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Antitrust Code Podcast
The economics and global implications of the French Google decision in ad tech

with Mikaël Hervé

Highlights:

The French Google ad tech decision is a first of its kind: first decision in ad tech analysing complex auction dynamics while many other cases are ongoing in other countries looking into similar (yet usually broader) practices; first time Google settles with a competition agency; first time Google voluntarily offers remedies which are to be applied worldwide.

Google's individual conducts identified in the French decision are seemingly independent, but they actually constitute a web of interrelated practices.

A major challenge in this case, from an economic perspective, was to understand effects as a whole, separating technological limitations from effects resulting from vertical integration, from effects due to Google's anticompetitive practices. The French authority had to consider effects on all sides to determine if effects were additive, multiplicative or whether a negative effect on one side could be offset or justified by a positive impact on the other side.

The French competition authority went deep in its counterfactual analysis of certain practices, disentangling effects, considering the most likely outcome absent Google's conduct and analysing Google's impression-level auction data, to conclude that anticompetitive effects were substantial and usually spreading to both rival ad tech intermediaries and publishers.

Similar practices are being investigated by other competition agencies in Europe and the US, even though the scope is usually broader, e.g., looking into data and privacy issues, advertiser-side self-preferencing concerns, and possible collusive and bid-rigging conduct between Google and Facebook as alleged in the US State AGs' complaint.

In this context it is unlikely the remedies offered by Google in France will be sufficient to address all competition concerns, even though they are to be implemented worldwide. Even for the practices identified by the French authority, it remains unclear whether these will suffice, since they have not been market tested. Finding effective remedies can be a headache in such markets and you have a bit of a 'whack-a-mole' dynamic: you impose a remedy that shortly after becomes obsolete. Google's recent Privacy Sandbox proposals and its decision to ban all third-party cookies from Chrome already pose new challenges from an antitrust standpoint. An ex-ante approach could be more effective in theory, but this remains to be seen in practice.

1. NC: The French Google decision received a lot of attention in France but also elsewhere. Can you tell me more? What was the global context of this decision and why did it receive so much attention?

MH: I listened to your first podcast on this hot topic with great interest and I'm very happy to be here today to give more of an economist and insider view as I have been advising one of the lead complainants in this case. Let's start with a bit of context. There has been a growing interest in ad tech over the recent years by competition agencies. Ad tech refers to intermediation technologies in online advertising used by advertisers and publishers to buy and sell ad inventory. An example of an advertiser is Nike. An example of a publisher is The New York Times. We've seen many reports looking into the functioning of these markets in the UK, Europe, Australia and the US which have eventually led to formal investigations and complaints.

- Last year, for example, the Competition and Markets Authority (CMA) in the UK published a very rich market study including strong recommendations to address issues in ad tech.
- Shortly after a coalition of states in the US led by Texas filed a complaint against Google regarding very similar practices.
- Then, of course, the Autorité de la concurrence (ADLC) in France published the first decision on ad tech in June of this year which we will discuss today.
- A few weeks after the French decision was released, the European Commission (EC) opened its own formal investigation.
- A few weeks ago, the US Department of Justice (DOJ) was said to be readying its own investigation in this space.
- Last month, the Australian Competition and Consumer Commission (ACCC) published its final report also covering ad tech practices.

So naturally other agencies around the world have been following this first decision in France with great interest. There is nothing that is French-specific about this case though. The markets are at least EU-wide, the technologies are the same everywhere and the remedies offered by Google are to be implemented worldwide.

Why it matters. We've witnessed a change of paradigm in advertising, moving away from contextual advertising towards programmatic advertising. Contextual advertising is basically having a fishing rod advert in a fishing magazine. So, the publisher's content is the basis for targeting. With programmatic advertising, you now have a fishing rod advert while you're reading an article online about Lionel Messi at PSG just because the advertiser knows you like fishing as well as football. The economic implication of this is that the value is no longer with those creating content. It is with those who have access to data and targeting capabilities: that is Google and Facebook essentially. And then we've seen newspapers struggling financially, which is a concern, of course, when we are all aware of the importance of having access to quality news. That's why in essence, ad tech received so much attention and why it matters to have effective competition in these markets.

