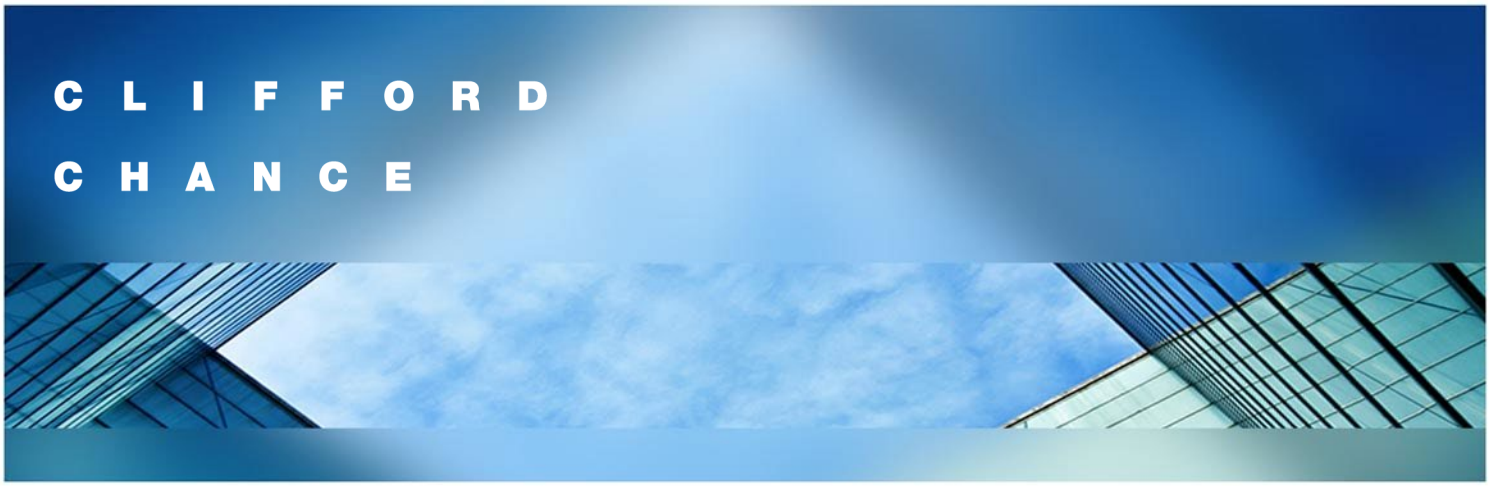

ON EXCLUSIVITY CLAUSES AND EFFECTS: THE EU GENERAL COURT JUDGMENT ANNULS THE GOOGLE ADSENSE DECISION INCLUDING ITS €1.49 BILLION FINE

On 18 September 2024, the EU General Court (**GC**) annulled the European Commission's (**EC**) decision finding that Google had abused its dominant position in the market for online search advertising intermediation by imposing exclusivity, privileged placement, and authorisation clauses on third-party website publishers who used Google's intermediation services to offer search ads.

The GC chiefly found that the EC had insufficiently established for the period of the alleged infringements that the three clauses in the Google Services Agreements (**GSAs**) were capable of preventing Google's competitors from accessing a significant part of the market for online search advertising intermediation. The judgment's main takeaway is that where the EC alleges an infringement based on exclusivity clauses, and where the dominant company disputes the specific capacity of those clauses to exclude as efficient competitors from the market, or raises an objective justification (as Google had), the EC must ensure that those clauses were, taking into account all the circumstances of the case, actually capable of excluding as efficient competitors.

The judgment marks a win for Google, which previously lost its appeals against the EC's *Google Shopping* decision (see our briefing) and the *Google Android* decision (see our briefing -- currently subject to a further appeal before the EU Court of Justice). The EC has the option of readopting a decision that addresses the shortcomings identified in the judgment and/or appealing the GC's judgment to the Court of Justice.

Key takeaways

- Where the EC alleges an infringement based on exclusivity clauses, and where the dominant company disputes the specific capacity of those clauses to exclude as efficient competitors from the market, or raises an objective justification (as Google had), the EC must ensure that those clauses were, taking into account all the circumstances of the case, actually capable of excluding as efficient competitors.
- The GC upheld the EC's market definitions distinguishing search ads from display ads and online advertising intermediation from direct advertising sales.

