” service in the US, followed by a launch in the United Kingdom and Spain in 2018 and in certain other EU Member States, notably Germany, France and the Netherlands, in 2019. Google for Jobs aggregates job postings from across the web, whether they are on businesses websites or job sites with thousands of listings. None of the information offered on Google for Jobs is actually provided by Google. The job advertisements are made available to Google either through job boards, social networks or directly by employers.
through an interface. Applicant tracking system (ATS) providers, job boards, and employers can use job posting structured data to directly integrate with Google.

When a job- or career-related search query is entered into Google Search, a dedicated box with matching job offers is displayed immediately, prominently and in a visually more attractive manner when compared to generic search results or even sponsored search advertisements (AdWords). Accessing one listing in the unit opens the detailed product page of Google for Jobs and does not redirect the user to the external listing. The user is then forwarded to the complete job advertisement and further information within the Google service.

The effects of the introduction of the dedicated Google for Jobs box are illustrated below. The first illustration below shows what a non-discriminatory Google Search results page to a job-related search enquiry would look like.

The second illustration below shows the results page for the same enquiry on Google Search following the introduction of the dedicated Google for Jobs box.
The possible implications for competition are highlighted by an assessment carried out by Sistrix in Germany (see graph below). The analysis provided that immediately after the launch of Google for Jobs in Germany and of the mere change of the Google Search results page, in over 90% of the cases where the Job box had been integrated in the search results, it appeared in the first spot. The immediate effects of the introduction of the service on the visibility of different competing services on the Google Search results page were assessed by Sistrix and are illustrated by the graph below.

This mere change, which gave special, massively increased, visibility to the new service, made Google for Jobs stronger and more visible overnight, in comparison to any other competitor, which worked on their brands and image for years.

Following the blueprint of “Google Shopping”, Google abuses the market dominance of its search engine to give an unfair advantage to another of its own products: by putting it on top of the SERP, making it usable directly on the SERP, and making it bigger and visually more appealing.
than any other search result, Google clearly practices self-preferencing, thereby distorting competition. German publishers have therefore raised concerns on Google for Jobs before the European Commission since 2018.\(^{27}\)

**Sources:**


MEEDIA, „Google Jobs Marktführer nach nur einer Woche? Verlegerverbände warnen vor Marktmacht“ (German), [https://meedia.de/2019/06/03/google-jobs-marktfuehrer-nach-nur-einer-woche-verlegerverbaende-warnen-vor-marktmacht/](https://meedia.de/2019/06/03/google-jobs-marktfuehrer-nach-nur-einer-woche-verlegerverbaende-warnen-vor-marktmacht/)


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**Google Search (Features and Tools)**

Over the past decade, Google has repeatedly and consistently introduced new tools and features to its Google Search service, which had the result to transition Google’s SERP from a search engine to a “search and answer” machine. By doing so, Google further developed its “walled garden”, keeping users engaged on the search engine rather than redirecting them to the results pages. This evolution of Google self-preferencing its own services was and continues to be to the detriment of press publishers. Increasingly, users now may find comprehensive answers on the search engine and are therefore less encouraged to click on redirecting search result links. In the meantime, competition on the search engine is distorted as organic search results are pushed further down and downgraded. The first watershed moment for the evermore increasing number of “no-click searches” was the introduction of the “Direct Answers” feature as well as the Google “Knowledge Graph” in the Google SERP.

In 2012 Google announced the launch of the “Knowledge Graph”. The function allowed users to search for prominent places, people, buildings, etc. Thereupon, Google immediately provides information and answers about the query in a box on the right side of the screen. As Google stated at the time of the launch, “This is a critical first step towards building the next generation of search, which taps into the collective intelligence of the web and understands the world a bit more like people do.”\(^{28}\)

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\(^{27}\) See e.g. BDZV, VDZ, “Verlegerverbände: Google darf Marktmacht nicht missbrauchen”, 22 May 2019, Retrieved from [https://www.bdzv.de/nachrichten-und-service/presse/pressemitteilungen/artikel/detail/verlegerverbaende-google-darf-marktmacht-nicht-missbrauchen/](https://www.bdzv.de/nachrichten-und-service/presse/pressemitteilungen/artikel/detail/verlegerverbaende-google-darf-marktmacht-nicht-missbrauchen/).

With mobile search allocating more traffic than desktop search, and with voice assistants increasingly gaining relevance, Google further developed the knowledge graph and introduced new features. The latest features include the so called “Featured Snippets” as well as the “People Also Asked” (PAA) box:

According to Google, the “Featured Snippet” appears in search queries where Google believes that this format helps the user discover what they are looking for. The featured snippet, which in most cases provides a comprehensive answer to the search query, appears on the so-called position zero, i.e. at the very top of the SERP and differs from the organic search results in both appearance and length of the snippets. Google alone determines which content and source is shown in the featured snippet box.

Similarly, the “People Also Asked” feature in Google search provides users with questions to the query, while also immediately offering the answers in form of snippets retrieved from a selected source. It is considered a living feature as with each click on a proposed question, new and additional related questions appear. As above, the PAA feature also differs from generic search results in both appearance and length of snippet and is usually located below the featured snippet box. As a result, it pushed organic search results further down and keeps users engaged for an extended period of time. In 2019, the PAA box appeared in 85% of all search result pages in the US.

By providing comprehensive snippets, Google significantly reduces the need for the user to click on the link (see figures below). Moreover, by providing comprehensive and graphically enticing answers, as well as related questions and answers on the top of the page, other organic search results, including links to publishers’ websites and other content, are downgraded and pushed further down on the search page and lose relevance. Third, with regard to featured snippets and
based on the information from Google’s “Help Center”, publishers don’t have a genuine choice. If a publisher wants to have a chance in appearing in the featured snippet, the publisher must increase the “max snippet value”, i.e. increase the amount of content that may be displayed directly on Google services, as the more comprehensive the snippet is, the more likely it will be chosen for the box. On the other hand, if a publisher does not want to be listed in a featured snippet box, the blocking of this function also leads to the blocking of regular snippets in the “regular” search results.

While Google has and continues to introduce new features to its search engine, the shift towards setting up a walled garden that keeps users engaged on the search engine for as long as possible is clearly visible and successful. Recent figures from the US market have highlighted that. In June 2019, for the first time over 50% of all browser-based Google searches, desktop and mobile, did not lead to a click from the user.29 Also, as the chart below shows, organic search click-through rate, in this case on mobile, steadily declines, while “zero-click searches”, searches where the user simply stays on the Google SERP without actually accessing any redirecting search result page, as well as paid click through rates continue to rise.


Since at least 2016, we witnessed a steady evolution towards evermore “zero-click” searches and clicks on search advertising when compared to actual organic searches (as illustrated on the graph below for mobile searches).

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29 Sparktoro, “Less than Half of Google Searches Now Result in a Click”, Retrieved from [https://sparktoro.com/blog/less-than-half-of-google-searches-now-result-in-a-click/](https://sparktoro.com/blog/less-than-half-of-google-searches-now-result-in-a-click/).
This evolution shows a consistent strategy by Google to extend its “walled garden” and give systematic preferential treatment to its own Google Search service by increasing the number of “zero-click” searches, as well as the number of commercial “paid” content accessed by users on the Google SERP.

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Google Search (COVID-19 Core Update)
As the Edelman Trust Barometer and the World Economic Forum have confirmed, press and media content emerged as the most trusted source of information throughout all age groups during the COVID-19 pandemic.30

Yet, at the height of the pandemic, Google rolled out a major COVID-19 “core update” on 4 May 2020, which introduced a number of algorithm changes to its search engine, with the effect of consistently promoting Google’s own services and content on the Google Search results page. The pandemic led to an increased interest in COVID-19-related information and content, as well as in facts and figures around the pandemic. The interest of users in news, as well as categorised and organised content was especially high. With the core update, Google effectively promoted its own services on “position zero” on page 1 of the Google Search results page, while it downgraded organic results, including news publishers’ content, to the non-visible area of the SERP.

As the examples below, from both desktop and mobile searches, show, the new Google information boxes cover near the entirety of the Google SERP, while organic search results, such as news and publishers’ content, were downgraded to be effectively inapparent.

Thereby, Google again exploited its de facto monopoly in the general search market to give preferential treatment to its own services, in order to further strengthen its walled garden, while reducing the visibility of organic search results, including press publishers’ content in a significant

manner. This has further exacerbated the no-click environment and furthered Google Search’s transition from a “search engine” to an “answer engine”.

The set of examples from Germany (below) include examples based on publicly available data from SEO visibility toolboxes, which highlight the preferential treatment of its own services, as well as the reduction of visibility for press publishers:

**Example 1:**

![Graph showing data retrieved from Sistrix](image)

Example 1, which shows data retrieved from Sistrix – a SEO toolbox which also provides a visibility index for the Google search engine, shows, that following the roll out of Google’s core update in early May 2020, the domain google.de saw a considerable increase in visibility on the Google SERP, while the German newspaper bild.de saw almost overnight significant reduction in visibility.

**Example 2:**

![Graph showing mobile search queries](image)

Example 2, which is based on data from Trisolute – a SEP and search visibility tool for publishers, shows, Based on the example of mobile search queries with the keyword “Bundesliga”, that content from Google, in this case YouTube, gained significant visibility compared to competing content from German newspapers and magazines right around the roll out of the core update.

