

Editorial

The Google Commitments: Now with a Cherry on Top

Andrew Leyden and Maurits Dolmans*

On 5 February 2014, Vice-President Almunia announced the third iteration of Google's proposed commitments to bring an end to the Commission's investigation into Google's online search and advertising business. This announcement followed a period of particularly intense negotiations and, unprecedentedly, two market tests of two previous iterations of the Commitments text. The text has changed substantially since the first version was published on the Commission's website on 3 April 2013, though the principles underlying the proposed remedies remain the same. The Commission is expected to adopt a decision under Article 9 of Regulation 1/2003 approving the revised text in the summer of 2014.

Perhaps inevitably, the revised commitments have met with vocal criticism from complainants. For the most part, complainants have criticized the 'vertical search' component of the commitments, which is by far the most contentious aspect of the case. This editorial does not seek to assess in detail the merits of the Commission's preliminary concern with respect to Google's alleged 'dominance' in free online search (which, on its face, is inconsistent with the Commission's findings with respect to free services in its *Microsoft/Skype* decision, recently upheld by the General Court). Nor does it seek to address the Commission's preliminary concerns relating to vertical search (which Google continues to contest, and which have been rejected by regulators and courts worldwide, including the US FTC, and EU Member State Courts, such as the Hamburg District Court).

Rather, this editorial addresses the legally relevant question raised by the complainants' criticisms. Namely: do the commitments adequately address the Commission's stated preliminary concerns? The answer to this question is a clear 'yes, and then some'. Regulation 1/2003 expressly limits the role of Article 9 commitments decisions to remedying the 'concerns expressed... by the Commission in its preliminary assessment'. The commitments text as it now stands goes much further than

anything that possibly could be required of Google, as a matter of law, to address the preliminary concerns the Commission has stated, and provides rival vertical search sites with an additional, highly valuable opportunity for promotion on Google. Even if complainants are still not satisfied, as the Commission's Manual of Procedures states, a market test 'is not an opinion poll which determines the fate of the remedies'. Moreover, Article 9 commitments cannot be used as a vehicle to address additional areas of concern, regardless of how vocally complainants may express them in market test responses or other public fora.

To understand the commitments, it is essential to understand the scope of the Commission's preliminary concerns, which arise from complaints from 'vertical search' websites. Such sites operate within narrow so-called 'vertical' areas of interest, such as products, restaurants, hotels, and the like. In contrast, generalist, or 'horizontal' search services like Google, Bing, or Yahoo!, aim to provide results for all categories of information. The complainants alleged that Google was leveraging a dominant position in a user-facing 'market' for 'horizontal search' to user-facing 'markets' for 'vertical search' through two principal means.

First, complainants alleged that Google 'manipulated' its search algorithms to 'demote' links to their sites in Google's web search results (the ranked set of 'blue links' visible on a Google search results page). Following the publication of the revised commitments, complainants are raising such concerns again, but the Commission has thoroughly investigated and roundly rejected these allegations already (indeed, Vice-President Almunia has explicitly stated that the 'objective of the Commission is not to interfere in Google's search algorithm'). The US FTC similarly unanimously found these allegations to lack any factual basis.

Second, complainants alleged that Google forecloses competition by displaying its own specialised results for

* Respectively Associate, and Partner, Cleary Gottlieb Steen and Hamilton LLP. Cleary Gottlieb Steen and Hamilton LLP represents Google in the EU Commission's investigation. The views stated here are the authors' own.

certain query categories (e.g., products or local places) in specialized display formats within its general search results (known as 'Universal Results'). Complainants are again raising the mere fact that Google displays such result designs in their criticisms of the commitments. But the Commission has not raised any preliminary concerns with respect to Google's display of Universal Results as such. Indeed, it would be difficult to do so, since Universal Results are manifestly pro-competitive and useful. For example, when a user searches for [restaurants in London] on google.co.uk, Google will display a list of links to such restaurants, along with their location on a map, and reviews and star ratings for each. Such information is clearly more beneficial to users than a bare list of blue links to other websites, since it is directly responsive and relevant to the query put to Google. The mere fact that more specialized 'vertical' search services also offer such information should not preclude Google, or other generalist search engines, from providing it in a useful format. Indeed, competition between generalists and specialists is an inherent part of the competitive process.

