The Autorité de la concurrence hands down a €150M fine for abuse of a dominant position

Published on December 20, 2019

Google has abused its dominant position in the search advertising market by adopting operating rules of its Google Ads advertising platform which are opaque and difficult to understand and by applying them in an unfair and random manner.

The Autorité de la concurrence hands down a €150M fine, and requires Google to clarify the wording of Google Ads' operating rules, as well as the accounts suspension procedure.

Background

In the light of its decision published today, the Autorité de la concurrence considers that Google Ads operating rules imposed by Google on advertisers are established and applied under non-objective, non-transparent and discriminatory conditions. The opacity and lack of objectivity of these rules make it very difficult for advertisers to apply them, while Google has all the discretion to modify its interpretation of the rules in a way that is difficult to predict, and decide accordingly whether the sites comply with them or not. This allows Google to apply them in a discriminatory or inconsistent manner. This leads to damages for both advertisers and for search engine users.

The Autorité imposes Google a financial penalty of €150M. It subjects Google to clarify its advertising platform Google Ads' operating rules and account suspending procedures.

Google will also have to put in place measures to prevent, detect and deal with the Google Ads violations of the “Rules”.

The summary of the decision must be accessible via the home page of the search engines Google.com and Google.fr, for a period of one week.

How does Google search engine work?

When a user makes a request in the Google search engine, they obtain two types of results:

- the so-called "natural" results, presented by relevance, from the Google algorithm;
- "sponsored" results or commercial ads, which appear to the right, above or below the results of natural search.

The ads that appear then in front of the user are the result of the implementation of auctions, during which different publishers wishing to promote their sites, products or services bid on keywords (ig: hotels, restaurants, dishwashers - dishes, weather, etc.) on the Google Ads platform. The result of these auctions depends, among other things, on the price the advertiser is willing to pay for each click.

This system has the characteristics of a two-sided platform: the search engine serves as an intermediary between the internet user and the advertiser. If the user finds the relevant advertisement, the user clicks on the link, which establishes an interaction with the advertiser, possibly leading to a transaction. The quality of the service offered by the search engine to users depends both on the relevance of the results through referencing but also on the relevance and the value of the paid advertisements displayed. In a competitive market, a search engine is therefore naturally encouraged to ensure the quality of the sites that carry ads.

Google thus regulates the interaction between the "advertisers" side and the "users" side in its best interests. The elements of the case show however that, by its practice, it only partially protects users and can even deprive them of sites with innovative economic models. It also exposes advertisers to particularly opaque Rules, the application of which is unpredictable and unfair.

The complaint

The Gibmedia company publishes weather information sites (info-meteo.fr), company data (info-societe.com) and telephone information (pages-annuaire.net and directories-inverse.net), some of which offer paid services. Following the suspension without notice of its Google Ads account (formerly AdWords), it lodged a complaint with the Autorité, by a request for urgent interim measures and a complaint on the merits of the case for anti-competitive practices. It considers that the procedure followed by Google and the reasons for the suspension were not objective, transparent and non-discriminatory.

By its decision 15-D-13 (see press release), the Autorité rejected Gibmedia's request for urgent interim measures, considering that the conditions for urgency were not met[1]. However, it had decided to continue the investigation into the merits of the case, which ends today.

Rules framing the operation of Google Ads advertising platform

The functioning of the Google Ads platform is framed by Rules, defined by Google, which specify the conditions under which an advertiser can advertise. In order to open an account, each advertiser must expressly agree to respect them. The purpose of some of them is to protect the user so that the user is not exposed to advertisements redirecting him/she to sites which may prejudice his/her legitimate interests. Google Ads notably prohibits advertisers from selling products or services that are normally free or presenting content to users

that is different from that presented to Google. It also imposes transparency vis-à-vis consumers on how they will be billed, if so. In case of non-compliance with these Rules, Google can refuse ads, block sites, or even suspend the accounts of advertisers, who can no longer place any ads via Google Ads.

