

CLEARY GOTTlieb STEEN & HAMILTON LLP

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CONFIDENTIAL
CONTAINS BUSINESS SECRETS

ANNEX 1 – DISCUSSION PAPER SUBMITTED BY GOOGLE
ON
THE PRELIMINARY CONCERNS IDENTIFIED BY THE EUROPEAN
COMMISSION AND GOOGLE'S PROPOSED SOLUTION

In

Cases COMP/C-3/39.740 *Foundem and others*, COMP/C-3/39.768 *Ciao*, COMP/C-3/39.775 *1PlusV*, COMP/C-3/39.845 *VfT*, COMP/C-3/39.897 *Microsoft*, COMP/C-3/39.961 *Higgins*, COMP/C-3/39.968 *AEDE*, and COMP/C-3/39.975 *Twenga*

June 30, 2012

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I. INTRODUCTION

1. At a state-of-play meeting on May 30, 2012, the European Commission (the "Commission") informed Google that its investigation of Google's online search and ads business has identified four areas raising preliminary concerns. As Google understands it, these concerns relate to the following:
 - the display of links, within Product and Local Universal Results, to Google Product and Local Pages that contain user reviews.
 - the display, on Google Product and Local Pages, of review snippets derived from other websites.
 - requirements in Google's AFS agreements relating to the display and positioning of Google's search ads.
 - requirements in Google's AdWords API Terms and Conditions relating to common input fields and copying of user ad campaign data.
2. Google would prefer to resolve the Commission's preliminary concerns quickly and amicably, so as to avoid the need for drawn-out adversarial proceedings, provided this does not adversely affect user experience and does not unduly interfere with Google's design freedom or ability to innovate. Accordingly, and without prejudice, Google is pleased to offer an early constructive resolution of the Commission's preliminary concerns based on the following main principles:
 - **Links to rival vertical search sites.** Google proposes to display up to three, algorithmically selected links to rival "vertical" search sites within Google's Product and Local Universal Results. This would give users another clearly marked way to reach competing "vertical" search services via Google's Product and Local Universal Results.
 - **Opt-out for review snippets.** Google proposes to provide websites with the ability to opt-out of the display of review snippets from their sites on Product and Local Pages through the electronic submission of a simple notification form. Google would also commit to maintain an opt-out mechanism for Google News.
 - **No AFS exclusivity and premium placement.** Google proposes not to include exclusivity and premium placement requirements with respect to Google search ads in future AFS contracts. For existing contracts that contain provisions that are not in line with these principles, Google will waive the relevant provisions. Google would also clarify "non-confusion" clauses in its AFS contracts with Online Partners.
 - **Common input fields and advertiser data copying.** Google proposes to remove common input field and advertiser campaign data copy limitations from its AdWords API Terms and Conditions, subject to Google's ability to revise the

AdWords API Terms and Conditions in other respects, including by specifying Required Minimum Functionality.

3. While Google sees value in an early resolution of this investigation, Google is confident that its conduct does not infringe EU competition law. Google is not dominant and its conduct is not abusive or anti-competitive. The complainants in this matter are not equally efficient competitors that are unlawfully foreclosed. Rather, these competitors seek to hamstring Google's ability to compete and innovate. Google is one of the most innovative companies in an extremely dynamic and rapidly evolving IT sector. Its products and services succeed or fail on their own merits in an environment where competition is only a click away.
4. Google's proposed solution represents a significant effort on Google's part to devise a clear-cut resolution that directly and tangibly addresses the Commission's preliminary concerns. These proposals will require substantial changes to Google's search service, and involve significant commercial concessions towards Google's competitors. Entering into a formal commitment further exposes Google to the threat of opportunistic and meritless lawsuits. Indeed, IPlusV has launched civil litigation against Google in France, demanding EUR 295 million, and Foundem recently initiated proceedings in the UK. Google would therefore expect that the wording of a final commitment decision be framed in a manner that does not encourage such litigation.
5. Google believes that Google and the Commission achieve more through cooperation and flexibility than through lengthy legal proceedings. At the same time, as some of the complainants in this case are certain to continue to voice objections once they see these proposals, there should be no doubt about Google's resolve to defend itself vigorously against any attempts to hamstring its competitiveness or its ability to innovate to the benefit of users.
6. This paper further describes Google's proposed solution outlined above. Google will discuss the four areas of preliminary concerns identified by the Commission and, for each area, explain the solution that Google proposes.¹ While Google recognizes that the purpose of these proceedings is not to debate the merits of the case, this paper also

¹ Nothing in this paper should be construed as an admission that Google agrees with the concerns expressed in the Commission's state-of-play meeting or preliminary assessment, or with any factual allegation or legal conclusion asserted or referenced by the Commission in any final commitments decision, or any other documents or statements released by the Commission in connection with this investigation. Google expressly denies any wrongdoing or that it has any liability whatsoever relating to the Commission's investigation under Article 102 TFEU. Consistent with Article 9 of Regulation 1/2003, the Commitments are given to avoid the time, inconvenience, and expense of ongoing proceedings with the understanding that the Commission will confirm that there are no grounds for further action and will close all open investigations in relation to Google's online search and advertising services. Google's proposed Commitments and Discussion Paper are without prejudice to Google's position should the Commission or any other party commence legal proceedings against Google that relate in any way to the subject matter referenced in the proposed Commitments.

sets out observations on the substance of the Commission's preliminary concerns to provide context to Google's offer.²

II. LINKS IN PRODUCT AND LOCAL UNIVERSAL RESULTS TO GOOGLE PRODUCT AND LOCAL PAGES CONTAINING REVIEWS

A. The Commission's Preliminary Concerns

1. The conduct at issue

7. At the May 30 state-of-play meeting, the Commission expressed preliminary concerns about Google's alleged "*favoring*" of its own "*vertical search services*" in "*horizontal search*." Google understands that the Commission's preliminary concerns relate specifically to certain aspects of the display of Product and Local Universal Results as part of Google's organic search results, namely:
 - the display within Local Universal Results of "Google review" links that lead to Google Local Pages with user reviews for individual local results.
 - the display within certain forms of Product Universal Results of links that lead to Google Product Pages with user reviews for individual product results.
8. Google understands that the Commission's preliminary concerns do not extend to other aspects of Google's search service against which complainants have objected. In particular:
 - **No concern with regard to the concept of Universal Results.** Google understands that the Commission has no concern with the concept of Universal Results and recognizes that Google's display of specialized results for specific information categories in the form of Universal Results, such as grouped results for local restaurants in response to a restaurant query, is legitimate, efficient, and beneficial for users. The Commission also noted that the display of a header link leading to a Google page that merely displays more results of the same kind raises no concerns.
 - **No concern with regard to the concept of OneBoxes.** Google understands that Commission has no concerns with the concept of OneBoxes that display relevant factual information directly as part of the search result page in response to a query.
 - **No concern with demotions.** Google understands that the Commission has no concerns with both Google's manual and algorithmic demotion of low-quality sites.

² Google will not discuss all relevant matters here, but will limit itself to principal points that it considers pertinent for purposes of discussing the context of its proposal. In particular, Google will not discuss the many reasons why it is not dominant. Silence on any point does not imply consent. Google reserves all rights.

9. It is important to Google that the clarifications set out above in paragraph 8 be confirmed in any final commitment decision.

2. Legal theory

10. The Commission noted that the display of the links at issue could, in its preliminary view, amount to "*anti-competitive foreclosure*". The Commission did not claim that Google is an essential facility with a duty to supply particular search ranks to its rivals or that Google impermissibly ties allegedly separate products. Instead, the Commission's preliminary concerns seem to rest solely on an allegation that Google through the links at issue improperly "favors" itself.

B. Google's Position On The Merits

11. Google is confident that further investigation would confirm that Google's display of the links at issue is not abusive because among other things, (1) Google's display of such links reflects competition on the merits, (2) mere allegations of favoring, without more, have no proper foundation in law, and (3) empirical evidence shows that there is no foreclosure in the present case.

