



## Press Publishers' Response to Google's Third Commitments Proposal

### European Commission's Competition Investigation of Google - AT.39.740

#### Executive Summary

On behalf of hundreds of press publishers, the undersigning European and National Associations **call upon the Commissioners to reject Google's latest commitments proposal**. Closing the pending Google investigation on the basis of this proposal would not even remedy the four competition concerns identified by the Commission, let alone address the urgent competition concerns raised in the various complaints. On the contrary, accepting these commitments would inflict additional harm to competition, innovation and consumer choice **as they are based on an ineffective and harmful concept**. They will secure Google dominance in any market it wishes to enter and legalise its anti-competitive conduct.

- The Commission rightly considers Google's promotion of own services as anti-competitive. The **commitments**, however, **do not preclude Google from favouring own services**. Nor do they limit Google's ability and incentive to demote rivals. The most relevant concerns remain unaddressed.
- The **most prominent areas of any search results pages would be reserved for Google's own services**, independent of their quality, while all rival services, even if they are far more relevant to a search query, have to accept inferior visibility. In the case of mobile product search, for instance, Google can always show six times more products than even the most successful rival. The proposed layout ensures Google's services the highest click-rates and, ultimately, market shares.
- Google offers to include a minute  icon to a favoured link to inform users that it "is inserted to show more results from Google's own specialised [image, product etc.] search pages". Studies show that less than 0.1% of users will ever click on the icon. Plus, **the proposed information does not reveal Google's search manipulation and will not alter users' behaviour**.
- Apart from the ineffective  icon, Google offers no remedy for its preferential treatment of services that are not directly monetised (e.g. Google News, Google Images).
- The only relevant "commitment" is the addition of three Rival Links whenever Google puts links to its own monetised services first. However, in the most relevant commercial areas rivals will have to bid for a Rival Link in an auction and pay Google the highest price for a click. As a result, **websites would not be ranked by relevance anymore but primarily according to the price they are willing to pay Google**. As a new type of ad, Rival Links are not a concession but a new revenue stream for Google. As rivals could always bid for AdWords-ads, their situation is not improved.
- Paid Rival Links **amount to an offer to buy back the traffic that Google is abusively diverting**, i.e. to substitute the diverted natural traffic with paid-for traffic. This contradicts DG COMP's finding that "paid search traffic cannot be a substitute for natural search traffic".
- If accepted, the **commitments would directly reward Google's abusive self-preference** as due to the changes more clicks would be paid for and generate revenues for Google.
- The latest proposal contains no improvement for Google's anti-competitive use of third-party content. **A settlement would legalise the ineffective "opt-out" mechanisms which Google has imposed on content providers** against their will and against the basic legal principle that it is the rightsholder and not the user that may determine the scope and conditions of the use of its content.

**We call upon the Commission to insist on a decision achieving the following requirements:**

- **non-discrimination**: equal search and display criteria for all websites, including Google's own services = holding all services, including its own, to exactly the same standards, using the same crawling, indexing, ranking, display, and penalty algorithms;
- **no use of content** from press publishers (newspaper, magazine and online publishers) **beyond what is truly indispensable** for navigation purposes in the horizontal search without prior consent;
- an option to mark information on an item-by-item-basis in a machine-readable way in order to express permissions and restrictions for use of that respective content outside horizontal search;
- **no direct or indirect punishment of websites that restrict the use of their content**; and
- no preferential display or ranking of news aggregators towards online press portals.

After two years of fruitless negotiations, the only credible option left for the Commission is to return to the traditional route of a prohibition decision that deals with all grave competition concerns, including those raised since the launch of the investigation in 2010 and which have not yet been addressed at all.

### A. Background – The investigation so far

Following competition complaints in spring 2010, the Commission launched an investigation in November 2010. The number of official complaints soon rose to 18. Many other companies submitted informal complaints. In **May 2012** the Commission announced that it had identified four business practices of Google which are "liable to harm consumers" and, in the Commission's view, create "**a strong case for action** under our [European] antitrust rules"<sup>1</sup>.

In April 2013, Google proposed a **first set of commitments** to close the Commission's investigation with a settlement. A formal market test on that set of proposals **received "very negative" feedback**, leaving the Commission with "serious doubts" about whether it was possible to reach a settlement<sup>2</sup>.

After a request from the Commission to improve its proposed commitments, Google submitted a **second set of commitments** on 21 October 2013. The **Commission first indicated** that the second package contained "**significant improvements**"<sup>3</sup>. However, the Commission did not appear to consider the amended proposals as significantly different, as can be concluded from the fact that it did not conduct a new market test, which according to the Best Practice Notice<sup>4</sup> would be required if after a first market test the revised proposals alter the very nature and scope of the initial commitments. Instead the Commission sent out **125 information requests** to complainants and interested parties. The information request was perceived by many as **misleading**, if not pre-conceived, as it diverted attention from the points that were really problematic to issues of marginal importance. The information request and all its annexes had been declared **confidential** although they contained hardly any more information than the initial set of proposals. Many assumed that the confidentiality was destined to avoid an open debate which would have revealed the fundamental flaws and shortcomings. Despite the limited and confidential consultation of third parties the Commission had to correct its initial positive announcement about the merits of the amendments. On 20 December 2013 Vice-President **Joaquín Almunia said**: "*The latest proposals are not acceptable in the sense that they are not proposals that can eliminate our concerns regarding competition and in particular regarding the way Google's rivals in vertical search [...] are being treated. At the moment there is little time left, but the ball is still in Google's court. But within a short timeframe, the ball will then be here and then it will be the moment to take decisions*"<sup>5</sup>.

Google submitted the new commitments proposal on 31<sup>st</sup> January. Already two days earlier, a **Reuters article** quoted two sources from the case team that the Commission will adopt a commitments decision without any prior consultation of third parties. This was confirmed when the Commission announced just three working days after receiving the third set of commitments that they were capable of addressing the competition concerns and that there will be no further consultations<sup>6</sup>. In an interview Vice-President **J. Almunia** even went so far as to suggest that he would not consider the responses of the complainants who have to be informed about the planned settlement and be given an opportunity to comment (Article 7(1) Regulation 773/2004): "*I don't see why from now on I will change my mind about the sufficient solution of the problem that we have based on the commitments that Google has proposed to us*"<sup>7</sup>.

Thus, it appears that instead of first testing and discussing the new proposals with complainants, interested parties and other Cabinets Vice-President J. Almunia preferred to confront everyone with a fait accompli. To make matters worse, the information given in the Commission's **Press Release (IP/14/116) and Memo (14/87) appear to be misleading and in several ways cloud the shortcomings**

<sup>1</sup> J. Almunia, SPEECH/13/768 of 1 October 2013, "The Google antitrust case: what is at stake?".

<sup>2</sup> J. Almunia, *ibid.*

<sup>3</sup> J. Almunia (n. 1) <http://uk.reuters.com/article/2013/12/20/uk-google-eu-idUKBRE9BJ0HF20131220>.

<sup>4</sup> Notice on best practices for the conduct of proceedings concerning Article 101 and 102 TFEU, OJ C 308/6, para. 133.

<sup>5</sup> J. Almunia (n. 1) <http://uk.reuters.com/article/2013/12/20/uk-google-eu-idUKBRE9BJ0HF20131220>.

<sup>6</sup> Press Release IP/14/116 and Memo 14/87 of 5th February

<sup>7</sup> J. Almunia, Press Conference Antitrust, <http://ec.europa.eu/avservices/video/player.cfm?ref=I086152>.