**Example 3:**
In Example 3, based on visibility data from both Sistrix and Trisolute, the upper two highlight the changes for a selection of newspaper and magazines in Germany. Following the roll-out of the core update and the implementation of the algorithmic changes, on average, publishers lost 26% (Trisolute) and 19% (Sistrix) of visibility.

Example 5:

Example 5 further highlights how the update provided Google’s own services a significant spike in visibility. The visibility of the Google Play Store, with the domain play.google.com, saw an immensely increased visibility on the Google SERP after the roll-out of the core update.

Sources:

Edelman Trust Barometer, “Trust and the Coronavirus”,
Facebook (Marketplace)

Facebook “Marketplace” was launched in 2016 and is used by Facebook users to buy and sell items, mainly between private individuals, leveraging Facebook’s large user base.

Classified advertisements are a vital source of revenues of newspaper and magazine publishers – both in print and digitally. Reportedly, classified ads competitors have complained that Facebook has used its market power to give the Facebook Marketplace an unfair competitive advantage. The recent move of Facebook to open Marketplace Search Results to ads may further escalate the competition concerns.

In the course of the rollout of the Facebook Marketplace, Facebook gave its own classifieds ads service preferential treatment on its platform when compared to other competitors and made abusive use of data to strengthen its online classified ads business.

The main problem is that Facebook is tying separate services together through functional integration of its social network service and its classified ads, “Marketplace”, service. It has boosted its own Facebook Marketplace classifieds service to an unprecedented growth by leveraging its social network to drive ads and traffic to that service. And users cannot choose not to have the service in their Facebook account as it is automatically tied to the social network.

Facebook uses and shares data and its access to data through interfaces such as login tools and social plug-ins. Special attention should therefore be spent on the competitive advantages that data can confer on Facebook vis-à-vis its online advertising rivals.

Formal antitrust complaints for an alleged abuse of dominance were submitted to the European Commission in 2018. A first questionnaire by the European Commission of June 2019 inquired about the economic particularities of providing online classifieds ads and Facebook’s activities on this market. A second questionnaire of September 2019, in turn, went into greater details of Facebook’s alleged tie of social media advertising customers to its classified ads platform.

Sources:

Reuters, “Facebook in EU antitrust crosshairs, online marketplace now under scrutiny”,
Facebook (Shops)

On 19 May 2020, Facebook announced the launch of its new “Facebook Shops” platform, which aims at businesses to set up an online store that customers can access on both Facebook and Instagram. Facebook Shops intends to allow businesses to connect with customers on Facebook’s services: Facebook, Instagram and WhatsApp. Facebook and Instagram users will be able to find Facebook Shops through a business’s profile page or can discover them through stories or ads. A feature available in the US also allows customers to checkout and pay within the app. Moreover, shops are able communicate with users directly through WhatsApp.

Creating a Facebook Shop will be free for businesses. Businesses may choose the products they want to feature from their catalogue and customise the shop with a cover photo and accent colours that showcase their brand. Facebook intends the “Shops” service to drive more ad sales, Facebook CEO, Mark Zuckerberg reportedly said: “Our business model here is ads, so rather than charge businesses for Shops, we know that if Shops are valuable for businesses they’re going to in general want to bid more for ads, we’ll eventually make money that way.”

If retailers believe they can close a sale directly on Facebook or Instagram, they may be more likely to promote products on those apps. But commerce could also offer an alternative revenue stream to advertising. When users buy a product directly through Instagram, for example, the company could take a small cut of those sales. Instagram only works with a few hundred retailers right now for direct checkout.

This new service will furthermore allow Facebook access to new and increased data on consumer and buyer’s behaviour. The shopping platform will provide data on customer behaviour, as Mark Zuckerberg reportedly emphasised. "We'll see what shops they interact with, what products they're interested in, what they buy and so on.,” he said. However, at the moment, no function is planned to share this information with friends, and no one else except the user, the shop and Facebook will have access to it. But with the data, the online network could continue to perfect its lucrative ability to get advertisers to the right people for their ads.

With its 2.6 billion user base and its well-established online advertising system, Facebook may intend to become a serious rival for major e-commerce platforms. However, this demeanour is comparable to the one for Facebook Marketplace: By tying Facebook Shops to its dominant social

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media services through functional integration, Facebook is leveraging its dominance in social networks to boost another service in a separate market.

Sources:


CNBC, “Mark Zuckerberg announces Facebook Shops, making it easier for businesses to list products for sale”, https://www.cnbc.com/2020/05/19/zuckerberg-announces-facebook-shops-e-commerce-for-businesses.html


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Google (Android)

(Case AT.40099 — Google Android)

On 15 April 2015, the European Commission initiated formal antitrust proceedings against Google with regard to its business practices related to Android. The Commission intended to investigate whether Google has illegitimately hindered the development and market access of rival mobile operating systems, applications or services for smartphones and tablets.

Description

Since around 2011, Google Android has consistently been the leading mobile operating system provider in the EU with a worldwide market share of around or even more than 80% in 2020. The Commission suspected that Google may have breached EU rules prohibiting anti-competitive agreements and abuse of dominant position - in particular that Google stifled choice and innovation in a range of mobile apps and services by pursuing an overall strategy on mobile devices to protect and expand its dominant position in general internet search.

On 18 July 2018, the Commission adopted its Decision (Case AT.40099 — Google Android). The Decision establishes that, since 2011, Google LLC (‘Google’) has imposed illegal restrictions on Android device manufacturers and mobile network operators to cement its dominant position in general internet search. In particular, Google:

- required manufacturers to pre-install the Google Search app and browser app (Chrome), as a condition for licensing Google’s app store (the Play Store);
- made payments to certain large manufacturers and mobile network operators on condition that they exclusively pre-installed the Google Search app on their devices; and

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has prevented manufacturers wishing to pre-install Google apps from selling even a single smart mobile device running on alternative versions of Android that were not approved by Google (so-called "Android forks").

The German Newspaper Publishers’ Association (BDZV) and the Association of German Magazine Publishers (VDZ) actively participated in the administrative procedure that led to the Decision by submitting, inter alia, written observations, studies and surveys to the Commission at various stages of the procedure.

The European Commission fined Google €4.34 billion. Google must now bring the conduct effectively to an end within 90 days or face penalty payments of up to 5% of the average daily worldwide turnover of Alphabet, Google’s parent company. At a minimum, Google has to stop and to not re-engage in any of the three types of practices. The decision also requires Google to refrain from any measure that has the same or an equivalent object or effect as these practices.

Effectiveness of the Compliance Mechanisms

Thus far, Google has implemented or announced three mechanisms to comply with the Decision: (i) new licensing options (i.e. legally “untying” the Play Store from the Google Search and Chrome browser apps) (in October 2018); (ii) browser and search app download prompts (in March 2019); (iii) choice screen with auction mechanism (in August 2019), to be presented to users starting March 2020.

However, for the following commercial and legal reasons, Google may not effectively bring the abuse to an end with either of these mechanisms:
Within the new **licensing scheme**, the Play Store was again used as a lever to promote Google Search and Chrome. For licensing Google Mobile Services (including the Play Store), original equipment manufacturers ("OEMs") had to pay up to USD 40 (depending on the pixel density of the device). Such payments significantly increased the production prices, and OEMs could only “counter” this by also pre-installing the Google Search app as well as Google Chrome (i.e. cross-subsidization through revenue sharing agreements). Therefore, from a macro-perspective, nothing had changed in economic terms: If OEMs wanted to produce Android devices at low cost, they had to license the entire bundle. Competing general search services could not match Google’s “offer” — simply because Google is the most profitable search service due to indirect network effects and its high (at least partially abuse-based) market penetration. This incentive to receive all apps in sort of a mixed bundling is contrary to the intention of the Decision, as clearly expressed in the Decision.

The download **prompt screen** did not deal with the issue of pre-installation and default setting ("pre-installation" or “status quo” bias). It only gave an option to receive additional software. It is doubtful whether this screen incentivised users to download and use any additional app.

*An illustration of the download prompt screens’ appearance according to a Google announcement.*

In August 2019, following the European Commission’s Android Decision, Google announced that it would implement a **choice screen** for general search providers on all new Android phones and tablets shipped into the European Economic Area (EEA) where the Google Search app is pre-installed. Google announced that a choice screen would appear during initial device setup and

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would feature multiple search providers, including Google. The choice screen should begin appearing on new devices distributed in the EEA on or after March 1, 2020.

Google announced that eligible search providers would need to fill out an application form and could bid for inclusion based on an auction. According to Google’s announcement, in each country auction, search providers will state the price that they are willing to pay each time a user selects them from the choice screen in the given country. The three highest bidders would then appear in the choice screen for that country. The provider that is selected by the user should pay the amount of the fourth-highest bid. The auction winners, and Google, would then be ordered randomly in the choice screen.

After strong criticism from the industry, Google had to significantly alter the initial auctioning conditions and lowered the burden for competitors to participate. In addition, Google answered some requests regarding the layout and presentation, for example the search providers visible in the choice screen can now describe their services to attract new users (which they could not before and which would have led Google to benefit from its strong brand even more).

Nevertheless, like in the Google Shopping Case, the Compliance Mechanism is still far from reinstating fair competition. An “effective” remedy within the meaning of the Decision would require Google to ensure that competitors are protected from the ongoing consequences or effects of its previous infringements. This means that Google should include some “proactive” or “procompetitive” elements in its remedy to create the level-playing-field that would have been there absent the abuse.