1. The links at issue reflect Google's competition on the merits

12. The favoring theories advanced against Google's search results rest on the erroneous notion that generalist search services, such as Google, can be subdivided in some fashion into "horizontal" and "vertical" portions. But this is not the case. Users expect generalist search services to provide answers for questions of any type: Who won the best picture Oscar in 1990? What is happening in Syria right now? What camera should I buy? What restaurant should I go to tonight? Google needs to answer each of these questions to the best of its ability and to do so it may design search results in different ways depending on the type of query that a user enters on Google. The links at issue are part of this effort to provide users with the best possible results.
13. The term "vertical" denotes nothing more than a particular subject category, such as "products", "local information", "news", "travel", "images". Yet, the purpose of a generalist search service is to provide the best possible results for all subject categories. All "horizontal" results can be characterized in some sense as "vertical" results because they belong to different "verticals". There is no principled basis for subdividing a generalist search service into "horizontal" and "vertical" portions. The mere fact that some results are generated by different algorithms, presented in different formats, or associated with information, such as reviews, cannot turn them into distinct "vertical" search services. Rather, all these aspects are simply normal manifestations of a

generalist search service competing on the merits of its search results. In particular, for the links at issue the following considerations apply:³

14. **Links to Local Pages in Local Results.** In the case of Local Universal Results, Google identifies local entities that are responsive to a user's local queries (e.g., restaurants located in Brussels in response to the query [restaurants in Brussels]). For each identified local entity, Google displays a main link that leads directly to the site of that entity (e.g., a restaurant's web site).⁴ Google understands that these links are not at issue. Instead, Google understands that the Commission's preliminary concerns relate solely to "Google review" links that Google displays underneath each individual local result, as shown in the screenshot below:

restaurants in Brussels - TripAdvisor

www.tripadvisor.co.uk › Belgium › Brussels › Brussels Restaurants
 ★★★★★ 16746 reviews
 Dining in Brussels, Belgium: See 16000 TripAdvisor traveller reviews of 1270 Brussels restaurants and search by cuisine, price, location, and more

Chez Léon

www.chezleon.be/translate this page
 Score: 15 / 30 - 81 Google reviews

Belga Queen

www.belgaqueen.be/costac - Translate this page
 Zagat: 18 / 30 - 89 Google reviews

't Kelderke

www.tkelderke.be/
 Zagat: 19 / 30 - 21 Google reviews

Aux Armes De Bruxelles

www.auxarmesdebruxelles.be/
 Zagat: 21 / 30 - 71 Google reviews

Comme Chez Soi

www.commechezsoi.be/ - Translate this page
 Zagat: 26 / 30 - 87 Google reviews

Vincent

www.restaurantvincent.com/ - Translate this page
 Score: 17 / 30 - 29 Google reviews

Le Fourneau

www.lefourneau.be/ - Translate this page
 Zagat: 23 / 30 - 32 Google reviews

More results near City of Brussels, Belgium »

Map for restaurants brussels



15. These links lead to Local Pages⁵ that display relevant information, notably user reviews, associated with a given local entity. Local Pages provide information that helps users determine which of the different listed local results is the most relevant for them. They therefore represent an enhancement for these search results that makes it easier for users to select among different results. As such, they reflect nothing more than Google's competition on the merits.

³ The discussion of Local and Product Universal Results in the following sections relates to the display of these results on Google's domains at the time of submission of this paper.

⁴ Note that Bing's local results only link to its equivalent of Local Pages and include no direct links to local entities. This can only be taken as an indication that Google's rivals consider such links to provide a superior search experience.

⁵ Until recently these pages were referred to as "Place Pages" and are now known as "Google+ Local Pages". For the purpose of this submission, Google will refer to both types of pages as "Local Pages".

16. **Links to Product Pages in Product Results.** In response to product queries, Google may display two different design forms of Product Universal Results. If the product query is sufficiently specified or cannot be further sub-divided by Google, Google displays within a Product Universal Result links that directly lead to merchants selling the product at issue, as shown in the screenshot below for the query [red roses] on google.co.uk on June 25, 2012:

Rose - Wikipedia, the free encyclopedia

en.wikipedia.org/wiki/Rose

Cinnamomeae) - white, pink, lilac, mulberry and red roses from everywhere but North Africa. Synstylae - white, pink, and crimson flowered roses from all areas.

Red Roses - Wikipedia, the free encyclopedia

en.wikipedia.org/wiki/Red_Roses

Red Roses (Welsh: Rhos-goch, "red moor") is a village in Carmarthenshire, Wales. Contents: 1 General information; 2 History and Local Amenities; 3 Roads ...

Shopping results for red roses



Marks and Spencer Autograph™ Colombian Dozen Red Roses

£25.00 - Marks & Spencer

Ultimate Romantic Red Roses

£50.00 - John Lewis

24 Red Roses - Red Rose Bouquet

£44.99 - Bunches.co.uk

Same Day Roses

www.florist.co.uk/same-day-roses-EN.html

£59.90. Beautiful red roses expertly arranged and hand delivered by skilled florists ...

£24.90. Three beautiful, long-stemmed red roses, carefully arranged ...

Red Roses






www.purelyroses.co.uk/info/red-roses

This is our range of gorgeous red roses. We sell delightful hand tied red rose bouquets as well as single stem Red Roses which are available in quantities of 50 ...

17. As is apparent from the screenshot, the three links displayed within the Product Universal Result lead to Marks and Spencers, Bunches.co.uk, and John Lewis. The header link leads to a list with additional merchant results for the query. Google understands that the Commission has no issue with this implementation of Product Universal Results.
18. If the product query is not sufficiently precise and Google is able to sub-divide the query into different product entities, such as different models of an electronic product, Google identifies different product entities within a Product Universal Result, as shown in the screenshot below for the query [lcd TV] on google.co.uk on June 25, 2012:

Cheap LCD Plasma and LED TVs | TV deals | Buy from Comet
www.comet.co.uk/Televisions/LCD-Plasma-LED-TVs 1844
 Results 1 - 12 of 115 - Buy LCD Plasma and LED TVs from Comet - Latest models
 from all leading brands - FREE Delivery on 1000s of Products
 Samsung TV - Panasonic TV - Sony TV - JVC LT-42TG30J 42" LCD TV

Shopping results for lcd tv

				
Samsung - LE40D501 - LCD TV - 1080p ★★★★★ 47	Samsung - UE220S903 - LED-backlit LCD (FullHD) ★★★★★ 112	LG - 42LK450U - LCD TV - 1080p ★★★★★ 115	LG - 32LK330U - LCD TV - 720p ★★★★★ 115	Sony - KDL - 32CX523 - LCD TV - 1080p ★★★★★ 20
£312	£143	£349	£199	£269

LCD Televisions | LCD TV starting at £114.99 | Toshiba
www.home-entertainment.toshiba.co.uk/Televisions/LCD-TV/
 54 items - With a Toshiba LCD TV starting at £114.99, now is the time to ...
 32" Full HD 1080p LCD TV with Freeview HD 32BV801B
 32" LCD Televisions with HD ready screen and Freeview 32BV501B

LCD television - Wikipedia, the free encyclopedia
en.wikipedia.org/wiki/LCD_television
 Liquid-crystal display televisions (LCD TV) are television sets that use LCD display technology to produce images. LCD televisions are thinner and lighter than ...

Dixons | Low Priced Electricals and Kitchen Appliances
www.dixons.co.uk/
 Low Web Prices on a Huge Range of products including Great Offers on TVs, Tablets, Digital & DSLR Cameras, Cookers and Washing Machines. Free Home ...

19. As is apparent from the screenshot, the Product Universal Result in this implementation identifies different TV models from Samsung, LG, and Sony. The link for each model leads to a Product Page that includes a list of links to merchants selling that specific model, not Google, together with user reviews for the product model, to help users select between different results. By first identifying different product models associated with the query, Google can disambiguate the query and group merchant results for a given model. This tiered approach is therefore a means to better organize Google's results and identify them in a way that is more useful for users. It is hard to see why this design could be characterized as anti-competitive. It reflects no anti-competitive foreclosure strategy, but Google's competition on the merits.

