The Consumer Voice in Europe

Google internet search case

BEUC response to the Market test

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Summary

BEUC calls upon the European Commission to reject the proposals put forward by Google in response to enquiries into abuse of its dominance in the online search market.

The remedies tabled would continue to harm consumer welfare, stifle innovation and further restrict market competition for online search services.

It is important that Google is obliged to use an objective, non-discriminatory mechanism to rank and display all search results, including any links to Google products. We therefore call upon the European Commission to ensure that non-discrimination principle is the starting point of the remedies.

The European Consumer Organisation (BEUC) calls upon the European Commission to reject the proposals put forward by Google in response to enquiries into abuse of its dominance in the online search market. The remedies tabled would harm consumer welfare, stifle innovation and further restrict market competition for online search services.

Consumers use search engines on a daily basis to source the information most relevant to them and to access content of their choice. They trust search results to be impartial and based solely on relevance to their query, without manipulation of the order or results. Consumers have such a right to impartial results without manipulation according to Google’s commercial interests. It is important to note that Google has on various occasions[1] publicly asserted that its search results are neutral and generated objectively.

Consumer welfare is the standard of proof in antitrust investigations and Google’s commitments far from meet this threshold.

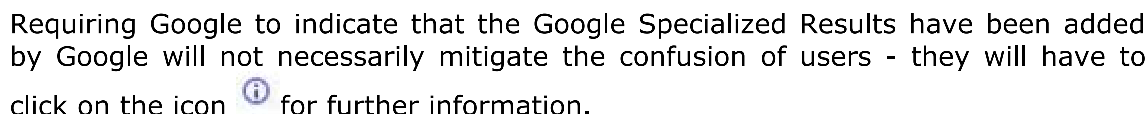
Instead of remedying the situation in a market in which Google is clearly dominant and has been discriminating against alternative providers in vertical search, approval of the commitments as proposed will legitimise anticompetitive practices and provide Google with additional tools to further strengthen its dominance.

Google only proposes to obscure the anti-competitive effects of its behaviour by labelling its own services, but does not at all address the core issue of search result manipulation.

Labelling proposals will continue to mislead consumers

BEUC has repeatedly stressed that labelling alone is insufficient to prevent Google from manipulating search results and discriminating against competing services. Apart from the general concerns regarding labelling as a competition remedy, Google’s proposals fail to comply with the minimum standards of effective remedies. The harm caused by Google’s anticompetitive practices is not only about misleading consumers, it is about stifling innovation and hindering competition to the detriment of European consumer welfare.

Requiring Google to indicate that the Google Specialized Results have been added by Google will not necessarily mitigate the confusion of users - they will have to



click on the icon for further information.

The similarity with an icon-based system developed by the advertising industry for online behavioural ads is remarkable. A recent TRUSTe study in the US evidenced the ineffectiveness of such an icon-based system which requires users to click in order to get further information: out of approximately 20 million consumers (7 million unique visitors), it was accessed 56,000 times with 44,000 unique views. If calculations are made just on the unique visitors and unique views, this means only 0.6% of consumers clicked through to the information page.

[1] For instance, Google CEO Eric Schmidt on National Public radio in 2009: "[W]e work very, very hard to keep the answers - the natural search answers completely unbiased."; "We never manipulate rankings to put our partners higher in our search results" - Google.com "Our Philosophy"; "[O]ur search results are generated objectively and are independent of the beliefs and preferences of those who work at Google" --Lucinda Barlow, Head of Corporate Communications for Google Australia, 2010.

Furthermore, Google's proposal to use graphical frames in order to display the promoted links in fact aims to further increase traffic to its own vertical results. Such differential labelling would amount to special advertising of Google's own services.

Consumers rely on the search engine's format and arrangement of results to identify the services most relevant to their search query. Google's control of format and placement allows for influence over the consumers' search process and site visits. Consumers are likely to click on the promoted links simply because the design will be more prominent and attractive.

At the same time, consumers will be extended a less effective choice of other (non-Google owned or affiliated) vertical search results as these will be less visible.

Google's remedies are contrary to European Union case law

Google did not provide objective justification for its anti-competitive behaviour, which would allow it to escape prohibition of abuse of its dominant position[2]. Such abuse of its dominance cannot be justified on the basis of the 'objective necessity' defence. Similarly, Google cannot invoke the efficiency defence as any efficiencies brought about by the conduct concerned do not outweigh the negative effects on competition, as consumers continue to suffer harm.