Rules that are unclear in their formulation and interpretation and which, moreover, are subject to numerous modifications without advertisers being informed

The elements of the case show that Google had an ambiguous behaviour in several aspects: the Rules enacted are themselves opaque and difficult to understand, so they give Google discretion to interpret and modify them. In addition, the application of these Rules does not seem to follow coherent principles: thus, some sites have been suspended by Google while others, with similar content, have been maintained. Finally, the internal application of these Rules by Google is also not consistent, as some sites which did not comply with the Rules were offered personalized Google Ads services to increase their exposure.

- *Unclear Rules*

Given its dominant position (more than 90% of searches carried out in France and probably more than 80% on the online advertising market linked to searches), reinforced by the existence of very high barriers to entry[2], Google is required to define the operating Rules of its advertising platform in an objective, transparent and non-discriminatory manner. However, the wording of the Rules is not based on any specific and permanent definition, which gives Google full latitude to interpret them according to the situations.

Thus, the "*sale of free articles*" Rule prohibits, without further form of specification, "*charging users a fee for products or services that are normally free*". However, the "normally free" nature of a service cannot be easily determined. In

terms of weather, for example, some sites offer a large number of free information, but sites like Météo France or Meteoconsult also offer a paid subscription. It is therefore very difficult for a professional to determine whether the service in question is "normally free", this concept not being defined precisely.

- *Position changes in the interpretation of the Rules*

Google has frequently changed its position on the interpretation of the Rules. This instability has the effect of keeping certain advertisers in a situation of legal and economic insecurity, the latter being exposed to Google's position changes, and therefore to the suspension of their site or even their account, which they cannot anticipate.

In September 2014, Google considers, for example, that the pay-per-use site *annuaires-inverse.net* complies with its Rules relating to the sale of normally free services. However, in January 2015, without the site having changed its economic model, Google suspended the site.

Google's support teams, with whom advertisers can exchange, sometimes have difficulty understanding the scope and content of the "Rules" themselves, and in some cases may have to turn to other specialized teams, called "Policy", in charge of the sites' compliance with the Rules, in an attempt to obtain explanations. Google's internal teams sometimes have diverging approaches, the former committing in some cases to advertisers to recommend that the suspension of accounts be lifted, without being followed by the "Policy" teams.

Advertisers' support teams have sometimes gone so far as to put the customers they support at risk against the Rules.

In this regard, we can mention the case of Amadeus, whose Google sales teams actively participated in promoting its services on Google Ads, by participating in the writing of advertisements and the editing of its site's home page until the end of 2017. However, the site would then be suspended by Google in January and July 2018 for non-compliance with the Rules.

- *Changes to the Rules not transmitted to the sites*

The content of the Rules has, moreover, evolved on numerous occasions during the period covered by the instruction, without these changes in content having been the subject of information or notification to the concerned advertisers.

For example, an online directory site has been suspended several times. When it was last suspended, Google justified the suspension of this site by updating the Rule on the sale of free articles. If this modification was indeed published on the help center, recording all the modifications of the "Rules", no information had been notified to the publisher.

By refraining from informing the sites of the modifications made to the operating Rules, Google did not apply what it had announced to the Autorité in the context of the Navx[3] case examined by the Autorité in 2010. This case ended with an approval of Google's commitments, which had been made mandatory for a period of three years.

In this context, Google was to set up a procedure for advertisers to notify and inform of the changes in its content policy.

This volatility of the Rules has the effect of keeping certain advertisers in a situation of legal and economic insecurity, the latter being exposed to Google's position changes, and therefore to the suspension of their site or even their account, which they couldn't anticipate.

Rules applied in a discriminatory manner: several sites were suspended while others, with similar content, were not

Thus, for example, Google temporarily suspended Gibmedia's site(s) or its Google Ads account several times, before suspending them definitively in 2015,

for violation of various user protection rules.

Yet, at the same time, Google continued to run similar ads.

While it, for example, suspended the accounts attached to the reverse look-up directory sites published by Gibmedia, it, at the same time, maintained those of its sister company - with content however similar - and even supported its development.

Beyond the complaint lodged by Gibmedia, the Autorité has highlighted that other sites may also have been subject to differential treatment in the application of the Rules.

This is for example the case of several sites offering reverse look-up directory or weather information paid services, which have been suspended by Google for violation of the rule on free articles or unreliable promotions, while other sites offering similar paid services have not been suspended.

Google has also applied its own Rules inconsistently. Google's sales teams were able to offer sales support to promote previously suspended sites. This could lead to exposing users to ads aigainst their interests.

Serious practices that may have discouraged the development of innovative sites

The objective of consumer protection, displayed by Google, is perfectly legitimate but it cannot justify that Google treats actors in a different and random manner in comparable situations. Google cannot suspend an advertiser's account on the grounds that it offers services that it considers being against the interests of the consumer, while agreeing to reference and accompany sites that sell similar services on its advertising platform.

If the element in the case does not establish that Google has implemented a deliberate and comprehensive strategy to disrupt competition downstream, that is to say on the development of new sites, it has nevertheless showed, at best

negligence, at worst opportunism, by displaying a consumer protection behaviour, while developing commercial offers towards editors of sites however considered by Google itself as doubtful, with the objective to increase investments in Google Ads (support services).

In addition, the "sale of free services" Rule may have led sites to favour a content policy based on free content coupled with advertising, a model very present in the ecosystem of Google products. Indeed, in order not to be faulted on the Rule prohibiting the sale of free services, sites have been able to review their economic model by exclusively offering non-paying services for users, and finance, indirectly, by the sale of advertising space via display advertising for which Google offers its services.

These practices also damaged sites with low visibility. Indeed, the optimization of natural referencing can only be long and complex, the only real possibility offered to these sites to make themselves known is, in the vast majority of cases, paid referencing, ads linked to Google searches having become the "de facto standard" for advertisers wishing to purchase this type of advertising.

Finally, the Autorité notes that Google has implemented these practices even though it has been regularly alerted of the importance of respecting competition law. The European Commission has indeed fined it for infringement of another kind but also constituting of an abuse of a dominant position, in the Google Shopping, Google Android and Google Search AdSense cases. With particular regard to the enactment and application of the Rules on the advertising market, the Autorité has, since 2010, repeatedly specified[4] the conditions of their legality, in decisions granting or rejecting urgent interim measures, commitments or rejection for lack of evidence.

The fine imposed

On the basis of the elements in the case, the Autorité fined Google 150 million euros.

It also orders Google to:

- clarify the drafting of the Rules for its Google Ads advertising platform and review the information procedures concerning changes to the Rules (individual notification two months before the change of Rule);
- clarify the procedures for suspending accounts in order to prevent them from being brutal and unjustified;
- set up procedures for alerting, preventing, detecting and treating the breaches of its Rules, so that measures to suspend Google Ads sites or accounts are strictly necessary and proportionate to the objective of consumer protection.

To this end, Google must organise an annual mandatory training for staff responsible for personalized support for companies present on Google Ads so that the teams are sufficiently informed of the content and scope of the Google Ads Rules, as well as the risks that their customers and users incur if they don't respect them.

Google will send the Autorité, each year, a report notably specifying the number of complaints filed against it by French users, the number of sites and accounts suspended, the nature of the Rules violated and the terms of the suspension.

In addition, Google will have to present to the Autorité:

- within 2 months, a report detailing the measures and procedures it intends to take to comply with the injunctions.
- within 6 months, a report detailing all the measures and procedures that it has effectively implemented.

Finally, a summary of the decision must be accessible via the home page of Google.fr and the version of Google.com accessible in France, for a period of one week.

[1] No serious and immediate damage to the interests of consumers, the sector or the complainant was characterized.

[2] In order for a supplier of advertising services linked to research to enter the market, it must make significant investments in capital and time, in particular in the development of a general search engine and of a technology putting through users' researches with those of advertisements.

[3] See decision 10-D-30 and Press Release of 28 October 2010.

[4] See decisions 19-MC-01 (Amadeus), 15-D-13 (Gibmedia), 13-D-07 (E-Kanopi), 10-MC-01 et 10-D-30 (Navx), 05-D-34 (online sale of audiovisual equipments).

> See the full text of decision 19-D-26 of 19 December 2019

Contact(s)

Bertille Gauthier
Communications Officer
+33155040039
Contact us by e-mail