Now going back to the ADLC, it happens that the French authority has been at the forefront of big tech antitrust cases for many years with decisions and investigations against Google, Facebook, Apple and others. On a related topic, the ADLC released a new decision against Google in July on pay-for-content and the remuneration of neighbouring rights of news publishers. The French decision in ad tech, in particular, is quite impressive in that it

demonstrates a deep understanding of wide-ranging ad tech issues and complex auction dynamics. All this in a timely fashion. Acting quickly was one of the main objectives of the ADLC which probably makes sense when we know how difficult it is to restore competition once the markets have tipped.

2. NC: Good to see the French authority being so active and effective with these cases. Can you tell me more about the functioning of these auctions and the type of issues raised by competition agencies?

MH: When you load a page on a website it creates ad slots or impressions. One impression is one ad seen by one user. These impressions will be up for sale and what publishers want is to create competition between buyers to sell at the best price and to the highest willingness to pay. The role of ad tech intermediaries in this context is to facilitate the placement of ads and organise auctions to determine the price at which impressions will sell. They charge take rates along the way, which in total usually represent between 30 and 60% of what the advertisers pay.

In practice, this process involves three key layers of intermediaries. First is the ad server of the publisher that is managing ad inventory for the publisher. The ad server will connect to multiple ad exchanges or SSPs. These SSPs, or supply-side platforms, organise auctions between buyers. The buyers are DSPs, demand-side platforms. The role of the DSPs is to collect demand from advertisers. They are rather advertiser-oriented. They can also organise auctions between advertisers.

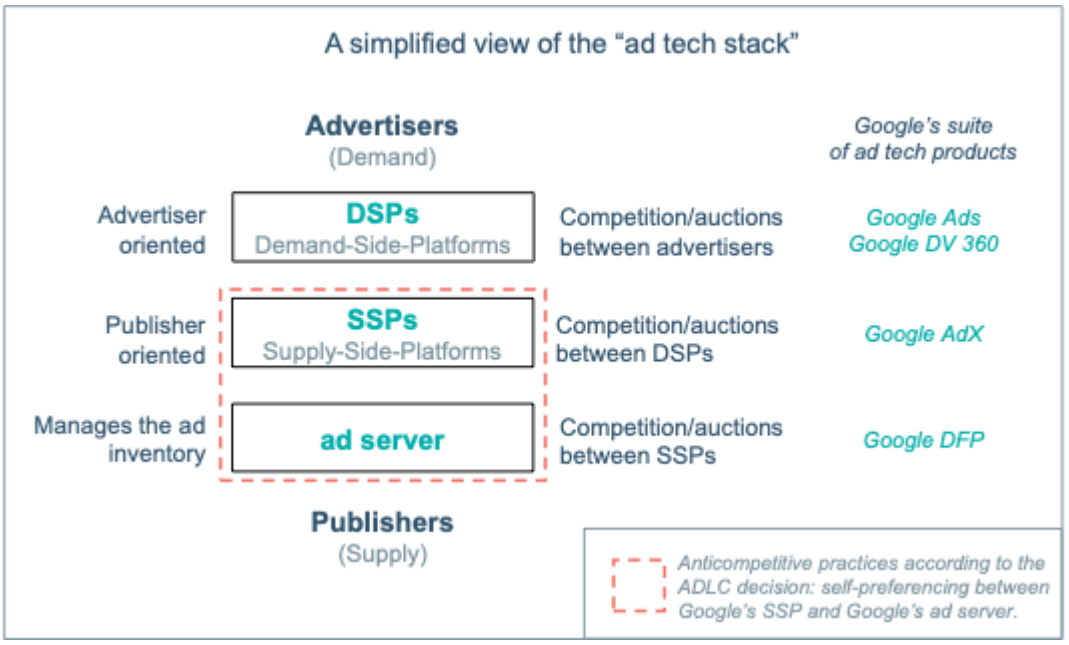
So, as you can tell there is no single marketplace where all advertisers and all publishers meet. There are rather three layers: ad server – SSP – DSP, making the ecosystem quite fragmented.