**of the Commission's investigation.** In fact almost every sentence contains inaccuracies, for example the following:

- **Claim:** *"The European Commission has obtained an improved commitments proposal from Google"*.  
**Fact:** The third proposal only amends the commitments relating to the first concern (Google's self-preference). The equally unworkable proposals for the second to fourth concerns were not improved.
- **Claim:** *"Google has now accepted to guarantee that whenever it promotes its own specialised services on its web page [...], the services of three rivals [...] will also be displayed"*.  
**Fact:** Google only has to make minor concessions (by displaying Rival Links, which are in most cases paid ads), if Google promotes specialised *search* services. Google's various practices to promote Google+, YouTube, Gmail or other service remain entirely un-remedied.
- **Claim:** *"rivals will be displayed in a way [...] that is comparable to the way in which Google displays its own services"*.  
**Fact:** At best, three rivals can get one Rival Link each, whilst Google's own service gets at least three times more slots. Plus, Rival Links look like ads, while Google's links look neutral.
- **Claim:** *"Google and its rivals will be able and encouraged to innovate and improve their offerings"*.  
**Fact:** Google is still free to promote its services and to demote any rival to the bottom of the results page. Who would invest in a service that can be made invisible overnight?
- **Claim:** *"The Complainants will [...] have the opportunity to make their views known to the Commission before the Commission takes a final decision"*.  
**Fact:** This opportunity is not a concession of the Commission but required by EU-law. In fact Vice-President J. Almunia wants to ignore it: *"I don't see why from now on I will change my mind"*.<sup>8</sup>

On 12<sup>th</sup> February VP Almunia briefed the other Commissioners on the state of play of the procedure. The official Minutes of the meeting<sup>9</sup> reveal that the information provided again contained inaccuracies which cast a better light on the proposals than justified. In spite of that misinformation several Commissioners rightly questioned the merits of the proposed commitments.

In the course of June, the Commission informed complainants, including German and Spanish press publishers' associations, that it did not intend to further investigate Google's conduct but to reject their complaints as Google's proposed commitments would remedy all concerns raised. It was only with this **Pre-Rejection Letter** that the complainants saw the Commission's Preliminary Assessment of 13 March 2013, Google's official third set of commitments from January 2014 as well as some further information on which the Commission's assessment was apparently based (yet no evidence whatsoever).

VP Almunia had repeatedly reassured colleague Commissioners and the public that a new market test of the third set of commitments was not necessary as the complainants would be given *"a reasonable period to comment and inform the Commission of their own views"*<sup>10</sup>. However, **the complainants were given a mere four weeks** in the main summer holiday season **to respond** to the Pre-Rejection Letter, the Preliminary Assessment *and* the latest commitments proposal. **Applications for an extension of the unreasonably short deadline to comment were rigorously rejected.**

## **B. Google's latest proposals regarding the abusive preferential treatment of its own services**

The Commission found that Google promotes its own specialised search services (Google Shopping, Places, News etc.) in its general web search by displaying those links higher and with greater visibility than links to other potentially more relevant sites. In the Commission's own view this practice raises competition concerns as it diverts traffic away from competing sites and towards Google's own services.

As a remedy Google proposes to continue the self-promotion of own services but – as a "concession" - to *label* the preferred links to its services so that users do not confuse them with generic search results.

<sup>8</sup> J. Almunia, Press conference antitrust – Commission obtains from Google comparable display of specialised search rivals, <http://ec.europa.eu/avservices/video/player.cfm?ref=I086152>.

<sup>9</sup> European Commission, PV(2014) 2075 final, Minutes of the 2075th meeting of the Commission held in Brussels (Berlaymont) on Wednesday 12 February 2014 (morning), Strasbourg 25 February 2014.

<sup>10</sup> See MEMO/14/87, Antitrust: Commission obtains from Google comparable display, Q&A, p. 3.

To this end Google will include an info icon (i) above those results. For Google services such as Google News and Google Images that do not directly generate revenues (by showing advertisements or receiving payments for inclusions – "paid inclusions"), this info icon will be the only commitment to Google's abusive self-favouring. Only for those services that directly generate revenues, Google proposes the additional remedy "*that whenever it promotes its own specialised search services on its web page (e.g. for products, hotels, restaurants, etc.), the services of three rivals, selected through an objective method, will also be displayed*"<sup>11</sup>. However, the benefit of such Rival Links is highly disputed.

## 1. Display of Google's paid-for search services – e.g. Google Shopping

*Abusive design at present:*

gas grill

Web Shopping Maps Images Videos More Search tools

About 8,240,000 results (0.20 seconds)

**Shop for gas grills**

GP-Grill Gas Grill - black/	Falcon Dominator	Outback Omega 250	Blue Seal Cobra CS9	Barco
£141.96	£888.00	£129.00	£897.60	£850.50
www.Ambient...	Catering Appl...	Outback Direct	Carlton Sales	e-tradecounter

**Buy a Gas Grill 2014 - Gas Grill Ratings - Gas Grill Reviews**  
bbq.about.com/cs/grills/bb/aabyb042503.htm

Before you run to the hardware store to buy a new gas grill you should know that there are a lot more grills out there than you'll find in one store. I've broken ...

**Top 10 Gas Grills between ... - Top 10 Gas Grills under \$250 - Gas Grills under \$250**  
More by Derrick Riches - in 1,156 Google+ circles

**Top Gas grill Reviews | Best Gas grill – Consumer Reports**  
www.consumerreports.org > Home > Home & garden

Looking for the Best gas grill? Consumer Reports has honest Ratings and Reviews on gas grills from the unbiased experts you can trust.

**Weber.com - Weber® Grills - Gas**  
www.weber.com/grills/category/gas

Manufacturer of gas and charcoal grills, parts and accessories. Features recipes, service and dealer locations.

Grills - Gas - Parts & Support - Charcoal

*Google's remedy proposal:*

gas grill

Web Images Maps Shopping More Search tools

About 44,000,000 results (0.18 seconds)

**Weber.com - Weber® Grills - Gas**  
www.weber.com/grills/category/gas

Gas Grills. Grill Shopping Tools. 0 Grill Comparison Grill Finder. Spirit® ... 4 or 6 stainless steel burners • Backlit LED tank scale • Grill Out® handle lights.

**Gas Grills. Shop at Sears for Your Outdoor Cooking Gear**  
www.sears.com/grills-outdoor-cooking-gas-grills-1024073

Sears features gas grills with a wide variety of features, including multiple burners and searing options. Entertain outdoors year round with gas grills.

**Natural Gas Grills - Home Depot**  
www.homedepot.com/.../Grills-Grill...Gas-Grills...Gas-Grills/N-5yc1vZc5t...

Natural Gas Grills - Gas Grills - Grills & Grill Accessories - Outdoors at The Home Depot.

**Shop Gas Grills at Lowes.com**  
www.lowes.com/Grills-Outdoor-Cooking/Grills/Gas-Grills/\_/N.../pl

Products 1 - 877 - Find Gas Grills at Lowes.com. Shop a variety of quality Gas Grills and Outdoor Living & Recreation that are available for purchase online or in ...

**Weber Gas Grill - Walmart.com**  
www.walmart.com > Patio & Garden > Grills & Outdoor Cooking

Shop Weber Gas Grill at Walmart.com - and save. Buy Weber Spirit E-210 2-Burner LP Gas Grill, Black at a great price.