2. Favoring theories have no legal basis

20. Even if Google were "favoring" itself through the links at issue, *quod non*, this would not support a finding of infringement of Article 102 TFEU. A theory of abuse based on a contention that a company favors itself, without more, conflicts with established case law and has no meaningful limiting principles.
21. The case law of the EU Courts makes clear that the "favoring" of a company's own products alone cannot in itself constitute an abuse because the courts have only identified special forms of favoring as abusive, such as refusal to supply or tying practices. A finding of abuse for these forms of favoring is subject to specific legal conditions, which excludes a finding of abuse under Article 102 TFEU based on the mere contention that a company favors itself. To hold differently would render past case law meaningless because any refusal to supply or tying can be re-characterized as "favoring".
22. If "favoring" alone were an abuse, the EU Courts would not have rejected the application of Article 102 TFEU in *European Night Services* and *Bronner* because the

defendants in those cases could easily have been characterized as “favoring” their own train and newspaper operations. Similarly, in *Microsoft*, the Commission would not have sought to establish the indispensability of Windows interoperability information or the tying of Windows Media Player to the operating system, when it could simply have said that Microsoft was favoring itself.

23. Indeed, there have been many cases where an abuse claim could have been brought simply on the basis that a company favored itself, but Google is not aware of a single instance where the Commission or the EU Courts relied on such an argument. Instead, the Commission and the EU Courts have consistently required additional elements such as the existence of an essential facility and a threat of elimination of all viable competition to support a finding of infringement under Article 102 TFEU.
24. None of these additional elements are present here. Google has shown that efficient vertical search sites do not depend on traffic from Google, but rather have many sources available to generate user traffic.⁶ Competition in vertical search is not under a threat of elimination, but is thriving. Nor, more generally, should any search service, be expected to act as a referrer to other search services for queries that users put to it. The very purpose of a search service is to refer users to the results that they are looking for, not to refer them to other search services that may have alternative results for the same query.
25. As a matter of policy, treating mere “favoring” of a company’s own products as abusive would be highly problematic because every company gives preference to its own products. The fact that a company prefers its own products over those of its rivals is an intrinsic aspect of competition. Abuse theories based on “favoring” therefore offer no meaningful distinction between anti-competitive conduct and competition on the merits.
26. In effect, the favoring theories advanced by the complainants are just a thinly veiled attempt to circumvent the legal conditions for established abuse categories. The complaints raised against Google closely follow the pattern of a duty to supply case: They all maintain that “visibility” in Google’s search results is “necessary” for rivals and that Google improperly “reserves” certain ranks to itself without supplying those ranks to rivals. Yet, the conditions for a duty to supply are manifestly not met here.
27. In these circumstances, there is no room for “favoring theories”. When allegations relate to conduct covered by established abuse categories, it is necessary to prove the legal conditions for those abuses. These conditions cannot be side-stepped by advancing some other theory. Otherwise past case law would be disregarded and legal certainty would be lost. Without meaningful limiting conditions that distinguish clearly

⁶ See Response to Foundem Complaint, ¶¶ 122-127; Response to eJustice Complaint, ¶¶ 74-75, Response to VDZ Complaint, ¶ 189; RBB Response to Foundem and eJustice, pp. 32-36, RBB Response to VIT, p. 12; Search and Ad Design Framework Paper, ¶¶ 58-63.

anti-competitive practices from beneficial competition on the merits competition law intervention risks to harm rather than promote competition and stifle innovation to the ultimate detriment of users.

3. Empirical economic evidence is inconsistent with foreclosure concerns

28. In addition, it remains unclear how “favoring” with regard to the links at issue could result in foreclosure of equally efficient competitors. Indeed, any foreclosure concerns are inconsistent with empirical economic evidence:

- A review of sites active in vertical search demonstrates that vertical search is highly competitive and vibrant. Google estimates that there are at least 191 local search sites active in the EEA. For product search, Nielsen/Netratings identifies 239 product search sites in the U.K., 169 product search sites in France, 295 product search sites in Germany, and 94 product search sites in Spain in March 2012. The combined, de-duplicated number of product search sites across these four countries alone is 676 sites.
- Even though Google has displayed the kind of links at issue for considerable time there is no indication from empirical data that these links have had any material impact on competition, let alone foreclosed competition. To the contrary, economic data in the present case exhibit a fundamentally different picture than the economic evidence presented in *Microsoft* to establish foreclosure. Thus for example, in product search in France, Shopzilla, Le Guide, and Kelkoo all command a higher usage share than Google, with Shopzilla and Le Guide each attracting roughly twice as many users as Google.

C. Google’s Proposed Solution

29. While Google is confident that its search result design is lawful and expressly contests any wrongdoing or liability under Article 102 TFEU, Google is prepared to propose, without prejudice, a constructive resolution of the preliminary concerns raised in connection with Google’s links to Product and Local Pages. At the state-of-play meeting, the Commission indicated that one way of resolving its preliminary concerns would be to display link references to rival vertical search sites as part of Product and Local Results.

30. Google’s commitment offer proposes to implement such a solution. Google has set out the specific language for its proposal in Section I of Annex 2. At the state-of-play meeting, the Commission also encouraged Google to increase transparency about the operation of Google’s algorithmic search ranking and manual interventions in search ranking. Over the recent past, Google has undertaken a number of initiatives to provide webmasters and users with more information on these matters. Annex 3 summarizes these recent transparency initiatives. Google hopes that these initiatives address what the Commission had in mind in this regard.






31. In the following, Google will discuss its proposed solution for the display of links to rival vertical search sites in more detail.

1. Basic principles

32. The operation of Google's proposed display of links to vertical search sites within Local and Product Universal Results would be subject to the following basic principles:

- When Google displays Local or Product Universal Results that contain links to Local or Product Pages will display as part of such Local and Product Universal Results links for up to three rival vertical search sites that offer an alternative for the kind of review information displayed on Place and Product Pages, along the lines set out in the screenshot below:

Shopping results for lcd tvs

				
Samsung - LE40D503 - LCD TV - 1080p	LG - 42LK450U - LCD TV - 1080p (FullHD)	Samsung - UE22D5003 - LED-backlit LCD TV - 1080p	Sony - KDL- 32CX523 - LCD TV - 1080p	Samsung - UE40D5520 - LED-backlit LCD
★★★★★ 98	★★★★★ 114	★★★★★ 42	★★★★★ 29	★★★★★ 40
£330	£300	£144	£269	£400

Search lcd tvs on [Amazon](#), [SupaPrice](#), or [Kelkoo](#)

- These links will lead, to the extent possible, directly to result pages of the alternative vertical search site for the query that the user entered on Google (rather than merely to the home page of the site where the user would have to reenter the query). For example, if the user entered the query [restaurants Brussels] in Google, the links will lead to the result pages of rival vertical search sites for that query.
- To qualify for inclusion, sites can sign up with Google and provide information on their URL patterns that allow Google to link directly to the relevant result pages.⁷ To ensure meaningful results, applying sites will need to meet a number of minimum criteria. In particular, (i) they must qualify as vertical product or local search sites, (ii) they must show review information as part of their results, (iii) they must rank among the top-100 Web Search results for at least 10% of all traffic-weighted queries triggering Product or Local Universal Results on the applicable

⁷ Sign-up and provision of URL information would not in itself provide a site with a right to be displayed as part of the proposed solution. Conversely, Google would remain free to sign-up on its own initiative vertical search sites for which it is confident that it has appropriate URL pattern information.

Google country domain, and (iv) they must appear within the top-100 Web Search results for the specific query at issue.

- For each relevant query, Google will algorithmically select for display three qualifying sites based on their Web Search rank for that query (excluding duplicates). For example, if a user enters the query [lcd TV] on Google and that query produces the display of a Product Universal Result with review links Google will identify qualifying vertical product search sites that rank among the top 100 Web Search results for the query [lcd TV] and will display as part of the Product Universal Result links to the three highest ranking, non-duplicate sites.⁸
- The proposed solution will apply to Google's search results displayed on desktop PCs given that the mobile space is highly dynamic,⁹ a large portion of search activity on mobile devices takes place via mobile apps, rather than traditional Internet browsers, and vertical search sites are highly successful at disseminating mobile apps for their services.¹⁰

⁸ Less than three results would be displayed if there are less than three qualifying vertical search sites.

