

From: Johanna Shelton <jshelton@google.com>
Sent: Monday, March 23, 2015 7:55 PM
To: Hipsley, Heather <HHIPPSLEY@ftc.gov>
Subject: Google further follow-up

Heather -

Google remains deeply troubled by the FTC's lack of an on-the-record clarification about the effect of the Bureau of Competition staff memo. We are puzzled why the FTC has not affirmed on the record that it took the staff recommendations from the Bureau of Competition, as well as the Bureau of Economics and others, fully into account in the final decision to close the investigation. Over the weekend we saw several press outlets confuse the Bureau of Competition's recommendations for further action with the question of search bias, and we saw a number of press outlets write that the Commission's ultimate decision went against the Bureau of Competition staff recommendations.

It also appears that the FTC is not responding to requests for comment from a number of outlets, nor commenting on the record that the Commission took the staff recommendations into account in its final agency action. This is enabling our competitors to make misleading statements that are not getting corrected. As you know, Google's competitors have used this document release to sow confusion and undermine the FTC's conclusions, especially in Europe. European policymakers are being quoted saying that this is "new" and "crucial".

We believe it is critical for the FTC to defend its reputation, showing that it followed a thorough process and fully took into account the Bureau of Competition staff memo, among other internal agency opinions including the Bureau of Economics. A public statement standing by the FTC's ability to make a final decision after assessing differing internal views would go far in the international space to restore the reputation of the FTC, especially on due process. We recall that in February 2013, when the process and result were similarly called into question by our competitors, every Commissioner, including then-Commissioner Ramirez, wrote a clarifying letter to the editor of Politico standing by the staff and their work in this matter. We believe this unfortunate FOIA incident is similarly worthy of a public statement of the FTC standing by its decision.

I detail some of this confusion and its impact below. We understand the Chairwoman will be in Europe this week and may have opportunities to express that the staff memo was fully taken into account and not inconsistent with the final agency action.

- Johanna

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1) Without a clear statement from the FTC to set the record straight, third parties are confusing and distorting the staff recommendations, creating a misleading impression that the FTC failed to take the staff recommendations into account when the Commission closed the investigation.

- Yelp's Luther Lowe has been widely quoted saying the FTC went against the recommendation of its staff. "With the F.T.C. agreeing to a weak settlement **against the recommendation of professional staff**, this anti-consumer behavior has been effectively greenlighted in the United States." (New York Times, 3/19/15, [Take Google to Court, Staff Report Urged F.T.C.](#))
- Matthew Reilly, Simpson Thacher/FairSearch counsel and former FTC official, is claiming on the record that the Commission voted against the division recommendation: "It's really remarkable the staff recommended issuing a complaint, and **the commission not only disagreed** but allowed Google to issue a letter saying 'we won't do it again,' rather than enter into a consent decree" (New York Times, 3/19/15, [Take Google to Court, Staff Report Urged F.T.C.](#))
- Consumer Watchdog, urging the Senate to examine how Google "**escaped prosecution for its anticompetitive practices**" (MediaPost, 3/20/15, [Advocacy Group Calls For FTC To Reopen Google Investigation](#)).
- Scott Cleland, Net Competition Chairman and Microsoft Consultant: "**The FTC staff findings and recommendation are very different from the ultimate FTC-Google settlement, which oddly did not focus primarily on fully resolving the FTC staff's recommendations**", creating "the appearance that the Google antitrust case was resolved for political reasons." (Daily Caller, 3/20/15, [Googlegate: FTC Political Appointees Bury Report Alleging Search Manipulation](#)).

2) It appears the FTC is declining to speak on the record.

- "A spokesman for the agency called the release of the documents unfortunate, but **declined to respond about their contents.**" (New York Times, 3/19/15, [Take Google to Court, Staff Report Urged F.T.C.](#))
- "A representative of the FTC said the agency had no comment on the report." (Reuters, 3/19/15, [Confidential FTC report found Google anticompetitive tactics: WSJ](#)).
- "A representative of the FTC said the agency had no comment on the report." (DailyMail.com, 3/20/15, [Google DID skew its search results: Report reveals tech firm favoured its own services over its rivals](#)).
- "The FTC declined to comment." (CNN, 3/19/15, [Google abused its monopoly power, FTC experts found](#)).
- "The FTC has not responded to a request for comment." (CNET, 3/20/15, [Ugly documents surface in antitrust case that Google settled with FTC](#)).

3) The release of the internal staff memo is creating the very type of confusion in the public that the FOIA exemption for pre-decisional agency analysis is designed to avoid. In particular, press outlets are questioning whether the final decision of the FTC really represented the agency's views, especially on search bias, and are skewing the agency's regular process as internal discord.

- "[W]hether the Federal Trade Commission made the right call when it **rebuffed its own staff recommendation** in 2013 to take Google to court over alleged anti-competitive practices." (Brian Fung and Andrea Peterson, The Washington Post, 3/20/15, [The FTC's internal memo on Google teaches companies a terrible lesson](#)).
- "The FTC's decision not to sue Google **contradicted those findings**." "But the Journal report shows that **U.S. regulators were more worried than they led on**." (CNN, 3/19/15, [Google abused its monopoly power, FTC experts found](#)).
- "Google was almost prosecuted by the US government three years ago for **skewing its search results**, according to a confidential report." (DailyMail.com, 3/20/15, [Google DID skew its search results: Report reveals tech firm favoured its own services over its rivals](#)).
- ['Googlegate': FTC Political Appointees Bury Report Alleging Search Manipulation](#), Daily Caller, 3/20/15.
- [Google cooked search results - FTC](#), RT, 3/20/15

4) This confusion is having a direct impact in Europe and other international investigations.

Ramon Tremosa i Balcells, European MEP from Catalonia: "This **new element and evidence is crucial** and could not come at better time" (NY Times, 3/20/15, [European Lawmaker Pushes Europe to Take Stronger Stance on Google](#)).

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