Arguably, any remedy that would require competitors to pay for Google’s compliance (i.e. make the abuse overall profitable) would lack any deterrence effect and thus run counter to the principle of effective competition law enforcement (as a general principle of EU law).

The Android choice screen is the opposite of “genuine consumer choice”. It only shows some of the available search services and leads to a “financial power play”. Any search service not visible on this screen will virtually become invisible for users. If a service intends to remain visible, it is coerced into the auction. This financial power play also stifles any alternative approach to general internet search: privacy driven search services or search services with other social goals cannot compete, in the long run, with purely profit-maximization-driven and data-exploiting search services such as Google. Thus, competitors with business models different to Google’s (or new market entrants) will not be able to constantly pay Google for visibility on Android devices before they reached a critical mass of users (which the Compliance Mechanism in turn prevents). Thus, instead of lowering the barriers to market entry, Google creates new, additional barriers.

There are only limited requirements for the participation in the auction. Google syndication partners can also participate. It is likely that Google syndication partners can make higher bids than “real” competitors (in particular, Google could theoretically cross-subsidize their participation with benefits under their revenue sharing agreements).

Any auction, by its very nature, is arguably inconsistent with the past Commission practice. If the Microsoft browser choice screen is taken as a benchmark, Google’s choice screen falls short of what was requested from Microsoft. Inter alia, Microsoft had to offer “access” to the choice screen for free. Such a choice screen was merely based on relevance of the available browsers; there was no artificial scarcity, as Microsoft included up to 12 different browsers as options in the choice screen (whereas Google only allows three competitors per country). Such artificial
scarcity influences the auction (i.e. oversubscription is more likely), and creates additional barriers instead of ensuring genuine consumer choice. Last but not least, the auction provides competitively sensitive information to Google.

Auctioning off slots on the choice screen should therefore be considered neither procompetitive nor compliant with the remedies imposed by the decision. The choice screen does not allow for genuine consumer choice as it only shows some of the available search services and leads to a financial power play. Search providers will be coerced into participating in the auction, or else will virtually become invisible for users of the EU’s dominant mobile operating system.

Further, Google’s syndication partners – which integrate Google’s search tools into their own service – can participate in the auction. It thus appears that every query entered in such search engine would then again benefit Google, which should not be the outcome of any compliance mechanism. As a result, doubts again remain regarding the effectiveness of the remedies.

Application for Annulment

In October 2018, Google launched an application for annulment of the European Commission’s decision before the Court of Justice (CJEU, Case T-604/18). In September 2019, the Court of Justice determined that both BDZV and VDZ can establish an interest in the result of the case and must therefore be granted leave to intervene in the case in support of the form of order sought by the Commission.

The Court of Justice determined that for VDZ and BDZV, the devices, apps and general search services concerned by the Decision have become an essential channel for distributing news and press articles. It emphasised the practical impact of the restrictions at issue on their members. In particular in the case of activities which require the use of devices, apps and search services to publish news and press articles. It therefore determined that the case was liable to raise questions of principle affecting the functioning of the sector concerned, including press publishers, whose economic viability now largely depends on their visibility on the internet, and that the interests of the members of those associations were liable to be affected to an appreciable extent. It therefore concluded:

“As associations of undertakings active in the sector concerned, VDZ and BDZV therefore have a direct, existing and definite interest in the Decision not being annulled since that decision seeks to fine and to bring to an end practices that the Commission considers to be abusive and to deny app developers and Google’s rivals the opportunity to innovate and to compete with Google on merit.”

Sources:

European Commission, “Google Android”,

European Commission, Summary of Commission Decision (Case AT.40099 — Google Android),
Google (Search, News, Showcase and Discover)

Google (Germany)

In 2013, an ancillary copyright for press publishers (“Leistungsschutzrecht für Presseverleger”) was introduced in Germany. The ancillary copyright granted press publishers the exclusive right to decide on the use of their products, or extracts thereof, by commercial providers such as search engine operators or news aggregators. It was the declared intention of the legislator to enable publishers to request a reasonable compensation for each use. Thus, ensuring a fair balance of interests between the producers and the users of press products in the digital media markets. The principle of copyright, which is to establish a balance between right holders and users, thereby also applied to the digital world.

The German legislator incorporated the ancillary copyright for press publishers into the existing body of German copyright law (UrhG) with the three new paragraphs 87f to 87h. The producers of press products, press publishers, were thus guaranteed the exclusive right to make the press product or extracts thereof publicly available for commercial purposes. In particular with respect to operators of search engines and news aggregators. In case press products are used commercially by such services, the provider of the service therefore had to obtain a license from the press publishers to do so since 1 August 2013. The explanatory memorandum for the law stipulated explicitly that the right shall enable publishers to link the issuing of licenses to the payment of a reasonable compensation. The German ancillary copyright for press publishers has thus been deliberately structured in a way for both sides to negotiate an adequate compensation for the use of press products.

According to the legal definition of the ancillary right, articles and images that serve to convey information, form an opinion, or entertain were generally protected as part of a press product. However, individual words or very short text extracts could be made publicly accessible without the press publishers’ consent. In particular, quickly and briefly naming the linked content in search engines and news aggregators without having to obtain consent was permitted. In an
attempt to define this legal exception further, the arbitration board at the German Patent and Trademark Office ("Deutsches Patent- und Markenamt") suggested that the ancillary copyright shall be applicable if more than seven words (not incl. search term(s)) are displayed. As a cogent procedural pre-requisite, the case had to be brought before the German Patent and Trademark’s arbitration board as a first instance. It issued a settlement proposal on 24 September 2015. According to the arbitration board, only if the display of press products exceeded this limit of seven words, an authorisation and prior consent for usage in accordance with ancillary copyright for press publishers was required.

With the ancillary copyright for press publishers, publishers had the exclusive right to make press products or extracts thereof publicly available for commercial purposes. This right applied in particular vis-à-vis operators of search engines and news aggregators. This included the right to grant the authorisation to use the publications upon the payment of a compensation. Press publishers therefore entered into negotiations with operators of search engines and news aggregators for the granting of paid licences. Some of the rightsholders, around 230 digital publishing sites (domains), decided to entrust the management of their rights to a pre-existing German collecting society, the VG Media (Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Sendeunternehmen und Presseverlegern mbH). In accordance with the legal requirements for collective management in Germany, the VG Media subsequently published a tariff for the granting of licenses.

After establishing a tariff for the usage of extracts of digital press products and its publication in the German Federal Official Journal ("Bundesanzeiger"), the collecting society VG Media offered the operators of search engines and news aggregators to negotiate license agreements based on the published tariff. However, some large search engine operators, incl. the quasi-monopolist Google, neither recognised the applicability of the law nor the appropriateness of the tariff set up by VG Media.

Google used its overwhelming market power on the search engine market to circumvent the ancillary copyright for press publishers. Due to its market position Google has been able to obtain free-of-charge licenses from the press publications represented by VG Media in order to use text extracts in its own services free of charge.

Google threatened to restrict the display of the press products of publishers who insisted on the enforcement of the ancillary copyright granted by German law on Google’s various services. Because Google — due to its market share — effectively determines whether press products may be found on the internet or not, this would have resulted in severe competitive disadvantages for those publishers who would have insisted on the enforcement of their ancillary copyright, when compared to the publishers who abstain from doing so out of their intimidation by Google’s threats. The Federal Cartel Office has been very reticent in the application and implementation of German cartel law against internationally active internet companies. In 2014, several publishers thus filed a lawsuit before the District Court of Berlin ("Landgericht Berlin") directed against Google’s anti-competitive behaviour. A court decision in first instance ruling against the claimants was subsequently issued on 19 February 2016.  

In May 2014, a group of publishers and their collecting society VG Media applied to the Federal Cartel Office ("Bundeskartellamt") for the initiation of abuse proceedings against Google. The

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complainants were of the opinion that Google violated German competition law (“GWB”) by forcing publishers to waive an appropriate remuneration on the basis of its market power. The publishers based their motion on Google’s demand that publishers give their consent to the free-of-charge exploitation of their press products on all various Google services, in particular on Google News (so-called "opt-in declaration"). The Federal Cartel Office was of the opinion at the time, that German national general competition law was insufficient to engage in a formal procedure.

In the event of failure to grant a licence free-of-charge, Google (implicitly) threatened to "delist" press publishers on its services. However, Google did not disclose the concrete extent of the disadvantages associated with such a delisting. From the perspective of the publishers, the (implicit) threat of delisting appeared untransparent in terms of the possible negative consequences for the publishers. The complainants assumed that an unsigned opt-in declaration would have a massive impact on all constituent parts of Google’s search engine. In particular, the publishers assume that a lack of opt-in will have a negative impact on the positioning and ranking of their offers within Google’s search functions. The display of press products and in particular their positioning in the individual Google search functions are of great economic importance for the publishers. For this reason, the (implicit) threat of delisting already did constitute an imperative and almost all publishers have signed the opt-in declaration.

As part of a second distinct legal procedure on the application and enforcement of the German ancillary copyright, the District Court of Berlin determined in a ruling of 9 May 2017 that the publishers’ claim against Google was at least partially well founded. It found, however, that in the event that such a provision constituted a "technical regulation" within the meaning of Directive 98/34/EC on technical standards and regulations, prior notification of the measure by the German Government to the European Commission would have been required. In which case, failing the required notification, the inapplicability of the law could be claimed. It therefore initiated preliminary ruling proceedings before the CJEU on the question of the notification requirement.

