

**Competition and Markets Authority**

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By email only

**Our Ref:** TC02271  
10 February 2025

Dear Sirs,

**Re: Foxglove submission on the CMA's SMS Investigation into Google's general search and search advertising services**

We are writing on behalf of Foxglove, a not-for-profit seeking to make technology fair and for the benefit of everyone. We are writing further to the CMA's Google Search investigation ("**Investigation**")<sup>1</sup> and its Invitation to Comment<sup>2</sup>.

We focus our comment on the topic of Google's artificial intelligence (AI) product, AI Overviews. In particular, we consider that the CMA needs to take swift action and demonstrate its effectiveness with imposing remedies now, which support competition and growth by addressing Google's restrictions imposed in its dominant search engine on third parties' ability to operate without constraint. We highlight the following two issues:

**1. Lack of publisher choice to opt out of AI Overviews**

We welcome the CMA's inclusion of Google's AI Overviews as one of the search features of Google's search engine results page.<sup>3</sup> To be clear, for the purposes of establishing SMS status, Google's AI Overviews is in a separate product market – Large Language Model (LLM) answer machines that provide responses to specific, often non-commercial search queries (n.b. Google allows LLMs to perform commercial search queries). They differ from general search in that general search provides an index of the web, enabling the use of the web for general searching of websites on the Open Web. This is supported by Judge Mehta's Opinion in the DOJ Google Search Case.<sup>4</sup>

Google remains dominant in search and AI is not a substitute,<sup>5</sup> as is stated with approval by the CMA:

“The emergence of AI foundation models may affect Google's conduct in carrying out general search services, and foreseeably the sector more generally. However, the United States District

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<sup>1</sup> <https://www.gov.uk/cma-cases/sms-investigation-into-googles-general-search-and-search-advertising-services>

<sup>2</sup> [https://assets.publishing.service.gov.uk/media/678524823ef063b15dca0f04/Invitation\\_to\\_Comment.pdf](https://assets.publishing.service.gov.uk/media/678524823ef063b15dca0f04/Invitation_to_Comment.pdf)

<sup>3</sup> Invitation to Comment, para 20

<sup>4</sup> [https://storage.courtlistener.com/recap/gov.uscourts.dcd.223205/gov.uscourts.dcd.223205.1033.0\\_3.pdf](https://storage.courtlistener.com/recap/gov.uscourts.dcd.223205/gov.uscourts.dcd.223205.1033.0_3.pdf)

<sup>5</sup> This is reinforced by Google's increased income levels that remain unaffected by any competitive pressure – up by 15% to \$88 billion in the last reported quarter of 2024. We agree that Google's position over search advertising has increased since 2020. DAMS also found that Google accounted for more than 90% of UK search advertising revenues in 2019, an order of magnitude greater than its next closest rival, Bing.29 Google's UK search advertising revenues may have continued to increase since DAMS given Ofcom's finding that in 2022 a 'large majority' of the UK's £13.1 billion search advertising revenue was generated by Google.

Court found that: ‘Currently, AI cannot replace the fundamental building blocks of search, including web crawling, indexing, and ranking ... AI may someday fundamentally alter search, but not anytime soon’.<sup>6</sup>

However, Google uses contents and data from its rivals’ publisher inventory (websites) crawled through its general search engine for the benefit of its AI Overviews. In turn, Google benefits from such data from its increased digital advertising revenue. Through Google’s dominance in search and access to its huge data trove, it steals data from publishers. Such issues should be included at the heart of the CMA’s investigation.

This is like the position that can arise in other network industries – for example with relation to data available between competing telecoms operators at wholesale level, where access to that data can give rise to competitive advantage and market distortion. However, it is also significantly different because the data that is important for advertising is derived from interactions with end users and Google’s information services agreement and arrangement for the exclusive access to data from Apple device users need to be within the scope of the investigation. In particular, the discriminatory nature of Google’s access to Apple user data and to which third parties do not have access to.

As the CMA may be aware, Google does not provide publishers with the ability to opt out of being crawled by Google for AI Overviews, without being removed from the Google search index altogether. Content curators, including the press, are already suffering harm, at the expense of Google’s conduct. Therefore, a permanent injunction is needed urgently, providing an opt out for press outlets to stop Google trawling their data for its AI Overview functions, while remaining in the search index.

## **2. Google’s bundling of its AI Overviews functionality into its Google Search Engine Results Page**

We welcome the CMA’s press release’s clarification that the investigation will include:

**“whether Google is able to shape the development of new AI services and interfaces, including ‘answer engines’, in ways which limit the competitive constraint they impose on Google Search.” (emphasis added)** (paragraph 39(a), Invitation to Comment)

We see the above issue as including the anti-competitive self-preference, discrimination and bundling of Google’s own AI Overviews into its search results pages. In addition to the copyright infringement of its website publishers, Google promotes its own AI product at the top of the general search engine results page in the same way that it illegally promoted and displayed its own shopping results over those of rivals in *Google Search (Shopping)*<sup>7</sup> which was decided by the Commission in June 2017 and finally determined by the CJEU in September 2024.

As the CMA already notes in para 39(b) of its Invitation to Comment, it seeks to prevent Google’s leveraging of market power. The CMA should ensure to investigate AI capabilities that Google is developing as well as partnering with or investing in (see for example, the recent Amazon/Anthropic and Microsoft/Inflection CMA cases). In addition, Google’s capability in the tech layer of AI capabilities (such as data centres and chips) should also be considered by the CMA.

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<sup>6</sup> CMA Investigation Notice, para 17.e.

<sup>7</sup> Case AT.39740 available at [https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39740/39740\\_14996\\_3.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf)

To ensure that UK businesses and consumers do not endure anticompetitive harm, this practice can be enjoined now. Interim measures giving effect to injunctive relief, ordering the suspension of the activity pending the outcome of the CMA investigation, would be the most effective action in the short term. Google should be ordered to stop discriminating in the presentation and display of AI-generated answers and stop bundling its own AI overviews into its general search results.

We trust the above is useful to the CMA and remain fully available should the CMA have any questions.

Yours faithfully,

**Preiskel &Co LLP**