



A Brief Response to  
Commissioner Almunia's March 2014  
*Key Points* Position Paper

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June 12, 2014

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## Introduction

Foundem first came to the Commission in July 2009 as an innovative European technology start-up. Our groundbreaking service, built on patented programmable vertical search technology, had been suppressed by an illegitimate three-year exclusion from Google's search results—effectively an exclusion from the Internet. We presented the Commission with overwhelming evidence of Google's anti-competitive penalty practices, its woefully inadequate appeals procedures, and its rapidly expanding appetite for systematically force-feeding users its own, often inferior, specialised services.

We explained that Foundem—like the vast majority of online businesses—could not compete, let alone thrive, in any sector where Google grants its own services such insurmountable anti-competitive advantages. We suggested that Foundem was just the tip of a substantial and rapidly-growing iceberg and that many other companies suffering similar anti-competitive harm were presumably too afraid to speak out. Although a number of other companies have subsequently come forward with similar complaints, we know that many more are suffering in silence for fear of retaliation.

After the Commission reached the preliminary conclusion that Google's search manipulation practices were indeed an abuse of dominance, in May 2012 Commissioner Almunia offered Google “a matter of weeks” to propose remedies capable of addressing his competition concerns. More than two years later we are still waiting for Google to offer anything other than a substantial escalation of its abusive practices masquerading as concessions.

As we wrote to Commissioner Almunia at the start of the first Market Test in May 2013:

*“In the eleven months since the Commission offered Google the opportunity to volunteer remedies, we and other Complainants have had no opportunity to hear, comment on, or rebut any of the arguments that Google has made to the Commission. Several times during this period, we expressed concern about the asymmetry of this dialogue and its likely undesirable consequences. Given the inherent complexities of search and the unusual two-sided market in which it operates, negotiating and assessing appropriate remedies was always going to be challenging, especially with Google's vested interest in exaggerating, distorting, and exploiting these complexities. An opportunity to comment on Google's proposals is not a substitute for an opportunity to challenge the many false assumptions that must underpin them.”*

Regrettably, despite our numerous attempts to hear and respond to the Commission's thinking over the past two years, Commissioner Almunia's leaked March 12 *Key Points* position paper was the first indication that any of the Complainants had of the Commission's internal analysis of Google's remedy proposals. Not only does this paper reveal fundamental errors in the Commission's understanding of the economics and mechanics of the online search market, it also reveals that, after two years of talking almost exclusively to Google on this topic, the Commission may have lost sight of the problem it was trying to solve in the first place. This has never been about the ability of vertical search services to compete amongst themselves. It has always been about the inability of vertical search (and other) services to compete against Google's own growing stable of often inferior services in the face of Google's anti-competitive and immensely powerful search manipulation practices.

Notably, the Commission's paper makes no attempt to explain why Google's proposals would do anything other than make it impossible for Google's vertical search competitors to compete against Google's services, which would now—as a direct result of these proposals—take sole possession of the free, relevance-based traffic that has always been the lifeblood of the Internet. Google's competitors will still have to contend with the systematic self-preferencing and anti-competitive demotions and exclusions that Google was instructed to remedy, and they will now also have to contend with a devastating new form of abuse that will force them to bid away the majority of their profits to Google.

As the company whose November 2009 Competition Complaint first brought Google's search manipulation practices to the Commission's attention, we are well placed to address and clarify some of the most misleading assertions in Commissioner Almunia's March 12 *Key Points* position paper.

## A Brief Rebuttal to Commissioner Almunia's Assertions

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**Assertion 1:** *"Imposing strict 'equal treatment'...could mean imposing Google, in certain cases, not to display its own services on its own page."*

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No one is proposing that Google's own services be prohibited from appearing in its own search results. The non-discrimination/even-handed principle (also known as "equal treatment") dictates that Google's own services have as much right to equal treatment as anyone else's.

