

Strategic Market Status Investigation into Google’s General Search and Search Advertising services

Response by Lovehoney Group to the CMA’s Invitation to Comment dated January 14, 2025

January 31, 2025

NON-CONFIDENTIAL VERSION

Lovehoney Group, founded in 2002, is an international manufacturer, distributor, and retailer of sexual wellness products. It is co-headquartered in Bath with over 250 employees. In 2016 and 2021 Lovehoney Group was awarded the King’s Award for Enterprise (formerly Queen’s Award for Enterprise). The business model is still heavily reliant on digital markets for product sales.

Lovehoney Group’s operating entity in the UK is Lovehoney Limited.

<p>Box 3, Q2: “Do you have submissions or evidence relevant to the avenues of investigations set out in paragraphs 26-28”</p>
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We agree with the proposed scope of the CMA’s investigation and, in particular, with paragraph 27 (p. 10 ItC) lit. (f), “*Whether Google can influence how other firms conduct themselves in relation to general search and search advertising.*”

Google has significant influence on our business conduct in relation to general search and search advertising. Most notably, in September 2021, Google has introduced “SafeSearch”, a content moderation tool, which is turned on by default in Europe when a user is below 18 or of “unknown age”. The result is that such users cannot discover our website via Google Search, which is our primary gateway to consumers and drives the largest portion of our revenue.

Our products are sexual wellness products (“**SWP**”) which are legal and not age-restricted; SWP images shown on our websites do not qualify as illegal content or content that is harmful to children pursuant to the Online Safety Act 2023. Yet, Google has decided, or at least knowingly tolerates, that online SWP retailers cannot be found by consumers. This is despite the fact that there is no legal or regulatory basis for this. **Our business has since shrunk dramatically.**

Due to SafeSearch, we are forced to find alternative ways to be discoverable for end-users. Google’s dominance of the SafeSearch market is, therefore, detrimentally

impacting on our access to consumers – and therefore revenue – and forcing us to use resources to find new strategies.

Box 3, Q2: “Are there any other issues we should take into account, and if so why?”

Inherent in how Google’s dominance in search manifests for online services and Google’s ads customers is its approach to content moderation. Due to its ~90% market share of search, Google’s policies and how it applies them can determine what information and services consumers are able to access. As referenced above, examples of over-moderation and/or inequitable application of these policies can determine B2C online retailers’ success or failure.

Also, any search algorithm influences and defines the organic search results discovered by end-users. This, on the one hand, inevitably defines and limits end-users’ choices and influences their decisions and, on the other, decreases or increases the sphere of influence of online content providers such as retailers, entrepreneurs, NGOs, political parties, artists and the press. While a certain degree of prioritization or bias is inherent to search algorithms, there is also a potential risk of discrimination, manipulation and censorship. Such risk is particularly obvious in case of an overzealous, moralising or arbitrary content moderation policy (see details below).

We, therefore, propose to extend the scope of CMA’s investigation to the question

***whether Google can influence the behaviour,
choices and views of end-users.***

Box 4, Q4: “Do you have views on whether the issues outlined in this section are the right ones for the CMA to focus on, or whether there are others we should consider?”

A. Search marketing

We are concerned about the CPC (**cost per click**) **inflation** we have seen in recent years. Our brand keywords (e.g "lovehoney") have increased in cost by over 100% in some regions. Given that our brand position has remained largely stable, and we have seen no large increases in competitive bidding on our brand terms this inflation has no obvious cause other than Google simply increasing the costs of their auctions. We found that by switching off our smart bidding strategy (target ROAS – Return on Advertising Spend) and switching to a manual optimisation we were able to reduce CPCs immediately with no impact on our visibility or impression share. This suggests that Google's own tools are artificially increasing costs in the auction and is seriously impacting our business costs.

We have also experienced a **decrease in data visibility** from Google as well, first with the move from text ads to ETA (expanded text ads) and now RSAs (responsive search ads), where the advertiser is required to give Google ad copy but has no visibility of how and when these ads are shown by Google, and which aspects of an ad are driving engagements. With the introduction of PMAX (performance max) campaigns we have seen a further decrease in our visibility, with advertisers unable to view or control which channels (search, shopping, display, youtube etc) their budget is spent on. The impact of this is a forcing of the advertiser to "trust" in Google's bidding technology and a huge degree of autonomy is removed from the advertiser.