According to EU case law, the burden of proof for such objective justification lies with the dominant company[3]. It should be for the company invoking the benefit of a defence against an infringement finding to demonstrate to the required legal standard of proof that the conditions for applying such defence are satisfied.

If the proposals were to be accepted, the European Commission would send an ill-advised signal to dominant companies in other markets that immunity from competition rules on the basis of poor evidence is possible.

Furthermore, it will set a dangerous precedent allowing dominant companies to apply discriminatory practices against their competitors as long as the competitors are not discriminated among themselves. Neither EU competition case law nor the Commission guidance on applying Article 102 of the Treaty[4] have yet allowed such an exception.

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[2] See for instance Case 40/70 Sirena S.r.l. v Eda S.r.l. and others [1971] ECR 69, paragraph 17; Case 78/70 Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG [1971] ECR 487, paragraph 19; Case 27/76 United Brands, paragraphs 182-184; Case 77/77 Benzine en Petroleum Handelsmaatschappij BV and others v Commission [1978] ECR 1513, paragraphs 32-34; Case 395/87 Ministère public v Jean-Louis Tournier [1989] ECR 2521, paragraph 46; Case 311/84 Centre belge d'études de marché - Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB) [1986] ECR 3261, paragraph 27; Joined cases C-241/91 P and C-242/91 P Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission (Magill) [1995] ECR 743 paragraph 55; Case T-30/89 Hilti, paragraphs 102-119; Case T-83/91 Tetra Pak International SA v Commission (Tetra Pak II), paragraphs 115, 136 and 207; Case T-228/97 Irish Sugar, paragraphs 167,188-189 and 218; Case C-163/99 Portuguese Republic l v Commission [2001] ECR 2613, paragraph 53.

[3] See Case T-203/01 Manufacture française des pneumatiques Michelin v Commission (Michelin II) [2003] ECR II-4071, paragraphs 107-109.

[4] Communication from the Commission: Guidance on its enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. OJ C 45, 24.2.2009, p. 7–20

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Google's proposals will further limit competitors' access to the market

Acceptance of the remedies in their current form or with minor alternations will not only fail to address the anti-competitive behaviour by Google and restore competition, but would further disempower consumers and stifle innovation. Endorsing what has been put forward would grant Google a de facto 5-year immunity period during which Google will be able to shape the online vertical search marketplace according to its own commercial interests and further strengthen its dominance to the detriment of consumer welfare.

Google aims to divert attention from manipulation of the natural search results by focusing exclusively on universal search. Universal search was established in order to prominently insert links to Google's own vertical search and thus divert traffic away from competitive services.

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 them for the 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.

Furthermore, the fact that only three rival links will be displayed distinctively does not address our concerns in terms of consumer choice. It is unacceptable that only the three links who have offered the highest bid in an auction will appear. The remaining links may not even appear on the front page of the natural results.

Likewise, Google will be granted leeway to exclude rivals for a period of two to four weeks, which in most cases would be sufficient to drive them off the market, to the detriment of consumer choice.

In addition to the need for neutral search results, the existence of and accessibility to competing vertical search services are crucial for consumer choice, effective competition and innovation in the search market.

Google's proposals fall short of respecting the non-discrimination principle

Overall, the remedies proposed by Google fall short of meeting the even-handed principle, according to which Google should be obliged to hold all services, including its own, to exactly the same standards, using the same crawling, indexing, ranking, display and penalty algorithms. Adherence to this principle would end Google's ability to systematically penalise, demote or exclude alternative providers.

In addition to the non-discriminatory principle being a central means of restoring competition and ensuring effective consumer choice, it has an obvious precedent in the form of regulation of Computerised Reservation Systems (CRS) for air transport

products (principally purchases of flights)5. This regulation obliges a systems vendor to prevent its parent carrier benefiting from preferential treatment in the operation of the CRS which, either separately or jointly, they own or effectively control. BEUC does not see why the same standards should not be applied in this case.

It is important that Google is obliged to use an objective, non-discriminatory mechanism to rank and display all search results, including any links to Google products. If that is difficult to achieve in a settlement, Article 7 procedure6 and structural remedies must be considered, particularly given the substantial risk of repeated infringement due to Google's constant expansion of services and products. Structural remedies are essential for restoring competition and promoting innovation in the online environment.

We therefore call upon the European Commission to reject the current proposals and ensure that non-discrimination principle is the starting point of the remedies.

END

[5] Council Regulation (EEC) No 2299/89 of 24 July 1989 on a code of conduct for computerised reservation systems [Official Journal L 220 of 29.07.1989]

[6] Of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty