



*Google sanctioned by the French Competition Authority for abuse of dominant position in its self-preferencing on the online advertising market*

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**To quote this paper:** M. BOURDELEIX, “Google sanctioned by the French Competition Authority for abuse of dominant position in its self-preferencing on the online advertising market”, *Competition Forum – French Insights*, 2022, n° 0030, <https://competition-forum.com>.

**Resume:** On June 7th, 2021, Google was fined €220 million by the French competition authority for abuse of dominance in antitrust on the market for advertising servers for online publishers and mobile applications, in violation of articles L. 420-2 of the French Commercial Code and 102 of the Treaty on the Functioning of the European Union. The platform was sanctioned for a reciprocal self-preference practice between the AD server and the Programmatic marketings platforms for advertising spaces, as SSP, in the online advertising sector (Google).

## I. Legal background of the case

In the famous case « Google Shopping » in 2017<sup>1</sup>, the European Commission condemned the digital platform for the first time for abuse of dominance. According to the Commission, Google favoured its own price comparison tool to harm its competitors<sup>2</sup>. The international firm Google was sentenced to pay a fine of 4.2 billion euros (6% of its global turnover), for violating European competition. Self-preferencing implies that a company, by its behaviour, favours its own products or services over those of its competitors.

<sup>1</sup> EU Comm. June 27, 2017, *Google Search shopping*, DG COMP/39.740 - EU Comm. IP/17/1784, June 27, 2017

<sup>2</sup> General Court of the European Union, press release, No. 197/21 Judgment in Case T-612/17 Press and Information Google and Alphabet v

The French competition authority, in 2021, four years after « Google Shopping », followed the same position of the European Commission.

## II. Facts of decision

**In the facts**, three are news editors, News Corp (Murdoch Group), La Voix (which controls La Voix du Nord among others) and Le Figaro (which withdrew in the process) have referred the matter to the Authority for alleged abuse of dominance practices implemented by Google in the advertising technology market, using two advertising technologies offered by Google<sup>3</sup>:

Commission (Google Shopping), November 10, 2021

<sup>3</sup> ADLC, Decision No. 21-D-11 on practices implemented in the Internet advertising sector, June 7, 2021.

- The first is the Doubleclick ad server for publishers (« DFP »)
- The second is the Doubleclick AdExchange programmatic ad space marketing platform (hereinafter “AdX”).

To understand this case, we must focus on the digital display advertising technologies for publishers:

- the *ad server* is a tool that allows the serving of ads on the website or mobile app of the publisher.
- the *supply side platforms for the programmatic sale of advertising space* (« SSP ») are « marketplaces » where buyers of advertising space and publishers wishing to sell advertising space come together. They typically solicit bids from advertisers for a given impression, then conduct an auction between the different prices offered by the advertisers, and finally transmit the winning bid to the ad server.

### III. Analyse of Google’s anti-competition practices

Google was accused of **two discriminatory practices aimed at promoting Google’s advertising sales technologies**: its DFP ad server and its Adx programmatic sales platform <sup>4</sup>.

The first was an artificial reduction in interoperability between the Double-Click for Publishers DFP (DFP) and its advertising space marketing platform (Double-Click Ad Exchanges

– AdX). This led to a reduction in the opportunities for AdX to compete with third-party platforms.

The second practice was a self-interested strategy (self-preferencing) depriving competing servers of real competition on merit.

According to the Autorité de la concurrence, DFP’s control made it possible to inform AdX of the prices offered by the competing platforms: this inside information made it possible to strategically vary the commission required to supplant competitors such as Smart AdServer or Xandr.

Google used information which it collected on two platforms to optimise the bid system and varying its commission on impressions sold according to the intensity of competition.

Google also imposed to users of AD server to interacted with a third party. As a result, the modalities of interaction offered to third-party ad server clients were inferior to the modalities of interaction between DFP and AdX, which penalised both third-party SSPs and publisher clients.

A double damage could arise from these practices:

- A damage to competitors which could not compete on an equal footing with weapons and who were therefore likely to be evicted from the market

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<sup>4</sup> ADLC, Decision No. 21-D-11 on practices implemented in the Internet advertising sector, June 7, 2021.

- A damage to publishers - as commercial partners - which could take the form of abuse of exploitation, more damaging as advertising revenues are decisive to ensure their economic balance.

In the present case, the alleged anti-competitive practices were so serious that they paralysed Google's direct competitors in the SSP market and publishers of websites and mobile applications.

That's why **Google was sanctioned for a reciprocal self-preference practice** between the AD server and the Programmatic marketing platforms for advertising spaces, as SSP, in the online advertising sector (Google) by the French competition Authority.

#### **IV. The request for transaction procedure by Google**

Google requested the transaction procedure to the French competition authority, pursuant to the provisions of III of Article L. 464-2 of the French Commercial Code, which provides that *«where the company (...) undertakes to change its behaviour, the General Rapporteur may take this into account in its transaction proposal»*.

In a decision of the French competition authority on practices implemented in the road freight transport sector <sup>5</sup>, The Autorité confirmed that, in soliciting the transaction, an undertaking

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<sup>5</sup> ADLC, Decision No. 19-D-21, on practices implemented in the road freight transport sector, October 28, 2019.

undertakes to provide all sufficient guarantees to put an end to the practice at issue as soon as possible after the signing of the transaction minutes. This compliance does not in itself constitute an undertaking liable to give rise to a reduction in the penalty. Moreover, by signing the Transaction Report, the Company considers that the proposed ranges of penalties are consistent with its financial position. It cannot therefore argue that the proposed sanction is incompatible with its financial situation unless it deteriorated after the signing of the minutes.

At first, Google has presented its commitments link to practices sanctioned by the Autorité de la concurrence. The intent of these commitments is for Google to provide third parties with a means of interoperability with the DFP server, enabling merit-based competition between AdX and third parties for the purchase of inventory of publishers using DFP.

Secondly, Google is committed to modifying existing configurations related to the use of third-party ad servers by publishers so that they have access to AdX demand in real time <sup>6</sup>.

In this respect, the authority confirmed that the nature of the commitments proposed by Google was in favour of bringing Google into compliance and improving the competitive functioning of the market for ad servers and SSP platforms.

The authority declared the commitments binding for a period of three years from the notification

<sup>6</sup> ADLC, Decision No. 21-D-11 on practices implemented in the Internet advertising sector, June 7, 2021.

of the decision or, where appropriate, following their effective implementation.

## V. Impact of the decision

*« The decision sanctioning Google has a special meaning because it is the first decision in the world to address the complex algorithmic bidding processes by which display advertising works »*<sup>7</sup> affirmed at the time of the decision, the President of the Autorité de la concurrence, Isabelle de Silva.

Overall, the concept and legal regime of self-reference under Article 102 TFEU still needs to be clarified. The details of the European jurisprudence this regard is expected <sup>8</sup>.

By the way, the Digital Market Act, whose main objective is to create a level playing field in the digital domain, with clearly defined rights and obligations for large online platforms, will impose obligations to gatekeepers. Such as, an obligation links to provide companies that advertise on their platforms with the tools and information necessary for advertisers and publishers to conduct their own independent verification of advertisements hosted by the access controller.

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<sup>7</sup> ADLC, press release, “The Autorité de la concurrence hands out a €220 millions fine to Google for favouring its own services in the online advertising sector”, June 7, 2021.

<sup>8</sup> D. BOSCO «Nouvelle condamnation de Google pour des pratiques d'autopréférence» CONTRATS-CONCURRENCE-CONSOMMATION-N°8- August-September, 2021