Moreover, the Commission's assertion ignores the fundamental difference between prohibiting Google from systematically placing its own services **at the top** of its search results and prohibiting them from **appearing at all**. The first page of Google's search results is just a window into what is typically a much longer list of relevant or potentially relevant results. It is misleading to focus exclusively on the first ten-or-so results that appear on the first page.

We suggest that Google would not argue in public that its own services should appear even when they are irrelevant to a user's query, or that they should be placed above other services that its own algorithms consider more relevant.

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**Assertion 2:** *"Imposing strict 'equal treatment'...could also mean returning to the old world of Google displaying only ten undifferentiated search results - the so called 'ten blue links'."*

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This is a point we have addressed several times over the past few years. For example, in our November 2013 [Analysis of Google's Second Proposals](#)<sup>1</sup>:

*"Google likes to suggest that a call for remedies based on the even-handed principle is a call for an end to innovation and a return to the "ten blue links" of old. But the reverse is true. As we pointed out above, allowing Google to force-feed users its own services, irrespective of their merits or relevance, removes Google's incentive to innovate; it does not encourage it. What the even-handed principle would look like in practice would be entirely up to Google. Google would be left free to pursue any and all developments that improve the quality of its search results or enrich or enhance their display. The only difference would be that, under a non-discrimination remedy, the*

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<sup>1</sup> [http://www.foundem.co.uk/Foundem\\_Comments\\_Google\\_Revised\\_Proposals.pdf](http://www.foundem.co.uk/Foundem_Comments_Google_Revised_Proposals.pdf)

search results afforded these enhancements would be based on their relevance to the users' query rather than Google's financial interests."

And from our June 2012 [Remedy Proposals Paper](#)<sup>2</sup>:

"If Google sees a benefit in providing enhanced, context-specific result-formats that include 'rich snippets' like thumbnail images, star-ratings, price-ranges and so on, then these enticing display formats need to be made available to all relevant services, not just Google's. Much of this would be relatively straightforward to implement through the use of mark-up-based meta-tags, similar to those that Google and others have already adopted."