In its judgement of 12 September 2019 (Case C-299/17), the CJEU ruled that the German ancillary copyright was not applicable in the absence of a prior notification to the European Commission. Thus, it found that, in so far as such a rule is specifically aimed at information society services, the draft technical regulation should have been notified in advance to the Commission. Failing that, the inapplicability of the law could be claimed.

In view of the CJEU’s decision, the German Newspaper and Digital Publishers’ Association (BDZV), the Association of German Magazine Publishers (VDZ) and the Association of German Local Newspapers (VDL) urged the German Government to a rapid and faultless transposition of Directive (EU) 2019/790 and the introduction, as soon as possible, of the neighbouring right for press publishers on the basis of the Directive.

Sources:


Google (France)


On 25 September 2019, Google announced a series of changes in the way press publications would be displayed on its services. As of 24 October 2019, on all its services, Google by default no longer displays thumbnail-images and text extracts (previews) for EU press publications in France, unless the publication page overrides the site setting on Google. According to the announcement, the default result for an EU press publication would consist only of a short search result title and a hyperlink towards the publication.

For the standard preview to continue to be displayed in the search results, publishers have to authorise it through the new display settings imposed by Google, which unilaterally conditions the request to the prior waiver by publishers of any compensation for the display of their content. Publishers received an automatic message instructing them to set the display modalities for their publications on Google’s services before 24 October 2019, or to be imposed a downgraded display on all of the Google services.

Thereby the dominant player in the search market circumvented the newly introduced publishers’ rights, and put publishers in a situation where they had to choose between
authorising the use and commercial exploitation of their content without remuneration of their neighbouring right or risking damaging consequences for their business and services.

By refusing to remunerate the use of publishers’ content, contrary to the law of the democratically adopted EU and French laws, Google challenges national and EU sovereignty by circumventing the legislator’s will.

The press publishing sector claims the full exercise of its neighbouring right, in accordance with EU and French laws. As any rightholder, publishers desire to freely determine the modalities of exploitation of their rights and, consequently, ask to be fairly remunerated for the reproduction and the communication to the public of their content by Google, whose business relies to a large extent on the use of press content.

In November 2019, several French newspaper and magazine publishers’ organisations, Alliance de la Presse d’Information Générale (Alliance), Syndicat des Éditeurs de la Presse Magazine (SEPM) and Agence France-Presse (AFP), have therefore lodged complaints at the French Competition Authority (Autorité de la concurrence), in support of an investigation it had already initiated on its own.

According to the complainants, the methods of implementation by Google of the law of 24 July 2019 aiming at creating a neighbouring right for the benefit of news agencies and press publishers constitutes an abuse of a dominant position, as well as an abuse of economic dependence. The law of 24 July 2019 transposes into French law the directive on copyright and neighbouring rights of 17 April 2019, and aims to set the conditions for a balanced negotiation between publishers, news agencies and digital platforms, in order to redefine, in favour of press publishers and news agencies, the sharing of the value between these actors.
of the entry into force of the neighbouring rights law were likely to constitute an abuse of a dominant position and caused serious and immediate harm to the press sector.

It thus required Google to conduct negotiations in good faith with publishers and news agencies on the remuneration for the re-use of their protected contents, within three months. This negotiation must retroactively cover the fees due as of the entry into force of the law on 24 October 2019.

However, on the grounds of complying with the law, Google unilaterally decided that it would no longer display extracts of articles, photographs, infographics and videos within its various services (Google Search, Google News and Discover37), unless the publishers grant them the authorisation to use their protected content free of charge.

In practice, the vast majority of press publishers have granted Google licenses to use and display their protected content, without possible negotiation and without receiving any remuneration from Google. In addition, as part of Google’s new display policy, the licenses it has been granted by publishers and news agencies offer Google the possibility of taking up and using even more content than before.

The Autorité believes that Google may have abused its dominant position in the market for general search services by imposing unfair trading conditions on publishers and news agencies.

The Autorité has led, upon receiving the referrals, an investigation to rule on the interim measures, and heard, not only Google, press publishers and the AFP, but also several economic players (other search engines for example) or institutional actors. The board of the Autorité held a session on 5 March 2020 to hear the complainants and Google. The decision issued today is intended to protect the complainant businesses from the consequences of potentially abusive practices, pending the decision on the merits of the case, which will be preceded by an investigation allowing the Autorité to rule on the existence of competition law breaches.

At this stage of the investigation, the Autorité considered that Google is likely to hold a dominant position on the French market for general search services. Indeed, its market share was around 90% at the end of 2019. In addition, there are strong barriers to entry and expansion on this market, linked to significant investments necessary to develop a search engine technology, and to the effects of networks and experience such as to make Google's position even more difficult to contest by competitive engines wishing to develop.

In the current state of the investigation, the Autorité considered that the practices denounced by the complainants are likely to be qualified as abuse of dominant position on several grounds:

- **Imposing unfair trading conditions**

  At this stage of the investigation, Google may have imposed on publishers and news agencies unfair transaction conditions which would have allowed it to avoid any form of negotiation and remuneration for the re-use and display of protected content under the neighbouring rights.

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37 Google Discover is accessible on tablets and smartphones. It presents users, without having to make a specific request, with content, including news content, according to their interactions with Google services: search history, activities on YouTube or Maps.
• **Circumvention of the law**

Google used the legal option to grant free licenses for certain content in certain cases, deciding that generally no remuneration would be paid for the display of any protected content. The Autorité notes that, in the state of the investigation, this choice seems difficult to reconcile with the purpose and scope of the law, which aimed to redefine the sharing of value in favour of press publishers vis-à-vis platforms, by assigning a neighbouring right which must give rise to remuneration, according to precise criteria. Furthermore, Google refused to provide publishers with the information necessary to determine the remuneration and considered that it could reproduce all the titles of the articles in their entirety, without seeking the publishers’ agreement.

• **Discrimination**

By imposing a principle of zero remuneration on all publishers without examining their respective situations, and the corresponding protected content, according to the precise criteria laid down by the law on neighbouring rights, Google may have treated in the same way, economic actors with different situations outside of any objective justification, and therefore of having implemented a discriminatory practice.

These different practices are likely to constitute an abuse of a dominant position from Google.

According to the Autorité’s decision, Google’s practices caused a serious and immediate harm to the press sector, while the economic situation of publishers and news agencies is otherwise fragile, and while the law aimed on the contrary at improving the conditions of remuneration they derive from content produced by journalists.

These practices are made possible by the dominant position that Google is likely to hold in the market of general search services. This position leads Google to bring significant traffic to the websites of publishers and news agencies. Thus, according to the data provided by the complainants relating to 32 press titles, and not disputed by Google, the search engines - and therefore Google for a large part - represent, according to the sites, between 26% and 90% of the redirected traffic to their pages. This traffic is also very important and crucial for publishers and news agencies who cannot afford to lose any share of their digital readership due to their economic difficulties.

Under these conditions, publishers and news agencies are placed in a situation where they have no other choice than to comply with Google’s display policy without financial counterpart. Indeed, the threat of downgrading from the display is synonymous for each press publisher with the loss of traffic and therefore of income, both if it is the only one affected by this downgrading and if this downgrading targets all the publishers.

This is the reason why most publishers have been led to accept conditions which are even more unfavourable for them after the entry into force of the law on neighbouring rights than those pre-existing.
Given all of these elements, the Autorité noted the existence of a serious and immediate effect on the press sector, resulting from the behaviour of Google, which, in a context of major crisis in the sector, deprives publishers and news agencies of a resource considered by the legislator as vital for the sustainability of their activities, and this at the crucial moment of the entry into force of the law. As a result, the Autorité issued several injunctions as a matter of urgency.

According to the Autorité, the objective of the interim measures pronounced is to allow publishers and news agencies wishing to do so, to engage in negotiations in good faith with Google in order to discuss both the terms of the re-use and display of their content that the remuneration associated to it.

During the negotiation period, Google will have to maintain the display of text extracts, photographs and videos according to the methods chosen by the publisher or the news agency concerned. In addition, in order to guarantee a balanced negotiation, the interim measures provide for a principle of neutrality on the way in which are indexed, classified and more generally presented the protected contents of the editors and agencies concerned with the services of Google.

Finally, these interim measures will remain in force until the adoption by the Autorité of its decision on the merits. During this period, and in order to ensure the effective implementation of these interim measures, Google will have to send monthly reports on the procedures for implementing the decision to the Autorité.

In July 2021, the Autorité has fined Google up to 500 million Euros for non-compliance with the injunctions issued as part of the interim measures in April 2020. As the Autorité made very clear, Google simply disregarded inter alia the obligation to negotiation in good faith, by extending negotiations with publishers on a global level as part of the new Google Showcase service, where the remuneration of the Publishers’ Right was a mere ancillary component with no isolated value for the right held by the publishers. In addition, the Autorité found that Google has disregarded the injunctions by deliberately only negotiating with publishers of the so called “political and general information press” and therefore leaving out other publishers such as magazine publishers, which are clearly covered by the scope of the EU directive and the French implementation.

Despite the pressure from the Autorité, Google has not yet concluded a single individual contract with a publisher.

