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Competition in Digital Advertising Markets – Note by France

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More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/competition-in-digital-advertising-markets.htm>

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Introduction

With the growth of the digital economy, it has become essential for competition authorities to enhance their knowledge and understanding of these complex ecosystems, in particular through the use of sector inquiries and thematic studies. In order to ensure that a sufficient competitive dynamic is maintained, they have subsequently had to deal effectively, where necessary through innovative decision-making practices, with the concerns posed by digital markets and by certain players, first and foremost by platforms.

The *Autorité de la concurrence* ("the *Autorité*") rapidly took up these issues and continues to inform the debate by conducting both global analyses, as it did very recently in its study on competition and e-commerce¹, and more targeted studies, such as the one on algorithms² conducted in cooperation with the Bundeskartellamt.

On the strength of its abundant decision-making practice in the digital sector, the *Autorité* has also endeavoured to put forward proposals for possible adjustments to its means of intervention in order to address the challenges and specificities of the digital economy³. The importance that the *Autorité* attaches to a proper understanding of these developments has also been tangibly demonstrated by the creation of a digital economy unit, which has been tasked with developing expertise on these subjects and specific investigation tools⁴.

Online advertising markets are one of the emblematic sectors of the new digital economy. The Internet is now the leading advertising medium, ahead of television. Online advertising is growing at an accelerating pace and, in 2018, accounted for a turnover of approximately 5.2 billion euros in France, increasing by 12% in 2019 to reach approximately 5.862 billion euros⁵. Within this sector, search advertising⁶ still marginally accounts for the majority of turnover, but growth in the display advertising segment (⁷) is higher. This type of advertising is developing in particular thanks to social networks, video advertising and the mobile sector.

¹ Study "Concurrence et commerce en ligne [Competition and e-commerce]", Autorité de la concurrence, 5 June 2020 : <https://www.autoritedelaconcurrence.fr/sites/default/files/concurrence-commerce-en-ligne-en.pdf>

² Study "Algorithme et concurrence [Algorithm and Competition]", Bundeskartellamt and Autorité de la concurrence, 6 November 2019 : https://www.autoritedelaconcurrence.fr/sites/default/files/Algorithms-and-competition_FR.pdf; <https://www.autoritedelaconcurrence.fr/sites/default/files/algorithms-and-competition-summary.pdf>

³ Contribution of the Autorité de la concurrence to the debate on competition policy and the challenges raised by the digital economy, 19 February 2020 : https://www.autoritedelaconcurrence.fr/sites/default/files/2020-03/2020.03.02_contribution_adlc_enjeux_numeriques_vf_en.pdf

⁴ <https://www.autoritedelaconcurrence.fr/en/press-release/autorite-creates-digital-economy-unit>

⁵ Source: 22nd and 23rd E-advertising Observatories presented by the Syndicat des Régies Internet (SRI) and the Union des Entreprises de Conseil et Achat Média (UDECAM).

⁶ When an Internet user enters a query in the Google search engine, he or she gets two types of results: (i) the so-called "natural" results listed in order of relevance by Google's algorithm; (ii) the "sponsored" results or commercial ads, which are displayed to the right of, above or below the natural search results.

⁷ i.e., the tiles, banners and skins embedded in the content of a site so that they can be seen by Internet users.

As early as 2010, the *Autorité* started to examine the complex mechanisms of this sector. It did so first of all in its advisory capacity (Section 1). The *Autorité* has also had to address this issue in the context of its decision-making practice in respect of merger control⁸ and anticompetitive practices. With regard to the latter, the interim measures (Section 2) and commitments and fines (Section 3) imposed on Google are a perfect illustration of the *Autorité*'s vigilance with regard to practices that may be implemented by dominant operators in these markets.

1. An in-depth understanding of digital advertising markets: the advisory activity of the *Autorité de la concurrence*

The *Autorité*'s advisory function is an essential tool that enables it to conduct an in-depth assessment of a sector and identify any shortcomings.

It was this instrument that the *Autorité* used first to gain an understanding of the challenges in online advertising markets, in 2010 and then in 2018⁹. The opinions issued placed it at the forefront of the analysis of these markets and enabled it - when it subsequently had to rule on complaints - to base its decisions on solid and in-depth thinking.

1.1. The search advertising market within the context of the 2010 sector-specific inquiry¹⁰

As early as 2010, the *Autorité* started to examine the market for search engine advertising within the context of an opinion on the functioning of competition in the online advertising sector. It backed up this examination with an in-depth investigation, which it supplemented with comments collected from a wide-ranging debate involving a broad range of stakeholders.

1.1.1. Google's dominant position in the search engine advertising market and the concerns expressed

The *Autorité* first sought to define the relevant markets by distinguishing between the offline advertising market and the online advertising market and, within the latter, between search advertising¹¹ and other forms of digital advertising (in particular "display" advertising), each of which caters for different needs of advertisers.