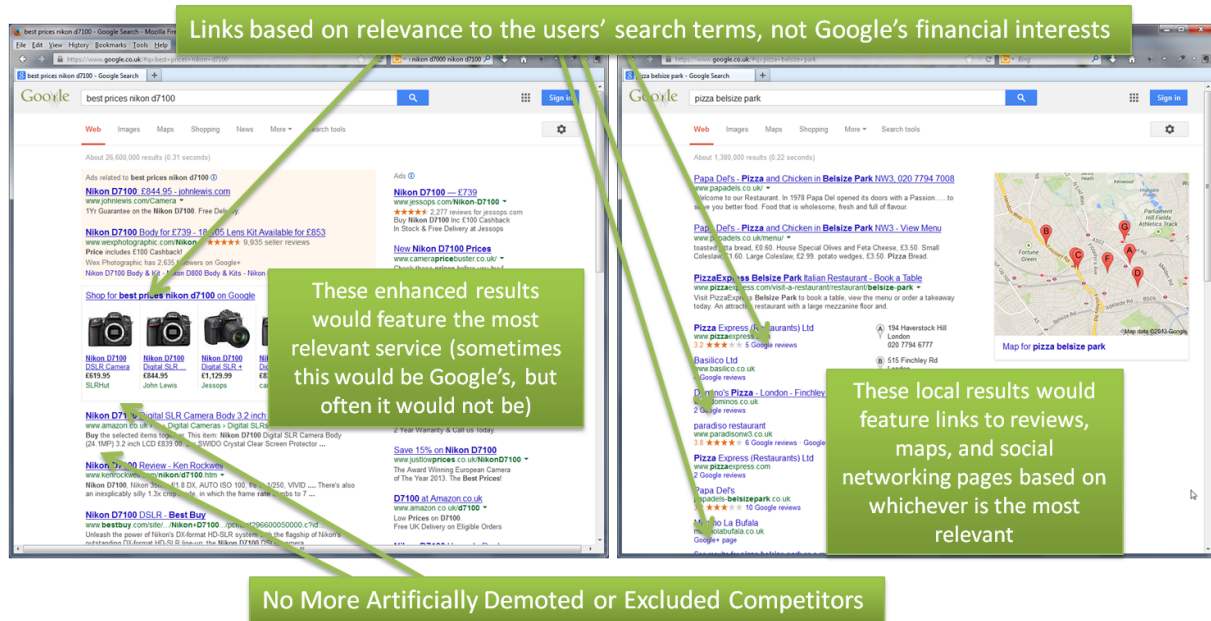


Figure 1: What Google's search results might look like under a non-discrimination/even-handed-principle based remedy

**Assertion 3:** "The auction will favour small and innovative companies by allowing them to focus their participation on those specific keywords where their offer is best positioned."

It is wrong to suggest that innovative new entrants will be "favoured" by the ability to "focus" their bids on the "specific keywords where their offer is best positioned". Keyword-based advertising campaigns often cover tens of thousands of keywords, and large incumbents cover small niche areas as a matter of course. Moreover, Paid Rival Links will only be triggered and displayed in cases where Google's own services already cover the products and keywords being searched for. Suggesting that the auction mechanism will favour small innovative companies is like suggesting that a small independent retailer can easily compete against a national supermarket chain by choosing to focus on something specific, like lemons; as if the efficiencies of scale and vastly superior buying power of a national supermarket chain can be offset by a single-minded focus on lemons.

But, crucially, even if the Commission's assertion was correct (which it is not), it entirely misses the point. The services that this auction mechanism will actually favour are, of course, Google's, which

<sup>2</sup> [http://www.foundem.co.uk/Foundem\\_Remedy\\_Proposals.pdf](http://www.foundem.co.uk/Foundem_Remedy_Proposals.pdf)

will now be granted sole access to the highly profitable, relevance-based free traffic that is and always has been the essential lifeblood of the Internet.

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**Assertion 4:** *"The winners of the auction will not only be determined by their bids but also by the attractiveness of their offer to users ("predicted click through rate", PCTR). The combination of these two parameters (bid and PCTR) will ensure that high quality rivals will be displayed."*

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As we have explained previously, the combination of bid and PCTR will only ensure that the rival links likely to generate the most revenue for Google will be displayed. For example, in our November 2013 *Analysis of Google's Second Proposals*:

*"Paid Rival Links are a significant and immensely damaging departure from relevance- or merit-based organic search results.*

*Under Google's proposals, the selection and ranking of Paid Rival Links would be based on the keywords that advertisers choose to bid on, the amount advertisers are willing to pay, and the predicted efficacy of the related ad text.*

*... As Google explains, Paid Rival Links are ranked according to the following simple formula:*

*Bid multiplied by Predicted Click-Through-Rate (PCTR)*

*This formula tells Google how much money it can expect to make by displaying each particular ad. **By Google's own admission, it selects the three most likely to earn Google the most money. Not the three most relevant and not the three highest quality."***

In the words of Google's own Chief Economist, Hal Varian (emphasis added)<sup>3</sup>:

*"The expected revenue received by the search engine is the price per click times the expected number of clicks. In general, the search engine would like to sell the most prominent positions—those most likely to receive clicks—to those ads that have the highest expected revenue.*

***To accomplish this, the ads are ranked by bid times expected clickthrough rates, and those ads with the highest expected revenue are shown in the most prominent positions."***

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**Assertion 5:** *"There needs to be an objective selection mechanism which ensures that users will see the best service."*

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The proposed auction mechanism would not fulfil this requirement. Instead, it would directly harm consumers.