**Amazon.co.uk: Gas - Barbecues: Garden & Outdoors**  
www.amazon.co.uk > Garden & Outdoors > Barbecues

Results 1 - 24 of 658 - FoxHunter Garden Outdoor Portable BBQ Gas Grill Stainless Steel 6 Burner Barbecue Barbeque + 1 Side Burner With Thermometer New.

**Amazon.com: Natural Gas Grills: Patio, Lawn & Garden**  
www.amazon.com/b?node=509240

23 Results - Online shopping for Natural Gas Grills from a great selection of Patio, Lawn & Garden; Weber & more at everyday low prices.

**Amazon.com: Grills & Outdoor Cooking: Patio, Lawn & Garden...**  
www.amazon.com/Grills-Fryers-Outdoor-Cooking-Living/b?ie...

Results 1 - 24 of 37492 - Online shopping for Grills & Outdoor Cooking from a great

**Google Shopping results** Sponsored

GP-Grill Gas Grill - black/	Blacktop 360 Party Halo Gas	OUTBACK Omega 250	Anthony Worrall Thompson 2
£141.96	£299.00	£127.99	£250.00
www.Ambient...	Garden Gift S...	Outback Direct	Ebay

**Alternatives**

GP-Grill Gas Grill - black/	Kelkoo	Shopzilla	Garden XL
£152.00	Best stock of gas grills from £129.00	Great deals on gas grills from £129.00	Best prices on gas grills from £180.00
www.Ambient...			

**5 links that look like neutral search results for Google alone displayed above**

**3 links that look like ads for all rivals together = fair competition?**

The abuse of market dominance in this typical example lies in the fact that the first search result is a link to Google Shopping ("*Shop for gas grills*") and that Google presents the product information that merchants have uploaded to Google Shopping (here for the gas grills) in order to be displayed (against payment) as first search results and as the only results with descriptive images and detailed price information. Google achieves this result by using separate ranking mechanisms for its own services which promote them to the top, even if they are less relevant to the search query or lead to sites with more expensive offerings than other search results.

To remedy the described abuse, Google proposes a new heading ("*Google Shopping results*") instead of ("*Shop for gas grills*") and a notice "*(i) Sponsored*" above the box framing the promoted search results<sup>12</sup>. In addition, Google includes up to three "**Paid Rival Links**" beside or below the links to its own services. To this end, for each category of search results where Google manipulates the search to favour its own specialised search services, it will create a pool of alternative websites that fulfil minimum criteria set by Google (e.g. regarding their traffic and business practices) and apply for inclusion. Google may also on its own initiative add eligible non-Google sites to the pool of eligible rivals. Out of this "**Vertical Sites Pool**" Google will pick three websites that it will display as Rival Links. Selection and ranking will be based on an auction, i.e. Google will implement this "**Rival Links Auction**" by "*creating a new ad type for Rival Links*". If after a successful bid a site is displayed as a Rival Link and a user actually clicks on that link, the site will have to pay the offered price to Google subject to a minimum reserve price (in case there were no higher bids).

<sup>11</sup> As the Commission has highlighted itself: Press Release IP/14/116, 5/2/2014, p. 1.

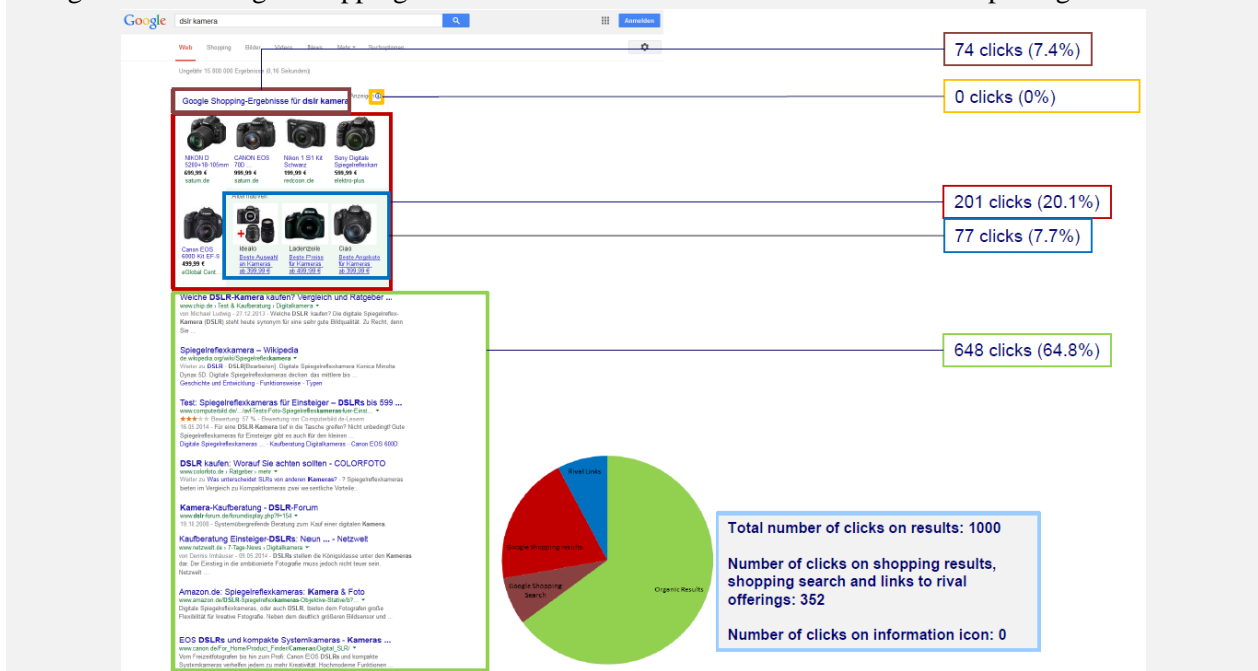
<sup>12</sup> Note that in the course of last year Google started to include the "sponsored" sign above its Google Shopping results. Prior to that consumers were not informed at all about the preferential ranking of results from Google Shopping.

***Criticism: Google's proposal does not address the overarching concern as Google reserves the right to rank links to its own services with greater visibility.***

The central concern lies in Google's diversion of traffic to its own services by automatically ranking and displaying links to its sites more attractive than links to competing services, even if they are objectively more relevant to the search query. Google's latest proposals do not bring an end to this. They are still explicitly founded on the premise that Google may continue to rank and display its own services "based on mechanisms that do not apply in an equivalent manner to links to non-Google websites"<sup>13</sup>. In its Press Release the Commission even admitted that in principle Google will retain the right to "promote its own specialised search services on its web page"<sup>14</sup>. By doing so Google can extend its monopoly in general search into any neighbouring market it wishes to enter.

***Revealing self-preference with a text label "sponsored" is no solution since users pay more attention to the position of a result than its label.***

Over the past years, Google has made users believe that Google ranks results solely on the basis of relevance. They click the first search results roughly twice as often as the respective subsequent result, even if the text is objectively less relevant to their query. Thus, as long as Google is still allowed to display the results for its services larger and more prominently than any other links and to add detailed information that others may not add, it is illusionary to assume that the re-labelling of the heading for those links will have any significant effect on users' decisions and competition. "[C]onsumer decision-making (and click-through rates) are driven more by the architecture of the search results page (i.e., the location of the shopping region) than by the Google label as such."<sup>15</sup> While the latest proposals give rivals more visibility, Google's own results are still better placed at the left hand corner of the results page, three times bigger than any rival result and with a white background which makes users believe that those results are neutral search results while the rival links appear like ads. The inefficiency of the labelling remedy is demonstrated in the following excerpt from a representative click study<sup>16</sup>. Using Google's proposed design, 1000 internet users were asked where they would click if they wanted to buy a DSLR camera. Despite comparable product prices and images, Google Shopping gathered 27.5% of all clicks, whilst all Rival Links together received 7.7% of all clicks. In other words, the proposed design secured Google Shopping more than three times more clicks than all rivals put together.