⁹ For example, Apple recently announced a series of initiatives to do "everything it can with iOS to de-emphasize the importance of search, and the web in its mobile devices", see Jay Yarow, "THE BOTTOM LINE: Apple Really Is Going To Try To Kill Google", Business Insider, June 11, 2012, <http://www.businessinsider.com/apple-really-is-going-to-try-to-kill-google-2012-6>. This includes introduction of its own local search solution in cooperation with Yelp, the enhancement of Apple's Siri search technology, and steering users towards apps as a means to discover and access online content. As commentators have observed, "the idea is to get you to use the app, not the mobile web. The more you use the app, the less you use the mobile web. The less you use the mobile web, the less you use Google" (ibid.).

¹⁰ For example, data published by Expedia and TripAdvisor show that their mobile apps are among the most downloaded apps across all mobile platforms, generating millions of downloads per month. Similarly, Yelp reported in its first quarter 2012 results that "our mobile apps were used on approximately 6.3 million unique mobile devices on a monthly average basis for the quarter". In 2011, Yelp released data showing that 35% of all Yelp searches came from a Yelp mobile app, "Yelp: 35 Percent of Searches Mobile Now," Greg Sterling, Search Engine Land, February 4, 2011, <http://searchengineland.com/yelp-35-percent-of-searches-mobile-now-63518>. According to another recent article, "about 40 percent of traffic to Yelp is from their mobile app", <http://www.bloomberg.com/news/2012-06-25/apple-to-feature-yelp-check-ins-within-iphone-maps-app.html>. Note that this is 35-40% of all search queries, not mobile search queries, which means that the share of mobile queries that come from the Yelp app has to be much bigger.

Apps usage is also widespread for product search. For example, the product search site Idealo announced a "400% increase in smartphone app use in run up to Christmas", The Drum, January 11, 2012, <http://www.thedrum.co.uk/news/2012/01/11/idealo-finds-400-increase-smartphone-app-run-christmas> and The Telegraph reports that "bagging yourself a bargain is now even easier as shoppers use price comparison applications (or "apps") on their mobile phones", Kara Gammell, "Use your mobile to call up a bargain", The Telegraph, August 14, 2009, <http://www.telegraph.co.uk/finance/personalfinance/consumertips/6025716/Use-your-mobile-to-call-up-a-bargain.html#>.

2. Considerations

33. Google's proposed linking solution fully addresses the Commission's preliminary concerns in an effective and rapid manner. In particular:
- The proposed solution will ensure that links to qualifying rival vertical search sites are displayed each time Google displays Local or Product Universal Results with links to Google review pages. The rival vertical search sites will be part of the Local and Product Universal Result "blocks" that display the links to Google review pages and therefore will have the same position and visibility as these blocks. The links to third-party sites will lead directly to the result pages on these sites. Users will therefore be only one click away from the result pages of alternative third-party sites, just as they are one click away from the Google review pages.
 - Google will display links to rival vertical search sites automatically from launch of the solution to all users of Google's EEA domains. The display will not require any manual action from users. Google's solution therefore goes substantially beyond Microsoft's browser commitment since that commitment allows IE to be the sole pre-installed browser, requires manual actions from users to see the ballot screen and download rival browsers, and is limited to users who receive Windows updates. Moreover, Google will display the links for the entire duration of the commitments, while Microsoft's ballot screen disappears if users do not interact with it.
 - The proposed solution will provide users with a selection of alternative vertical search sites. Because rival sites will be selected algorithmically different sites can appear for different types of queries (*e.g.*, [restaurants Brussels], [plumbers Brussels]) and new sites may surface as they gain in relevance.
 - The mechanism for the operation of the solution is well defined and based on existing Web Search algorithms. It should therefore not raise problems in implementation, interpretation, or enforcement. Indeed, the Commission will easily be able to verify compliance by entering product and local queries in Google to confirm that Google displays the requisite links.
34. In sum, Google's proposed solution will give users another clearly marked and simple way to reach competing vertical search services via Google's Product and Local Universal Results in each instance where Google displays such Universal Results with links to Product and Local Pages. This should address the preliminary concerns identified with regard to the display of these links.
35. While the proposed solution does not apply the same algorithms for the display of links to vertical search sites as to Google Product and Local Pages, this is not needed for the

solution's effectiveness.¹¹ Nor would this be practicable or justified. The following principal considerations are relevant in this regard:

- By relying on the Web Search rank of vertical search sites for the query that the user entered on Google, the proposed solution reduces query latency, minimizes the risk of irrelevant results, and offers the most efficient engineering method for addressing the Commission's preliminary concerns.
- Trying to apply the same algorithms for links to Google Local and Product Pages also to links to vertical search sites would create an "apples and oranges problem."¹² Because the Google links at issue are associated with the primary local and product results, *i.e.*, individual products and local entities, the rank of these links is determined by Google's specialized local and product search algorithms. These algorithms take into account dedicated signals tailored to local entities and products that cannot be applied to vertical search sites.¹³
- At the state-of-play meeting, the Commission suggested that rival vertical search sites could provide Google with a data feed for the signals of their local and product results. But such a solution would be cumbersome for both Google and these sites, it would be fraught with technical difficulties, and would be open to manipulation since Google would have no means to verify whether the signals provided by a site are genuine or fabricated.
- At the state-of-play meeting, the Commission also referred to the "focus on the user" hack for social search as a possible model. But as best as Google can tell, that feature is simply based on a manual list of a few leading social networks. As noted, for product search alone there are hundreds of different sites. Moreover, different product and local sites may not cover the same range of products or local entities

¹¹ It is well established that a remedy under Article 102 TFEU must be limited to what is necessary and proportionate to address the identified competition concern. Case 241/91 *Magill* [1995] ECR I-743, ¶ 93, Case T-201/04 *Microsoft*, [2007] ECR II-3601, ¶ 1276. Where "several remedies exist for bringing an infringement to an end", the company at issue must remain free to choose among these possibilities (Case T-24/90 *Automec*, [1992] ECR 2223, ¶ 52, Case T-167/08 *Microsoft*, judgment of June 27, 2012, not yet reported, ¶ 95. These principles also apply in the context of Article 9 commitments, Case C-441/07 *Alrosa*, [2010] ECR I-5949, ¶¶ 36, 61 and Commission Manual of Procedure, ¶ 46: "the commitments offered should be proportionate, *i.e.*, not go beyond what is needed to remedy the competition concern". As Commission officials have noted, "also under Article 9 the Commission should not accept commitments that impose broader obligations than what is required to address the concerns identified", P. Lowe, F. M. Rigaud, "Quo Vadis Antitrust Remedies", pp.605-606.

¹² See Google's submission of September 7, 2010, "Comparing Apples With Oranges – How Google Ranks Universal Results From Specialized Content-Specific Search Algorithms Within Web Search".

¹³ For example, for the query [restaurant Brussels] Google will rank an individual restaurant and its ancillary review link, among other things, based on the proximity to the user. Yet, proximity is not a meaningful relevance signal that could be applied to "vertical" search sites.

(e.g., electronics vs. clothes and shoes, restaurants and hotels vs. plumbers). A solution along the lines of "focus on the user" would therefore artificially narrow the "universe" of qualifying sites and would likely lead to irrelevant results where links to sites would be displayed that in fact have no reviews for the type of entity at issue.

36. Moreover, while Google is prepared to add link references to rival vertical search sites in Product and Local Universal Results, it firmly believes that all current design features of its Product and Local Universal Results are legitimate, including links to Product and Local Pages. In particular:

- The links at issue appear on Google's search service and users, by entering queries on Google, affirmatively choose to see search result links in the design that Google has developed.
- Google must remain free to display the links that it considers relevant and useful on its search services. Google has information about the reliability, accuracy, and freshness of the information displayed on Product and Local Pages that it cannot obtain in the same way for vertical search sites.
- All of the design elements of Google's Product and Local Universal Results, including the review links at issue, have gone through extensive user testing, which will not be the case for any changes made as a result of the commitments given by Google to the Commission. In these circumstances, it is critical for Google not to remove existing features of its Product and Local Universal Results.