Nevertheless, the Commission raised a 'preliminary concern' with respect to 'vertical search'. Specifically, the Commission's preliminary concern relates to 'favourable display' of 'links to Google specialised search services' within Google's general search results. This preliminary concern relates only to hyperlinks to separate Google-owned pages containing such category-specific results (typically the links to pages containing 'more shopping results', or 'more local results' found in the header or footer of certain Google Universal Results). The Commission's preliminary concern was that any favourable display of such links might 'divert traffic' from rival vertical search services. The goal of the search commitments is therefore to eliminate this preliminary concern by providing, in the words of Vice-President Almunia, a 'choice between different options'. Simply put, if users are aware of alternative choices, but still choose to click on Google's results, there could be no question, even in theory, of any anti-competitive traffic 'diversion'.

From the first iteration of the Commitments, therefore, the essence of Google's proposed solution has been to provide users with such informed 'choice', by (i) clearly labelling links to Google's specialized search results; (ii) separating such links from other links displayed on the page; and (iii) for certain types of monetized results, providing additional links to three rival specialized search services selected based on mechanisms set out in the commitments ('Rival Links'). The display of such Rival Links would be free of charge for rival sites when appearance in Google's results is free for merchants or other third parties. But where, eg, merchants pay to appear in

Google's specialized shopping results, and the Rival Links take up valuable promotional space that otherwise could have been monetized through ads, the Rivals would also pay to appear via a dedicated auction mechanism ('Paid Rival Links').

During the first and second market tests, the complainants raised numerous concerns about the proposed commitments. The final text reflects the outcome of extended negotiations on the basis of these concerns, but the principles set out above remain constant. In particular, while the details of the auction mechanism have been modified to respond to rivals' concerns, participation in Paid Rival Links is still subject to payment. This reflects an important point of legal principle: Even if Google were an essential facility (which the Commission does not even allege), it would be entitled to compensation for its highly valuable promotional 'screen real estate'. Just as Commercial Solvents was not required to supply aminobutanol for free, United Brands was not required to supply bananas for free, and Volvo was not required to supply spare parts for free, Google should not be required to provide its valuable promotional space for free.

However, the text has seen numerous other changes since the first iteration, all of which provide important additional concessions and opportunities for rival sites to promote themselves on Google. Notable changes include the following.

First, the complainants publicly claimed that their testing data demonstrate that users would not click on Rival Links. Even assuming such data to be reliable, this misses the point, since the purpose of competition law is not to guarantee a certain market outcome, but to ensure customer choice. Regardless, to address this concern, the commitments text was modified to allow greater 'prominence' for Rival Links. Under the revised text, Rival Links will be associated with prominent branded icons ('favicons'), and will include snippet text. Moreover, if Google uses prominent display formats (e.g., product images or videos) in its results, rivals can also include comparable prominent visual elements.

Second, the revised text allows vertical search sites broad freedom to define the destination of Rival Links, including by linking to relevant pages on third-party sites that sell the product or service relevant to the user's query. This will create a novel and remarkable commercial opportunity for vertical search sites by, in effect, allowing them to resell Rival Links to merchants, and to extract their own margin, without the user visiting the rival site at all.

Third, the revised text applies not only to links to separate Google specialised search pages, but also to evolutions that may replace such designs, including equivalent user

interface elements that are directly displayed on Google's general search results pages. This is a significant concession that expands the scope of the remedies beyond links to pages containing specialised search results (as per the Commission's stated preliminary concern).

In summary, the revised commitments are more than adequate to address the Commission's preliminary concerns. Already, the text has undergone multiple revisions and two market tests, and the Commission has obtained

concessions from Google that go far beyond what any other regulator (notably the US FTC) saw fit to extract. Based on the terms of the Commission's preliminary concerns, Google's commitments were adequate even in their very first iteration. If the second revision of the commitments provided the '*icing on the cake*', then the third iteration is surely the '*cherry on top*'.

doi:10.1093/jeclap/lpu038

Advance Access Publication 9 May 2014

Note from the Editors: in accordance with our aim to organize a forum between leading practitioners, we will publish another view on the *Google* case in the following weeks.