⁸ See, for example, in the online and television advertising markets: Decision 10-DCC-11 of 26 January 2010 on the acquisition of sole control of NT1 and Monte-Carlo Participations (AB group) by TF1 group; Decision 10-DCC-152 of 3 November 2010 on the acquisition of sole control of SeLogger.com by Axel Springer AG through a public cash offer; Decision 14-DCC-50 of 2 April 2014 on the acquisition of sole control of Direct 8, Direct Star, Direct Productions, Direct Digital and Bolloré Intermédia by Vivendi SA and Canal Plus Group; Decision 18-DCC-18 of 1 February 2018 on the acquisition of sole control of Concept Multimédia by Axel Springer Group; Decision 18-DCC-63 of 23 April 2018 on the acquisition of sole control of Aufeminin by TF1.

⁹ See also, in the audiovisual sector, Opinion 19-A-04 of 21 February 2019 on a request for an opinion by the Cultural Affairs and Education Committee of the National Assembly.

¹⁰ Opinion 10-A-29 of 14 December 2010 on the competitive functioning of online advertising.

¹¹ The advertisements displayed to Internet users are the result of auctions at which publishers that wish to promote their websites, products or services bid on keywords (e.g. hotel, restaurant, dishwasher, weather, etc.) on the Google Ads platform. The auction results depend in particular on the price per click that the advertiser is prepared to pay.

The *Autorité* then analysed Google's position in the French search advertising market and found that the company held a strongly dominant position based on various criteria: market share, level of margin, nature of customer relations, maintaining prices permanently above competitors' prices, etc. The *Autorité* also highlighted the existence of significant barriers to entry.

While the *Autorité* noted that Google's position, which is the result of significant innovation, backed up by serious and continuous investment, is not in itself wrongful, the sector-specific inquiry revealed that this dominant position has nevertheless generated criticism and concerns among many stakeholders, some of whom considered themselves to be victims of unfair or even unlawful behaviours on the part of the search engine.

1.1.2. Possible responses from competition law

In response to the behaviours reported by various market players, the *Autorité* has drawn up a non-exhaustive typology of practices that could be implemented by Google in the context of the use of its market power, while at the same time providing an analytical framework for assessing the compliance of these practices with competition law.

In doing so, the *Autorité de la concurrence* has sought to inform the sector by providing a guide to behaviours that, based on the specific circumstances and their impact on the market, may or may not constitute an abuse of a dominant position. As the matter was brought before the *Autorité* in its advisory capacity rather than within the framework of a complaint, the *Autorité* did not rule on the legality of the reported behaviours.

The *Autorité* has thus distinguished between potential foreclosure abuses and exploitative abuses:

- possible exclusionary abuses (i.e., discouraging, delaying or eliminating competition in markets where a dominant player would be present) include artificially erecting barriers to entry, whether of a contractual nature (e.g. excessive exclusivity clauses, in particular in contracts between Google and AdSense network partner sites) or of a technical nature;
- possible exploitative abuses (i.e., undertaking implementing the abuses disrupts the operation of other markets, thereby affecting customers, suppliers or partners who are not necessarily competitors) include, for example, the imposition of exorbitant conditions (e.g. excessive prices), discriminatory treatment or lack of transparency, in particular in relation to the operation of the AdWords service¹².

The *Autorité's* analysis has shown that the legal and analytical framework relating to abuses of dominant position serves to prevent, remedy or sanction certain types of behaviours and thus to set limits on the conduct of dominant digital platforms that are likely to harm effective competition between players.

The opinion also addressed the possible impact of certain actions on the press sector, which is particularly affected because of its special status as a customer, partner, competitor and potential supplier of Google.

In particular, Google was criticised for positioning itself as the reference site for access to information without paying any financial compensation to newspapers, which have to bear the costs of creating quality information. The *Autorité* has invited the legislator to clarify or supplement the existing legal framework on transparency in the advertising sector in order to take account of the specificities of online advertising.

¹² The advertising space sales service of the search engine Google, which became Google Ads in the summer of 2018.

As will be analysed in detail below, ten years on from this opinion, the *Autorité* has had the opportunity to take a position on these issues by imposing interim measures on Google to the benefit of newspaper publishers.

1.2. The display advertising market and the increasing importance of data: the 2018 sector-specific inquiry¹³

As a follow-up to its 2010 opinion and the study on big data conducted jointly with the Bundeskartellamt, the *Autorité de la concurrence* launched a new sector-specific inquiry on the digital advertising sector in 2016, which was finally concluded in 2018.

In this new sector-specific inquiry, the *Autorité* decided to assess the competitive situation in the display advertising sector, which is mainly based on the commercial processing of users' data.

1.2.1. Analysis of the display advertising ecosystem

The opinion focused on analysing the ecosystem of "programmatic" digital advertising and, more broadly, the various forms of real-time user-targeted advertising.

