Assessing Google's Alleged Abuse of Dominant Position: A Case Analysis of the Portuguese Competition Authority's Process

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This decision of the Portuguese Competition Authority (PCA) concerns the request to investigate the practice of abuse of individual dominant position, within the scope of a complaint against Google.

The Private Media Platform (PMP), an entity that aggregates the publishing groups Cofina, Global Media, Impresa, Media Capital, Público and Renascença, filed a complaint to the PCA, claiming that it has verified an abuse of dominant position carried out by international operators, such as global aggregators, social networks and content distributors.

The PCA initiated this proceeding as Google was suspected of abusing its dominant position under Article102 TFEU and Article11 of the Portuguese Competition Law, since it was behaving in a self-favouring way regarding the sale of online advertising space.

In meetings held between the PCA and Xandr and Smart AdServer, Google's main competitors in Portugal, the latter claimed that Google was favouring its online advertising server for publishers and its programmatic advertising sales platform (SSPs).

Google and Google LLC and Google Ireland Ltd, could be held liable for the conduct at issue.

In order to establish the existence of a dominant position and for Article 102 TFEU to be applied, it is necessary to define the relevant market in question at the product and geographic level. This need is referred to in the Continental Can judgment, which states that "(...) the definition of the relevant market is of essential importance, since the

possibilities of competition can only be assessed by reference to the characteristics of the products in question (...)".[1]

However, it is necessary to first ask about the concept of dominant position since Article 102 TFEU does not define it. In fact, in the United Brands judgment, the concept of dominant position was defined as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market and thereby to behave to an appreciable extent independently of its competitors, its customers and, ultimately, of consumers".[2]

The relevant product market comprises all those products and/or services regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, prices and intended use, per the Commission notice[3].

In the present case, the relevant product markets would be the markets for online ad servers for publishers and SSPs. SSPs allow publishers of a certain size to sell advertising space on their websites to different advertisers. They also allow real-time auctions to be held.

It is estimated that in the national market(s) for publishers' online advertising servers, Google holds a share of 90% (and Xandr and Smart a share of 5% each), and in the national SSP market, Google has a share in the range between 60% and 70%. Therefore, it can be concluded that Google holds a dominant position in the national market for online advertising servers for publishers and in the national market for platforms for programmatic sales of advertising space.

It was concluded, in this process, that the practices carried out by Google consisted of practices of self-defence through the last look advantage, the ability to adjust bids according to the degree of competition and interoperability limitations and exclusivity

[1] Case 6/72, Continental Can Judgment, para. 32
[2] Case 27/76, United Brands Judgment, para. 65
[3] Commission Notice on the definition of relevant market for the purpose of Community competition law (97/C 372/03)

practices which aim to induce publishing groups to use the services provided by Google exclusively and which could consist in indications of abuse of dominant position.

Therefore, an investigation was opened by the PCA, according to articles 7/2, 8/1 and 17/1 and 2 of the Competition Law. After the European Commission had been informed of the opening of this same proceeding, the latter informed the PCA that it had extended the scope of its investigation into possible restrictive practices implemented by Google (Case No. AT.40670) to cover all the practices of this company in the digital advertising market, so that this behaviour under investigation in PRC/2022/4, would now be under the responsibility of the European Commission.

Pursuant to Article 11(6) of Regulation 1/2003, the initiation by the European Commission of an investigation into practices which infringe Article 102 of the TFEU deprives the competition authorities of the Member States of the power to investigate these practices, so the PCA was forced to cease its investigation in this case due to the European Commission's withdrawal of jurisdiction. Therefore, the PCA informed PMP that it had closed the case, although it understands that there are suspicions of prohibited practices.

Thus, the case is currently in the hands of the European Commission under case number AT.40670 and no response has yet been given to the complaint made by PMP.

There are some similarities with case AT.40411 (Google Search AdSense). In this case, it was found that Google engaged in behaviour restricting competition, such as including exclusivity clauses in its contracts, thereby prohibiting publishers from placing any ads associated with competitors' searches on their search results pages.[4] In this way, the company created strong barriers to the expansion and entry of competitors in the market. This was also the case herein since the PCA proved that exclusivity practices were carried out with the purpose of inducing publishing groups to use Google's services on an exclusive basis, specifically Google Ad Manager (GAM).

[4] PAIS, Sofia Oliveira, *Direito da Concorrência - Legislação e Jurisprudência Fundamentais, Volume II,* Universidade Católica Editora, Porto, 2022

In addition, Google's own competitors have highlighted the difficulty for a publisher to change an online advertising server, namely for technical reasons that could only be solved with the help of a specialised technical team.

Google also limited the development of Header Bidding technology, which allowed different SSPs to participate in a transparent auction, ensuring a level and fair playing field, by using information about online ad auctions, to which competitors did not have access, to condition the outcome of those auctions in their favour and limiting the development of competing auction technologies.

Although the European Commission has not yet adopted a decision on the matter, it can be concluded that Google may repeatedly be distorting competition by favouring its services over those of its competitors, abusing its dominant position in several services on the market.

Given the inability of both national and European competition authorities to respond quickly to the anti-competitive practices carried out by large technology companies in digital markets, the Digital Markets Act (DMA) was approved on 1 November 2022. Thus, the European Commission now has an appropriate instrument to supervise the anti-competitive conduct of large digital platforms.[5]

According to the same Regulation, Google could be designated as an "access controller" under Article 3, for which certain obligations are imposed on it under Articles 5 and 6, among which the prohibition of self-dealing conducts.

[5] PAIS, Sofia Oliveira, *"A interação entre o regulamento dos mercados digitais e as regras de defesa da concorrência: breves reflexões",* Estudos em homenagem ao Professor Doutor Américo Taipa de Carvalho, Universidade Católica Editora, Porto, 2022