

## COMMENTS

ON

### Commitments in AT.39740 – *Google*

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1. I write to comment on the Commission's proposed resolution of its investigation of certain Google practices. My separate comment with Zhenyu Lai presents comments grounded in our recent article measuring the effects of Google's Flight Search service. This comment gives my analysis of other aspects of the proposed commitments.

#### **A. The Commitments Identified Serious Harms to Competition**

2. The Commission noted four distinct areas in which Google's business practices violate Article 102. Specifically, the Commission identified concerns as to 1) Google's search results favoring Google's own specialized search services, 2) Google's use of original content from third parties without their consent, 3) Google's agreements with web publishers that oblige those publishers to place most or all of their advertising inventory with Google, and 4) contractual restrictions on advertisers copying and synchronizing campaigns to other advertising platforms.

3. The record before the Commission reveals that Google's practices have caused significant harm to competition. I examine each of the four areas in turn.

4. By favoring Google's own specialized search services, Google has increased its market share in multiple specialized search services, and reduced competitors' market share in specialized search services. As a result, competing specialized search services suffer reduced user attention, reduced interest from other participants (e.g. advertisers and content providers), and reduced incentive to create or improve their products. In the long run, advertisers are left with fewer choices to reach consumers, yielding higher prices to advertisers. Consumers similarly face reduced choice among specialized search services. For example, if there were a vibrant market for video search and hosting services, one might expect such services to compete by offering players for as many devices as possible; but Google's dominance allows Google to withhold support from devices and platforms that Google disfavors.

5. By taking content from third parties without their consent, Google accelerated the launch of its own services and escaped the difficulties that tend to impede entry in this area. For example, most new review sites struggle to attract initial reviews – making the sites initially empty shells that are unhelpful to users, hindering the sites' efforts to take off. Competitors

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\* I advise Microsoft on subjects unrelated to this comment. But this comment was not prepared at the request of, nor funded by, any third party.

made significant investments in order to overcome this challenge – advertising campaigns to woo users, parties for top users, and myriad other initiatives. Google did not need to match these investments because Google simply copied content from competitors’ sites. Through this strategy, Google was able to enter faster, at lower cost, and despite its significant late-start. This scheme discourages investment in other sites that might suffer a similar fate of content expropriated by Google, reducing other companies’ incentive to compete. It also undermined the returns that should rightly have flowed to other sites, reducing revenues to those sites and reducing those sites’ ability to provide additional benefits to their users.

6. By seeking a right of first refusal on all publisher advertising placements, or otherwise obliging publishers to place most or all of their advertising inventory with Google, Google suppressed a potential market in publisher monetization. Given the difficulty of providing a comprehensive ad platform with advertising on all subjects, a new or smaller advertising service would ordinarily seek to monetize some *portion* of a publisher’s content – perhaps content in a certain subject matter or content presented to users in a certain geographic area. By de facto requiring a publisher to use Google all-or-nothing, Google can prevent the publisher from moving a portion of its business to a competitor, even if that competitor offers a superior product in the realm in which it operates. This prevents competing ad platforms from gaining access to publishers and from, in due course, growing larger in scope. This also harms publishers by preventing them from gaining access to higher payments or superior service from other providers.

7. By restricting tools to manage advertisers’ advertising campaigns, Google discourages advertisers from using multiple ad platforms. Specifically, Google disallows the efficient centralized development of tools to copy campaigns from Google to other ad platforms and to synchronize campaigns across multiple ad platforms. These restrictions cause advertisers to use Google’s ad platform only, forgoing other ad platforms even when competitors offer additional distribution and/or lower prices, because the cost of manually copying and synchronizing ad campaigns exceeds the benefits of using competing platforms. These problems were not mitigated by advertisers’ supposed ability to write their own copying or synchronization tools, as small to midsized advertisers lack the required technical skills. Nor is manual data synchronization a reasonable solution, in that manual data transfer is both slow and error-prone.

## **B. Google’s Proposed Commitments Fail to Undo the Harm of Google’s Past Violations**

8. Google’s proposed commitments make some steps to avoid further violations in these areas in the future. However, with the exception of the Commission’s first concern, Google’s commitments make zero effort to undo the harm resulting from Google’s prior conduct.

9. As to Google favoring its own specialized search services, Google’s proposed commitments are deficient for the reasons set out in my separate comment, including the likelihood that, despite Google’s proposed commitments, users will continue to click on Google’s own specialized services. While Google creates the concept of Rival Links as a supposed attempt to restore competition damaged by Google’s prior practices, by all indications the benefit of the Rival Links will be limited due to the low prominence of Rival Links as proposed, as well as the pricing and other terms associated with Rival Links.

10. As to the other three areas identified by the Commission, Google promises to cease further violations but offers nothing to undo the harms from Google’s prior conduct. Specifically, Google’s proposed commitments offer not even a nod towards the years of Google

taking content from publishers without consent, de facto requiring publishers to place all ads with Google, and limiting how advertisers manage their own ad campaigns.