The *Autorité* first of all noted that the importance of owning data has given rise to new players and new professions: on the publishers' side, those whose job consists in creating coherent offers by type of medium or audience and, on the advertisers' side, those whose job consists in continuously optimising the sending of advertisements to Internet users likely to be interested in their products and to convert this interest into a purchase. On the publishers' side, platforms dedicated to the sale of online advertising space have been created¹⁴ and, on the advertisers' side, platforms specialising in programmatic purchasing and campaign optimisation have been set up¹⁵.

New technologies have also emerged: those underlying real-time bidding or those that allow for audience measurement applied to this particular type of advertising.

The *Autorité's* study has made it possible to describe and decrypt in an exhaustive manner the functioning of this new sector, characterised by the complexity of the processes at play: on the one hand, the many players involved and, on the other hand, the technologically advanced and innovative services, which are very "sequenced" and can give an impression of opacity.

1.2.2. Analysis of the competitive functioning of the display advertising market

Though this sector is developing within a powerful technological dynamic, the *Autorité* has nonetheless noted that its competitive balance remains fragile. Many intermediation and data processing service providers have entered the market (Smart Adserver, Weborama, Teads, Criteo, etc.), but they are still facing competition from global players, first and foremost Google and Facebook.

Facebook and Google, the two leaders of the online advertising sector, mainly provide free services to Internet users and generate most of their revenue from the sale of advertising

¹³ Opinion 18-A-03 of 6 March 2018 on data processing in the online advertising sector.

¹⁴ Known as "supply-side" platforms or SSPs. Other players involved on the publishing side include advertising networks, Ad Networks, advertising sub-networks and Ad Servers.

¹⁵ Known as "demand-side" platforms or DSPs. Other players on the advertisers' side include media agencies, trading desks and Ad Servers.

services to publishers and advertisers. The success of their advertising services is based on processing the huge volume of information available to them thanks to the popularity of their sites and the development of "log-in" environments where users identify themselves when accessing the service. Moreover, these two firms also draw on network effects, their capacity to produce technological innovations and a model of vertical integration, based on a presence in both publishing and technical intermediation.

Finally, the *Autorité* pointed out that Google also has specific competitive advantages, resulting in particular from its presence in both the display and search advertising sectors, where it has enjoyed a very strong position for some 20 years.

1.2.3. Analysis of the decision-making practice of the Autorité and the European Commission

The opinion then analysed how the French and European competition authorities have approached the digital advertising sector over the last ten years. Through a number of contentious decisions as well as merger control decisions, they have developed a decision-making practice that has clarified the competition issues in the online advertising sector.

The *Autorité* recalled that digital advertising still displayed certain specific features in 2018 compared to other forms of advertising, in particular television advertising, which related to targeting opportunities and pricing methods. However, it pointed out that this observation could change in the future depending on the development of targeted and programmatic television advertising.

Furthermore, the *Autorité* stressed that competition law applies to all services provided to Internet users, including those that appear to be free of charge.

1.2.4. The concerns of the players interviewed

In the course of the investigation prior to the opinion, many stakeholders described a series of individual and collective situations and practices implemented by various companies in the sector, some of which, if they became established, could have an impact on competition:

- Strategies involving bundling or tied sales, low prices, and exclusivities. Examples of the behaviours referred to were: the bundling of several intermediation services, the bundling of intermediation services with services supplying targeting data, as well as the bundling of an intermediation service with exclusive access to a site's inventory;
- leveraging of leading positions in certain service markets to develop positions in other markets and, sometimes, to distort competition in those markets;
- discriminatory practices related in particular to the possibility of monetising certain types of contents or related to the access conditions of DSPs to the marketplaces and to the advertising inventories of certain platform publishers;
- development of interoperability barriers in the advertising intermediation sector;
- existence of restrictions regarding the possibilities for collecting and accessing certain data.

Although the examination of these practices was not part of the *Autorité's* advisory role, the evidence gathered in the course of the sector-specific inquiry warranted that the *Autorité* pay close attention to the issue and even, where appropriate, start litigation proceedings *ex officio*. The *Autorité* subsequently indicated that it had opened several litigation investigations relating to the online advertising markets, which are still ongoing.

2. The importance of a swift intervention in the digital advertising markets: the use of interim measures

On several occasions, the *Autorité de la concurrence* has received complaints from third parties relating to practices implemented by certain digital players in the online advertising markets.

Some of these complaints were submitted together with a request for interim measures pursuant to Article L. 464-1 of the French Commercial Code. This provision allows the *Autorité* to order the interim measures that are requested by third parties or those that the *Autorité* deems necessary, when the reported practice causes serious and immediate harm to the general economy, to that of the sector concerned, to the interests of consumers or to those of the complainant undertaking¹⁶.

By ordering an interim measure, which usually takes the form of a behavioural injunction to stop the practice concerned and/or to restore the *status quo ante* pending the decision on the merits, the *Autorité* can thus prevent, during the investigation period, a potentially anticompetitive practice from seriously and irreparably harming competition or the undertaking which is the victim of the practice.