B. Discriminatory, manipulative & incomplete search results

We believe that category (c) (paragraph 39, p. 14 ItC, "*Protecting users against exploitative conduct.*") is phrased too narrowly and should also cover the risk that organic search results could be discriminatory, manipulative and/or incomplete:

Since September 2021, Google SafeSearch has discriminated against specialised retailers of sexual wellness products (SWP), despite the fact that these companies have been at the forefront of responsible marketing and development of these products, and that these products are legal and not age-restricted. For illustration purposes, we attach as **Annex 1** a presentation providing for screenshots of Google search results with SafeSearch turned on and off (the "**Presentation**").

With the introduction of SafeSearch, we have seen material impact on sales and revenue. Google has limited our discoverability (see p. 2 of the Presentation) resulting in a drop in traffic (impressions and clicks) and a loss of revenue and decreasing our topline.

Taken together, this is having a substantial impact on our ability to operate successfully and grow in the UK. One of our most important B2C marketing channel has essentially been blocking us from one day to the other. This also caused an internal reorganization, and we had to lay off approx. 100 employees in 2022.

This not only creates a disparity between how SWPs are treated in the online and offline worlds. Most concerningly, and most pertinently for the CMA, Google is applying these policies inequitably (see p. 3 et seqq. of the Presentation). While our websites are restricted by SafeSearch, similar products and even the *same* products are discoverable on websites of mainstream UK and non-UK retailers, including Tesco, Boots, Temu, Shein and Amazon. When consumers actively search for our sites or our products, those retailers which are not impacted by SafeSearch are instead returned in search results.

Through allowing some retailers to be discoverable while limiting the discoverability of others, as a result of applying its policies inequitably, Google is discriminating

against dedicated SWP retailers, restricting end-users choice, distorting the SWP market and creating harm to end-users. This impact is magnified by Google's dominant position in the UK search market.

Box 4, Q5: “Do you have views on whether the potential interventions are likely to be effective, proportionate and have benefits for users, including consumers and business search users? Are there other measures the CMA should consider that would be more effective or proportionate, or that would deliver greater benefits for users?”

We welcome the CMA's intention to consider interventions that seek to prevent undue discrimination in search.

We have consistently tried to engage with Google on the difficulties we face due to its implementation of SafeSearch. Despite the inconsistent application of its own content policies, Google has been unwilling to countenance taking measures to rectify this to ensure that SWP retailers are treated equitably. Instead, Google has used our engagement to either request information and statistics from Lovehoney (despite then never taking action and coming up with additional requests when information is delivered) or pointing us in the direction of its official support site ([Support Site](#)) – which, however, is a place for users to report inappropriate content; we reported the matter nevertheless but did only receive a standard response (see both, our report and Google's response in **Annex 2**).

Google has near-unlimited resources to delay the proceeding, increase the claimant's costs and utilize all appeal stages. This threshold, and the burdens it implies, are high for small and medium-sized companies.

In view of these challenges, which many other market players are facing, we believe that **interventions have to be powerful and prompt and that non-compliance must lead to rigorous penalties.**

A. Content moderation

We propose the following interventions to the CMA addressing the risk that Google's content moderation policy is discriminatory to content providers and/or withholding content from end-users:

1. Content moderation policy

Google would be required to prepare a content moderation policy (“**Content Moderation Policy**”) in a detailed and comprehensive manner, including the following:

- Restricted content categories and rationale for restriction (e.g. compliance with laws; own considerations)

- Description of how content is reviewed and moderated (e.g. reliance on AI, algorithms and/or human reviewers) along with inherent weaknesses and mitigation strategies
- Overview on content moderation actions, including statistics on removals and appeals

Due to Google's position as a gatekeeper for online communication & transactions and its responsibility towards online users deriving therefrom, **Google's scope of discretion** to moderate content would have to be significantly **limited**. For instance, Google would not have any right to limit content for moral, artistic or political reasons unless (and only to the extent) this is indicated by law (e.g. age-restricted content) or harmful to the society (e.g. demagogic content, "fake news").

The Content Moderation Policy would need to be updated on a regular basis (e.g. quarterly and whenever there are significant changes).

2. **CMA validation**

CMA would review, and sign off on, the Content Moderation Policy and its updates to ensure **fairness, consistency and a minimally invasive approach**. Google's actual content moderation would then be judged by this Content Moderation Policy. To that goal, the Content Moderation Policy cannot be high level nor fragmentary. It would have to cover all content moderation areas comprehensively, distinguish prohibited and permitted content and address borderline cases.

3. **Transparency for online users**

Google would have to **publish** its Content Moderation Policy, and any of its updates, and make it easily accessible by online users.