Competition to buy the impression occurs at every level: there is competition between the SSPs, competition between the DSPs and competition between the advertisers. Competition takes the form of real-time auctions at each level of the stack. All this happens in milliseconds while you load your page. There can be up to four auctions organised in milliseconds for a single impression.

Competition concerns are wide ranging:

- Conflicts of interest and lack of transparency. Because Google is active at every level of the stack, and because the interests of these parties do not align, this creates conflicts of interest for Google which can harm both advertisers and publishers. There is often a parallel that is made with financial markets, and Google even likens its ad exchange to the New York Stock Exchange in marketing documents. There are of course many differences; one being that ad tech is unregulated and quite opaque, with the same player organising and participating in auctions at the same time. You can easily conceive how conflicts of interest are likely to arise in these situations.
- Interoperability and self-preferencing between the different intermediaries – i.e. between DSPs and SSPs and between SSPs and the ad server.

• And a last block of concerns is about data and privacy issues. These relate, for example, to the way GDPR rules will be interpreted by digital platforms, the use of cookies and user IDs and to Google's recent decision to ban third-party cookies from Chrome.



Source: CRA.

3. NC: I didn't realise everything that was happening while I was loading a page online! Good to understand a bit more about how this ecosystem works. Let's go back to the French decision. What was it about, specifically?

MH: The French decision is about self-preferencing and self-preferencing happening on the publisher side, which is between the ad server and the SSP. The ADLC concluded that Google favoured its own products, abusing its dominant position on the ad server market where it has a market share of about 80%. Google implemented a double self-preferencing conduct: Google's ad server favours Google's SSP and Google's SSP favours Google's ad server.

The practices involve a mix of interoperability and bidding data sharing conducts. For example, Google prevented real-time bidding for rivals or communicated rival bidding data between its services to favour its own SSP. Google also shared with its own SSP, information collected by its ad server about rival SSP prices, to give itself a leg up in auctions.

The French decision is a first of its kind for at least three reasons:

• First decision on these complex markets while many cases are ongoing;

• First time Google settles with a competition authority and

• First time Google voluntarily offers remedies, and these remedies are to be applied worldwide. The remedies are quite technical but aim at making Google's products more interoperable with rivals or relate to bidding data information whereby Google would either stop leveraging bidding information about rivals, or would ensure rivals will have access to the same level of information.

4. NC: Wait, on remedies, you said the remedies are applied worldwide, does it mean that these should address the concerns by other agencies too, like in the US in particular?

MH: This is a fair question. I'd say it's unlikely because other agencies are raising other concerns that go beyond those fined by the French authority. These relate, for example, to self-preferencing on the advertiser side (so between the DSP and the SSP this time) or user data and privacy issues.

Then even for the practices fined in the French decision, it is unclear yet whether the remedies offered will be effective or sufficient.

5. NC: But the remedies have been accepted by the ADLC, right? So the ADLC must think these are effective?

MH: Yes and no. The decision says these "contribute to having more competition in the market." So that's an improvement. At no point does it say they address all conducts or that they are sufficient.

There is sometimes a misunderstanding. This is a settlement decision – not a commitment decision. So the ADLC did not need remedies. There could have been none at all. These were offered voluntarily by Google and the proposals have not been market tested.

And actually, we can see a disconnect between the list of conducts and the list of commitments. So, it is difficult to think these will be sufficient, but we should first wait and see when they are implemented.

6. NC: This is an important clarification indeed, thank you. It will be interesting to see if other remedies are imposed elsewhere. Thinking about the economics of the case now, what were the main challenges?