From a procedural standpoint, a request for interim measures can only be made incidentally to a complaint on the merits of the case which is referred to the *Autorité de la concurrence*. Such request for interim measures is investigated by the investigation unit and gives rise to a decision by the Board of the *Autorité*. This decision is taken within a very short period of time, usually a few months after the complaint.

It is important to note that the transposition into French law of the "ECN+" Directive, which was adopted on 11 December 2018 and published on 14 January 2019, will give the *Autorité* the possibility to start proceedings *ex officio* when it deems interim measures to be necessary in a given market, without having to wait for a referral by third parties¹⁷. This will enable the *Autorité* to intervene even more effectively, particularly in the rapidly evolving digital sector.

Not all of the many referrals made to the *Autorité* in relation to the digital advertising sector have been successful: some referrals on the merits have been rejected on the basis of Article L. 462-8 of the French Commercial Code when the facts invoked were not supported by sufficient evidence¹⁸; a request for interim measures was also rejected because the complainant was unable to demonstrate the existence of serious and immediate harm, as required by Article L. 464-1 of the French Commercial Code¹⁹.

¹⁶ These different cases of harm are not cumulative but alternative conditions.

¹⁷ Namely by the French Minister of Economy, the persons mentioned in the last paragraph of article L. 462-1 or undertakings.

¹⁸ See in this regard: Decision 05-D-34 of 27 June 2005 on practices implemented in the market for the online sale of audiovisual equipment (final decision); Decision 13-D-07 of 28 February 2013 on a referral from E-kanopi company (confirmed by the Court of Appeal in 2014 and the Cour de cassation (French Supreme Court) in 2016); Decision 16-D-25 of 23 November 2016 on practices implemented in the online advertising sector (final decision); Decision 17-D-24 of 18 December 2017 on practices implemented in the online search engine and online advertising intermediation sector (final decision); Decision 18-D-13 of 20 July 2018 on practices implemented by Google in the online advertising sector (final decision).

¹⁹ See in this regard Decision 15-D-13 of 9 September 2015 regarding a request for interim measures from Gibmedia (final decision). It should be noted that the investigation on the merits of this case continued and resulted in Decision 19-D-26 of 19 December 2019 regarding practices implemented in the online search advertising sector.

On the other hand, the *Autorité* granted three requests for interim measures in relation to the online advertising sector, all of which were against Google. The three corresponding interim measure decisions will be presented below.

2.1. The *Navx/Google* case²⁰

On 16 February 2010, the *Autorité de la concurrence* received a complaint from Navx, a company that sells data online showing the position of speed cameras, the location of petrol stations and the price of fuel, against practices adopted by Google Ireland and Google Inc.

In 2008, Google decided to change its content policy on speed camera detection devices to make it more restrictive. However, the drafting of its internal rules lacked clarity as to whether or not manufacturers could continue to advertise these products. After a period of uncertainty, in November 2009, Navx's account was unilaterally suspended by Google.

Navx argued that Google, which allegedly holds a dominant position in the market for online advertising, in particular search advertising, had abused that position. It also allegedly abused Navx's economic dependency on Google.

The complainant primarily complained about the sudden termination of the contractual relations (established via the AdWords contract), a refusal to sell and a discriminatory practice. In addition to the complaint on the merits of the case, Navx requested interim measures to put a stop to the reported practices.

2.1.1. *Google's dominant position in the search advertising market in France*

In its Decision of 30 June 2010, the *Autorité* found that, based on the evidence collected during the investigation, the French market for online search advertising was likely to constitute a relevant market within the broader online advertising sector.

In this market, Google was to be regarded as holding a dominant position. Its search engine was very well known and accounted for about 90% of online searches in France. The existence of significant barriers to entry, linked in particular to the large investments required, the data already collected by Google and the weak bargaining power of advertisers in respect of Google confirmed this preliminary finding.

2.1.2. *Practices likely to constitute an abuse of dominant position*

While Google is, in principle, free to define its policy as regards the contents allowed on AdWords, the *Autorité* nevertheless found that the evidence in the case revealed a lack of objectivity and transparency in Google's AdWords content policy. Moreover, the discrimination stemmed from the differentiated treatment between different manufacturers, which was not objective, and from the level of information made available to each advertiser.

These practices, which were likely to have had anticompetitive effects, were deemed likely to be in breach of the provisions of Article L.420-2 of the French Commercial Code and, where applicable, Article 102 of the Treaty on the Functioning of the European Union²¹.

²⁰ Decision 10-MC-01 of 30 June 2010 on the request for interim measures from Navx (final decision).

²¹ In the question of possible abuse of economic dependency (Article L.420-2, paragraph 2, of the French Commercial Code), the *Autorité* found that it was not necessary to rule on this point at the interim measures stage, since the existence of a dominant position had, in any event, been established at that stage of the investigation.