37. In short, Google trusts that its proposed solution provides an effective means to address the Commission's preliminary concerns without unduly interfering with Google's search result design and jeopardizing the quality of Google's search service.

II. GOOGLE'S SNIPPET REFERENCES TO WEBSITE REVIEWS ON PRODUCT AND LOCAL PAGES

A. The Commission's Preliminary Concerns

1. The conduct at issue

38. At the May 30 state-of-play meeting, the Commission expressed preliminary concerns as to Google's display of content from competing vertical search services on Google's own vertical search services. More specifically, Google understands that the Commission's preliminary concerns relate to the display on Google's Product and Local Pages of snippet results for reviews drawn from other websites.

2. Legal theory

39. It remains unclear to Google what the legal basis is for raising EU competition law concerns in connection with the display of snippet references to other websites' content.

B. Google's Position On The Merits

40. Google complies with applicable laws concerning the display of crawled content. In Google's submission, the complainants objecting to Google's display of third-party review snippets do not raise genuine competition law concerns. In particular the following considerations bear emphasis:
- Google does not violate exclusive intellectual property rights of other websites by displaying snippet references to their reviews on Product and Local Pages. Indeed, various Member State courts have rejected copyright infringement claims with regard to the display of snippet references by online search services.¹⁴ If EU competition law were to prevent Google from displaying snippet references, competition law would be imposing barriers beyond the scope of national copyright laws. This would be at odds with the fundamental objectives of EU competition law, which has sought to limit the exercise of exclusivity granted by intellectual property rights, rather than extend the scope of such exclusivity.
 - Sites that do not want to have snippet references displayed have the option to block such references through robots.txt without blocking "blue link" references. Blocking snippet references is therefore not an all or nothing choice as complainants have characterized it.
 - In reality, websites overwhelmingly seek inclusion in Google's search results, including specialized results and choose to have snippets displayed to draw attention to their sites and drive traffic to their sites from users who want to read the full text. In the case of snippet references in Google News, for example, the opt-out mechanism that Google introduced for Google News remains largely unused. Only five European news site currently use Google News specific robots.txt commands to adjust the way their content is referenced in Google News and a handful of additional sites have manually requested an opt out. In contrast, Google receives as many as 1,000 requests per week for inclusion in Google News.

C. Google's Proposed Solution

41. While Google is confident that Google's display of review snippet references on Product and Local Pages represents no EU competition law violation and expressly contests any wrongdoing or liability under Article 102 TFEU, Google is prepared to propose, without prejudice, a constructive resolution of the Commission's preliminary concerns. At the state-of-play meeting, the Commission indicated its preliminary concerns could be resolved by providing websites with a dedicated option to opt-out from the display of review snippet references on Product and Local Pages without

¹⁴ See, for example, Judgment of the Bundesgerichtshof of July 17, 2003 – I ZR 259/00, BGHZ 156, 1 – *Paperboy*; and Judgment of the Audiencia Provincial de Barcelona of September 17, 2008, Case 92/2006, *Aleix P. L. v. Google Spain*.

removing such references in Google's Web Search results. Google's commitment offer proposes to implement such a solution for Product Pages and also for Local Pages, (should Google decide to re-introduce review snippets from other websites on Local Pages). Google has set out specific language for its suggested solution in Section II of Annex 2.

1. Basic principles

42. Google's opt-out solution would be subject to the following basic principles:

- Google will offer websites an electronic option to opt-out from the display of review snippets on Product and Local Pages, whilst maintaining the display of snippet references in Google's Web Search results.
- Google will implement the opt-out option by making available on its site a standard form notice that sites wishing to opt out can electronically submit to Google. Following receipt of a duly completed notice, Google will halt the display of the review content in question on Product and Local Pages.
- Google is also prepared to commit to maintaining an opt-out mechanism for Google News.

2. Considerations

43. The proposed solution should address the Commission's preliminary concerns. It provides websites with the option to block display of review snippets in Product and Local Pages while maintaining such references in Google's Web Search results. It is clear cut, it can be quickly implemented by Google, and will be straightforward for website owners to apply.

III. GOOGLE'S AD PLACEMENT RULES IN AFS AGREEMENTS

A. The Commission's Preliminary Concerns

1. The conduct at issue

44. At the May 30 state-of-play meeting, the Commission expressed preliminary concerns with regard to certain provisions in Google's AFS agreements. More specifically, Google understands that the Commission's preliminary concerns relate to the following clauses in Google's existing or past AFS agreements:

- Clause 6.1 of Google's pre-March 2009 "old" template contract with Direct Partners, which requires that Direct Partners shall not place ads on their websites which are the same as, or substantially similar to, Google search ads;
- Clause 7.2(b) of Google's post-March 2009 "new" template contract with Direct Partners, which provides that Google's AFS Direct Partners must request at least three Google ads in relation to each search query and must display the ads served by

Google such that no equivalent third party search ads appear above or directly adjacent to Google's search ads¹⁵;

- Clause 3.6 of Google's AdSense Online Terms and Conditions and Clauses 4.1 and 4.2 of Google's CSE Online Terms and Conditions, which require Google's Online Partners not to display third party ads which an end user would reasonably confuse with a Google ad or otherwise associate with Google.¹⁶

2. Legal theory

45. Google understands that the Commission's preliminary view is that Clause 6.1 of the old template contract with Direct Partners imposes an exclusivity obligation. While this clause was replaced in March 2009 with Clause 7.2(b) of Google's new template contract, the Commission considers on a preliminary basis that Clause 7.2(b) creates "*de facto exclusivity*" by causing publishers "*to obtain all or most of their requirements for search advertisements from Google*". More specifically, the Commission's preliminary concern as Google understands it is that the premium placement provision in Clause 7.2(b) of the new template contract may reserve, for Google ads, positions that generate most or all of the ad revenues revenue derived from the Partner's site. The Commission also indicated that the ad mock-ups provided by Google to AFS partners may be misunderstood as binding with regard to ad placement and thus may have exclusivity-type effects.
46. In addition, Google understands that in the Commission's preliminary view the no-confusion provision found in Online Partners' contracts (*i.e.* Clause 3.6 of Google's AdSense Online Terms and Conditions and Clauses 4.1 and 4.2 of Google's CSE Online Terms and Conditions) may lack clarity and create "*de facto exclusivity*" by discouraging Online Partners from displaying third-party search-targeted ads.

B. Google's Position On The Merits

47. Google is confident that further investigation would confirm that Google's AFS agreements are fully compliant with EU competition rules, in particular: (1) the clauses at issue cannot be equated with exclusivity provisions; (2) empirical economic evidence confirms that the clauses at issue do not foreclose competition; and (3) the clauses at issue are in any event justified by legitimate considerations.

1. The clauses at issue cannot be equated with exclusivity provisions

48. It is well established that a review of contractual clauses under EU competition law must take account of the specific legal and economic context within which these

¹⁵ Similar requirements are also contained in Google's Simplified Contracts and these are therefore also covered by the AFS Commitments.