From our March 2014 [letter](#)<sup>4</sup> to Commissioner Almunia:

*"If Google's proposals were adopted, consumers would not only be harmed by the ensuing lack of competition and consumer choice, they would also be directly and immediately harmed by the transition from relevance-based ranking to auction-based pay-for-placement. In what might be the mother of all unintended consequences, this transition would all but eradicate the considerable value that vertical search services provide to consumers. Services that direct users to the merchants with the best prices or products cannot compete in an auction against rivals that direct users to the merchants that pay them the most. Not surprisingly, studies have already shown that*

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<sup>3</sup> <http://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.99.2.430>

<sup>4</sup> <http://www.searchneutrality.org/google/letter-to-almunia-and-college-of-commissioners>

*the recent transition of Google's own product price comparison service from relevance-based-placement to pay-for-placement has led directly to European consumers paying significantly higher prices for products purchased through this service<sup>5</sup>."*

In other words, far from being "an objective selection mechanism which ensures that users will see the best service", the proposed auction system would inevitably trigger a race to the bottom. In stark contrast to free, relevance-based traffic, which rewards value and incentivises innovation, the imperative to maximise the profit derived from every click would inevitably spawn a new breed of low-quality, low-margin, pseudo-vertical-search services that would simply direct users to the highest paying merchants, rather than to those with the best offers for consumers. As a result, consumers will end up paying significantly higher prices, and bona-fide vertical search services will be driven from the market.

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***Assertion 6: "Only specialised search services are eligible to bid in the auction - merchants are not. This will reduce the pool of bidders and lower the price that has to be paid."***

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It is difficult to understand what the Commission means when it suggests that the auction will "lower the price that has to be paid." Clearly, allowing Google to transition its competitors' free (relevance-based) traffic into paid (pay-for-placement) traffic under the guise of a concession cannot be said to be *lowering* the price. On the contrary, it is *raising* its competitors' prices from what is currently zero (for organic listings), to a level that will consume the majority of their anticipated profits.

Moreover, reducing the pool of bidders does not lower prices in an auction that is substantially over-subscribed, so the premise underpinning Commissioner Almunia's assertion is flawed. Unless, of course, the Commissioner is assuming that the pool of bidders (i.e., the number of surviving competing vertical search services) will not exceed the number of available paid rival slots (i.e., three).

Even if we assume that the Commission is only suggesting that Paid Rival Link prices would be lower than their corresponding AdWords prices, then not only would this be a modest and ultimately inconsequential claim, it would also be unfounded. Any reduction in pricing pressure stemming from the smaller pool of bidders is likely to be more than counteracted by the increase in pricing pressure stemming from the smaller number of available ad slots (just three Paid Rival Link slots compared to the twelve or so for AdWords).

Even in the UK's financial price comparison market, which—because it is regulated by the *Financial Conduct Authority*—has a strictly limited number of bidders vying for each ad slot, the harsh economic realities of Google's auction system (for everyone but Google) hold true:

*"MoneySupermarket hire the brightest and best digital marketers who spend in the region of £40M a year with Google. Every day, the MoneySupermarket team bid on more than 8 million different terms through complex and sophisticated bid management systems. As such, every day we adjust and flex our spend based on efficiency and profitability. **Paid search is a difficult***

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<sup>5</sup> <http://www.ft.com/cms/s/2/a004c830-552d-11e3-a321-00144feabdc0.html#axzz2vP0Hlhfg>



***marketing tool for businesses to make profitable because of its auction-based methodology; it contributes very little to our overall profitability.”***

MoneySupermarket CEO Peter Plumb, *Insurance Times*<sup>6</sup>, 1 February 2013 [emphasis added]

Finally, once again, the Commission seems to be ignoring the crucial point that, under these proposals, Google’s own vertical search services would now be the only services not bidding away the majority of their profits. It is difficult to understand how Commissioner Almunia can believe that this could result in anything other than a substantial escalation of Google’s already insurmountable anti-competitive advantage.

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**Assertion 7: “The auction will not create an additional revenue stream for Google”**

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From Commissioner Almunia’s speech to the International Competition Law Forum, 15 May 2014:

*“As you can see, the system that would emerge from the concessions would not create any additional earnings for Google. Nobody can say that it does without ignoring what is really on the table.”*

Despite Commissioner Almunia’s increasingly emphatic claims to the contrary, the adoption of Google’s proposals most certainly would create a substantial new revenue stream for Google—one that would come directly at the expense of Google’s competitors and whose value would asymptotically approach the total available profits in any vertical and territory where Paid Rival Links are deployed.