2.1.3. Demonstration of the existence of serious and immediate harm to the complainant

The *Autorité* found that the closure of Navx's AdWords account had severely and suddenly jeopardised Navx's business model and profoundly affected both its revenues and its growth potential, making it highly unlikely that Navx would continue its retail sales activity, which accounted for approximately two thirds of its turnover.

These practices were therefore regarded as causing serious and immediate harm to the complainant.

2.1.4. Interim measures ordered

On this basis, in its decision of 30 June 2010, approximately four months after the case was referred to it, the *Autorité* ordered Google Ireland and Google Inc., as an interim measure, and within four months of the notification of the Decision :

- to clarify the scope of the AdWords Regulation applicable to speed camera detection devices as regards (i) prohibited behaviours for advertisers (keywords, ad text, destination page, landing pages, etc.) and (ii) permitted or prohibited devices (in particular speed camera warnings and databases);
- to clarify the AdWords procedures that can lead to the suspension of an advertiser's account.

Such information shall be made available to advertisers under objective, transparent and non-discriminatory conditions and shall specify the date of application of the amended procedures in order to give the advertisers sufficient notice.

Finally, the *Autorité* ordered Google Ireland and Google Inc. to reinstate, within five days of the notification of the Decision, Navx's AdWords account in order to enable it to release advertisements without prejudice to the ability of Google Ireland and Google Inc. to apply in a non-discriminatory manner the AdWords Regulation and its procedures, as clarified in accordance with the injunctions imposed.

These injunctions were implemented by Google and the decision on the merits of the case, which was issued on 28 October 2010²² (see Section 3 below), made these commitments binding.

2.2. Amadeus/Google case²³

The 2019 *Amadeus/Google* case, which will be presented below, has many similarities with the 2010 *Navx/Google* and 2019 *Gibmedia/Google* cases. This decision relates to a complaint about the operating rules of Google's AdWords service (later Google Ads), in this case applicable to paid electronic directory enquiry services, a sector in which Amadeus was active.

Amadeus complained that Google had suspended some of its Google AdWords accounts without any warning or clear indication of the alleged breaches, and had refused most of its advertisements since January 2018.

The *Autorité* found that the practices adopted by Google, which is dominant on the search advertising market, were liable to constitute a sudden termination of commercial relations

²² Decision 10-D-30 of 28 October 2010 on practices implemented in the online advertising sector.

²³ Decision 19-MC-01 of 31 January 2019 on the request by Amadeus for interim measures.

with Amadeus under conditions that were not objective or transparent and which were discriminatory, and therefore liable to constitute abuses of a dominant position²⁴ causing anticompetitive effects.

In light of the serious and immediate harm to the complainant (massive and very sudden loss of turnover), the *Autorité* ordered injunctions similar to those ordered in the 2010 *Navx/Google* case.

This decision has been the subject of litigation before the French courts, which is worth mentioning since this litigation relates, in particular, to the scope of the interim measures that may be imposed by the *Autorité*.

Indeed, one of Google's pleas was that the measures taken by the *Autorité* were not interim measures, as the *Autorité* was already taking a position on the merits of the case, and that the measures were neither necessary nor proportionate.

The Paris Court of Appeal²⁵ found that the measures ordered by the *Autorité* were indeed of an interim nature and that the *Autorité* was entitled to order, based on the circumstances of the case, interim measures other than those referred to in Article L. 464-1 of the French Commercial Code (i.e., the suspension of the practice concerned and/or an injunction to the parties to revert to the *status quo ante*) insofar as this article only provides examples of measures.

The Court further noted that the measures ordered were precisely intended to remedy the practices which the *Autorité* considered likely to be anticompetitive.

As regards proportionality and necessity, all the measures ordered by the *Autorité* were confirmed, with the exception of the measure relating to specific training for Google's commercial staff on the AdWords rules, which the Court found not to be necessary in order to address the situation of Amadeus in view of the other measures taken to clarify the rules and to put in place an advance warning.

Following the decision on interim measures of January 2019, the investigation into the merits of this case continued and the *Autorité* found, in its decision of October 2020²⁶, that the facts reported by Amadeus in its complaint had in the meantime been addressed, qualified and sanctioned in the *Gibmedia/Google* decision of December 2019 and that the injunctions imposed on Google in that decision also covered the practices reported by Amadeus, as with the interim measures imposed in January 2019. As Amadeus' complaint had become moot, the *Autorité* dismissed it pursuant to Article L. 462-8 of the French Commercial Code.

²⁴ On a possible abuse of economic dependency, the *Autorité* noted that “The investigation into the merits of the case will determine whether or not Amadeus is in a situation of economic dependency in respect of Google. However, it is not necessary to rule on this point, since, at this stage of the investigation, Google appears likely to hold a dominant position on the French market for search-related online advertising.”

²⁵ Paris Court of Appeal, Pôle 5 - Chamber 7, 4 April 2019, No. 19/03274. On questions of business secrecy protection, see also Judgement N° 429279 of the French Administrative Supreme Court (Conseil d'Etat) of 20 March 2020 and Judgement N° 4193 of the French Jurisdiction Court (Tribunal des conflits) of 5 October 2020.

²⁶ Decision 20-D-14 of 26 October 2020 regarding practices denounced by the company Amadeus.

2.3. The Google "related rights" case²⁷

In November 2019, several trade unions representing press publishers and the Agence France-Presse referred to the *Autorité* a case of abuse of dominant position and abuse of economic dependency by Google in the press, online public communication services and digital advertising sectors. At the same time as referring their complaints on the merits of the case, the complainants filed a request for interim measures.

According to the complainants, the practices at stake were implemented by Google at the time of the entry into force of the law of 24 July 2019 on related rights, which transposed into French law the European directive of 17 April 2019 on copyright and related rights. The aim of this law is to establish the conditions for balanced negotiation between publishers, news agencies and digital platforms in order to redefine, in favour of publishers and news agencies, the sharing of value between these players.

On alleged legal compliance grounds, Google unilaterally decided that it would no longer display excerpts from articles, photographs, computer graphics or videos within its various services (Google Search, Google News and Discover) unless publishers gave it permission to do so, free of charge.

The vast majority of news publishers indeed granted Google licences to use and display their protected content, without any possibility for negotiation and without receiving any remuneration from Google. In addition, under Google's new display policy, the licences granted to Google by publishers and news agencies give it the possibility to use even more contents than before the entry into force of the law of 24 July 2019 on related rights.

At this stage in the investigation, the *Autorité* considered that the relevant market in which the practices at stake were likely to be implemented is the French market for general search services.

The digital advertising markets were indirectly covered in this decision, as the direct and indirect revenues generated by Google's free services referred to above come mainly from advertising activities, as well as from the various advertising intermediation services offered by Google.

Thus, in the specific case at hand, publishers and news agencies may act as sellers of advertising space (in which case Google acts as an intermediary) or as advertisers (in which case they may conclude contracts with Google Ads).

In April 2020, five months after the case was referred to it, the *Autorité* issued its decision on interim measures, in which it concluded as follows :

- the *Autorité* considered that Google is likely to hold a dominant position in the French market for general search services, with a market share of around 90 % and significant barriers to entry and expansion in this market²⁸;

²⁷ Decision 20-MC-01 of 9 April 2020 on requests for interim measures by the Syndicat des éditeurs de la presse magazine, the Alliance de la presse d'information générale and others and Agence France-Presse.

²⁸ The barriers to entry and expansion identified include the significant investments required and the network and experience effects that are likely to make it even more difficult for competing search engines wishing to expand to challenge Google's position.

- the *Autorité* considered that, at that stage in the investigation, the practices reported by the complainants could be regarded as an abuse of a dominant position²⁹ in several respects:
 - the imposition of unfair trading conditions, which allowed Google to avoid any form of negotiation and remuneration for the use and display of content protected under related rights;
 - the circumvention of the law on related rights with regard to the possibility afforded by the law to grant, in certain cases, free licences for certain content;
 - the implementation of a discriminatory practice, by imposing a principle of zero remuneration on all publishers without examining their respective situations and the corresponding protected content;
- the *Autorité* indicated that these practices were implemented without objective justification, are likely to harm competition and caused serious and immediate harm to the press sector.

On this basis, the *Autorité* ordered Google to conduct, within three months, negotiations in good faith with publishers and news agencies regarding remuneration for the use of their protected content using transparent, objective and non-discriminatory criteria. This negotiation will have to retroactively cover the fees due as of the entry into force of the law of 24 October 2019. In particular, the indexing, ranking and presentation of the protected content used by Google in its services must not be affected by the negotiations.

The investigation into the merits of this case is ongoing before the *Autorité*. The *Autorité* has ordered these interim measures to remain in place until the *Autorité* adopts its decision on the merits. During this period, and in order to ensure effective implementation of these interim measures, Google will be required to provide the *Autorité* with monthly implementation reports relating to the decision.

The decision ordering interim measures was broadly confirmed by the Paris Court of Appeal in its judgement of 8 October 2020³⁰.

²⁹ As regards a possible abuse of economic dependency, the *Autorité* stated: “The investigation into the merits of the case will determine whether or not publishers and news agencies are economically dependent on Google, and if so, whether or not there is any abuse. However, it is not necessary for the purposes of this urgent procedure to rule on these points, since, as the investigation stands, Google appears to hold a dominant position in the French market for general search services.”