¹⁶ Similar requirements are also contained in Google's Simplified Contracts and these are therefore also covered by the AFS Commitments.

clauses are concluded.¹⁷ Google is confident that such an analysis would show that the clauses at issue do not qualify as exclusivity provisions, for four main reasons:

49. First, allegations that the clauses at issue create exclusivity or *de facto* exclusivity rest on a market definition that treats search-targeted ads as a separate relevant market from all other forms of online ads. Absent such a narrow market definition, exclusivity claims must fail because the clauses at issue do not govern the placement of non-search ads by AFS partners. Google has shown in past submissions that there is no sound basis for narrowing the market definition to search ads only.¹⁸ It runs against industry trends that have blurred the distinction between search ads and other forms of online advertising. It also conflicts with the Commission's own findings in its 2008 *Google/DoubleClick* decision that did not delineate the relevant market in this way.¹⁹
50. Second, even focusing on a putative market for "search ad intermediation", no competition concerns can arise. In particular, as previously explained,²⁰ the provisions in Google's contracts with Online Partners and its new template contracts with Direct Partners do not involve *de facto* exclusive dealing as previously considered in the Commission's decisional practice and EU Court case law.²¹
51. Third, in the case of partners that display search ads in conjunction with Google web search results, Google's ads are a corollary to Google search results through which these results are monetized.²² It must therefore be possible for Google to define the placement of Google search ads in conjunction with Google search results. Arguing that Google's AFS agreements impose "exclusivity" by regulating ad placement on Google search results is like arguing that a news publisher would impose exclusivity by preventing a distributor from pasting third-party ads into its news paper. Outlawing the

¹⁷ Case C-234/89 *Delimitis* [1991] ECR I-935, ¶ 31; Case C-399/93 *Oude Luttikhuis* [1995] ECR I-4515, 10; Case C-214/99 *Neste* [2000] ECR I-11121, ¶ 25; Joined Cases T-374/94 et al. *European Night Services* [1998] ECR II-3141 ¶ 134; Case T-77/94 *VGB* [1997] ECR II-758, ¶ 140.

¹⁸ See, for instance, Response to Microsoft's Complaint, September 16, 2011, RBB Paper on Market Definition and Dominance, section 3.1.

¹⁹ Case No COMP/M.4731 *Google/ DoubleClick*, decision of 11 March 2008, Section 6.1.

²⁰ See paragraphs 5.3 et seq., "*Google's AdSense and Distribution Agreements do not have Anti-Competitive Foreclosure Effects – An Analytical Framework*", submitted to the Commission on 17 September 2011.

²¹ In *Coca Cola*, (Case COMP/A.39.116/B2 *Coca-Cola*, Commission Decision of 22 June 2005), the commitments allowed Coca Cola to reserve 80% of a customer's requirements where Coca-Cola provides a beverage cooler to the customer, and allowed Coca Cola to reserve substantial volumes of shelf space (proportionate to national market share minus 5%). This was not regarded as an exclusivity arrangement (which was prohibited).

²² Google's search technology is not a must-have for publishers that want to enter into a search ad intermediation arrangement. Many publishers provide search capability for their own site only, which can be offered relatively easily through a range of open source solutions.

ability of a search service to stipulate what ads can be shown in conjunction with its search results expropriates those search results. This would jeopardize the ability to develop efficient and innovative monetization models and threaten advertising-funded online services more generally, to the ultimate detriment of consumers.

52. Fourth, the premium placement provisions in agreements with Direct Partners are also a key element of the consideration that Google receives in return for the grant of a higher revenue share and other relationship-specific investments that it offers to Direct Partners. This does not mean that publishers are compelled to accept premium placement provisions. Publishers that want to show Google search-targeted ads, but do not want to commit to premium placement can negotiate the scope of this provision (or sign-up to Google's Online Terms). Conversely, if Google were precluded from including such provisions in its AFS agreements with Direct Partners, the very basis for these arrangements would fall away. As a consequence, only Bing/Yahoo! could bid for premium placement of its search-targeted ads, which would reduce, not increase, competition to the detriment of publishers, advertisers, and ultimately consumers.

2. Empirical economic evidence confirms that the clauses at issue do not foreclose competition

53. The compatibility of Google's AFS agreements with EU competition law is confirmed by empirical economic evidence, which shows that the clauses at issue are not liable to foreclose competition. In particular:
- Empirical evidence does not support a suggestion that Google is an unavoidable trading partner in search ad intermediation or that rivals would be unable to satisfy a publisher's entire demand for search-targeted ads. To the contrary, the fact that, following the Search Alliance between Microsoft and Yahoo!, Microsoft is now serving ads against all search results on Yahoo! in France, Ireland and the UK (with other European countries to follow shortly)²³ clearly demonstrates Microsoft's/Yahoo!'s ability to do the same for the entire demand of other partners.
 - Google has also demonstrated that there is very significant multi-homing of advertisers between AdWords and the adCenter/Yahoo platforms. As explained in earlier submissions to the Commission, a properly specified and conservative analysis shows a high degree of advertiser multihoming: in the largest EU Member States (i.e., the UK, France and Germany), advertisers accounting for between 56.6% to 67.3% of the paid clicks on Google also advertised on Bing/Yahoo! (in the EEA as a whole, this number is also over 50%).²⁴

²³ Pamela Parker, "Search Alliance: AdCenter Migration Complete in the UK, Ireland and France", Search Engine Land, 7 May 2012. Available online at: <http://searchengine.land.com/search-alliance-adcenter-migration-complete-in-uk-ireland-and-france-120409>

²⁴ See RBB's "Analysis of Advertiser Multihoming", dated 23 September 2011.

- A review of negotiation histories for past search ad intermediation deals shows that such deals can be hotly contested. Google has provided examples of such contested negotiations that confirm the ability of Microsoft/Yahoo! to compete for a publisher's entire demand, including during Google's negotiations with AOL (2010), MySpace (2010), eBay (2006), and Freenet.de (2010).²⁵
- The majority of Direct Partner contracts extend for no more than two years. Considering that there are around 90 active EMEA-managed Direct Partners, with over 50% of these partners' contracts due to expire by the end of Q1 2013, this gives rivals ample opportunities to compete for these contracts in the short as well as medium term. Google notes also in this respect that the Commission has not raised objections as to the duration of Google's contracts.

3. The clauses at issue are in any event justified by legitimate objective interests

54. Even if the clauses at issue, despite their specific legal and economic context, were viewed as exclusivity-type provisions giving rise to restrictive effects, *quod non*, these clauses would be justified by legitimate objective interests, including the following:
- The current premium placement requirement for Direct Partners ensures efficient pricing of Google's search functionality and allows Google to recover its investments in such partners. Absent such protection, partners could (for example) potentially decide to "bank" a generous revenue share offer from Google (premised on an expectation of receiving a representative mixture of inventory) by providing Google with the less attractive inventory (e.g. the bottom search ad positions, for which Google would have offered a lower revenue share) and re-marketing the best inventory to another party. Absent the clauses at issue, Google could find itself paying a price reflecting an expectation of receiving both "milk" and "cream" inventory, but ending up only receiving the "milk".
 - The requirement also keeps the AdWords experience for advertisers consistent across Google's ad network (including Google's own websites as well as publisher websites) and preserves network value to advertisers and publishers.

C. Google's Proposed Solution

55. While Google strongly believes that its AFS agreements are lawful and expressly contests any wrongdoing or liability under Article 102 TFEU, Google is prepared to propose, without prejudice, a constructive resolution of the preliminary concerns raised in connection with the AFS clauses identified by the Commission. At the state of play

²⁵ See paragraph 5.19, "Google's AdSense and Distribution Agreements do not have Anti-Competitive Foreclosure Effects – An Analytical Framework", submitted to the Commission on 17 September 2011.

meeting, the Commission indicated its preliminary concerns could be resolved by eliminating exclusivity and premium placement provisions from Google's AFS Agreements. Google's commitment offer proposes to implement a solution along these lines. Google has set out the specific language for its suggested solution in Section III of Annex 2. In the following, Google will discuss its offer in more detail.

1. Basic principles

56. Google's proposed solution would be subject to the following basic principles:

- Going forward, Google will not include clauses in its AFS agreements that:
 - require exclusivity;
 - require premium placement of Google ads;
 - require compliance with mock-ups that have the same effect;
 - require partners not to display non-Google search-targeted ads that an end user could reasonably confuse with a Google ad, provided that Google may require proper labeling of its own search-targeted ads and non-Google ads or other means to clearly distinguish the source of the ads.
- For existing contracts with Direct Partners that contain provisions which are not in line with these principles, Google will waive the relevant provisions.²⁶

2. Considerations

57. The proposed solution fully addresses the Commission's preliminary concerns. In particular:

- Direct Partners will be free to place third-party search ads anywhere on a search results page, including in the most prominent and valuable positions of that page. Accordingly, Google's proposed solution would provide broad scope for rival ad networks to compete and ensures that Direct Partners are not required to "*obtain all or most of their requirements of search advertisements from Google*".
- Google will retain the possibility to ask Direct Partners to display a minimum of three Google ads, but will not influence the location of these ads. Following removal of the premium placement language, Direct Partners will be free to relegate Google's ads to the most obscure portion of their page. The total number of ads that a site can display is moreover not static: partners can decide to increase the number of ads shown, reducing the percentage of ads sourced from Google.