### **C. Alternative Remedies Would Better Protect Competition and Undo the Harm from Google's Prior Acts**

11. Remedies might reasonably be evaluated based both on how well they preserve and restore competition, and how well they deter future and similar wrongful acts by the defendant and others similarly situated. There is ample room to improve Google's proposed commitments in both these dimensions.

12. In the area of specialized search services, preserving and restoring competition requires more than a few small "Rival Links" placed where users are unlikely to see them and priced in such a way that the Rival Links are in any event unlikely to preserve competitors' incentive and ability to compete. Several years ago, Google was a leading advocate of the "browser ballot box" in which every European consumer was affirmatively invited to choose a choice of browser from a screen presented 1) automatically, 2) prominently, 3) with options in random order, 4) with no default, and 5) without any payment required from the providers of alternatives. Google's proposed Rival Links offers none of these features. In contrast, my separate comment with Zhenyu Lai sketches a specialized search choice mechanism whereby similar benefits could be provided in the realm of specialized search.

13. A special remedy is also appropriate because Google decided to favor its own specialized search services despite Google's prior statements to users. For years, Google told users and web sites that Google was an impartial arbiter of site quality and relevance. I present ten such quotes at <http://www.benedelman.org/hardcoding/> (at heading "Google Usually Promises Unbiased Results"), including Google co-founder Sergey Brin stating that Google's "approach to search is" "fully automated" and Google's "Explanation of Search Results" page (through May 2007) claiming that "Our search results are generated completely objectively and are independent of the beliefs and preferences of those who work at Google." In sharp contrast to these claims, Google now admits – and now claims that it is Google's right – to favor its own services. Having repeatedly promised a billion users for a decade to be "completely unbiased" and "objective[] and independent", Google cannot reverse its position in an instant. Rather, Google should be required to prominently tell users about this important change. There is ample precedent for such notification: Google has used its home page to tout political policies on which Google has a view, and Google has modified its site to notify users of its use of cookies (as required by EC law). A similar notification, with text and process approved by the Commission, is appropriate to affirmatively alert users that Google's previously-stated policies are no longer in effect.

14. Having taken content from third parties without their permission, the obvious baseline requirement is that Google cease using what was taken impermissibly. Tellingly, Google's proposed commitments omit even this basic action. Moreover, a remedy should address the fact that Google took and used the third-party content in order to *launch* Google's competing services – services which are now much less dependent on the unauthorized third-party content, but which would have been unlikely to achieve their current market position had they lacked the content that Google took. In this context, Google should be required to pay a reasonable royalty to all providers whose content was taken by Google. Google may argue that the calculation of

such a royalty is difficult, but I believe it is not beyond the Commission's capabilities. Moreover, prior practice – including prior business dealings between Google and at least some of the targeted content providers – provides a reasonable basis for estimation.

15. Google proposes to modify its contractual relationship with publishers to allow publishers to show non-Google search ads, but this modification, in and of itself, is insufficient to restore competition in syndicated search. Indeed, Google's proposed commitments nowhere require Google even to tell publishers that Google's policy in this area has changed; it would seemingly be sufficient for Google to silently make the change to materials posted on its web site.<sup>†</sup> A silent change, with no notice to the publishers potentially in a position to act on that change, does little to prompt or facilitate competition. Instead, Google should be required to provide affirmative notice to each affected publisher, noting the change, the reason for the change, and the timing, benefit, and impetus of the change. This notice should be reviewed and approved by the Commission and should include links to one or more competing services that publishers might want to consider.

16. Finally, Google's barriers to advertiser multi-homing have for years inflated the prices paid by advertisers – causing advertisers to use expensive Google campaigns only, even when competing ad platforms offered lower prices. Google should be required to offer appropriate refunds to harmed advertisers. Appropriate fact-finding can estimate the proportion of advertisers (and associated spending) who would have multi-homed had it not been for Google's artificial barriers preventing them from reasonably doing so. Further fact-finding can determine the impact that advertiser multi-homing would have had on prices charged to advertisers, and refunds should be provided accordingly.

17. In addition to the injunctive remedies sketched above, significant fines are appropriate in order to deter the behavior that Google engaged in. Under the proposed commitments, Google will largely retain the ill-gotten gains it accrued throughout the period: Google will retain the benefit of extra traffic to its specialized search services, accelerated launch of Google's various specialized search services despite their late arrival, access to the entirety of publishers' inventory without competing with competitors' offerings, and access to the entirety of advertisers' budgets. Each of these actions provided Google with immediate traffic and revenue boosts, and each of these actions strengthened Google's competitive position and weakened rivals. Under Google's proposed commitments, Google would retain a windfall benefit from these actions. A significant monetary penalty is appropriate to reverse that benefit, discouraging Google and others from similar violations in the future.

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<sup>†</sup> This suggestion is more than speculative. I note that Google used exactly that method when lifting certain AdWords API restrictions in response to FTC concern.