³⁰ Paris Court of Appeal, Pôle 5 - Chamber 7, 8 October 2020, No. 20/08071. The Court of Appeal upheld the decision of the *Autorité* in its entirety, with the exception of the injunction requiring Google to “take the necessary measures to ensure that the existence and outcome of the negotiations provided for in the injunctions do not affect the indexing, classification or presentation of the protected content used by Google in its services”. The court specified that even though this interim measure is indeed limited to the period of negotiation and is likely to prevent a deviant economic situation, its wording is too general, which implies that the measure is not limited “to what is strictly necessary to deal with the urgency of the situation since it could lead to the freezing of all innovations necessary for the performance of the search engine during the negotiations [...]”. Thus, the court imposed a modification of the terms of the injunction by supplementing it as follows: “This injunction shall not prevent improvements and innovations to the services offered by Google LLC and Google Ireland Ltd and Google France, provided that they do not entail, directly or indirectly, any consequences that will harm the interests of the holders of related rights affected by the negotiations provided for in Article 1 of this Decision”.

3. Referrals on the merits

As indicated above, once the decision on interim measures has been adopted, the investigation of the merits of the case continues and culminates in a new decision by the *Autorité*. When the preliminary findings are confirmed by the investigation into the merits of the case, the *Autorité* may adopt a commitment decision if the undertaking concerned proposes commitments that are likely to put an end to the competition concerns identified by the *Autorité*, or a decision imposing fines, accompanied where appropriate by injunctions.

3.1. Commitment decisions : *Navx/Google*³¹

Following the *Autorité*'s interim measures decision of June 2010 (described above) and in the context of the investigation into the merits of the case, Google proposed commitments designed to provide a permanent solution to the difficulties identified by the *Autorité* regarding the operation of its AdWords service.

In essence, Google committed to make the operation of its AdWords service for speed camera detection devices in France more transparent, accurate and predictable for advertisers:

- by specifying the devices whose advertising is permitted or prohibited, in particular in the case of speed camera warning devices and databases ;
- by specifying the scope of the prohibition and in particular whether it applies only to the content of the advertisements or whether it includes the advertisers' destination and landing pages and the use of keywords ;
- by establishing a procedure for targeted information and notification of changes to the AdWords content policy (more restrictive changes to be notified with three months' notice, except where otherwise specified in the commitments);
- by specifying the procedure that can lead to the suspension of the advertiser's account in the event of an infringement of the AdWords content policy. Unless otherwise specified, this procedure must include at least two steps, including a final formal warning to inform the advertiser of the alleged violation and the risk of suspension of its account.

Following a market test, these commitments, which were undertaken for a period of three years, were accepted by the *Autorité de la concurrence* and made binding on Google. The *Autorité* has therefore decided to close the proceedings initiated before it in accordance with Article L.464-2 of the French Commercial Code.

3.2. Decisions imposing fines: *Gibmedia/Google*³²

In March 2015, Gibmedia, a company active in the publishing of websites offering chargeable information on weather, company data and directory enquiries, referred a case to the *Autorité de la concurrence* regarding practices implemented by Google in the online search advertising market. At the same time as referring the complaint on the merits of the case, Gibmedia filed a request for interim measures.

³¹ Decision 10-D-30 of 28 October 2010 on practices implemented in the online advertising sector.

³² Decision 19-D-26 of 19 December 2019 regarding practices implemented in the online search advertising sector. An appeal against this decision is pending.

The facts of this case are similar to those of the two other *AdWords* cases mentioned above. In essence, Gibmedia complained that, in January 2015, Google suspended, without any notice, the AdWords account that Gibmedia used to display advertisements on its websites, using a procedure that it considered not to be objective, transparent or non-discriminatory.

A few months after its referral, on 9 September 2015, the *Autorité* rejected Gibmedia's request for interim measures³³ on the grounds that the investigation, as it stood at that time, had not established that the disputed practices had caused serious and immediate damage to the general economy, to the industry or to the situation of Gibmedia.

However, the *Autorité* considered that the investigation into the merits of the case should continue and fined Google in 2019 for abusing its dominant position in the market for online search advertising, in breach of Article L. 420-2 of the French Commercial Code and Article 102 of the Treaty on the Functioning of the European Union, and ordered it to pay a fine of € 150 million.

This decision is important in a number of respects. First of all, it is the first decision imposing fines, the investigation of which allowed for a detailed analysis of the online search advertising market and the specific role played by Google in this market. This decision was also an opportunity to review the characterisation of the exploitative abuses in that market and the calculation of the fine that may result from such abuses.

3.2.1. Delineating the two-sided market for online search advertising

The *Autorité* was able to review in detail the functioning of Google's AdWords platform. This system has the characteristics of a two-sided platform: the search engine acts as an intermediary between the Internet user and the advertiser. If the Internet user finds the ad relevant, he or she clicks on the link, which establishes an interaction with the advertiser, possibly resulting in a transaction. The quality of the service offered to users by the search engine depends on both the relevance of the results delivered by referencing but also the relevance and value of the paid advertisements displayed. In a competitive market, a search engine therefore has a natural incentive to ensure the quality of the websites running ads.