<sup>13</sup> Google's Commitments in Case COMP/C-3/39.740, January 31, 2014, Definition of "Google Specialised Results Trigger", para 26.

<sup>14</sup> Press Release IP/14/116, 5 February 2014.

<sup>15</sup> This is the result of an empirical study on labelling solutions: Hyman/Franklyn, Search Neutrality v. Search Bias: An Empirical Perspective on the Impact of Architecture and Labelling, May 2013. The study concludes: "[T]weaking the Google Shopping label to make it crystal clear that it includes paid content does not affect the frequency of click-through."

<sup>16</sup> Lewandowski/Sünkler: Representative online study to evaluate the third set of commitments proposed by Google as part of EU competition investigation, AT.39740-Google, commissioned by Olswang LLP, available on request.

***Requiring rivals to bid in a separate auction and to pay Google to appear beside the pre-set Google-links would exclude Google's services from any competition and reward the abusive self-preference.***

The auction model for "Paid Rival Links" imposes costs on rivals which Google itself does not have to bear but which are actually a source of revenues. If the proposals are accepted, in the future Google will earn from both the traffic it diverts to its own services (by pre-setting the first links) and the traffic it lets through to "Rival Links" displayed alongside its own links. The abusive self-preference would remain unchanged and would be supplemented with a new advertising product for Google to also earn the highest possible revenues from the traffic to non-Google websites. In the current (abusive) situation, Google's rivals only compete amongst themselves for the first (generic) search results below Google's pre-set links. This is unfair enough since Google automatically secures more than half of the clicks for its own, often inferior service. But at least, currently, those clicks to non-Google generic search results – for which rivals can compete – do not create additional costs for rivals. Under the revised proposals, Google would still secure most traffic through the preferred first links to its own services. But now rivals will even have to pay for the traffic they manage to obtain despite Google's search manipulation. This is in direct contrast to the Commission's Preliminary Assessment of 13 March 2013 which concluded that "*paid search traffic [...] cannot be a substitute for natural search traffic from Google's horizontal web services*"<sup>17</sup> as Google is now offering precisely that. As a result, while the proposals do not significantly increase rivals' chances to reduce the fixed share of traffic that Google leads to own services, they multiply their costs for the remaining traffic to their sites.

***The "Rival Links Auction" exchanges relevance-based competition with price-based competition (only) amongst rivals which will lead to less relevant search results and higher prices for consumers.***

Currently, Google's rivals compete on the basis of relevance for those users that do not click on an ad or a Google link. If the proposals were accepted, this remaining competition amongst rivals would be substituted with a much weaker form of price-competition on the basis of who is willing and able to bid the highest price to Google. The auction cost will have to be amortised, so prices for the end products will go up. The sites that will succeed will not be the most relevant sites or those with the cheapest products, but those that are able to generate the highest profit from any click. Ironically, the stronger the competition amongst rivals becomes (for those few users that do not click on a Google site), the more they will have to bid in the auction, the higher the prices for end customers will get and the more Google will earn. In every scenario, the winner of the new proposals will always be Google.

***The economics of auction systems in over-subscribed pools will drive prices up to a point where Google becomes the main beneficiary of any profit resulting from clicks.***

In an auction with more bidders than available slots, the price mechanism will drive bids up to a point where Google becomes the main beneficiary of any profit resulting from a click on a Rival Link. Given that there are only three slots available for all rivals put together and that Google would be entitled to add new sites to the pool of bidders "on its own initiative"<sup>18</sup>, over-subscription will be the norm. Against this background the small maximum reserve price (if no other rival bids), which Google sold as a huge concession, will have little or no effect on the actual costs to rivals: Rivals will have to bid.

***The proposals are not "commitments" but an authorisation of a new business model to transition organic traffic into paid traffic.***

While disguised as a remedy to the abusive manipulation of horizontal search, "Paid Rival Links" are nothing other than "*a new ad type*"<sup>19</sup>. In fact, the auction mechanism is very similar to Google's premier revenue model, AdWord ads. Offering rivals to buy more ads from Google, however, is not a remedy for organic search manipulation and certainly not a "commitment"; it is Google's core business.

<sup>17</sup> Preliminary Assessment, recital 94.

<sup>18</sup> Commitments, Annex 1 I.1.g)

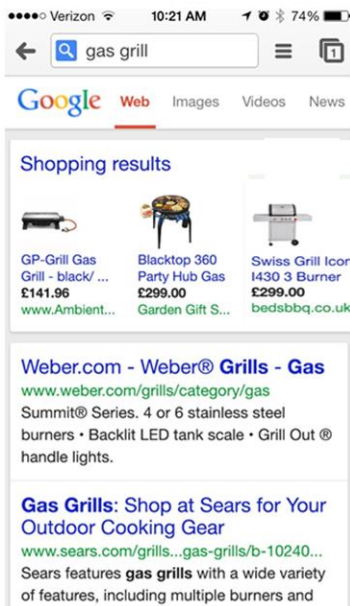
<sup>19</sup> Google itself calls them "a new ad type" in Annex 1, Paragraph 14 of the second set of proposals.

*The proposals would create a further incentive for Google to ask more website operators to pay for the inclusion of their sites in search results.*

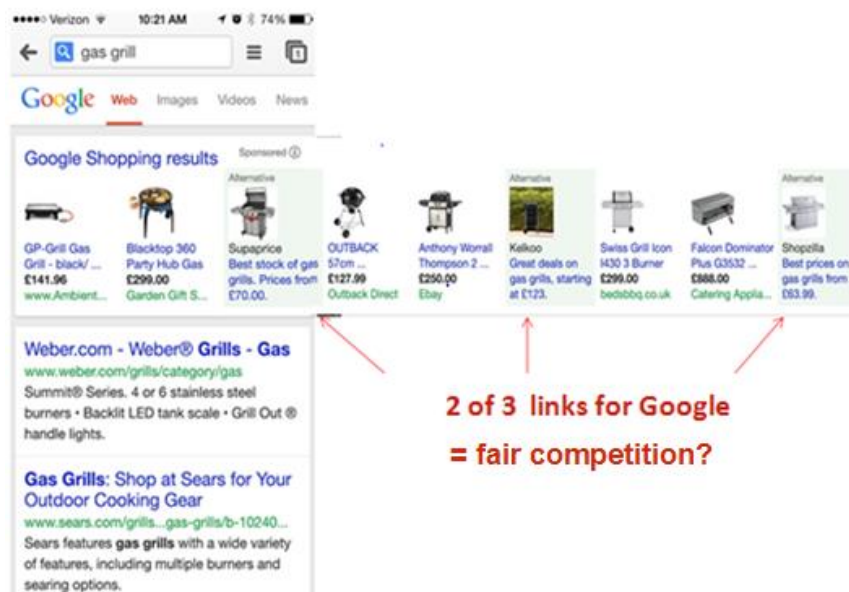
Currently Google only charges shops for the inclusion of their products in Google Shopping. However, adopting the commitments proposal would create a strong economic incentive to offer more website providers an inclusion in search results against payment, since this would open the door to the lucrative "Paid Rival Link" model under the commitments decision: As soon as Google charges for the inclusion into any of its services (e.g. Google Maps, hotel-finder, local etc.) it could auction of the Rival Links which it has to display under the proposed commitments. Hence, to accept the commitments would directly reward Google's abusive self-preference. It would authorise Google to implement its long-running strategy to transition free organic search into paid-for search.