MH: There were many challenges in this case. One such challenge was to track the practices that have evolved along with the market over many years. Related to that, you need to disentangle restrictions that are due to technological limitations from those imposed by Google that would have anticompetitive effects. If you read the decision, it feels like there is a long list of seemingly independent practices and sometimes you fail to see the link between these. But when you take a close look you can see a common theme in the French decision. For example, while publishers wanted to create bid density between SSPs, Google's conduct

undermined competition at the SSP level and shielded AdX – Google's own SSP – from competition according to the ADLC.

Then you also need to look at effects as a whole and on all sides and wonder whether effects are additive, multiplicative or whether one negative effect on one side could be offset or justified by a positive one on the other side. At a high level you might think there is a bit of a communicating vessels dynamic. If advertisers pay less, surely it would be bad for publishers but would be good for advertisers. Now of course the story is different if advertises don't actually pay less, but it's just Google in the middle charging higher commissions leading to lower prices paid to publishers.

7. NC: Do you have specific examples where the ADLC had to consider effects on all sides?

MH: Sure, there are many. For example, we can talk about the "last look." The last look refers to the fact that Google, rather than participating in the so-called header bidding auction organised between the SSPs, would reserve itself the right to bid after everyone else. And it would bid after everyone else, while often knowing the price to beat, which means that Google knew the best rival price that would come out of the header bidding auction.

And how could Google know that? Because the auction between the SSPs is happening at the ad-server level where Google is dominant and can collect such information. As a result, Google paid, a significant proportion of the time, just one penny more than the best rival bid. So this is something we could measure. We could measure the proportion of impressions that would be won by Google just above the best rival bid. But this doesn't tell you about the counterfactual.

What would have happened in the counterfactual? If Google had been forced to participate in the rival auction instead of bidding after everyone else, would Google have lost or won the impression? We don't know. Basically, you can see two possible outcomes. Google would have won the impression anyway, but then it would have only won it at a higher price. This means that publishers were harmed because they were paid less. Or, Google would have lost the impression, in which case the rival SSPs were harmed because they won fewer impressions. The challenge here for the ADLC was to disentangle effects and isolate the effect on competition, that is on rival SSPs. The French authority went deep in its counterfactual analysis, considering the most likely outcome absent from the practices, and analysing Google's impression-level auction data, to conclude that effects on SSPs were substantial and without the last look, rival SSPs would have won a significantly higher percentage of impressions.

And I can give you another example, which is dynamic revenue sharing. Dynamic revenue sharing refers to Google's ability to vary its take rates dynamically, on a per-impression basis. So, rather than having a revenue share or a take rate that is fixed flat at say 20% on all impressions, Google would adjust its take rate on each individual impression depending on the level of competition. And this is important because competition takes place on the net-price basis. So, what Google would do is reduce its take rate to increase its net-price bids on impressions that would be highly competitive, and it would lower its net-price bids on impressions that are less competitive. At the same time, Google would guarantee that the

average take rate would not exceed the contractual 20%. So, in this case, the negative impact on rival SSPs is clear since Google would be able to win more impressions. Google's defence was to say that it was good for publishers and therefore had a legitimate justification for this conduct. That seems intuitive at first sight because Google guaranteed the take rate would not exceed the contractual 20% rate anyway. Well actually the decision rejected this argument and demonstrates how publishers can be harmed too. Actually, everyone can be harmed: the advertiser, the publisher and the rivals. The economic intuition is that if only one participant can price discriminate, it can lead to an inefficient allocation of impressions – with someone having a lower willingness to pay winning the auction – harming everyone along the stack. If you're interested to understand more, we published an article earlier this year which gives you concrete examples of how this can materialise. It shows that even though the take rate remains at 20% prima facie, publishers may get less while Google earns more impressions. Another important implication from this is that you can't directly compare average nominal take rates across intermediaries if only one can price discriminate and the other one is charging a flat rate on all impressions. This is important for the antitrust assessment, in France, but also in other countries.

