

Kluwer Competition Law Blog

Google offers commitments to get off the radar screen

Eric Barbier de la Serre (Jones Day) · Thursday, July 29th, 2010

A case involving Google confirms that the French Competition Authority is keen on using a combination of interim measures and commitment proceedings in order help it quickly resolve matters which it perceives as competition issues. This may remain a specific feature of the French system however: having regard to the very demanding standard of proof imposed on the Commission before it can grant interim measures, it would be difficult to replicate this powerful regulatory tool at the EU level for instance.

The case at hand concerns the content policy of Google's famous AdWords service. As many readers will know, the object of AdWords is to sell online advertising space on Google. Advertisers bid for the purchase of keywords, which, when Internet users type them as part of their request on Google, prompt the advertisers' commercial links to appear on the page of results.

Navx is one of these advertisers. It markets online databases for GPS navigation devices and smartphones which allow the user to locate fixed and mobile speed cameras.

In its complaint to the French Authority, Navx argued that Google had abused its dominant position by suddenly terminating its contract on AdWords, and showing discriminatory treatment. The French Authority found that there was indeed a *prima facie* case of infringement: it ruled that Google probably held a dominant position on the advertising market related to online searches, and that the wording of its general conditions lacked clarity with regard to the right (or prohibition) to advertise speed camera databases on Google.

At no point in the Decision does the French Authority deny Google's general right to define its content policy. On the contrary, the Decision clearly confirms this right and implicitly finds that AdWords is not an essential facility (paragraph 179). What bothered the Authority in this case was the way that Google had implemented and publicized its policy: it found that Google's rules were neither objective nor transparent, as they did not clearly specify whether speed camera warning systems and speed camera databases were prohibited or not. In addition, advertisers did not have sufficient certainty as to whether the ban concerned only the use of keywords and the advertising of products in the text of the announcement or on the page accessible via the commercial link, or if it also concerned further pages accessible from the latter. Finally, the Authority found that the procedures applicable in case of a change in the conditions, or of a suspension, were unclear.

For the practice to be found potentially illegal, even in a *prima facie* case like this one, it was still necessary to prove potential anticompetitive effects, at least on the downstream market (*i.e.*, on Navx's market, on which Google is not present). The Decision is not very detailed on this issue (*See e.g.*, paragraphs 243-244), and it may be that in practice, Navx's critical financial situation played a greater role than is apparent from the Decision.

Among other measures, the Authority ordered Google to clarify the scope and impact of the AdWords conditions applicable to devices aimed at evading traffic speed cameras, as well as the

AdWords processes that may lead to an advertiser's account being suspended. It also ordered Google to restore Navx's AdWords account, all the while letting Google keep the possibility of applying its policy to this account in a non-discriminatory manner.

Less than three weeks after these measures were adopted, Google offered commitments addressing the Authority's concerns. The market test on these commitments is open until 13 September 2010.

Offering these commitments seems like a smart move on Google's part: was the litigious wording of the ban on speed camera databases worth the risk of an adverse decision on the substance, that is a decision in which the Authority may have made a definitive finding on Google's potentially dominant position and imposed a fine? As regards Navx, the Authority's Decision may have bought it just a few more weeks: Google has merely committed to clarify its policies, which does not mean that they will leave room for Navx's products. This may be harsh, but this is the logical consequence of Google's general right to define its content policy.

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