## 2. Display of Google products in mobile search – Google Shopping

*Abusive design at present:*



*Google's remedy proposal:*



In this example of a shopping-related mobile search, the abuse of dominance again lies in the automatic display of the Google Shopping result as first search result. As a remedy, Google proposes to label the heading "Google Shopping results" which links to Google Shopping with a "Sponsored (i)" sign. In addition Google displays one product image from a competing shopping portal beside two images from Google Shopping. If the user scrolls to the right, new results from Google Shopping and alternative providers will appear, always in relation: two Google results, one alternative.

### Criticism:

*In the Commissions view, Google's self-preference is the competition concern as it diverts traffic. If that is the case, how can a proposal that manifests this self-preference be an adequate remedy?*

If, as the Commission has repeatedly stated, the abuse of dominance lies in Google's favouring of own services, then the only acceptable remedy and hence minimum criteria for a settlement would appear to be a method that brings this self-preference to an end: Google must be obliged to treat all services equally, including its own sites. Merely exchanging the present self-preference with another design that favours Google's own services just as much - as suggested by Google - is not a solution.

*The commitments will fix a market share of well over 60% and hence market dominance for Google in the growing field of mobile search for every of Google's specialised services.*

More and more searches are entered into a mobile device. It is expected that in the course of this year mobile search will become more relevant than desktop search. Yet Google's proposals are even weaker

when it comes to mobile searches. In the auction for Rival Links every rival can at maximum acquire one of the three Rival Links which Google displays. Since Google itself can display six links, it will take up 66% of the slots and will have six times more chances to convince a user to click than even the most relevant rival. Assuming that the click-through rate will lead to a corresponding market share, Google would secure market dominance for all its existing and future specialised services. Thus, even leaving the requirement to pay for Rival Links aside, Google's commitments are a safe path for Google to achieve market dominance in any area it wishes – on the Commission's demand.

### 3. Display of Google services without ads or paid inclusions – Google News / Google Images


*Abusive design at present:*


obama


Web Images Maps Shopping News More Search tools

About 919,000,000 results (0.26 seconds)

**News results for Obama**

 **Obama's Other 'Cliff' Is in Foreign Policy**  
New York Times - 1 hour ago  
National security issues involving Syria, the Middle East, and the United States' relationship with Russia and China, are now clamoring for the ...

 **Obama victory spells trouble for Israel's Netanyahu**  
Reuters - 5 hours ago

 **Obama Re-Election Spells Trouble For Netanyahu**  
Huffington Post - 4 hours ago

More news results for **obama** »

**Barack Obama**  
www.barackobama.com/  
BarackObama.com is the official re-election campaign website of President Barack Obama. Visit the site for the latest updates from the Obama campaign, ...  
Store - Donate - Find Event - Contact Us  
165 people in Mountain View, CA +1'd this

**Barack Obama - Wikipedia, the free encyclopedia**  
en.wikipedia.org/wiki/Barack\_Obama  
Barack Hussein Obama II is the 44th and current President of the United States. He is the first African American to hold the office. Born in Honolulu, Hawaii, ...  
United States Senate career - Early life and career of Barack - Illinois Senate career


*Google's remedy proposal:*


obama


Web Images Maps Shopping News More Search tools

About 919,000,000 results (0.26 seconds)

**Google News Search** ⓘ

 **Obama's Other 'Cliff' Is in Foreign Policy**  
New York Times - 1 hour ago  
National security issues involving Syria, the Middle East, and the United States' relationship with Russia and China, are now clamoring for the ...

 **Obama victory spells trouble for Israel's Netanyahu**  
Reuters - 5 hours ago

 **Obama Re-Election Spells Trouble For Netanyahu**  
Huffington Post - 4 hours ago

More Google news results for **obama** »

**Barack Obama**  
www.barackobama.com/  
BarackObama.com is the official re-election campaign website of President Barack Obama. Visit the site for the latest updates from the Obama campaign, ...  
Store - Donate - Find Event - Contact Us  
165 people in Mountain View, CA +1'd this

**Barack Obama - Wikipedia, the free encyclopedia**  
en.wikipedia.org/wiki/Barack\_Obama  
Barack Hussein Obama II is the 44th and current President of the United States. He is the first African American to hold the office. Born in Honolulu, Hawaii, ...  
United States Senate career - Early life and career of Barack - Illinois Senate career

The abuse here lies, *inter alia*, in the fact that whenever users search for topics of current interest, Google presents a special news results box that promotes Google News above all other news sources or general search results (here: www.barackobama.com and Wikipedia). The results box is further highlighted by the fact that it contains the only link with an image to catch the user's eye.

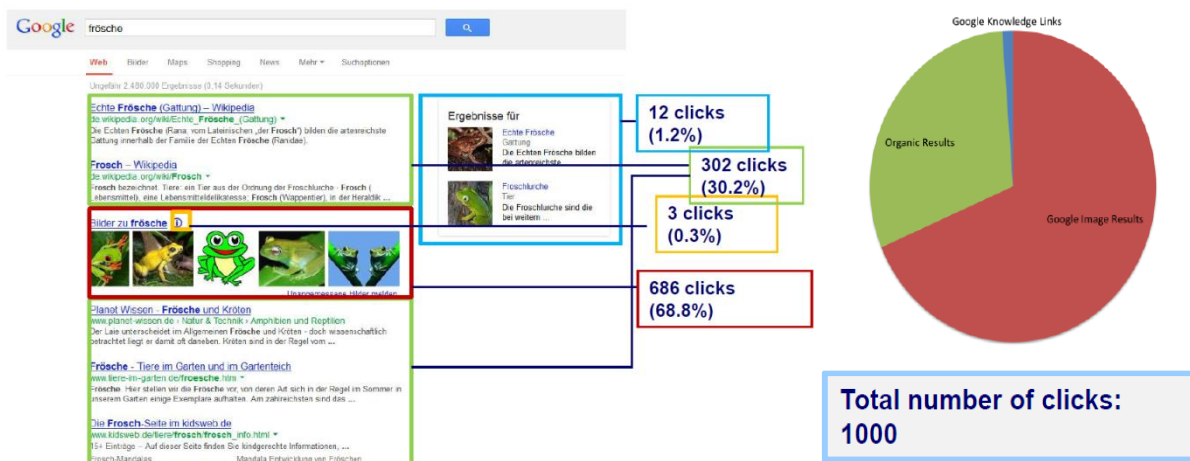
The first link ("*News results for*") and the last link ("*More news results for*") in the news results box lead users to Google's specialised news search. The links in between do indeed lead users to the mentioned external news sources (New York Times and Reuters). However, the linked-to articles have been taken from Google News. This means that in order to be included in this attractive results box, a news portal must have first granted Google News free use of its articles, as a type of quasi "consideration", by not technically preventing the display of content in Google News. This leaves press publishers hardly any choice but to accept Google's use of their content to fill Google News if they want to be found in the general web search for any topic of current interest<sup>20</sup>. This affects competition, as Google News competes with press publishers' news services for the attention of the same audience. The same principles apply to searches for images, where Google promotes its service Google Images.