If Paid Rival Links did anything to end or mitigate the abusive practices Google was instructed to remedy, the question of whether or not they would generate additional revenue for Google would be largely irrelevant. But, because this new revenue would come at the direct expense of the competitors the Commission is duty bound to protect, to admit to the substantial new revenue is to admit to the substantial additional harm that Google’s proposals would inflict on these competitors.

The only explanation the Commission has ever offered for its assertion that Paid Rival Links will not generate additional revenue for Google is that, as of the third iteration of Google’s proposals, Paid Rival Links appear to be carved out of space that is already monetised. To believe that Paid Rival Links would be effective<sup>7</sup> and would not create any additional earnings for Google, the Commission must believe that any clicks on these links would come at the expense of the product-specific merchant advertisements within the same box. But this is a flawed assumption that fails to take into account that for vertical-search-related queries vertical search services will nearly always be significantly more relevant than individual merchant offers. As such, the majority of clicks on these prominent and visually enticing Paid Rival Links will inevitably come at the expense of free, natural, relevance-based vertical-search-related search results.

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<sup>6</sup> <http://www.insurancetimes.co.uk/moneysupermarket-boss-on-the-impact-of-google/1400819.article>

<sup>7</sup> Note that if nobody clicks on Paid Rival Links, or if clicks only come at the expense of existing AdWords advertisements, then the Commission cannot believe that Paid Rival Links would be effective.



## Key Points

### 1. Whether Rival Links are Free or Paid is not a Detail, it is Transformative

Because Google, not rivals, would be the main beneficiary of any profits derived from Paid Rival Links, any improvements to their “visibility” and anticipated “click through rates” are essentially irrelevant.

From Our November 2013 *Analysis of Google’s Second Proposals*:

*“To be clear: even if the ‘visibility’ of these Paid Rival Links was increased to a point where they occupied 90% of the page and attracted 90% of all ‘clicks’, they would still be considerably more harmful than helpful. Google—not rivals—would be the main beneficiary of any profit derived from these links. As such, it would often be in Google’s interest to make these links highly visible. Indeed, there will inevitably be cases where it would prove more profitable for Google to send traffic to rivals than to its own services.”*

All of this is even more remarkable when you consider how many of the Commission's assumptions hinge on the fact that Google employs a pay-for-placement model for many of its own vertical search offerings. It is as though the Commission has forgotten that Google only introduced this fundamental change several months after the commencement of settlement negotiations, and only just before submitting its first set of remedy proposals (settlement negotiations commenced in May 2012, and Google introduced pay-for-placement in the U.S. and Europe in October 2012 and February 2013 respectively). It is also notable that, prior to introducing this pay-for-placement model for its own vertical search services, Google had spent more than a decade railing against the many obvious shortcomings of such models for consumers.

### 2. Prohibiting Illegal Practices is the Norm under EU Antitrust Law

It is important to note that no one is asking the Commission to impose a business model on Google or to dictate the layout of Google’s pages. But not asking the Commission to **impose** a business model or layout is entirely different from insisting that the Commission **not allow** Google to introduce a new and immensely anti-competitive practice under the guise of a remedy.

Moreover, insisting that the Commission prohibit rather than escalate the illegal Google practices the Commission has identified is most certainly not beyond the limits of EU antitrust law. According to the Commission's own statements, its role in the context of a case pursuant to Article 102 TFEU is to ensure that efficient competitors are not driven out of the market by the abusive conduct of a dominant company. But, by allowing Google to continue its illegal preferencing and penalty practices unabated, the Commission is guaranteeing that Google will continue to do exactly that. Worse still, far from mitigating or diluting this abuse, the proposed Paid Rival Links introduce a further abuse that would substantially accelerate the rate at which competitors are driven out of the market. Not only would Google continue to profit from the traffic it illegally diverts from its competitors, but it would now also profit from any traffic it sends to them. If the Commission adopts Google’s proposals, it would therefore not only be failing to fulfil its role, it would be unwittingly aiding and abetting the abusive conduct.