²⁶ Contracts with Online Partners can be amended by Google and therefore require no dedicated waiver mechanism.

- Google will ensure that the inclusion of ads placement “mock-ups” in Direct Partner contracts does not impose additional restrictions on Direct Partners using third party search ads.
 - Finally, Online Partners would no longer be subject to the no-confusion provisions. As a result, any possible risk of discouraging these partners from displaying third-party ads would be removed.
58. Google will retain the ability to adjust its revenue shares, including in dependency of the ad revenue amount that a Direct Partner generates for Google, or to amend search fees. Google understands that the Commission has no concerns with regard to Google’s pricing.
59. Google also considers that it should remain free to maintain provisions limiting the placement of non-Google search ads in contracts with Direct Partners for whom Google provides an individually customized or enhanced search or ads syndicated offering. Google’s contracts with such partners require substantial additional relationship-specific investments and are the subject of lengthy and detailed bilateral negotiations. In particular, in such circumstances regulating the placement of search ads is one element of an overall negotiation and reflects the value and investment of the individually customized and enhanced offering. It is especially difficult to waive or remove heavily negotiated ad placement provisions in existing custom contracts without negatively affecting the overall value and balance of the deal. As regards existing AFS agreements, only Google’s agreement with AOL and IAC involve such customization.²⁷
60. Finally, Google considers that it should remain free to negotiate provisions on the placement of non-Google search ads in situations where Google is participating in an open and competitive tender process or requested to meet a competitive offer for the display of all or most ads on the partner’s site. Where rival search ad intermediation providers are able to compete with Google on an equal footing for a particular partner’s demand, it must follow that Google’s AFS service does not represent a “must have” service for that partner. In these circumstances, Google considers that, consistent with

²⁷ Both AOL and IAC currently have syndication contracts with Google that allow them to provide highly customized and differentiated search services in their own names, promoting their own brands. In addition they benefit from ready access, at their election, to important new features of Google’s search functionality and AOL can benefit from new and enhanced ad formats and features. AOL praised its agreement with Google when signed noting, “*Google will provide AOL with additional features and enhancement to its leading Web search products that will improve the consumer search experience across AOL’s network of sites ... Google will provide AOL with best-in-class ad formats, giving AOL consumers a better, more relevant ad experience*”, <http://corp.aol.com/2010/09/02/aol-and-google-renew-and-expand-global-partnership/>. As previously explained, Google faced head to head competition from Microsoft/Yahoo! for the AOL contract (see Footnote 20). Similarly, during negotiation with IAC, IAC repeatedly suggested that it could switch to another provider if it was not satisfied with Google’s offer.

paragraph 36 of the Article 82 Guidance Paper, no anti-competitive foreclosure concerns (and consequently no consumer harm) can arise from Google competing on the merits to win the customer's business. To decide differently would effectively deny publishers the ability to maximize the revenues generated from their websites, as one bidder (Google) would offer less (commensurate to the reduced value of the contract), and the other bidder(s) would take this fact into account when making their own offer(s).²⁸

IV. GOOGLE'S PROVISIONS ON COMMON INPUT FIELDS AND ADVERTISER DATA COPYING IN THE ADWORDS API TERMS AND CONDITIONS

A. The Commission's Preliminary Concerns

61. At the May 30 state-of-play meeting, the Commission expressed preliminary concerns with regard to Clauses III.2.c.i and III.2.c.ii of Google's AdWords API Terms and Conditions that govern the use of common input fields and advertiser data copying by campaign management tools. The Commission's preliminary concerns appear to be that these provisions could prevent the development of tools that enable cross-platform ad campaign management and data transfer. The Commission suggested that this may impede innovation in tools and create barriers to switching between AdWords and other ad networks.
62. At the same time, the Commission recognized that Google has expanded the list of input data for which tools can offer common input fields and noted that this was "*a step in the right direction*".²⁹

B. Google's Position On The Merits

63. Google is confident that its AdWords API Terms and Conditions, including Clauses III.2.c.i and III.2.c.ii comply with EU competition rules. The following main considerations bear emphasis:

²⁸ This is also consistent with the Commission's approach in *Coca Cola*, (Case COMP/A.39.116/B2 *Coca-Cola*, Commission Decision of 22 June 2005), where the commitments entered into by Coca Cola draw a distinction between the Take-Home Channel, where Coca Cola's products can be seen as "must have" products (on the basis that their products would need to be stocked to ensure the retailer offers a 'complete offering'), and the On-Premise Channel, where Coca Cola's products were apparently not "must have" on the basis that the customer could, for example, choose to stock a competitor's products (e.g. Pepsi) in place of Coca Cola's drinks.

²⁹ Currently, tools can offer common input fields for bulk editing the following data items: keyword match type, keyword bid, destination URL, Campaign budgets, Campaign name, ad group name and ad group bid. Google internal data show that the vast majority of changes to AdWords campaigns concern in fact changes to bids, budgets, and status for which tools can offer common input fields.

- The clauses at issue do not restrict competition that would exist absent Google's license agreement. They merely limit the scope of the license that Google grants for using its AdWords API. Such a limitation is not unlawful under EU competition rules, without proof of an essential facility (which does not exist here). Google must have more than a binary choice between making an API available without limitation or not making an API available at all. Under the complainants' reasoning, once Google makes available an API it must tolerate its unlimited usage without the ability to define boundaries. Such a position is wrong on the law because it ignores the difference between license limitations and competitive restrictions, and is counter-productive as a matter of policy. Presenting technology owners with such binary choices would discourage development of APIs in the first place and would reduce, rather than promote competition.
- The clauses at issue have no restrictive effect on competition. Google has provided abundant evidence on the ease of porting AdWords advertiser data and the existence of a wide range of cross-platform campaign management tools. Indeed, the Commission at the May 30 state-of-play meeting pointed to intense competition among campaign management tools. Recent developments and industry statements only confirm this point:
 - In reaction to reports on the Commission's investigation, prominent tool developers and advertisers have publicly noted that Google's AdWords API Terms and Conditions do not restrict them in their activities.³⁰
 - Recently, Microsoft launched a tool that complies with the AdWords API Terms and Condition and enables the porting of AdWords campaign data to adCenter via the AdWords API. Microsoft explicitly notes that *"with this tool you can actually sync your Google AdWords accounts and import them directly from Google and enter them into Microsoft adCenter. So with that API functionality, you're now able to just quickly launch your Google campaigns onto adCenter"*

³⁰ For example, the Wall Street Journal reported that (*"[...] several companies said on Monday they weren't concerned about the issue. 'In my opinion, Google has provided sufficient exportability of AdWords campaigns, and they have done so for years,' said Denis Grosz, CEO of Conjecture, which runs information site WiseGeek.com and is a Google advertising partner. Matt Lawson, vice president of marketing for Marin Software, which manages more than \$1 billion in online-ad spend by companies such as retailer Macy's, said Google's restriction on automatically transferring ad campaigns to AdCenter 'hasn't been a problem' for its clients,"* Amir Efrati, "Google Seems Ready to Cope With Three of Four EU 'Concerns'", The Wall Street Journal, May 21, 2012, <http://blogs.wsj.com/digits/2012/05/21/google-seems-ready-to-cope-with-three-of-four-eu-concerns>.