As a remedy, Google merely proposes to add a ⓘ symbol that shall inform users about the promotion of its services. Plus, on desktops (but not on tablets or mobile devices) Google offers a new wording for the heading above the favoured results box ("*Google News Search*" instead of "*News results for*").

<sup>20</sup> Note that the situation appears different in Germany since the introduction of the so called ancillary copyright for press publishers in August 2013. Presumably in the light of this legislation and the pending EU competition investigation, Google started to include websites in its news results box (Universals) that have not opted-in or have opted-out of Google News. However, as the commitments proposal does not require Google to do so, Google could go back to its old conduct at any time. Plus, Google is still favouring its service Google News.



**Criticism: Revealing self-preference alone does not help competitors or content providers since users do not care where the content they see originates from.** Representative studies showed that the only remedy proposed for services that are not directly monetised by Google, the re-labelling of the headings of the preferred links, makes no difference whatsoever. Users simply ignored the new label. In a representative and independent click study on Google's proposed layout for image searches, for instance, 2,718 searchers out of 4,000 (68%) clicked on a result from Google Images. This is not surprising given that no other image search site was ranked on the first results page let alone displayed with thumbnails of images uploaded to the site. Only 5 of the 4,000 users (0,1%) clicked on the "info" icon that is supposed to inform users that the link to Google Images was "inserted to show more results from Google's own specialised image search pages" (below are the statistics for Germany). The study's results for clicks to Google News are very similar.



### 3. Legal framework – distortion of traffic as an abuse of dominance

In all of the above cases the proposed commitments would not bring Google's abuse of dominance to an end. Abuses of a dominant position are prohibited by Article 102 of the Treaty of the Functioning of the European Union (TFEU). With market shares of well above 90%, **Google is dominant in the EU both in web search and search advertising** and "it does not seem likely that another web search service will replace it as European users' web search service of choice"<sup>21</sup>.

Google's conduct is a clear abuse of dominance. Article 102 TFEU contains no exhaustive list of abusive practices ensuring crucial flexibility when dealing with new types of anti-competitive conducts. The article conveys quasi-judicial powers to the European Commission in the field of competition law.

Most generally, the concept of abuse relates to methods which are different from those that condition normal competition and have the effect of hindering the maintenance or the growth of competition<sup>22</sup>. According to the case law of the European Court of Justice **a dominant firm commits an abuse**, in particular, **if it forecloses competitors** or prevents new market entry through means that do not fall within the scope of competition on the merits, i.e. based on quality<sup>23</sup>. It is considered to constitute an abuse, in particular, if an undertaking holding a dominant position on a particular market "reserves to itself [...] an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking"<sup>24</sup>. The complainants' concern is that Google in effect uses its de-facto monopoly on the market for general web search to reserve to itself several ancillary search and non-search related services on neighbouring but separate markets<sup>25</sup> by displaying its own services better than those of rivals which

<sup>21</sup> European Commission, MEMO/13/383, 25 April 2013, p. 1.

<sup>22</sup> ECJ, Case 85/76, Hoffman-La Roche v Commission [1979] ECR 461, para. 91.

<sup>23</sup> ECJ, Case C-62/86, AKZO v Commission [1991] ECR I-3359, para. 70; Case C-202/07 P France Télécom v Commission [2009] ECR I-2369, para. 106.

<sup>24</sup> ECJ, Case C-311/84, Télémarketing [1985] ECR 3261, para. 27.

<sup>25</sup> See Case COMP/M.5727 Microsoft/Yahoo! Search Business, para. 31 "General internet search must be distinguished from vertical internet search, which focuses on specific segments of online content such as for example legal, medical, or travel search engines."

are often even actively demoted down the results page. Displaying (own) products better than competing products irrespective of the products' quality is the opposite of competition on the merits<sup>26</sup>.

Since "*a system of undistorted competition [...] can be guaranteed only if equality of opportunity is secured as between the various economic operators*"<sup>27</sup>, it may also constitute an abuse if a dominant company discriminates between market players on neighbouring markets<sup>28</sup>. While in general even a dominant firm may grant favourable conditions to its own subsidiaries and services, this is not the case where the company enjoys a particular gatekeeper position which conveys control over access to a particular market<sup>29</sup>. Therefore, for instance a monopoly broadcaster was considered "*to infringe Article [102] of the Treaty by virtue of a discriminatory broadcasting policy which favours its own programmes*"<sup>30</sup>. Similarly, in network industries, in particular in the field of telecoms, it has long been recognised by the Commission that "*there is, in this context, a general duty on the [dominant] network operator to treat independent customers in the same way as its own subsidiary or downstream service arm*"<sup>31</sup>. For economic reasons no lesser standards can apply to Google's search, as it enjoys an even stronger position than dominant telecoms networks which may at least be evaded by other technologies such as mobile phones, TV-cables or satellites. Google's search is omnipresent - on all internet devices.

Furthermore, Google's preferential display of own services can be considered as an **anti-competitive technical bundling** of these services to its general web search, similar to the bundling of the "Internet Explorer" to the windows operating system in the Microsoft case<sup>32</sup>. As a remedy, Microsoft had to display alternative browsers (including its own) on a rotating basis without them having to pay for that display. Why should Google be allowed to continue placing its own services first (rather than rotating) and to even charge those few that are being placed behind the highest price they are capable of bidding?

### C. Google's proposals regarding the abusive use of third party content

Another abuse of dominance identified by the Commission is the fact that Google uses original content from third party websites without their consent. One prominent example is Google News, a service without a single journalist which, since 2007, has been referring traffic to Google's general search (worth \$100 million just one year later<sup>33</sup>) by copying the most relevant text extracts and pictures from press publishers' websites without their consent. According to the Commission, Google "*thereby benefits from the investments of competitors, sometimes against their explicit will*". This practice reduces incentives to invest in original content, since users have no motive to visit competing sites if Google's search already provides them with all of the information. Publishing houses, often small and medium sized enterprises, will not be able to survive in a market that allows third parties to exploit their creative content without remuneration or even prior consent. This imposes a serious threat to the European press sector and media pluralism in general, a crucial element of democratic societies.

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<sup>26</sup> Cf. Commission, Case IV/29.418, Spices, para. 25; CFI, Case T-65/98, Van den Bergh Foods Ltd Commission, para. 160.

<sup>27</sup> CFI, Case T-271/03, Deutsche Telekom [2008] ECR II-477, para. 198.

<sup>28</sup> ECJ, Case C-95/04 P, British Airways [2007] ECR I-2331, para. 142-149.

<sup>29</sup> ECJ, Case C-179/90, Merzi Convenzionali Porto di Genova [1991] ECR I-5889, para. 19-20; CFI, Case T-128/98, Aéroport de Paris [2000] II-3929, para. 205-216.

<sup>30</sup> ECJ, Case C-260/89, ERT v DEP [1991] 2925, para. 37.

<sup>31</sup> Commission notice on the application of the competition rules to access agreements in the telecommunications sector, OJ 22.8.1998, C 265/2, para. 125.

<sup>32</sup> CFI, Case T-201/04, Microsoft [2007] ECR II-3601.

<sup>33</sup> CNN Money, v. 22.7.2008, <http://tech.fortune.cnn.com/2008/07/22/whats-google-news-worth-100-million/> ("What's Google News worth? \$ 100 million"). "*Google News is free and has zero ads. So what's it worth to Google? About \$100 million. That's the figure Google vice president Marissa Mayer [...] threw out during a [...] conference. [...]*".