4. **User complaint & appeal process**

Users affected by Google's content moderation would have the opportunity to **complain to Google** if they think that Google's behaviour is unlawful or the Content Moderation Policy is not properly applied to or not in line with the law. Complaints would be reviewed by human moderators. Google would be required to reply within a short time, providing its reasoning.

In addition, there would have to be an **independent review body** outside of court to review Google's content moderation decisions appealed by users. This could be a CMA/Ofcom-supervised arbitration body. Users would **appeal** to this body if the Google-led process fails to resolve the dispute. To avoid careless use or misuse, users would be required to pay a certain fee upfront. This fee would be reimbursed in case the appeal is granted and otherwise retained.

Such principles can be seen in the **Amazon Patent Evaluation Express** (APEX) allowing patent owners to report a potential patent infringement by a product offered on Amazon which is then evaluated by a neutral evaluator. Both, the patent owner and the product seller are required to pay a fee of USD 4,000 for the briefing schedule to be set. The fee is refunded to the prevailing party. Please see **Annex 3** for details on APEX and **Annex 4** for a visualization of APEX and the user appeal process proposed above.

5. SafeSearch turned off for adult users identified by age assurance

Google SafeSearch is usually turned on by default. Adult users do, therefore, not get the search results they are looking for. Many of them might not be aware that their search runs through a filter or do not know how to switch it off.

Such a default setting is neither necessary nor proportional to the purpose of SafeSearch as there are age assurance methods (i.e. ways to determine whether a particular user is a minor) allowing for a more user-friendly approach.

For instance, Google stores credit card details of its users. In the UK, individuals must be 18 or over to obtain a credit card, and credit card issuers are obliged to verify the age of applicants before providing them with a credit card. Thus, whenever a Google user has stored their credit card details in their Google account, this is an indication the user is not a minor.

Google could also analyse the user behaviour/pattern, including the registration for, and use of, certain online services that are age-restricted or otherwise indicative for an adult user.

Ofcom has recently published an [Age Assurance and Children's Access](#) including kinds of age assurance that Ofcom deems highly effective ([Guidance on highly effective age assurance and other Part 5 duties](#)). Credit card checks and email-based age estimation are listed as examples for highly effective age assurance (see Sec. 4.16 and 4.17 of the Guidance).

6. Severe penalties for non-compliance

We are convinced that the interventions proposed above will not be sufficient standalone. Google's lack of cooperation or systematic non-compliances would have to have consequences in a way that Google cannot afford. Most efficient are **fin**es that the CMA would define in its discretion. They, however, have to be **significant** which they would if they lead Google's business decision to comply and which, in contrast, they would not if they could be absorbed by Google's business case or otherwise. It is also of utmost importance that fines are imposed on Google consistently and **consequently**.

B. Search marketing

To address the CPC inflation and lack of data visibility in search advertising Google would have to provide full transparency on (i) price formation and (ii) ad placement & performance:

1. Determination of the ad price

The CMA and bidders have to understand the determination of the ad price. It is particularly important to ensure that the price is a result of a fair & competitive bidding process without a reserve price or any “hidden costs” and without any participation of, or intervention or even manipulation by, Google.

2. Transparency through a database

Google would, therefore, create and maintain a database showing keywords, bidders, their bids and the awarded bid. Bidders would have database access to those keywords they bid on in order to validate and retrace the price at which the ad was awarded. The name of the bidders would not be anonymous to enable validation and to ensure and show that Google did not participate in the bidding.

The data base would also show to the awarded bidder how, when & where the ad was shown as well as consumer engagement and any other information necessary to evaluate the impact and value of the ad.

3. User complaint & appeal process

In case of any issues (e.g. missing information, wrong information), there has to be a complaint & appeal process (similar to above A.4.).

4. Spot checks

In addition, CMA would carry out regular spot checks to see how consistently Google adheres to fairness and transparency. For instance, CMA would ask persons shown as bidders for a certain keyword to confirm that they actually participated in a bid and did offer the price shown in Google’s database.

5. Severe penalties for non-compliance

Similar to the enforcement of the content moderation interventions, Google’s lack of cooperation, lack of transparency or lack of accuracy as well as any intervention in, or manipulation of, the bidding process must consequently lead to severe fines as specified by the CMA.