Sources:

Loi n° 2019-775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse (French),
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Alliance, SEPM, FNPS, Press Conference of 24 October 2019, “Publishers Answer to Google”,


Autorité de la concurrence, « Décision n°20-MC-01 du 9 avril 2020 relative à des demandes de mesures conservatoires présentées par le Syndicat des éditeurs de la presse magazine, l’Alliance de la presse d’information générale e.a et l’Agence France-Presse », [https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2020-04/20mc01.pdf](https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2020-04/20mc01.pdf)


Google News Showcase (Germany)

On 4 June 2021, the German Federal Cartel Office (“Bundeskartellamt”) announced the initiation of a proceeding against Google’s “News Showcase” service. The investigation is based on the competences under the new Section 19a of the German Competition Act (“GWB”), which has introduced a two-step procedure that allows the Bundeskartellamt to determine that a company has paramount significance for competition across markets, and can as result, prohibit certain practices. These practices include, amongst others, making demands and imposing conditions which are disproportionate, such as the refusal to pay a fair price for rights such as the publisher’s right.

On 1 October 2020, Google announced the rollout of its new service “News Showcase” in Germany. Following agreements with publishers, Google will show articles of participating publishers in so-called “Story Panels”, presented in a more prominent manner compared to normal listings on the Google services, eventually also integrating the service in the company’s gatekeeper search engine.

The investigation into Google’s “News Showcase” follows a complaint from Corint Media and is two-fold. For one, the complaint contested the integration of the service in Google’s
monopolistic search engine, and thus, gives preferential treatment to its own service to the
detriment of other publishers and services on the market. Secondly, the complaint focuses on
the underlying contracts, which are structured in a way to undermine the publishers’ possibility
to obtain appropriate remuneration for the use of their content, as foreseen by the Publishers’
Right.

In its press release, the Bundeskartellamt highlighted that the proceeding will look at both
aspects of the claim and with regard to unfair access conditions, it announced that it will assess
“whether the relevant contractual conditions include unreasonable conditions to the detriment
of the participating publishers and, in particular, make it disproportionately difficult for them
to enforce the ancillary copyright for press publishers introduced by the German Bundestag and
Bundesrat in May 2021.” The Bundeskartellamt has also highlighted that it will examine how the
access conditions to “News Showcase” are defined.

Sources:

Bundeskartellamt,


Google News (Spain)

(Consolidation) Act [hereinafter, “IPA”] and the Civil Procedure Act was published in the Official
Journal of Spain. These amendments, whilst transposing a number of regulatory requirements
imposed by EU Directives into national law, have also introduced other changes, such as private
copying and compensation, by amending Article 21 of the IPA and have introduced a new
Article 32(2), “the right to aggregate and compensation”. In addition, the fourth final provision
of Act 21/2014 stipulates that the Government, within one year from entry into force of the
statute, would conduct the necessary preliminary work, in collaboration with all sectors and
stakeholders, to prepare a comprehensive amendment to the Intellectual Property Act that
would be fully adjusted to the needs of and opportunities afforded by the information society.

The newly introduced Article 32(2) IPA sought to regulate the commercial activity consisting in
the reproduction of excerpts of news publications by service providers which commercially offer
such content aggregation services online. The provision reads as follows: “permission shall not
be required where electronic content aggregation service providers make available to the public
the content of insignificant excerpts of content, reported in periodicals or regularly updated
websites and having an information, public opinion creation or entertainment purpose.” The
exception does not operate in relation to images, photographic works and simple photographs,
and, in any case, will generate an unwaivable right to receive fair compensation for the publisher
or, where appropriate, other copyright holders. When it refers to the provenance of the excerpts,
the law refers to periodicals or websites. When referring to service providers utilising the
respective excerpts, the legislator refers to “electronic content aggregation service providers”
thus limiting the scope of application of the provision to news aggregators and specifically excluding search engines. In fact, Art. 32(2) IPA, ensures that where service providers facilitate tools to search isolated words included in the aforementioned content, such provision shall not be subject to permission or fair compensation provided that (i) the same occurs without a business purpose, (ii) it is strictly limited to what is necessary to provide search results in response to previous user queries, and (iii) such provision includes a link to the provenance page of the content. As such, the Spanish Article 32(2) introduces a right to aggregate news content with mandatory compensation for the right holders, in this case press publishers.

A month after the publication of the law, and a month before its entry into force, Google News Spain, the most important news aggregator in Spain at the time, decided to completely withdraw from the Spanish market. Their reason for doing so was openly the newly introduced provision in the Spanish Intellectual Property law. According to a statement by Google “This new legislation requires every Spanish publication to charge services like Google News for showing even the smallest snippet from their publications, whether they want to or not. As Google News itself makes no money (we do not show any advertising on the site) this new approach is simply not sustainable. So it’s with real sadness that on 16 December (before the new law comes into effect in January) we’ll remove Spanish publishers from Google News, and close Google News in Spain.”

Thus, Google unilaterally decided to remove Spanish publishers from Google News sites worldwide and shut down this service in Spain in December 2014, thereby evading the newly introduced mandatory compensation for the use of press publications by news aggregators. According to Google, this business decision was motivated by the fact that the Google News service does not generate any advertising revenues. However, Google News is not a non-profit, but a commercial service.

Sources:


Reuters, “Google to shut down news site in Spain over copyright fees”, https://www.reuters.com/article/us-google-spain-news/google-to-shut-down-news-site-in-spain-over-copyright-fees-idUSKBN0JPQM20141211

Google Discover (Denmark)

On 24 September 2018, “Google Discover” was launched as a successor to the “Google Feed”, which had been launched the previous year. According to Google, Discover brings a new design and name to Google Feed. It intends to help the user uncover content, such as videos, visual
content and articles. As such, Google Discovers offers users a highly personalised experience by crawling and aggregating the open web, including news media and editorial content.

In May 2019, following the launch of Google Discover in Denmark, Danske Medier, the Danish trade association representing editorial media and news publishers, requested Google to abstain from using Danish publishers’ copyright protected content, articles and pictures in the Discover service. Danske Medier’s role is in assisting Danish news media in enforcing their rights, whereas Dansk Medier is not in any way engaging in commercial agreements on their behalf.

Although Google accepted the Danish associations’ request in principle they did pose the condition that the trade association offers Google a list of domains or URLs to exclude from the Google Discover service (through an opt-out), whereas Danske Medier sustains that publishers should be able to allow the use of their content only on the basis of individual agreements (through an opt-in).

Danske Medier insisted that the Google services may use their members’ content only with their permission, as dictated by the principles of intellectual property. For Google Discover to cease using publishers’ content, Danske Medier had to reluctantly provide Google with a non-exhaustive list of their members’ websites, underlining that the list could only represent a snapshot of the market reality, as well as demanding Google’s responsibility not to include any new or other websites from their membership. Google ensured Danske Medier that excluding members’ websites from the Discover service would have no impact on search.

All these exchanges were held between representatives of the trade association and Google, Dansk Medier is open to further exchange with the European Commission, if the latter requires more information.

Sources:

Google, “Discover new information and inspiration with Search, no query required”, https://www.blog.google/products/search/introducing-google-discover/

Google and Facebook (Australia)

On 20 April 2020, the Australian Government announced it had directed the Australian Competition and Consumer Commission (ACCC) to develop a mandatory code of conduct to address bargaining power imbalances between Australian news media businesses and each of Google and Facebook.

Australia’s Treasurer, Josh Frydenberg, together with the Minister for Communications, Cyber Safety and the Arts, Paul Fletcher, announced a mandatory provision whereby both US companies would have to pay compensation to Australian media companies in the future. A share of the advertising revenue of Google and Facebook is to be passed on to the traditional media and publishers. The aim of the initiative is to create a level playing field between the US
services and the Australian media. At the same time, Google and Facebook will be required to be more transparent about their algorithms, in particular about the effects of changes on the ranking of news content. Their algorithms shall also emphasise original content over derivative content in the future. And lastly, the media shall be given more influence on the presentation of their content and access to customer data within the framework of applicable data protection regulations.

The development of the code of conduct is part of the Australian Government’s response to the ACCC’s Digital Platforms Inquiry final report to promote competition, enhance consumer protection and support a sustainable Australian media landscape in the digital age. In its final report the ACCC identified that Facebook and Google have each become unavoidable trading partners for Australian news media businesses in reaching audiences online, resulting in an imbalance in bargaining power.

In December 2019, the ACCC was directed by the Government to facilitate the development of voluntary codes to address bargaining power imbalances between digital platforms and news media businesses. The Government indicated at the time that if an agreement was not forthcoming, the Government would develop alternative options to address concerns raised, which may include the creation of a mandatory code.

The Australian Government decided that the original timeframe set out in its response required acceleration. The Australian media sector was already under significant pressure; that has now been exacerbated by a sharp decline in advertising revenue driven by the COVID-19 pandemic. At the same time, while discussions between the parties have been taking place, progress on a voluntary code has been limited according to recent advice provided by the ACCC following a request by the Government for an update. The ACCC considers it is unlikely that any voluntary agreement would be reached with respect to the key issue of payment for content.

As a result, the Australian Government instructed the ACCC to develop a mandatory code to address commercial arrangements between digital platforms and news media businesses. Among the elements the code will cover include the sharing of data, ranking and display of news content and the monetisation and the sharing of revenue generated from news.

The mandatory code should also establish appropriate enforcement, penalty and binding dispute resolution mechanisms.

