

Kluwer Competition Law Blog

Who strikes next? Italian Competition Authority v Google

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Competition authorities are increasingly scrutinizing Google around the globe: The European Commission was the first authority to investigate Google and has issued three record-level fines in Google Shopping, Google Android and Google AdSense. In the US, the DoJ has recently filed a complaint against Google with the US Supreme Court arguing that Google abuses its dominant position by a range of practices that ensures that Google is set as the default search engine on nearly all search access points (e.g. in browsers, on phone home screens).

The latest competition authority that has decided to show its teeth against Google is the Italian *autorità garante della concorrenza e del mercato* (hereafter referred to as ICA). On 28th October 2020, the ICA announced that it has opened an investigation against Google for an “alleged abuse of dominant position in the Italian market for display advertising” and that it has conducted a dawn-raid at Google’s premises.

1. The affected markets

As in the Commission’s AdSense decision, the authority’s investigation concerns Google’s conduct in the online advertising market. How does this market work? Every time you open a website, in the background – not visible to you – there is an auction running that determines what kind of advertisement you see. This auction only takes a couple of milliseconds and is completely automated. There are several players involved here: The website selling the advertising space (the site you visit) and the buyer of the advertising space (the advertiser who can, for example, show you a pair of shoes) are the most obvious ones. But someone needs to bring these together. This is done through Supply Side Platforms (SSPs) and Demand Side Platforms (DSPs). The website owners can request an offer for the advertising space through the SSP. The DSP, on the other hand, is a technology platform that allows the advertisers to submit bids for ads. By matching supply and demand, the interaction between the two platforms through advertising campaign automation technologies (ad exchange) determine, which ad is ultimately shown and at which price. So-called ad servers then carry out the technical functions of the advertising on both supplier (publisher ad server) and advertiser side (advertiser ad server).

Google is the main player here: It offers both, a DSP and an SSP, with – according to the ICA – market shares of 92 % and 80 %, respectively. On the ad server side of the transaction, Google provides services on both, the advertiser and the publisher side with market shares above 80 %.

The ICA points out that the main characteristic of this market is the use of big data: The distinct feature of online advertising lies in the ability to show customized advertisement based on the information collected on individual users.

This data is, inter alia, gathered on the market for operating systems for smart mobile devices and the markets for browsers for surfing on the internet on PCs or mobile devices. According to the ICA, Google holds a dominant position in all these markets and is able to combine huge amounts of data collected through its different services.

2. Google's conduct

Sellers and buyers of advertisement space want to know as much as possible about the user of the website who is going to see the advertisement: The buyer can show a more personalized ad if he has more information about the viewer. Vice versa, the seller can demand a higher price as the ad is more valuable to the advertiser. The amount of available data thus plays a key role in the online advertising market. The core question of the ICA's investigation is whether Google must share the data it collects about its users.

One of the reasons why Google can obtain so much data is that it combines the information collected through its various services. The Google ecosystem is connected as most services require a *Google ID*. With this ID, the data collected through Google's different services, e.g. YouTube, Gmail, etc., can be combined to develop a precise picture of any specific user. Until 2018, Google provided advertisers and other players with keys to decrypt the Google ID, enabling them to associate the data collected by Google with its own data collected outside the Google System. This allowed to develop a specific profile of each user and therefore, more precise advertising. As of May 2018, Google only provides a pseudonym ID of its users. Although this ID still allows targeted advertising as it entails the data collected by Google, it cannot be associated with data collected outside of the Google system anymore to build an even more precise picture of the potential advertisement target.

Another aspect of the investigation is Google's third-party *tracking pixel* policy. Tracking pixels are snippets of codes that are embedded on a website and allow to gather information about the visitor, e.g. its scrolling behaviour, the type of ads they click on etc. Until 2018, Google accepted third party tracking pixels on YouTube. Advertisers or their intermediaries through such pixels could themselves gather data about the user to whom the ad was shown. Since May 2018, third party pixels on YouTube are rejected. Instead, advertisers can make use of the *AdsDataHub*. [According to Google](#), this allows advertisers to understand how their advertising is performing while at the same time, it safeguards the users' privacy. Here the concern is that the AdsDataHub only gives access to aggregated data and that this limits

advertisers and operators in the display advertising market from comparing and associating the users' browsing behaviour collected on YouTube with that collected elsewhere.

3. The competitive assessment

The authority considers an internal-external discrimination regarding the use of Google data. While Google can combine all data it collects within the Google system, it prevents other online advertising intermediaries from doing so by not giving them a decryption key to the Google ID and by not allowing third-party pixels. Google is thus in a better position to optimize the advertising campaigns it intermediates. If an advertiser wanted to use Google's intermediation services but also other intermediaries than Google, it would run the risk of redundant advertisements since it cannot know whether the person targeted through the non-Google service has already been targeted through the Google service. Google, on the other hand, is able to accurately profile the recipients of online ads through its different services (e.g. Android, Chrome, Maps, Gmail, YouTube etc.). Its competitors in the online advertisement intermediation sector cannot replicate this kind of data. The optimization of the intermediation process in the purchase and sale of advertisements is precluded to equally efficient competitors because Google - by refusing to provide the decrypted Google ID and to allow third-party tracking pixels - does not allow to associate the activity of a specific user (in terms of displaying a specific advertising message) within the Google system and outside the Google system. Google competitors are not able to provide online advertising intermediation services with the same identification capabilities because they simply do not have access to the same amount of data. As this data is collected through Google services that are not related to the advertisement, intermediation competitors - which generally do not offer the same range of online services as Google - are not able to gather this kind and amount of data themselves.

4. The theory of harm

The authority considers that Google's refusal to provide access to the encrypted Google ID and to allow the use of pixels has the effect of favouring Google's own intermediation services. This is likely to hinder effective competition in display advertising by foreclosing competitors. Further, it could reduce competition in the entire advertising chain and reduce the incentives for the technological development of advertising messages. Here, the agency notes that such developments otherwise could lead to less invasive technologies for consumers.

5. The remedy?

As the investigation focuses on a change of behaviour, the remedy might be quite straightforward: Google can go back to the status quo and allow third-party pixel

tracking and give access to the decrypted Google ID.

6. What to think of it?

This is not the first cartel investigation that targets the use of big data. However, the focus has previously been rather on the collection of the data itself. The German Bundeskartellamt, for example, has found an abuse of dominance in Facebook's generous data collection practices, and the European Commission recently started an investigation into Amazon's use of non-public independent seller data. But the ICA is the first who is tackling the question of whether Google can be forced to share its data – after all, the cornerstone of its economic power – with competitors. Google specifically justified its refusal to grant access to the decrypted user ID with data protection. This could be the first antitrust case that leads to a tech-company being forced to lower rather than to raise its privacy standards.

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