### 3. The Straightforward Alternative: Equal Treatment

Over the last two years, a strong consensus has emerged about the remedies that would be required to end Google's abusive search manipulation practices. The straightforward, principle-based, alternative to Google's proposals is eminently reasonable and would immediately restore the unbiased level-playing field that search engine users expect and that competition and innovation require.

As eleven Complainants wrote in an [open letter](#)<sup>8</sup> to Commissioner Almunia in March 2013:

*"There are two equally important aspects to Google's search manipulation practices: the systematic promotion of Google's own services, and the systematic demotion or exclusion of its competitors' services....Google's strict adherence to the following overarching principle would ensure an end to both aspects of Google's search manipulation practices:*

***Google must be even-handed. It must hold all services, including its own, to exactly the same standards, using exactly the same crawling, indexing, ranking, display, and penalty algorithms."***

This even-handed principle (also known as non-discrimination, equal treatment, or search neutrality) has now been endorsed by all or the vast majority of Complainants, by the European consumer organisation, [BEUC](#)<sup>9</sup>, and by an unprecedented [coalition of European Publishers](#)<sup>10</sup>.

Remedies that implement this even-handed principle would not only directly address the abusive search manipulation practices the Commission has identified, they would also be straightforward to define, implement, and monitor (for example, see [here](#)<sup>11</sup> and [here](#)<sup>12</sup>). Moreover, as we point out above, none of the Commission's stated reasons for failing to pursue a non-discrimination remedy stand up to scrutiny.

### Conclusion

To understand Google's proposals is to understand that their adoption would have catastrophic consequences for businesses and consumers. The following two questions (which regrettably the Commission did not put to market participants in either market test) could have unravelled much of the confusion and obfuscation around this important point:

Q1: What would be the impact on your business if all or the majority of your free, relevance-based, natural search traffic from Google was transitioned into AdWords-style, auction-based, paid traffic?

- ☐ Very beneficial
- ☐ Moderately beneficial
- ☐ Neither beneficial nor harmful
- ☐ Moderately harmful
- ☒ Very harmful

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<sup>8</sup> <http://www.searchneutrality.org/google/open-letter-to-almunia>

<sup>9</sup> <http://docshare.beuc.org/Common/GetFile.asp?ID=44729&mfd=off&LogonName=Guesten>

<sup>10</sup> <http://tinyurl.com/ojltzlx>

<sup>11</sup> [http://www.foundem.co.uk/Enabling\\_an\\_Anti-Demotion\\_Remedies.pdf](http://www.foundem.co.uk/Enabling_an_Anti-Demotion_Remedies.pdf)

<sup>12</sup> [http://www.foundem.co.uk/Foundem\\_Remedies\\_Proposals.pdf](http://www.foundem.co.uk/Foundem_Remedies_Proposals.pdf)

Q2: To what extent would this transition affect your ability to compete against a Google-owned rival that was exempted from this transition and continued to receive all or the majority of its traffic for free (from very favourable placement in Google's natural search results)?

- ☐ It would greatly improve our ability to compete
- ☐ It would moderately improve our ability to compete
- ☐ It would have no impact on our ability to compete
- ☐ It would be difficult to compete
- ☐ It would be very difficult or impossible to compete

For Commissioner Almunia to accept Google's proposals, he would need to be able to explain how he expects businesses to answer anything other than "Very Harmful" and "Impossible" to these two questions. So far, nothing the Commissioner has said or written has made any attempt to do this.

It should also be noted that the vast majority of businesses that would be devastated by the adoption of Google's proposals are currently unaware of this impending threat. This is not surprising; who could have anticipated that the Commission might allow a dominant company to settle a competition case and avoid prosecution by substantially increasing the anti-competitive abuse it had been instructed to remedy?