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ANNEXES

Annex 1 (Presentation on “Market distortion caused by Google SafeSearch”): See separate document

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Annex 2

Lovehoney report submitted on October 11, 2024 on Google’s support site, <https://support.google.com/legal/troubleshooter/1114905> (translated from German to English):

The Lovehoney Group sells sex toys worldwide (e.g., through websites such as lovehoney.net, lovehoney.co.uk, lovehoney.com, womanizer.com, we-vibe.com, arcwave.com, romp.toy, amorana.ch, espaceplaisir.fr, sexyavenue.com, etc.). This complaint is not directed at the URL of a third party but at Google itself. Specifically, it concerns the fact that Google SafeSearch filters out all products offered on the Lovehoney Group websites from Google search results, while simultaneously displaying results for websites of other product providers. With Google SafeSearch enabled, users can find the products they are searching for on other providers' websites, but not on those of the Lovehoney Group. In fact, users can even find the exact same products that are offered on Lovehoney Group websites but sold through other providers.

Even when specifically searching for Lovehoney Group products, users are not shown Lovehoney Group websites but instead are directed to websites of other providers.

Examples:

- *A search for "amazon sex toys" displays Amazon pages with sex toys but does not show any Lovehoney pages.*
- *A search for "boots adult sex toys" displays Boots pages with sex toys but does not show any Lovehoney pages.*
- *A search for "ebay sex toys" displays eBay pages with sex toys but does not show any Lovehoney pages.*
- *A search for "lovehoney sex toys" does NOT display Lovehoney pages, but it does show pages of other providers (e.g., Amazon and Boots).*
- *When clicking on "Images" in a search for "lovehoney sex toys," Lovehoney products sold on Lovehoney websites are displayed blurred, whereas the same products sold on other providers' websites (e.g., Superdrug, eBay, Tesco) are not blurred.*

This constitutes discrimination by Google through abuse of its dominant market position to the detriment of the Lovehoney Group, in violation of competition law principles applicable across Europe.

We therefore request that Google cease filtering out Lovehoney websites through Google SafeSearch.

This issue does not concern specific URLs but rather the settings or algorithm of Google SafeSearch. The problem has thus been described in general and by way of example above.

Google's e-mail response received on October 18, 2024 (translated from German to English):

Dear Sir/Madam,

Thank you for your enquiry.

The position of websites in Google search results is automatically determined based on various factors. These factors are explained in more detail at <https://www.google.com/search/howsearchworks/>. We do not manually assign keywords to websites or determine which ranking is appropriate.

However, if an attempt is made to manipulate a website's position in search results through spam, we reserve the right to manually assign a lower ranking to the website. Further information and guidance on improving the visibility of your website in Google search results can be found in our Webmaster Guidelines at <https://support.google.com/webmasters/answer/35769>. There, you will find important concepts for creating a Google-friendly website.

*Kind regards,
The Google Team*

For more information on content removal, please visit q.co/legal.

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Annex 3: Information about APEX

Content of a website of Amazon Sellers Central (available upon log-in):

Amazon Patent Evaluation Express

On this page

- Requirements for the program
- Apply for APEX
- What to expect from the evaluation
- Evaluator's fee
- Check the status of an APEX application
- Report a violation with my APEX ID

Learn how Amazon Patent Evaluation Express (APEX) can help you report a potential IP infringement.

The Amazon Patent Evaluation Express (APEX) program allows you to report listings that may violate your intellectual property. With APEX, US utility patent owners can report ASINs listed in our store that may infringe on their patents.

Note: Participation in APEX is voluntary and confidential.

Rights owners or agents who have concerns about potential intellectual property infringements of their utility patents can apply for the APEX program using the Report a Violation tool. APEX allows US utility patent owners to obtain a neutral evaluation of a patent infringement claim against ASINs listed in our store.

If you apply for APEX and your patent meets the program requirements, the reported sellers can opt in to the evaluation and defend their ASINs. If none of the sellers opt in, or if the neutral evaluator finds that the reported ASINs infringe on your patent, we'll remove the reported ASINs from our store.

You can also use the APEX ID associated with this decision in future US utility patent reports within the Report a Violation tool.

Requirements for the program

Currently, APEX is only available to those who have a registered US utility patent. APEX is not available outside of the United States. To participate in the program, your patent must meet the following requirements:

- It must be a registered US utility patent. Design patents, non-US patents, and expired patents are not eligible.
- There must not be a court order or International Trade Commission (ITC) order finding infringement of this patent.

If there is litigation pending on a patent that is subject to a proposed or pending evaluation, Amazon may decide not to initiate, or to suspend, an evaluation until the completion of that litigation.