*which will give you coverage on Yahoo and Bing. So it's just a quick and easy way to pull down your Google campaigns and launch them on adCenter".*³¹

- A recent analysis of US advertiser multi-homing conducted by NERA Economic Consulting on behalf of Google,³² found that approximately 98% of spend on Google's AdWords is generated by advertisers that use both Google and Bing/Yahoo!.³³ Moreover, advertisers that multi-home between Google and Bing/Yahoo! allocate a sizeable portion (on average 20%) of their ad spend to Bing/Yahoo!, showing that multihoming is neither incidental nor occasional. This finding applies to all advertisers, regardless of their size and the complexity of their ad campaigns.³⁴ The analysis further found that multihoming is equally, if not more, pervasive among advertisers with highly complex campaigns (e.g., campaigns with more keywords and/or ad groups), which are alleged to be the most affected by the clauses at issue.
64. The clauses at issue serve a legitimate interest in protecting the AdWords advertiser experience when advertisers or their representatives interact with AdWords via third-party tools. AdWords is a full-featured advertising platform. In instances where advertisers interact with AdWords via a third-party tool, their experience of the functionality and performance of AdWords is impacted by that tool. For example, if a tool does not expose input fields for all AdWords functionality or transfers data in a non-optimized way an advertiser's performance on, and impression of, AdWords can be impaired.³⁵ The clauses at issue are intended to prevent such an adverse experience and have evolved over time to enable, not hinder, cross-platform functionality.

³¹ Michelle Zung, Microsoft, <http://www.youtube.com/watch?v=A2Sn-Gpl6-4>. See also a more report from the industry analyst Searchenginewatch, noting that adCenter's Desktop tool "has an amazing new import tool. Yes, you can actually import campaigns directly from AdWords, without exporting a file" and providing a more general discussion on improvements in the usability of adCenter, "It's Time To Give Microsoft adCenter a Try", Searchenginewatch, June 5, 2012, <http://searchenginewatch.com/article/2182086/Its-Time-to-Give-Microsoft-adCenter-a-Try>.

³² "An Empirical Analysis of the Extent of Advertiser Multihoming", Lawrence Wu and John Scalf, NERA Economic Consulting, May 3, 2012.

³³ *Ibid.* p. 14.

³⁴ *Ibid.* pp. 16-17.

³⁵ As an independent industry analyst noted, "we all know that a copy and paste of a campaign from Google into adCenter or any other ad platform won't bring the best results – the systems have different campaign options, treat search strings and match types differently, have different consumer user bases, etc. I wouldn't want to use a "programmatic tool" to dump campaigns into other system from AdWords. Do I want to download them, open them, edit them to fit each platform and then quickly upload them? Yes. We all know how to use the various search engine editors and Excel today", Duncan Parry, "Dear European Commission: Please Don't Ruin PPC", Searchenginewatch, March 2, 2011, <http://searchenginewatch.com/article/2064805/Dear-European-Commission-Please-Dont-Ruin-PPC>.

65. Google has a legitimate interest in protecting the high quality advertiser experience that it has created with AdWords and in ensuring that advertisers and their representatives are made aware of AdWords' full functionality and performance regardless of whether they interact with AdWords directly or via third-party tools. If Google allows others to use its AdWords technology and develop tools through which advertisers can place bids on AdWords, it is proper for Google to define rules that protect advertisers' perception of the quality of AdWords when they or their representatives use such tools. Indeed, the Commission's Technology Transfer Guidelines expressly state that the "*licensor has a legitimate interest in ensuring that the quality of the products are such that it does not undermine the value of his technology or his reputation*". The legitimate interest of a company to protect the quality of its products and brand has also been repeatedly recognized by the EU Courts in cases such as *Metro*,³⁶ *Pronuptia*,³⁷ *Lancôme*,³⁸ and *Leclerc*.³⁹

C. Google's Proposed Solution

66. Notwithstanding the above and while Google expressly contests any wrongdoing or liability under Article 102 TFEU, Google is prepared to propose, without prejudice, a constructive resolution of the preliminary concerns raised in connection with Google's AdWords API Terms and Conditions. At the state-of-play meeting, the Commission indicated that its preliminary concerns could be resolved by deleting Clauses III.2.c.i and III.2.c.ii of the AdWords API Terms and Conditions. At the same time, the Commission indicated that it would be permissible for Google to require exposure of minimum functionality by tools to protect user experience. Google's commitment offer proposes to implement a solution along these lines. Google has set out the specific language for its suggested solution in Section IV of Annex 2.

1. Basic principles

67. Google's proposal would be based on the following main principles:
- Google will delete Clause III.2.c.i of its AdWords API Terms and Conditions and will allow common input fields for AdWords and other ad networks going forward.
 - Google will delete Clause III.2.c.ii of its AdWords Terms and Conditions and will allow copying of user campaign data from AdWords to other ad networks going forward.

³⁶ Case 75/84 *Metro* [1986] ECR 3021, ¶¶ 55-56.

³⁷ Case 161/84 *Pronuptia* [1986] ECR 353, ¶ 27.

³⁸ Case 99/79 *Lancôme* [1980] ECR-2511, ¶ 20.

³⁹ Case T-19/92 *Groupement d'achat Edouard Leclerc* [1996] ECR II-1851, ¶ 119; and Case T-88/92 *Groupement d'achat Edouard Leclerc* [1996] ECR II-1961, ¶ 117.

2. Considerations

68. Google considers that the proposed solution should address the Commission's preliminary concerns. It removes the two provisions of the AdWords API Terms and Conditions that the Commission has identified as raising preliminary concerns and will enable tools to display common input fields and copy advertiser campaign data across ad networks going forward.
69. Google's commitments would be subject to Google's ability to continue to revise the AdWords API Terms and Conditions in other respects, including by continuing to specify required minimum functionality. To ensure that AdWords advertisers and their representatives are aware of AdWords' functionality and performance, Google in particular envisages defining minimum functionality requirements along the following lines:
- Google will continue to identify and update a list of minimum AdWords functionality that tools must expose to advertisers or those acting on their behalf in a reasonably prominent location when interacting with AdWords.
 - Where tools transfer data between AdWords and another ad network for features that are not identical such that data cannot faithfully be transformed, tools will have to identify the data at issue, list any compatibility issues, and enable editing of the data prior to action.
70. The purpose of these requirements is to ensure that AdWords performance is not adversely impacted and that advertisers and their representatives are aware of AdWords' specific functionality and features and are informed about differences in feature sets between AdWords and other ad networks (e.g., as a result of a more limited or different feature set of these other networks) that could result in unexpected costs or problems that might be attributed erroneously to Google. As such, these requirements preserve Google's legitimate interest in safeguarding its AdWords user experience without preventing the provision of common input fields or copying of advertiser campaign data.

V. IMPLEMENTATION

71. With regard to the implementation of the solutions proposed above, Google notes the following:
- **Duration.** Google proposes to maintain its commitments for three years with a possibility to seek review if relevant competitive conditions have materially changed. This is consistent with the duration of the commitments that Google has given to the Italian and French competition authorities. As Google has documented

in past submissions, online search is an extraordinarily fast moving area.⁴⁰ A three-year duration therefore represents a long period during which the landscape in online search may change dramatically. Indeed, already today there are a number of developments that may have such an impact. To take just a few examples: Social networks, notably Facebook, have emerged as an alternative means for discovering online content and are amassing large volumes of content and data that are not accessible to online search engines. Microsoft is relentlessly catching up and is making it harder in Windows 8 to use third-party search engines. Users are increasingly moving to mobile apps as a way to discover online information, bypassing web browsers and online search services. Accordingly, a longer commitment period seems not justified. This is all the more so, as there is no demonstrable actual adverse competitive impact that would require restoration.

- **Geographic scope.** Consistent with the Commission's general practice, the proposed commitments would apply across the EEA. Google has set out its proposal for the criteria that would determine implementation within the EEA in the proposed commitment language in Annex 2. Google considers that these criteria represent reasonable proxies for implementation within the EEA.
- **Effective date.** Google proposes as the effective date for its commitments three months after notification of the Commission's final commitment decision. This would enable a quick implementation of the proposed commitments and is consistent with the implementation periods provided in other cases.

V. CONCLUSIONS

72. While Google is confident that it does not infringe Article 102 TFEU, Google believes that both Google and the Commission can achieve more through cooperation and flexibility than lengthy legal proceedings. Google trusts that its proposed solution, as set out in this paper and specified in more detail in Annex 2 provides the basis for a resolution of the Commission's preliminary concerns.

⁴⁰ See Google's submission "White Paper – Innovation in Search, Version II" of March 2011, especially Section 5.