Google thus regulates the interaction between the "advertiser" side and the "Internet user" side in its best interests. However, the evidence in the case has shown that, through its practice, Google provides only imperfect protection for Internet users and may even deprive them of sites with innovative business models. In addition, it exposes advertisers to particularly opaque rules, the application of which is unpredictable and unfair.

Moreover, the investigation into the merits of the case confirmed the relevance of the market segmentations identified in the decision-making practice of the *Autorité* described above.

3.2.2. Characterisation of Google's "extraordinary" dominant position in this market and its "special" responsibility

In the French market for online search advertising, the *Autorité* concluded that Google holds a dominant position, which in many respects exhibits the 'extraordinary' features identified by the European Commission in the Microsoft case³⁴.

³³ Decision 15-D-13 of 9 September 2015 regarding a request for interim measures from Gibmedia.

³⁴ European Commission Decision of 24 March 2004, Microsoft, COMP/C-3/37, paragraphs 429, 472 and 560; Judgment of the Court of First Instance of 17 September 2007, T-201/04, paragraph 387.

In addition to its market shares (which are very high - estimated at over 90 % - and stable) and the (continuous and sustained) growth of Google Ads, the *Autorité* has highlighted the significant barriers to entry that exist, in particular network effects, noting that this position is intrinsically linked to Google's position in the market for online search engines.

In addition to this level of dominance, the *Autorité* has indicated that the combination of two other factors - Google's attractiveness and its regulatory power vis-à-vis advertisers - is likely to increase its market power tenfold.

Google can indeed not only act independently in the market with a view to serving its own interests, but also has the ability to shape the business model of advertisers, limit their entrepreneurial freedom and ultimately influence the quality and diversity of the offer available to Internet users in the online search advertising market.

The *Autorité* has concluded that these findings place a particular responsibility on Google to comply with competition rules.

3.2.3. Google's "unfair" application of its Google Ads rules

The *Autorité* has reiterated the fact that the establishment of such rules is not in principle questionable, but that in the present case they were drawn up and applied under conditions that were not objective, transparent and non-discriminatory and did not give proportionate consideration to consumer protection objectives.

Application of these rules was found to be "unfair" within the meaning of point (a) of the second paragraph of Article 102 TFEU³⁵.

3.2.4. Calculation of the fine

The circumstances of the case led to the *Autorité* not applying its fines notice³⁶, as the application of such notice would have resulted in a fine which was not proportionate to the seriousness of the facts and the extent of the harm caused to the economy. Also, such amount of fine would have been devoid of any deterrent or punitive character.

More specifically, the starting reference used in this notice for the calculation of the fine is the value of all categories of products or services sold by the undertaking concerned in relation to the anticompetitive practices at stake. In the present case, the value of the sales could not be reduced to the value of Google Ads' advertising services in the three markets in which the complainant was active (weather information, online directories, business information). The disputed practices related to all the rules governing the operation of the Google Ads platform.

The *Autorité* therefore adopted a flat-rate method for setting the €150 million fine, taking into account the proven seriousness of the facts, the undoubted importance of the harm caused to the economy and the economic strength of the undertaking subject to the fine.

Finally, the *Autorité* also imposed several injunctions on Google³⁷ aimed at (i) clarifying the operating rules of its advertising platform Google Ads, (ii) clarifying the rules concerning the application of account suspension procedures and (iii) establishing measures to prevent, detect and address infringements of the Google Ads rules.

³⁵ The second paragraph of Article 102 TFEU, point (a), specifies the practices that may be qualified as abusive, which include "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions".

³⁶ Notice of 16 May 2011 on the method for determining fines, updated in 2017.

³⁷ These injunctions apply if the advertiser's billing location is in France, or if the Internet users' IP address is French.

These injunctions, which are subject to a monitoring procedure by the *Autorité*, will remain in force until 1 January 2025.

Several complaints are pending before the *Autorité*, which will continue to closely monitor the competitive situation in digital advertising markets. Its abundant decision-making practice in the field of abuse of dominant position demonstrates that competition law has flexible rules, and is capable of adapting to the digital sector and its specific features.

However, it is legitimate to consider additional avenues for adapting the existing competitive analysis grid to the digital environment. This is what the *Autorité* did in 2020 as part of its contribution to the debate on the digital economy³⁸. Consideration has been given to possible evolutions with no change to the existing law (in particular with regard to the concept of dominant position and the essential facilities doctrine) and to the adoption of new provisions specifically addressing the so-called "structuring" operators that implement practices which raise competition concerns.

³⁸ Contribution of the Autorité de la concurrence to the debate on competition policy and the challenges raised by the digital economy, 19 February 2020 : https://www.autoritedelaconcurrence.fr/sites/default/files/2020-03/2020.03.02_contribution_adlc_enjeux_numeriques_vf_en.pdf