The following categories of claims and patents may not be eligible for APEX:

- Extremely technical utility patents, such as patents that cover the operation of hardware components in consumer electronics
- Chemical composition claims
- Diagnostic claims
- Method claims where all steps of the method are not described on the product detail page
- Complex mechanical or electrical devices that require testing data or extensive breakdowns to demonstrate infringement

Apply for APEX

You can apply for the APEX program when you report a potential patent infringement.

Applications can include up to 20 ASINs. If more than 20 ASINs are submitted in a single application, Amazon may in its sole discretion reduce the patent owner's list to 20 ASINs.

To ensure that the evaluation is completed in a timely manner, we limit applications to one claim from one unexpired US utility patent.

If you have a registered US utility patent, you can apply for the APEX program by following these steps:

1. Sign in to Brand Registry, click **Protect**, and select **Report a violation**.
2. Search and select one or more ASINs to report for potential patent infringement.
3. Select **Potential violation of my utility patent** and complete the questions that follow.

Note: If you do not have a court order or an ITC order regarding the enforcement of this patent, select “None of these” to learn about applying for APEX.

4. Provide the additional details that are requested in the form and select **Submit**.

Once your application has been submitted, a success message will appear.

What to expect from the evaluation

When you submit an APEX application, we'll contact each reported seller and provide the opportunity to participate in the evaluation and defend their listings against the patent infringement claim. If the seller does not participate, we will automatically remove their listings from our store.

If a seller chooses to participate, we will engage a neutral evaluator, who is an attorney skilled in patent analysis. The evaluator will review the patent infringement claim against the third-party product listing in our store.

We'll use email to communicate with each party in the evaluation (for example, sellers, evaluators, rights owners and agents).

The initial APEX evaluation typically takes 4 to 6 weeks to complete. If a seller chooses to participate, the evaluation can take an additional 8 weeks to complete (12 to 14 weeks total). During this time, the reported listing will remain live.

The evaluator will determine the outcome of the evaluation and may decide that the patent does not cover a product listing because:

- It does not infringe;
- A court has found the patent invalid or unenforceable;
- The accused products (or physically identical products) were on sale more than one year before the earliest effective filing date of the patent.

Amazon will comply with the evaluator's decision pending any litigation or settlement between the patent owner and sellers, or other legal proceedings that may impact the patent. If the evaluator rules in favor of the patent owner, then the listing will be removed from our store.

Evaluator’s fee

The evaluator requires a \$4,000 deposit from all parties that are participating in the evaluation. Amazon does not handle the deposit and does not retain any portion of this fee.

The outcome of the evaluation determines the party that ultimately pays this fee.

	APEX evaluation outcome	Evaluator’s fee	Paid by	Description
1	No sellers opt in	No fee	Not applicable	If no sellers opt in to an evaluation, the patent owner will not be required to make a \$4,000 deposit.
2	Evaluated in the patent owner's favor	\$4,000	Seller	The evaluator’s \$4,000 fee will be paid by the seller if the evaluation is in the rights owner's favor and the rights owner, the winning participant, will receive their \$4,000 deposit back.
3	Evaluated in the seller's favor	\$4,000	Patent owner	The evaluator’s \$4,000 fee will be paid by the rights owner or agent if the evaluation is in the seller's favor and the seller, the winning participant, will receive their \$4,000 deposit back.

Check the status of an APEX application

Once you’ve submitted an APEX application, you can track its status by following the steps below:

1. Click **Monitor** and select **Submission history**.
2. Scroll down the page and click the **APEX application** filter under **Submission channel**.
3. Click **Open details** next to the complaint ID to view the status of your application.

APEX application status	Definition
Application received	The application has been submitted.

APEX ID granted	Either none of the reported sellers opted into the evaluation, or the evaluator determined that some or all of the reported listings infringe on the patent.
APEX ID not granted	Either the application did not meet the criteria for an APEX ID, or the evaluator determined that none of the reported listings infringe on the patent.
Application rejected	The patent is not eligible for APEX.

Report a violation with my APEX ID

If we grant your application an APEX ID, you can use this APEX ID when submitting a report of potential utility patent infringement in the future. This helps to ensure that we can remove infringing ASINs.

To report a violation using an APEX ID, follow these steps:

1. Sign in to Brand Registry, click **Protect**, and select **Report a violation**.
2. Indicate that you have an APEX ID.
3. Enter the APEX ID in the text field.

If you include an APEX ID with your report, we'll use the information from the neutral patent evaluation when reviewing the potential infringement.

[Source: [Amazon](#) available upon log-in.]

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Annex 4 (APEX & User Review Process Visualization): See separate document.

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