



The Consumer Voice in Europe

Cases COMP/AT.39740 – Google

Google's revised proposed commitments
BEUC response to the questionnaire

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The European Consumer Organisation (BEUC) calls upon the European Commission to reject the revised proposals put forward by Google in order to remedy its abuse of dominance in the online search market.

Consumer welfare should be the standard of proof in antitrust investigations. Unfortunately, both Google's commitments and the questions asked by the European Commission fall some way short of addressing it. This raises questions as to whether the Commission has properly evaluated the impact this anticompetitive behavior has on consumers.

On a procedural note, if a settlement is to be reached, the European Commission should allow complainants and interested third parties to study the evidence and the technical data that Google submitted since the launch of the investigation. Almost three years after the launch of the investigation, Google remains the only party with the capacity to test solutions against their business models and is therefore in a dominant position in discussions with the European Commission.

The European Commission as a whole is accountable for the impact that a settlement on the proposed remedies will have on the online ecosystem. A settlement in a competition case that harms consumer welfare, stifles innovation and endorses anticompetitive behavior cannot hope to stand close scrutiny by the European public, let alone by the European Court of Justice.

Not only do the new set of commitments proposed by Google fail to address the problems identified by the Commission but appear exclusively tailored to maximizing Google's profits and commercial interests. If the Commission endorse the remedies, it will automatically grant Google permission to continue with the manipulation of search results and exclude from the online search market the competitors to its vertical services. The impact on consumer choice and innovation will be significant.

The new proposals are based on the same wrong assumption that more prominent, and paid for, display of some of the Google's competitors is the best solution to the abusive and discriminatory behaviour of Google. Google continues to ignore the views of the majority of complainants, third parties and the European Parliament to end its current practices of manipulation of search results.

Instead of remedying the situation in a market in which Google is clearly dominant and has been discriminating against alternative providers in vertical search, approval of the commitments as proposed will legitimise anticompetitive practices and provide Google with additional tools to further strengthen its dominance. The fact that the Commission has come away empty handed from such a lengthy investigation will embolden Google and make further action by the Commission against it in future less likely and credible. Such a situation is worse than doing nothing.

Proposed remedies are flawed by nature and by design

The outcome of the first market test has clearly demonstrated that market players and consumers categorically reject the remedies put forward by Google. We would have expected Google to have taken these concerns seriously into account when coming up with new proposals. We are also surprised that the Commission does not seem to have taken those concerns on board, even if they were expressed by the overwhelming majority of stakeholders in this case.

We have thoroughly assessed the new proposals from the consumer welfare point of view. We have not been able to identify those elements of the proposal that constitutes any 'significant improvement', as outlined by Vice-President Almunia in his speech before the European Parliament.

Google has only introduced minor changes to non-essential elements of the remedies, which give the false impression that it has fully responded to the results of the first market test. A careful comparative analysis of the two documents demonstrates that Google has done nothing more than tinker at the edges with its first proposal.

Furthermore, we regret that the European Commission has not taken the time to address specific questions related to the impact on consumers. The questions posed by the Commission are addressed only to competitors, asking technical questions that the interested third parties involved in the case cannot be expected to respond to.

An auction is NOT a substitute for consumer choice

Consumers use search engines on a daily basis to source the information most relevant to them and to access content of their choice. They should be able to trust search results to be impartial and based solely on relevance to their query, without manipulation of the order or results. Consumers should have such a right to impartial results the ranking of which will be decided on the merits, not on financial resources, and not be subject to manipulation according to Google's commercial interests

There is absolutely no evidence suggesting that the Google's own vertical services are the best on their merits or the most relevant to consumers. Even if there were data to show that consumers 'choosing' Google's own vertical services, it has to be seen in the light of Google preferencing those services and directing consumers towards them.

According to the new set of the commitments, vertical results to be placed alongside Google's own preferentially displayed content, will be shown to consumers depending on the outcome of an auction, where the site offering the highest price will ensure a prominent place in the results page alongside Google. Competitors will have the 'choice' either to pay Google in order to remain relevant or otherwise lose visibility and become irrelevant. Rivals that do not have the means to play by Google's rules or which have been unilaterally judged as non-eligible by Google will be driven out of the market.

Such a system is not based on the merits or consumer relevance of the competing vertical services. Even if the 'minimum quality criteria' (Annex I Section 2) pretend to give significance to the quality of the sites, the lower quality score can be offset by a higher bidding price, therefore still stripping consumers of the relevant choice. It is important to note, in these remedies, that Google has predefined the universe of vertical search providers that is allowed to compete with it. This further restricts the range of competitive offerings likely to be placed before consumers.

