

– Google –

**Comments by**  
**ProSiebenSat.1 Media AG**  
**on**

**Google's revised proposed commitments text of 21 October 2013**

P7S1 is deeply disappointed by Google's revised proposal, and we urge the Commission to reject it.

Like its predecessor the proposal is totally inadequate to remedy the competition concerns in this case. Indeed, with regard to the search bias, accepting the proposal would be worse than doing nothing at all.

After the Commission had refused the original proposal, we would have expected Google to really try and make a serious effort to materially improve the substance of its proposal. However, Google has nothing to offer but cosmetic changes. It is our strong feeling that Google is not serious about addressing the competition concerns. It seems that Google is rather trying to play "hide and seek" in order to wear out any opposition against it.

The very format of the proposal reflects Google's lack of seriousness. Even readers familiar with US-style contract drafting will find the proposal a challenging read. This maze of cross-references, pseudo-exact definitions and long, nested sentences might just be the result of poor drafting skills, but we do not believe it is. Deliberate unintelligible writing, rather, is a typical strategy to prevent revealing one's true intentions. Google has obviously applied this strategy here. The revised proposal obscures Google's "commitments" more than it clarifies anything. It is indeed hard to conceive a set of rules less "user-friendly" and it is even more difficult to see how such an "occult" proposal is to be effectively enforced.

Complex commitments may, of course, be acceptable, if they properly remedied the antitrust concerns at stake. However, this is not the case here. As said, Google offers nothing but a mere modification of its original proposal. Thus, all the objections that have been raised still apply. In order to avoid any unnecessary duplication we shall concentrate on the first commitment while making reference to our submission of May 24, 2013 in regard to the remaining commitments.

Regarding the favourable treatment, within Google's web search results, of links to Google's own specialised web search services as compared to links to competing specialised web search services ("search bias"), Google had originally proposed to:

- label promoted links to its own specialised search services so that users can distinguish them from natural web search results,
- clearly separate these promoted links from other web search results by clear graphical features (such as a frame), and
- display links to three rival specialised search services close to its own services, in a place that is clearly visible to users.

As we – and many others – have already pointed out, this does nothing whatsoever to remove the favourable treatment. On the contrary, the proposed measure would lead to an even more favourable treatment of Google's own services. While Google currently simply favours its own services, it would, in the future, not only favour, but also actively promote them. Labelling and separating promoted links means that the links will be placed more prominently on Google's pages. This may to a certain degree prevent "confusion" about whether or not a service is a Google offer or a third party offer. However, this is not what this case is about.

All of this has been pointed out in the first "round", but Google has not even tried to address this criticism.

Regarding "search" the actual commitment remains practically unaltered: The sole change in the relevant paragraph 2 (a)-(c) and 3 (a)-(c) is the removal of the word "Link" in favour of the word "Trigger" – a mere redaction without any material impact. For the reasons stated in the first round the commitment was totally inadequate to remedy the antitrust concerns, and since no material change has occurred, the current proposal is just as inadequate.

The fact that three rival links will be displayed along with Google's offer is nothing but a fig leaf. Again, Google is not willing to make a serious offer worth considering.

First of all, the display for the three winner rival links is *sold* by Google while Google's services do not have to pay for being displayed. In contrast to that, Google's services do not have to compete for being displayed and they are automatically presumed to meet all the "Quality Criteria" – a clear competitive advantage and a clear discrimination on part of Google. In effect, the proposal enables Google to margin-squeeze its rivals by raising their costs.

Moreover, the inclusion in the "Vertical Sites Pool" of eligible candidates is conditional upon a bureaucratic and cumbersome process (e.g. the requirement to provide proof of incorporation, Annex 1, para. 4.a). Worse, the selection process is

also conditional upon a number of quality requirements that provide significant discretion for Google to deny access: How does Google define, e.g., *“frustrating navigation”* (Annex 1, 4.3.iii) or *“promotions related to sensational current events”* (Annex 1, 4.3.v)?

Furthermore, the visual examples provided by Google leave no doubt that rival links will be displayed in a less appealing manner than Google’s. The “Google Shopping results”, for instance, all come along with little photographs and pricing information while the rival offers are placed as second choice offers below Google. The little information box marked with the icon “( i )” is very difficult to find and as attractive for users as a link to the “General Terms & Conditions” (although T&Cs hidden in the same manner could not be effectively enforced). It does not remedy the fact that Google’s links are more prominently displayed than third-party offers.

The situation will be worse on mobile devices: Rival offers will not even be visible after consumers have clicked on “other sites”. Rather, Google will then display a second sign (*“tap here for additional shopping/flight/local search services”*) asking the user to confirm, before rival links may eventually be displayed. Google used to claim that competition were *“just a click”* away. Apparently, this is still far too close for Google to allow this to happen.

The proposal actually deteriorates the situation of “Rival Links” by adding the possibility to minimize the display of such links (cf. para. 6). It will “of course” not be possible to minimize the display of Google links, which is another indicator that Google is doing all it can to continue its unlawful and abusive discrimination of rival offers using the leverage of its search engine.

There are other strings attached to Google’s display of rival links. The additional caveat (*“Google may use suitable design measures to enable users to distinguish Rival Links from Google Search Results”*) moreover provides Google with a *carte blanche* for visual discrimination. E.g. making Google Search Results bigger or more visible would not infringe the letter of this part of the proposal. Nevertheless it would allow Google to completely remove the effect of the three lucky rival links that – thanks to the mercy of Google – have managed to make at least an appearance in the search results.

In sum, this proposal is not a serious offer and the Commission should reject it. As Google is apparently not interested to offer a solution for a settlement, we no longer see a basis for the Commission to close the case under Article 9 of Regulation N° 1/2003.

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