## Use of press publishers' content in the example of Google News:

The image shows a screenshot of the Google News interface. The main content area displays several news stories. A red box highlights a snippet of a news article titled "OECD cuts economic forecasts as eurozone drags on growth". A callout box with a black border and white text, containing the phrase "Content taken from publishers' websites", has lines pointing to the highlighted snippet and another snippet below it. The interface includes a search bar at the top, navigation tabs for "News", "Images", "Maps", "Play", "YouTube", "Gmail", "Drive", and "More", and a sidebar on the left with categories like "Top Stories", "World", "U.K.", "Business", "Technology", "Entertainment", "Sports", "Science", "Health", and "Spotlight".

To make matters worse, using its monopoly in search Google has made it economically impossible for content providers to disallow Google's use of content within its specialised search services. Due to various interdependencies any such opt-out of Google's specialised services has detrimental effects on the ranking or appearance of that website in the general web search; a consequence that no content provider can risk. In the Commission's view *"Google creates a link between getting the right to use material from other sites on its specialised search services [e.g. Google News] and the appearance that these sites have on Google's general search results – a practice that allows Google to benefit from investments made by other firms."*<sup>34</sup> This competition issue is irrespective of the IP situation because it is about the link that Google creates between general searches and specialised ones – such as when you look for news, items to buy online, and restaurants in your area.

To remedy the abuse Google proposes offering website owners the (single) option to disallow the display of *all* content on a domain or an entire sub-domain (not a sub-webpage) in special Google services via a *"Notice Form"* which Google will implement within *30 working days*. In addition, Google proposes:

- operators of product, local and travel search* sites can block certain data (reviews, contact details and opening times) on a webpage from Google's index but only to a maximum of 10% of the readable text which leaves 90% of the information at Google's free disposal;
- news publishers* maintain the option on a "webpage-by-webpage basis" (i.e. for every page accessible via a URL but not for individual items on it) to i) exclude the entire content from display in Google News; ii) specify a date when the content should no longer be displayed there; and iii) prevent the display of snippets, without preventing the display of result links on Google News.

***Criticism:*** *The commitments do not sever the link Google has created between getting the rights to use news in its specialised services and a website's appearance in general web search results.*

Joaquín Almunia had asked Google to sever the link between getting the rights to use materials from other sites and the appearance of those websites in general search results<sup>35</sup>. The proposed commitments, however, do not sever this link. Google only proposes that on opt-out of Google News will have no *"material"* adverse impact on the sites appearance in *"Generic Search Results"* or *"AdWords Results"* (and even save for *"indirect effects"*). This means that Google reserves the right to delist any news publisher that exercises an opt out of Google News from all *"News-Universals"*, i.e. from the most prominent news results blocks within the general web search (see above at 3.). That is because these

<sup>34</sup> J.Almunia, Intellectual property and competition policy, SPEECH/13/1042, 9/12/2013.

<sup>35</sup> Ibid.

separate news results blocks are neither "AdWords Results" nor "Generic Search Results" which are defined by Google as results that are "not restricted by design to one or a limited set of pre-defined content categories, such as news". Due to its prominent display specialised news results blocks attract most user attention. No publisher can afford to "opt-out" of those results to protect its content from being used elsewhere (in the specialised search services). For this reason alone the proposed commitments relating to the use of third party content are at best useless.

***The entire notion of a "Notice Form" is window dressing, as website operators have had the opportunity to opt out of search engines since 1994 via the "Robots Exclusion Protocol" - even on a webpage-by-webpage basis rather than just on a sub-domain by sub-domain basis.***

The proposed "Notice Form" to opt out is even less effective than the existing "noindex" Robots meta tag which, following the "Robots Exclusion Protocol" website operators may include in the header of each webpage if they don't want that webpage's content to be indexed. Since the "Notice Form" provides even fewer options to opt out than the existing mechanisms under the Robots Exclusion Protocol, it is apparent that it provides no help. Even if it did, in a digital age with a fast moving flow of data and daily content uploads, using a "Notice Form" that will be implemented within 30 working days is just not worth discussing. The commitments are an obvious attempt to legalise the abusive status quo.

***Google dictates unpractical and burdensome technical steps for content providers to prevent Google's unauthorised use of content and imposes the costs on them.***

Google still avails itself of the right to use all content found online, even if protected by copyright, in its own services without prior consent. Rather than requesting consent prior to the use of third party content in its various services, Google expects a rights holder to pro-actively instruct every operator of a website on which the rights holder's content can be found, to implement the technical tools which Google provides to website operators but which at a closer look are neither practical nor sufficient. Thereby Google shifts the burden for preventing unauthorised use of content to the content providers, which turns the relationship between abuser and victim upside down.

***In the face of Google's monopoly position an opt-out solution makes no sense.***

An opt-out, as proposed by Google, can only be helpful if there are alternatives to opt-in elsewhere. As long as content providers have no choice other than to be present on Google if they want to be found online, the "offer" to block Google is not a viable option. Content providers are dependent on Google displaying *links* to their content but not on the display of the content itself. Google's proposals, however, do not enable content providers to adequately distinguish between the linking to and the actual display of content or other types of uses.

***While Google is constantly expanding the way, scope and intensity in which it uses third-party content, the offered opt-out solutions merely repeat the options which have already existed for many years but do not prevent the abuse of dominance.***

Apart from the solution for operators of product, local and travel searches, all proposed options for an opt-out have been available to publishers via the "Robots Exclusion Protocol" as implemented by Google for some time now<sup>36</sup>. Indeed, "editors have always had the ability to prevent their appearing on Google News by simply contacting the Google News Help Center"<sup>37</sup>. Google has relentlessly emphasised the existence of those tools to deny any wrongdoing, both in the competition investigation and in copyright proceedings. Nevertheless the Commission has identified an abuse of dominance. Either Google has previously claimed opt-out options that actually did not exist to deny any wrongdoing, or Google is now dressing up long-existing options as new commitments.

<sup>36</sup> The Robots Exclusion Protocol was signed in 1994. Option b)aa) stands for the Meta Tag <meta name="googlebot-news" content="noindex">, which Google, according to its own statements, has implemented since December 2010. Option b)bb) refers to: <meta name="googlebot" content="unavailable\_after: Date Time"> and option b)cc) refers to <meta name="googlebot-news" content="nosnippet"> which Google claims it has been implementing since 2011.

<sup>37</sup> Italian Competition Authority, AGCM, case A420 – FIEG - Federazione Italiana Editori Giornali/Google, Prov. n. 21959, 2011, p. 3.

***The proposals do not fulfil the minimum needs of content providers to differentiate between the various types of use and to communicate usage rights adequately.***

Google's proposals do not enable content providers to express in advance precisely what content can be used for which types of use and by which provider and service. Nor can they communicate the extent and the terms and conditions of the allowed use. Rather, Google's options only leave them with the choice between "all or nothing", a rock or a hard place. In particular, the proposals do not enable content providers to separately block the use of a particular item that is presented together with other items on a webpage. Thus, if there are several articles on one webpage, as in the case of the homepage of most press portals, these articles can only be blocked jointly from Google's access, not separately.