A draft mandatory code should be released for consultation by the ACCC before the end of July 2020, with a final code to be settled soon thereafter.

On 19 May 2020, the ACCC published a Concepts Paper on the Mandatory News Media Bargaining Code. The proposed bargaining code is intended to address bargaining power imbalances between Australian news media businesses and digital platforms in order to ensure that commercial arrangements between these parties do not undermine the ability and incentives for news media businesses to produce news. The draft mandatory code of conduct to address bargaining power imbalances (the bargaining code) is being developed by the Australian Competition and Consumer Commission in close consultation with the Department of the Treasury (Treasury), and the Department of Infrastructure, Transport, Regional Development and Communications (DITRDC).
The ACCC has then started seeking the views of relevant stakeholders to inform the development of the bargaining code through a consultation period on this concepts paper scheduled for 19 May to 5 June 2020. The concepts paper is intended to guide the consultation process by clarifying the issues to be included in the draft bargaining code, identifying and exploring options for addressing these issues, and seeking stakeholder feedback by asking a number of specific questions about how these options may be implemented in the code.

On 23 February 2021, the Parliament passed News Media and Digital Platforms Mandatory Bargaining Code. The final agreement provides that news businesses must first signal their intention to sign an agreement. At the same time, the Government must designate digital platforms that should be required to negotiate with news media organisations. Subsequently, and should these digital platforms not reach an agreement with the news organisations, a binding arbitration mechanism kicks in. However, following last minute negotiations and threats by Google and Facebook to leave the Australian market or to not carry news at all, amendments were introduced to the bill, which were criticized for undermining the original goal of the Code and to not yield the warranted effects.

In fact, according to the last-minute changes, before the Code will be applied to the digital platforms like Google and Facebook, the Australian Treasurer must assess whether or not sufficient agreements with news media organisations were already concluded by the digital platforms. The Code has therefore moved away from the necessary non-discriminatory principle amongst news media organisations to a somewhat arbitrary selection based on the digital platforms’ conditions, as long sufficient deals were concluded. Several critics such as Professor Tama Leaver at Curtin University argues that under this agreement, the Code will likely never be used while the leverage remains with the digital platforms to the detriment of smaller publications.

Sources:


The Australian, “Here’s News – We’ll Hold Digital Giants To Account”,

ACCC, “Mandatory news media bargaining code – Concepts Paper”,
Facebook (News Tab)

In August 2019, an initiative by Facebook to license articles from a number of US news publishers and display that content inside the social network’s mobile app became public. There were press reports that Facebook is contemplating a separate news section in its platform and that, as part of that, it would license news content from publishers. Facebook confirmed that the company was aiming to include a “News Tab” inside its app by the end of the year.

However, many questions remained about this idea, including which publishers would be included, what kinds of terms they would be offered, and what it would mean for local journalism in particular. Moreover, Facebook still holds vastly greater bargaining power than any single publisher, even the very largest ones.

As of October 2019, participation in the News Tab is limited so far, and Facebook is only agreeing to licences with a few selected news publishers to be included in the News Tab. In light of Facebook’s significance for the public opinion and on the formation of opinion, this exclusive licensing practice on the News Tab service poses serious questions as regards its very problematic discrimination against media pluralism and the diversity of opinion. As a result, the effects of not allowing fair and non-discriminatory access to the News Tab platform on pluralism and diversity are potentially devastating.

Anything less than a fully comprehensive solution could put some publishers that are already struggling at a distinct disadvantage. So, while it is a good start, currently it is far from a comprehensive solution. Instead such agreements for the whole news ecosystem are needed, not a piecemeal solution.

According to reports, such agreements would let Facebook use headlines and previews of the articles from partner publications for display inside a “News Tab” in the Facebook app. Facebook hoped to introduce the effort by the end of 2019.

Sources:


Google Search (AdSense)

(Case AT.40411 – Google Search (AdSense))

On 14 July 2016, the Commission decided to initiate antitrust proceedings against Google's mother company Alphabet (Case AT.40411 – Google Search (AdSense)). The Commission intended to investigate agreements between Google and partners of its online search advertising intermediation programme AdSense.

Websites such as newspaper websites, blogs or travel sites aggregators often have a search function embedded. When a user searches using this search function, the website delivers both search results and search adverts, which appear alongside the search result. Through AdSense for Search, Google provides these search adverts to owners of “publisher” websites. Google is an intermediary, like an advertising broker, between advertisers and website owners that want to profit from the space around their search results pages. Therefore, AdSense for Search works as an online search advertising intermediation platform.

The Commission is concerned that Google has reduced choice by preventing third-party websites from sourcing search ads from Google's competitors. In particular through restrictions that the company has placed on the ability of certain third-party websites to display search advertisements from Google's competitors. The Commission's preliminary view set out in its Statement of Objections, in October 2016, was that these practices have enabled Google to protect its dominant position in online search advertising. It has prevented existing and potential competitors, including other search providers and online advertising platforms, from entering and growing in this commercially important area.

Google's practices covered over half the market by turnover throughout most of the period. Google's rivals 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 by far the most valuable commercial space on those websites, while at the same time controlling how rival search adverts could appear.

The European Commission concluded that Google has abused this market dominance by preventing rivals from competing in the online search advertising intermediation market.

Based on a broad range of evidence, the Commission found that Google's conduct harmed competition and consumers, and stifled innovation. Google's rivals were unable to grow and offer alternative online search advertising intermediation services to those of Google. As a result,
owners of websites had limited options for monetizing space on these websites and were forced to rely almost solely on Google.

Google did not demonstrate that the clauses created any efficiencies capable of justifying its practices.

The decision requires Google to, at a minimum, stop its illegal conduct, to the extent it has not already done so, and to refrain from any measure that has the same or equivalent object or effect.

Sources:
European Commission, Google Search (AdSense),


Google Search (Google Ads)

In December 2019, the French Competition Authority (“Autorité de la Concurrence”) sanctioned a €150 million fine against Google for abusing its dominant position in the market for search-related online advertising.

Following a referral from the company “Gibmedia”, the French Competition Authority launched an investigation on Google’s online advertising service related to its search engine, known as “AdWords”, renamed into “Google Ads” in July 2018.

The Competition Authority determined that, on the French market for search-related online advertising, Google holds an ‘extraordinarily’ dominant position. Its search engine now accounts for more than 90% of all searches in France and its market share in the market for search-related online advertising is probably above 90%. Advertiser’s position with respect to Google’s offer is thus particularly constrained. Leaving them no choice but to either accept the strict rules imposed arbitrarily by the service or to renounce using the Google Ads service entirely, even though the service accounts for almost the entirety of the online-search advertising market in France.

Some of these Rules aimed at preventing the exposure of internet users to malicious sites that may harm their interests. The enactment of such Rules is in no way objectionable in principle. However, such Rules must be defined and applied in an objective, transparent and non-discriminatory manner, taking into account their impact both on the activity of advertisers and the sites and products they promote, and their more general effects on Internet users and the ecosystem as a whole.
However, the assessment of the precise scope of each Rule is hampered by their lack of clarity and the absence, at times, of a clear distinction between them, even though there are many of them.

The lack of objectivity and transparency in the Rules makes it very difficult for operators to anticipate whether their ads, products and services comply with the Google Ads Rules. It also makes it very difficult for operators to anticipate whether their ads, products, and services will comply with the Google Ads Policy, and leaves it up to Google to monitor compliance and make changes at Google's sole discretion.

An examination of the terms and conditions of the Policy shows that Google has used precisely that discretion in a random and inequitable manner, by establishing differences in treatment between similar operators and by adopting, with respect to the same advertisers, reversals of position which reinforce the opacity of the policy.

In addition, Google engaged in inconsistent behaviour with respect to certain advertisers, which aggravated the lack of readability of the Rules. As a result, Google's sales teams were able to proactively engage with some advertisers, offering them "personalized support" to help them develop their sites using Google Ads services. However, some of the sites that have been approached include sites that had been previously suspended for breaches of the Rules, particularly those designed to protect users.

In the end, the Google Policy and its application go beyond what should be a proportionate use of Google's legitimate consumer protection objective.

The investigation concluded that the implementation of Google Ads’ rules and terms of service was non-transparent, non-objective and discriminatory. In addition to the direct effects on the market for search-related online advertising, this has at least the potential effect of disrupting the functioning of competition on the downstream markets on which advertisers operate. The formulation of the rules and their unfair and discriminatory implementation are likely to discourage the market entry of innovative sites while at the same time being unable to avoiding the inclusion sites which are potentially harmful to the consumer. On the contrary, some potentially harmful sites sometimes even benefit from personalised support for Google Ads from Google's sales teams.

Sources:

Autorité de la Concurrence, Décision 19-D-26 du 19 décembre 2019 relative à des pratiques mises en œuvre dans le secteur de la publicité en ligne liée aux recherches (Résumé) (French),

Autorité de la Concurrence, Décision n°19-D-26 du 19 décembre 2019 relative à des pratiques mises en œuvre dans le secteur de la publicité en ligne liée aux recherches (Texte intégral) (French),
Apple (App Store)

The Apple “App Store” is the only channel through which app developers may distribute their apps on iOS. First launched in 2008, the App Store has evolved into a highly profitable marketplace, with overall consumer spend exceeding $ 50 billion in 2019. However, concerns are increasingly expressed that various practices of Apple with regard to the App Store may breach competition law.