In addition, Google vertical results will still be displayed separately embedding the system of preferencing. The 'remedy' of an auction, apart from being fundamentally flawed with regard to consumer choice, does not even remove the concern of discrimination, but further cements Google's own position and limits the universe of competition within which it chooses to operate.

If the current proposal is endorsed within the framework of a settlement, the European Commission should explain to EU consumers and citizens the reasons why it has allowed Google to manipulate search results and decide on their behalf the information to be provided to them.

Google's proposals will stifle innovation

Allowing Google to define its field of competitors, and then charge them for the privilege of competing, it will be extremely difficult for new market entrants in vertical search. No matter how good and relevant their services are to consumers' queries, for them to compete against Google and its main rivals they will have to have the financial means to compete in the auction mechanism. This is further exacerbated by the fact that only sites that have already achieved a significant minimum traffic threshold will be eligible to be added in the Vertical Sites Pool. The Commission is effectively sanctioning the creation of a new combined and higher barrier to entry in the search market.

The proposals will do nothing to prevent Google from using universal search to squeeze out competitive vertical services. On the contrary, Google will now be able to profit not only from the traffic it diverts from competitors, but also from the new possibilities to charge for their inclusion among the Rival Links. By requiring Google rivals to pay a price for their links, Google will be granted the right to monetise its anticompetitive behaviour. It will have the incentive to provide links to the rivals who pay the most and not those who provide the best or most relevant results according to consumers' search queries.

In addition, this blueprint would grant Google unprecedented power to unilaterally decide whether a competitive vertical search provider fulfils the criteria to be included in the vertical sites pool. The proposed mechanism does not provide any robust safeguards against potential abuse by Google.

Google's proposals go against EU case law

Google is required by EU law to provide an objective justification for its abuse of dominance once such an abuse is alleged by the European Commission. It is clear from its 'proposals' that it has not provided any objective justification for its anti-competitive behaviour, which is required for it to escape a prohibition of its abuse of its dominant position. According to EU case law, the burden of proof for such objective justification lies with the dominant company. It is for the company invoking a defence against an infringement finding to demonstrate to the required legal standard of proof that the conditions for applying such a defence are satisfied.

If the proposals are accepted, the European Commission will send an ill-advised signal to dominant companies in other markets that immunity from competition rules on a poorly argued defence is not only possible but welcome. Negotiating a weak 'settlement' that states up front that the company does not accept any wrongdoing at all goes against established European competition law and practice. Furthermore, it will set a dangerous precedent allowing dominant companies to apply discriminatory practices against their competitors as long as those competitors are not discriminated against among themselves. Neither EU competition case law nor the Commission guidance on applying Article 102 of the Treaty has yet allowed such an exception.

The similarities of this case with the Microsoft Internet Explorer case are as disturbing as they are remarkable. Google is similar to Microsoft in using its dominance to leverage its market power from one market to another. In Microsoft the dominance in desktop operating systems was abused to push Internet Explorer; with Google the dominance in the online search is being used to push vertical services. However, the handling of the case by the European Commission is diametrically different. We see no rationale to this difference.

It is crucial that the European Commission uses its powers conferred by the Treaties to sanction Google for infringing EU competition rules.

Google's proposals fail to meet the requirements of transparency and legal certainty

The proposed remedies are drafted in a way that will make the monitoring of compliance an excessively complex task. The remedies document is full of ambiguous terms, and introduces exceptions to almost every single rule, let alone that the screenshots are by nature static and not suitable to visualize complex technical solutions.

At this stage, only Google is in a position to fully assess the impact of its proposals on its business model. Complainants and third parties cannot review technical proposals drafted in terms that fail to meet the minimum requirements of transparency and legal certainty. The only beneficiary will be Google and the lawyers who will have to check compliance.

Conclusion

The 'remedies' proposed by Google are in essence no such thing. They offer little more than tinkering with the initial proposal, which fell short of any objective justification for the abuse of dominance they were supposed to remedy. The absence of any objective justification for the abuse of dominance requires the Commission to issue a formal Statement of Objections; a move BEUC would applaud.

The lack of any recognition of consumer welfare, let alone the consumer interest, in the 'remedies' underlines the lengths Google and the Commission appear to want to go to negotiate a settlement not matter the damage to Europe's consumers.

The terms of the 'remedy' are so weak, ambiguous and indeed damaging that we cannot contemplate how they can be considered as serious. The erection of new barriers to entry, the allowance of a dominant company to define and tax its universe of competitors and the misleading of consumers who demand and expect to see fair and appropriate search results render these 'remedies' utterly unacceptable in the eyes of Europe's consumers.

We see no option for the Commission than to reject the proposed 'remedies' and proceed with a Statement of Objections. We look forward to seeing such a step taken and look forward to working with the Commission in the protection of the interests of the consumers.

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