THE GENERAL COURT'S JUDGMENT: THE EC FAILED TO ESTABLISH EFFECTS TO THE REQUISITE STANDARD

The relevant markets are online search advertising in national markets and online search advertising intermediation in the EEA. Potentially relevant to future EC enforcement in the online advertising space, the GC upheld the EC's definition of the relevant markets as being a) "online search advertising" (on a national basis) which is separate and not substitutable with online non-search advertising, and b) EEA-wide "online search advertising intermediation" which is separate and not substitutable with publishers' direct advertising.

The GC consequently upheld the EC finding of Google's dominant position in the online search advertising intermediation market in the EEA from 2006 to 2016. However, it concluded that the EC had fallen short of establishing effects to the requisite degree for the three types of allegedly abusive clauses.

The EC failed to establish that the three types of exclusivity clause used by Google were capable of foreclosure to the requisite standard. Google's GSAs contained, at various different times, one or more of the following types of exclusivity clause: (i) exclusive purchasing clauses requiring Google's website publisher customers to source all or most of their online search advertising intermediation requirements from it; (ii) placement clauses, which reserved the most prominent space on the customers' websites for Google's own search ads; and (iii) prior authorisation clauses, which required that customers gain prior approval in writing in advance from Google before making changes to any online search ads, including competing ads.

In its decision, the EC had gone on to examine whether these clauses were capable of restricting Google's as efficient competitors, despite claiming that it had not been legally required to do so.

The GC found that, where the EC alleges an infringement based on exclusivity clauses, and where the dominant company disputes the specific capacity of those clauses to exclude as efficient competitors from the market, or raises an objective justification (as Google had), the EC must ensure that those clauses were, taking into account all the circumstances of the case, actually capable of excluding as efficient competitors.

In this case, the GC agreed with the EC that each of the three types of clause were, in principle, capable of excluding competitors, as they acted to deter Google's customers from sourcing from Google's competing intermediaries.

However, the GC held that the EC failed to consider "all relevant circumstances" when assessing the exclusionary effects of the clauses. In particular, the GC held that:

- the EC was wrong to find that the exclusionary effects resulting from the clauses in a given GSA endured for the entire period in which the GSA was in place, as Google's website publisher customers had the option of sourcing from Google's competing intermediaries at the term of each of the GSAs, including before any extension of them or before a unilateral termination right had been exercised; and
- the EC did not establish that the exclusive purchasing and placement clauses had sufficient coverage among website publishers to have produced a foreclosure effect for several months in 2016 at the end of the alleged infringement. For that period, the EC had relied on a

> GSA with only one customer as evidence of the market coverage of the exclusive purchasing clauses and had failed to consider the significance of the gross revenues generated by Google from this customer. The Commission had also adduced no evidence of the market coverage of the placement clauses or prior authorisation clauses in the same time period.

As such, the EC failed to demonstrate to the requisite legal standard that the exclusivity clause in GSAs had possibly deterred innovation, helped Google to maintain and strengthen its dominant position on the national markets for online search advertising at issue, or possibly harmed consumers.

No single and continuous infringement. The GC found that it was apparent from the scheme and operative part of the decision that the EC considered that a single and continuous infringement was characterised only in so far as it consisted of separate infringements. As a result, failure to establish the constituent infringements precluded the finding of a single and continuous infringement.

Given the annulment of the infringement findings of the decision and the associated fine of EUR 1.49 billion, the GC did not need to address Google's arguments in relation to the calculation of the fine.

BACKGROUND

Starting in 2006, Google included exclusivity clauses in its contracts. As of March 2009, Google gradually began replacing the exclusivity clauses with the placement clauses. As of March 2009, Google also included the authorisation clauses requiring publishers to seek written approval from Google before making changes to the way in which any rival adverts were displayed. The EC decided to initiate proceedings based on Google's GSA clauses in July 2016. In September 2016, Google informed the EC that they had sent letters to all direct partners notifying them that it was removing the exclusivity and prior authorisation clauses in their entirety as well as making certain amendments to the placement clauses. The 2019 infringement decision thus centred on finding past infringements. Google appealed this decision, which led to the GC's judgment of 18 September.

IMPLICATIONS

The judgment confirms that while the standard to show foreclosure of exclusivity clauses is low (capability), the EC still has to meet its burden to show that the capability of foreclosure exists and cannot merely assume it, particularly when the dominant firm disputes this capability or invokes an objective justification.

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