According to these concerns, Apple may use its bottleneck power to exploit app developers, e.g., by charging exorbitant fees for the services it provides, imposing other unfair conditions or applying its guidelines capriciously. Pursuing these claims might be justified in presence of a de facto monopoly in a market where no entry is possible, and therefore where high prices and other abusive terms are not self-correcting.

In the second place, Apple may use its gatekeeper and regulator role to exclude downstream competitors. Besides operating the App Store, Apple also regularly launches new apps exclusively in the “digital goods or services” space, including categories such as music streaming (Apple Music), news (News+), video content (Apple TV app), gaming (Apple Arcade), payments (Apple Pay), credit cards (Apple Card) and many more. This creates a potential conflict of interest as Apple might have the incentive to leverage its monopoly position on the market for app distribution on iOS devices to distort downstream competition in its favour. It would not be the first time a vertically-integrated operator engages in vertical leveraging – as the cases of Google, Microsoft and Amazon have shown.

In March 2019, the audio streaming service Spotify launched an EU competition complaint against Apple for imposing unfair and discriminatory conditions on competing services in its App Store. The same challenges are also faced by news publishers and media companies offering apps for media consumers.

Scandinavian publishing house Schibsted therefore subsequently backed Spotify’s allegations that Apple is abusing its stance as the most dominant player in the app market. In Sweden, the iPhone has a market share of 48% and a large number of Schibsted readers use Apple products to access news, according to an open letter, signed by Anna Careborg and Lena K. Samuelsson (see below), publishers at Schibsted titles Svenska Dagbladet and Aftonbladet, respectively.

Apple collects a 15-30% cut of digital content revenues for any subscriptions sold through an app delivered via the Apple App Store. Apple also retains the customer data for these sign-ups, so publishers can’t tailor services or target readers. Publishers are also frustrated when new app functionalities that are first approved by Apple are later rejected for no reason.
On Apple’s iOS mobile operating system, end-users are only able to obtain apps via the Apple App Store. On Google’s Android operating system, app downloads are managed by the Google Play Store. Alternative app stores for the Android operating system exist but are only used sparingly by end-users, meaning that for the distribution and delivery of apps, news media companies are highly dependent on Apple’s and Google’s two major app stores.

Both Apple and Google unilaterally set strict requirements for apps before they allow access to their app stores. One of the imposed requirements by Apple is that the payment processing of in-app closed subscriptions and other in-app purchases is done via Apple’s own payment systems. When a consumer buys a digital subscription in the app of a news media company as an in-app purchase, the entire transaction is managed by the app store.

Apple and Google transfer subscription revenues to the app provider, but not without deducting a non-negotiable tariff for the use of their payment system leading to an additional levy equating 30% of the subscription price in the first year. After the first year, this percentage drops to 15%. But if a customer interrupts the subscription for more than 60 days, the 30% rate will again run for another year. These rates are non-negotiable.

The 30% commission is likely to negatively impact innovation as it places a heavy burden on app developers required to pay that sum – many of which may be SMEs/start-ups, distracting financial resources away from research and development. It may also prevent the development of new apps, and thus potentially innovative products and services considering that some apps may never be profitable if they have to pay a 30% fee on their revenues. In many instances, Apple’s 30% commission will be the largest component of these apps’ cost base.

The compulsory app purchase and delivery via the Apple App Store, on conditions unilaterally determined by Apple, coupled with the mandatory use of the App Store’s own payment system and thus the 30% levy on every transaction, deeply affects the revenue model of publishers and news media and thus the development of news apps for the media consumer.

Furthermore, the App Store’s “in-app purchase” (IAP) has been criticized for allowing Apple to capture the customer relationship, hence depriving app developers of the valuable data which would allow them to improve the quality of their products and offer a better user experience, while at the same time handing Apple the veritable “keys to the kingdom” of these app developers’ businesses. According to app developers interviewed by the ACM, “when users buy an app or use IAP in the App Store, the app providers often do not see the details (payment or otherwise) of their customers.” In practice, this means that app developers may be deprived from important customer data, such as the user’s name, email, phone number, age, IP address or mailing address, as well as payment data, such as such as card details or billing information.

This creates several practical problems. First, if the user wishes to cancel its subscription, the app developer is unable to issue a refund; in this case, the user will have to seek a refund from Apple. Second, if a customer stops paying its subscription, the app developer has no visibility into the underlying reason so that it may take appropriate steps to resolve the problem (e.g., if payment failed because the user’s credit card expired, the app developer might wish to make a new offer). Third, app developers are precluded from providing extra services to important customers, such as carrying over unused credits to subsequent months, as they are unable to identify their users.
In other words, Apple positions itself as an unnecessary intermediary between the app developer and the app user for payment-processing purposes, collecting all the crucial data and claiming for itself the benefits of handling the customer relationship. If developers were allowed to use their own payment solution, they would be able to gather the relevant customer and payment data, and have control over the customer relationship. Similarly, if developers used a third-party payment processing service, it is likely that competition among payment processors (e.g., PayPal, Stripe, Adyen etc.) would lead to certain processors giving app developers greater access to data and new and innovative features and services. For app developers that rely heavily on subscription revenues, having no access to such data makes it hard to approach subscribers for discounts, upselling or other offers and results in the problems identified above. Eventually, end users are the losers.

Sources:


EPC, “News media development on mobile stifled by anti-competitive app-stores”, https://static.wixstatic.com/ugd/33c303_afe65151d308469c8ff0af37cc503213.pdf


In 2019, several Member States such as Germany and Austria have launched investigations into Amazon’s terms of business and its practices with sellers to determine whether the e-commerce giant is abusing its dominant market position. In a similar spirit, on 17 July 2019, the European Commission opened a formal antitrust investigation to assess whether Amazon’s use of sensitive data from independent retailers or third party sellers who sell on its marketplace is in breach of EU competition rules, given its dual role as both a seller and a marketplace where independent sellers can sell products directly to consumers. Amazon continuously collects data about the activities on its platform, when providing a marketplace for independent sellers.

Amazon Marketplace offers merchants a wide range of functionalities. They can use the Amazon Marketplace as a new or additional sales channel, building on Amazon’s brand. They can also purchase additional Amazon services such as warehousing their products in Amazon’s fulfilment centres, where Amazon handles the packing and shipment of the goods and provides customer service for the merchants. In addition, Amazon collects and transfers shopper payments to the merchants.

At the same time, Amazon is one of the largest online retailers itself. Depending on the product, Amazon’s own retail offerings may directly compete with those of the merchants using the Amazon Marketplace. Amazon’s private labels are said to consist of over 45 different brands selling over 240,000 items. According to the recent JungleScout “State of the Amazon Seller Report”, which is conducted amongst over 1,000 global third-party sellers, 76% of sellers are concerned about Amazon closing the sellers account without justification, while 53% stated that Amazon sells own products that directly compete with them.38

Due to the comparable platform and similar shopping experience, many shoppers may not recognize any difference between Amazon’s own retail services and its marketplace activities for other merchants.

Over the years, Amazon’s dual role as both marketplace sales representative and online retailer (“hybrid platform”) has raised concerns both in the US and in Europe.39 Most allegations concern the manner in which Amazon collects and analyses retailer data to learn which products sell well. Merchants have claimed that Amazon is using the data it collects to identify successful new product offerings on its platform to then market them itself. Allegedly, Amazon uses the data it collects from the retailers using its Marketplace to compete against them with an own offering. To this end, Amazon is said to either approach the actual manufacturers of the original (successful) products with a view to reselling the products at a lower price or to even to sell those products as so called “Amazon Basics” – its own brand.

The online retailing giant has long asserted, including to the Congress of the United States, that when it makes and sells its own products, it doesn’t use information it collects from the site’s individual third-party sellers—data those sellers view as proprietary. Such information could help

39 See e.g. Greg Bensinger, „Competing With Amazon on Amazon“, Retrieved from https://www.wsj.com/articles/SB100014240527023044414004577482902055882264.
Amazon decide how to price an item, which features to copy or whether to enter a product segment based on its earning potential, according to people familiar with the practice, including a current employee and some former employees who participated in it.

A recent report based on interviews with over 20 former Amazon employees reiterated these allegations. Pushed by ambitious retail sales goals of their private-labels, Amazon employees allegedly collect and assess proprietary data from Amazon’s individual third-party seller, in order to identify bestselling items, to draw up strategies on pricing, as well as to determine whether or not to enter a product segment with its own brand based on popular features or earning potential. According to one example, Amazon allegedly assessed its profit-per-unit on the third-party item, based on which Amazon could negotiate with potential manufactures for their own, competing product to ensure higher margins. Besides allegedly using proprietary data from third-party sellers to identify and launch own and competing goods. Amazon reportedly offers its own products at a price below that of the original merchant so that Amazon’s offering appears as the lowest priced offer on its Marketplace platform – and thus as a first choice in Amazon’s “Buy Box”. The Buy Box refers to the white box on the right side of the Amazon product detail page, where customers can add items for purchase to their cart. Not all sellers are eligible to win the Buy Box, Amazon may select one seller among the eligible sellers based on algorithms and then grant that seller the Buy Box. The requirements to gain access to the Black Box are however not fully transparent.