***The mark-up technology offered to product, local and travel search sites proves that Google could implement "rights express languages" that would help publishers.***

For some reason Google only offers operators of product, local and travel searches the option to mark particular information on their websites for an opt-out, up to a maximum of 10% of the readable text. Due to this restriction, the benefit of this option as such is negligible. However, the proposal suggests that Google could technically implement a mechanism that allows publishers to express usage rights in a differentiated way – even within one and the same webpage – as has been demanded by publishers for many years. Google, however, offers publishers only simplistic opt-out variations that do not help.

***To tighten the protection against any retaliation for an opt-out is pointless if the proposed opt-out solutions are not feasible in the first place.***

The Commission highlighted Google's promise that an opt-out has not only no material adverse impact on ranking but will not materially impact the crawling and indexing of the site or its appearance. However, if for economic reasons no website can afford to implement any of the "all-or-nothing" opt-out solutions Google offers, there is no risk of any retaliation in the first place.

To add insult to injury, in its commitments proposal Google insists that an opt-out does not exclude Google's ability to otherwise use or process all of the content that it has crawled and that it may still display content that it has found on websites which have (legally or illegally) copied the content from a website that has opted out. Nor is there any other obligation to compensate for the damage caused and the competition advantages gained from the unauthorised use of third party content.

#### **D. The proposed settlement leaves central competition concerns entirely unaddressed**

The proposed commitments do not even solve those competition concerns it is claiming to remedy. Worse still, several urgent competition concerns have not yet been addressed by the Commission at all.

***Google's promotion of own services other than specialised search services:*** The Commission has only requested commitments for Google's promotion of specialised search services. Consequently, only the preferred display of links to Google's vertical search services now triggers an obligation under the commitments. However, Google also uses its Web Search to promote other own services which may not be considered as specialised search services, e.g. the social network Google+ or the video portal YouTube. The promotion of such services is not addressed at all by the proposed commitments.

***Demotions of rivals through unwarranted algorithm changes:*** Many Google rivals have already vanished as a result of unannounced changes to Google's algorithms targeted against them. Unannounced and unjustified algorithm changes that primarily hit Google's rivals by reducing the traffic they receive while not applying to Google's own services were and should be the cornerstone of many complaints. Google's self-preference and the demotion of rivals are two sides of the same coin. The commitments, however, do not limit Google's ability to demote rivals. Without any guarantee that Google may not again reduce the amount of traffic reaching rival sites overnight, there will be no planning security for rivals whatsoever which reduces their incentives to invest and innovate.

**Direct answers using third party content directly in Google Web Search:** The Commission only identified Google's use of third-party content within Google's specialised search services as a competition concern and asked for remedies in this respect exclusively. However, in the last couple of years Google has increasingly used third-party content directly within its general Web Search. Google displays content as "direct answers" that respond to a user query directly rather than to link to a site with the answer. Similarly, Google uses third-party content for its "knowledge graph" which is also intended to give the relevant information directly on Google's general search results page. While giving answers directly may be in the users' interest, this practice is at the expense of the content providers that have provided the information for the answer. Google commercialises their content more intensively while they receive less traffic as a result thereof: If Google gives the answer already on the search results page, there is no need for users to click to the site that provided the information, leaving it empty-handed. The commitments, however, even explicitly reserve the right to Google to "use or process crawled content".

**Rebates on ads for use of further Google products:** Google grants advertisers larger ads (by adding so called ad-extensions to standard AdWord text ads) for free and thereby makes these ads more attractive and as a result thereof cheaper, if the advertiser uses further Google products such as Google+ and Google Places. Advertisers that do not use Google's products but those of rivals, cannot get such attractive ad-extensions and will therefore have to bid a higher price to get their ads noticed. Google ultimately rewards advertisers that also use separate Google products with a lower price for their ads, a practice known as multi-product rebate and an abuse of dominance under Article 102 TFEU.

#### **E. The role of the College of Commissioners and the way ahead**

Commitment decisions making commitment proposals binding and bringing the investigation to an end "are adopted by the College"<sup>38</sup>, i.e. reserved to the College of Commissioners. Judging from the recent public statements it appears likely that VP Almunia will ask his colleague Commissioners to adopt a commitment decision as early as September 2014. **We respectfully request the Commissioners to reject the proposed commitments and to opt for a comprehensive prohibition decision instead.**

In contrast to traditional prohibition decisions (pursuant to Article 7 Regulation No. 1/2003), a commitment decision (under Article 9 Regulation No. 1/2003) has no binding effect on courts of the EU Member States (making following-on public or civil proceedings virtually impossible). Nor does it include a fine or a formal finding of a violation of competition law. Against the background of these shortcomings, **a commitment decision may only be adopted if** the proposed commitments truly satisfy the identified competition concerns. The decision "shall conclude **there are no longer grounds for action by the Commission**", Article 9(1) Regulation No. 1/2003. The proposed commitments must suffice to dispel all competition concerns and to bring the abuse of dominance effectively to an end. In the case at hand none of these conditions are fulfilled: The proposed commitments do not even bring the concerns identified by the Commission back in 2010 to an effective end. In the meantime Google has even expanded the search of its anti-competitive search manipulation. **Today there are more grounds than ever for the Commission to take action against Google.**

Considering the progress of the commitments procedure so far, it is clearly time for the Commission to turn to the traditional route of a prohibition decision. The purpose of a commitment decision is to "address identified competition concerns in a swift and effective manner, thereby quickly restoring undistorted conditions of competition in the markets. The procedure for commitment decisions is generally shorter than for prohibition decisions."<sup>39</sup> However, having started commitment talks in May 2012 the Commission has negotiated with Google directly for twenty months – an unparalleled process. Considering (i) the ineffectiveness of the commitments proposals so far, (ii) the uncertainty caused, (iii) the lack of transparency, (iv) the amount of time elapsed, and (v) the blocking of national competition

<sup>38</sup> Antitrust Manual of Procedures, 2012, Sec. 2.1 and 3.6.2, [http://ec.europa.eu/competition/antitrust/antitrust\\_manproc\\_3\\_2012\\_en.pdf](http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf).

<sup>39</sup> Commission, MEMO/13/189 of 8 March 2013, "Antitrust: commitment decisions – frequently asked questions", p. 2.

authorities in the meantime, **it is difficult to see the benefits of the chosen route**. In fact a commitment decision on the basis of the latest proposals would overstretch the purpose of an Article 9 procedure - a fast and effective "shortcut" - since it **would simply not lead to the desired goal of a quickly restored competitive process**. Google has decided not to use its chance to offer workable commitments to end the investigation. The Commission should accept this strategic decision and move on to an effective prohibition. A prohibition decision may of course take longer before it becomes effective. However, a prohibition decision that addresses all competition concerns within a couple of years is still preferable to a commitment decision today which does not help at all but actually makes matters worse for five years.

Since the launch of the investigation Google has moved on and engaged in new behaviour that restricts competition, including bundling, data appropriation and data blocking issues. As a result, new complaints have been submitted. Against this background it is necessary, if not inevitable, to return to the traditional route of a prohibition decision very soon; a decision which is not limited to the too narrowly defined concerns of the Commission's Preliminary Assessment but that addresses all of Google's anti-competitive acts raised in the various complaints, in particular those mentioned above (s. D.). In the interest of the European digital economy, media pluralism and diversity and to protect the credibility of EU competition law as a safeguard of free markets, **the Commission should not legalise, in principle, Google's anti-competitive practises**. That however, would be the direct result of making the proposed commitments binding for five years, since they in principle allow Google to continue its self-promotion and only impose some minor obligations in some case of the promotion of own services.

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**SCHWEIZER MEDIEN**  
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sanomalehtien liitto

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