8. NC: But couldn't rivals do the same and price discriminate too? It seems like Google decided to vary its commissions, but rivals could have done the same. Couldn't they? Why would price discrimination be anticompetitive?

MH: This is a very good question. Indeed you might think that the rivals could have done the same. If so, it could be just that Google was better at what it was doing. The French decision says no, because others didn't have access to the same level of information to build a similar feature, precisely because the information required to do so was in part coming from the ad server where Google is dominant. But again, this was a key point indeed for the ADLC to address. Similar considerations will also have to be addressed by other antitrust agencies looking at similar conducts.

9. NC: What next? What can we expect from other cases?

MH: It will be interesting to see what conducts are pursued by other agencies. Competition authorities may go deeper into some of the ADLC practices. I'm thinking, in particular, about the so-called Jedi blue agreement that was revealed as part of the Texas complaint, which allegedly would amount to collusive behaviour between Google and Facebook to undermine rival SSPs and header bidding even more.

Then there are two big themes that are not explored in the French decision which are self-preferencing on the advertiser side and user data and privacy issues. Here again, Texas has revealed a secret Bernanke programme which seems very similar to the dynamic revenue sharing feature I was talking about before, but this time price arbitrage is meant to happen at the DSP level rather than at the SSP level.

I think that both data and dealing with the advertiser side could be super important as they may be at the core of Google's market power. Indeed, if you think about it, Google's market

power could have been built from the advertiser side into the publisher side. This is because, initially advertisers wanted to use Google's tools due to the greater amount of data available on Google, and to access Google's proprietary inventories, such as YouTube. In turn, publishers wanted to have full access to that demand, so they used Google's tools on the publisher side, which over time, became dominant.

Now, one last thought is that you see other challenges when you start looking on the advertiser side, particularly around market definition and questions about whether social display advertising (on Facebook) and open display advertising (on newspapers) are substitutes. So again, it will be interesting to see what other agencies have to say on this.

10. NC: A lot more to come then potentially. And do you expect that different remedies too will be put in place?

MH: I really don't know to be honest, but it will be interesting to see first what the French remedies achieve. As seen from past big tech cases, finding effective remedies can be a headache. You have a bit of a 'whack-a-mole dynamic': you impose a remedy that shortly becomes obsolete.

And even in this space, there are already a few examples of that in a way. If you consider the last look I was mentioning before, Google has, quite recently, completely changed its auction setting which allegedly has removed the last look advantage, but at the same time it created new concerns about whether the new setting would actually allow Google to extract even more rents than before.

Some agencies also considered whether creating a universal user ID could be efficient in promoting competition. The motivation is that Google has access to its own user ID that is consistent across the stack, while rivals don't have access to it; they therefore need to synchronise cookies instead, which takes time and sometimes fails. In the meantime, Google has announced that it would remove all third-party cookies from Chrome and would create a so-called Privacy Sandbox where users will not be tracked individually but would be tracked in cohorts of common interests. The point is that the idea of a unique identifier may seem obsolete already if Google imposes a new standard to the industry. And not to mention that creating a unique identifier may raise significant privacy concerns anyway, and privacy experts need to be part of the debate.

The CMA was bold in its recommendations and even considered structural remedies, such as Google being required to divest its ad server. But, with the new Privacy Sandbox proposals, it seems that key functionalities of the ad server will be transferred to the web browser instead. This is partly motivated to have everything done on the device, which resembles Apple's model to some extent. Here, the point is that if key functionalities are transferred to the browser, divesting the ad server would not achieve anything.

And of course, related to all these challenges, you have the question of whether an ex-ante approach would be more appropriate to tackle these issues, with the DMA in Europe, the DMU in the UK or section 19a in Germany, for example.

I will not venture into this topic now, but one thing for sure is that ad tech is here to stay in the antitrust debate and will be under scrutiny by competition authorities for many years to come.