Based on the Commission’s preliminary fact-finding, Amazon appears to use competitively sensitive information – about marketplace sellers, their products and transactions on the marketplace. As part of its in-depth investigation the Commission will look into: (a) the standard agreements between Amazon and marketplace sellers, which allow Amazon’s retail business to analyse and use third party seller data, and (b) the role of data in the selection of the winners of the “Buy Box” and the impact of Amazon’s potential use of competitively sensitive marketplace seller information on that selection.

If proven, the practices under investigation may breach EU competition rules on anticompetitive agreements between companies (Article 101 TFEU) and/or on the abuse of a dominant position (Article 102 TFEU). This would also once again show the tendency for the systemic platforms to harvest and use sales, commercial and user data they have a privileged access and to give self-preferential treatment to their own offerings to the detriment of smaller competing operators.

Sources:


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## Facebook (Instant Articles)

Facebook launched its fast loading “Instant Articles” format in the spring of 2015. Instant Articles are articles from any site that load faster because they are hosted on Facebook. Reportedly, 72 publishers partnered with Facebook for the 2015 launch of Instant Articles.

According to news reports, Instant Articles has been criticized for underwhelming monetisation, less control over ads, limited user data, and underwhelming options for subscription-based outlets.

Reportedly, many publishers have claimed that the revenue they generate through Instant Articles visits doesn’t measure up to the money they earn when users visit their sites directly. The Guardian and The New York Times both stopped producing Instant Articles content in 2017, citing low monetization as a major concern.

Furthermore, Facebook imposes certain restrictions on publishers’ placement of ads in Instant Articles — publishers can post just one ad for every 350 words, and ads cannot exceed 15% of content, for example. On their own sites, publishers have full control over ad density and implementation.

Finally, some publishers allegedly complained that they received limited information on how they could track and learn about their Instant Articles readers. By distributing less Instant Articles content, and instead focusing on distributing content that draws users to their own sites, publishers don’t need to worry about going through an intermediary to access user data.

In February 2018, the Columbia Journalism Review reported that more than half of Facebook Instant Articles partners may have abandoned it. Of the 72 publishers that partnered with Facebook for the 2015 launch of Instant Articles, 38 did not post a single Instant Article on January 17, 2018, implying that over 50% of launch partners have abandoned the feature.

**Sources:**

Facebook, “Instant Articles”, [https://developers.facebook.com/docs/ instant-articles](https://developers.facebook.com/docs/instant-articles)
Google (AMP)

“AMP” (originally an acronym for “Accelerated Mobile Pages”) is an open source HTML framework developed by the “AMP Open Source Project”. AMP is optimised for mobile web browsing and intended to help webpages load faster. AMP accelerates load times on smartphones and other mobile devices by hosting content on Google’s servers rather than on the servers of a news organization or other websites.

AMP was first announced on 7 October 2015. After a technical preview period, AMP pages began appearing in Google mobile search results in February 2016. From the outset, AMP was criticised for potentially giving further control over the web to Google.

As early as 2018, the press reported on allegations that Google penalises publishers that do not use AMP by ranking their links lower than others in search results, an accusation Google denies. Furthermore, it was reported that Google imposes tough restrictions on the type of online advertising displayed on mobile pages via AMP, curbing revenue for websites. In October 2019, over 25 million website domains used AMP, publishing over 4 billion AMP pages in total.

In 2019, the Google AMP Project has emerged in the US as the centrepiece of a multistate group’s probe into whether Google violated state or federal antitrust laws by moving to dominate the online advertising ecosystem. The US investigation allegedly focusses on whether websites are compelled to participate in AMP to get a better ranking in Google search results, and the competitive advantage Google may gain through AMP in a host of different ways, such as possessing better advertising analytics than competitors like comScore and Adobe Analytics.
One US Federal State investigation allegedly questioned whether Google might use AMP to gain an advantage in gathering behavioural data about consumers to target ads to their interests and preferences. The investigation also enquires whether a website’s decision to not participate in AMP might lower its ranking in Google search results.

In January 2019, a study on online display advertising found an additional problem posed by the AMP standard, which is that it is making it harder for publishers to compete with Google in offering targeting services to advertisers. The rise of programmatic advertising resulted in advertisers valuing user data (and the targeting possibilities they unlock) more than ever. According to the study, some publishers with wide readerships, such as leading newspapers, have attempted to build their own unique proprietary datasets about their audience in order to offer targeting services directly to advertisers, eliminating the need to resort to intermediaries such as Google. However, the study found that such efforts are significantly undermined in the case of AMP. When the user visits an AMP-compliant page, the content of the page is fetched not from the publisher’s servers, but from Google’s servers, where it has been “cached”. The result is that Google collects large troves of data associated with the users’ interactions with the publisher’s website. Google shares such data with the publisher in a format that prevents cross-site matching, i.e. the publisher cannot match users visiting different websites which belong to the same publisher. Publishers are thus unable to gather the necessary data to create longitudinal user profiles they need to offer attractive targeting services.

Furthermore, the study argues that, of course, Google could claim that publishers do not have to comply with the AMP standard. But, in reality, publishers, especially news content providers, have to be AMP compliant, as otherwise they would lose the Internet traffic generated by Google searches. The reason is that Google only allows AMP-compliant webpages (designated as such with a lightning bolt icon and an “AMP” label) to appear in its News Carousel. Moreover, mobile web pages that do not comply with the AMP standard allegedly will figure lower on Google SERPs, since as of July 2018 page speed has become “a major ranking factor for mobile searches.” Compliance with the AMP standard is thus effectively mandatory for publishers given the importance of Google search as a source of referrals. For instance, data suggests that more than half (53%) of all referral traffic that digital publishers receive comes from Google search.

Sources:


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Google Chrome
(Third-Party Cookies)

In January 2020, Google announced that it would phase out the use of third-party cookies in its Chrome browser by 2022.

Chrome is far and away the most-used web browser in the world with a market share of 64.45% worldwide and 61.29% in Europe (February 2020). In the Android case, the Commission Decision has concluded that Google has engaged in illegal tying of the Google Chrome browser. As of 2012, Google required manufacturers to pre-install the Google Search app and browser app (Chrome), as a condition for licensing Google’s app store (the Play Store). As a result, Google has ensured that its mobile browser is pre-installed on practically all Android devices sold in the EEA. Browsers represent an important entry point for search queries on mobile devices and Google Search is the default search engine on Google Chrome.

Cookies and similar technologies are critical for many purposes, including the direct sale and marketing of press offerings, carrying out audience measurement (including for managing payment systems), designing news websites, preventing the unauthorized access to content (e.g. in the case of metered paywalls), or delivering relevant ads. Data-driven advertising, especially advertising that is matched to the interests of consumers, is an indispensable revenue stream for the financing of digital press content, as well as an appropriate and engaging way for advertisers to reach target consumers.

Cookies are how ad tech companies communicate with one another in order to trade programmatic ads. Cookies are critical to all steps of the digital advertising process, from the planning and activation of ads to the measurement of how they perform. Publishers depend on third-party data processing and, contrary to the few super dominant platforms, do not have millions of user log-ins (i.e. first-party data) at their disposal. If data processing is limited to first-party data only, the platforms will be even further ahead than they already are.

In 2019, Google and Facebook’s combined share of the global online advertising market is estimated to have reached over 61%. Within the European Union, the advertising duopoly’s share of online advertising markets in Germany, France, Italy and Spain is estimated at over 70%.

The step could therefore amount to a major advantage for Google over advertising rivals that would eventually find themselves shut out of Google’s dominant browser and could bolster the tech company’s already prominent position in the online advertising industry. As a result, Google stands to profit the most from this step. In the absence of third-party cookies’ use with Chrome,
the alternative for advertisers is to use Google’s first-party data within its own tools. This cements Google’s dominant position in digital advertising. An independent legal opinion by law firm Geradin Partners also came to this conclusion.

Sources:


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General Competition Issues
(United Kingdom)

In February 2019, the UK House of Lords conducted a study called “The Cairncross Review: A sustainable future for journalism” which concluded with the following key findings:

- “Google and Facebook play an increasingly important role in the markets for both online advertising, and the distribution of news. Between them they capture the largest share of online advertising revenue.

- Although it appears to have recently improved, the online advertising market is difficult to understand for advertisers and publishers alike.

- The programmatic display advertising market is seen as particularly complex and lacks transparency across the advertising supply chain. Both the scale and the data that the platforms possess on consumers make it hard for other players, including publishers, to compete.
• Google and Facebook also increasingly control the distribution of publishers’ content online. Because of their position, these platforms can impose terms on publishers without needing to consult or negotiate with them. This could threaten the viability of news publishers’ online businesses.

• The government must take steps to ensure the position of Google and Facebook does not do undue harm to publishers. Asking these platforms to draw up codes of conduct could ensure their decisions do not unnecessarily threaten publishers’ long-term viability.”

On 5 March 2020, the UK publishers’ association, the News Media Association (NMA), openly asked the UK Government for a market investigation of the digital advertising market. According to the NMA: “Finally, and most fundamentally, there is an urgent need for measures designed to put an end to Google’s anticompetitive practices with respect to online display advertising (which is the main source of revenue for news publishers). As the digital market unit has not yet been put in place and the codes of conduct contemplated are still virtual in nature and will take some time to negotiate, there is therefore a significant danger that the measures needed to ensure that news publishers receive fair revenues for their inventory may be significantly delayed. Given the dire financial situation which many UK news publishers are in, such a delay may be lethal.”

Sources:

The Cairncross Review, “A sustainable future for journalism”,