International Center for Law & Economics

# Comments of the International Center for Law & Economics

## CMA Google Search Conduct Requirements

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## Executive Summary

The International Center for Law & Economics (ICLE) welcomes the opportunity to submit these comments to the Competition and Markets Authority (CMA) regarding the proposed Conduct Requirements (CRs) for Google's general search services. ICLE is a nonprofit, nonpartisan research centre dedicated to promoting economically grounded public policy. Our work applies law & economics analysis to competition policy, including digital markets, artificial intelligence, and platform regulation. We seek to ensure that competition law rests on clear legal standards, established precedent, and robust empirical evidence, and that regulatory interventions protect consumers, rather than particular competitors.

The CMA's consultation arises at a pivotal moment for the UK digital economy. Google's designation with Strategic Market Status (SMS) triggers the Digital Markets, Competition and Consumers Act 2024's *ex ante* regulatory framework. While the DMCC Act aims to promote competition and innovation, the specific measures proposed here risk producing the opposite effect, if not carefully calibrated. Across the consultations, the central issue is proportionality: whether the proposed interventions address demonstrable consumer harm or instead impose costs on product quality, innovation, and user experience in order to alter competitive relationships among firms.

Our analysis draws on two established competition-law principles. First, the error-cost framework recognises that regulatory decisions under uncertainty can produce harmful false positives, particularly in dynamic markets where innovation is cumulative and path-dependent. Second, competition policy protects competition, rather than competitors. Conduct that disadvantages rivals—such as integrated search features, direct answers, or ranking differentiation—may nonetheless benefit users by reducing search costs and improving relevance. These principles are especially important in digital and AI-enabled markets characterised by rapid technological change, dispersed knowledge, and evolving consumer preferences.

We then evaluate the three proposed CRs.

**Publisher Conduct Requirement:** The proposed controls on the use of publisher content in generative-AI services risk distorting competition by imposing obligations on a single firm, while other AI developers remain subject only to generally applicable law. The measure also seeks to resolve disputes about the permissible use of copyrighted material—questions more appropriately addressed through intellectual-property law. In addition, the opt-out mechanism may degrade AI-generated search responses and fragment the user experience, while less distortive tools such as transparency and attribution could address many of the CMA's concerns.

**User Choice Conduct Requirement:** The proposal for recurring choice screens and complex switching journeys rests on behavioural assumptions that receive limited support from real-world evidence. Empirical studies of prior remedies, including the Microsoft browser ballot and the Android choice screen, show modest and short-lived effects on market outcomes. Repeated prompts

may therefore impose recurring time and attention costs on millions of users who already have settled preferences, without materially improving contestability.

**Fair Ranking Conduct Requirement:** The proposed obligation of 'objective' and 'non-discriminatory' ranking misunderstands the nature of search, whose value depends on selective curation and integration. The CMA has not identified direct evidence that individual ranking decisions are unfair, yet the CR would impose complex compliance obligations that are difficult to administer in machine-learning systems. Restrictions on integrated features may also eliminate efficiencies that reduce search costs and improve relevance, potentially degrading product quality without clear competitive benefits.

Taken together, the proposals risk substituting regulatory design for market processes, addressing uncertain or indirect harms with measures that impose immediate and durable costs. We therefore encourage the CMA to adopt a proportionate and evidence-based approach, to rely on demonstrable consumer harm rather than changes affecting particular rivals, and to prefer less distortive measures—especially transparency and attribution—over restrictions on product design and innovation.

# I. Analytical Framework for Assessing the Proposed Conduct Requirements

The Digital Markets, Competition and Consumers Act 2024 (DMCC Act) marks a structural reorientation of UK competition policy, shifting from primarily *ex post* enforcement toward an *ex ante* regulatory regime for firms designated with Strategic Market Status (SMS). Although Parliament has now settled the legislative framework, the CMA retains substantial discretion in designing and implementing Conduct Requirements (CRs). That discretion remains bounded by statutory obligations, including proportionality, evidence-based analysis, and a focus on consumer outcomes, rather than the commercial position of particular competitors.

These consultations therefore raise questions not only about specific remedies, but also about how enforcement should operate in dynamic and technologically complex markets. In such settings, regulatory decisions must be made under persistent uncertainty. The law & economics literature has long recognised that intervention entails a risk of error, and that enforcement policy should account for both the likelihood and the cost of mistaken intervention. Where innovation is cumulative and path-dependent—as in digital and AI-enabled services—the cost of prohibiting beneficial conduct may be durable, while some competitive harms may dissipate through entry and technological change. This asymmetry makes careful calibration of intervention especially important.

A related concern is analytical focus. Competition policy seeks to protect competition, not particular competitors. Conduct that disadvantages rivals—such as integrated features or direct answers in search—may nonetheless benefit users by improving relevance, reducing search costs, and accelerating access to information. Assessing the lawfulness of such practices therefore requires close attention to demonstrable consumer harm, rather than changes in traffic, revenues, or other outcomes affecting rival firms.

The CMA's proposed CRs should be evaluated against these principles. The central question is whether the proposed measures address clear and substantiated consumer harm in a proportionate manner, or whether they risk restricting product design and innovation in circumstances characterised by technological change, dispersed knowledge, and evidentiary uncertainty.

## A. The Error-Cost Framework and Enforcement in Digital Markets

Central to our analysis is the 'error-cost' framework, a foundational contribution of law & economics scholarship to the design of competition-law institutions. Developed by Judge Frank Easterbrook and extended by scholars including Geoffrey Manne and Joshua Wright, the framework recognises that regulatory decision-making under uncertainty inevitably produces errors. The appropriate enforcement posture therefore seeks to minimise the total expected cost of those errors.[1] In complex

[1] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 14–15 (1984). Easterbrook offers the clearest exposition of the error-cost approach to antitrust, arguing that '[t]he economic system corrects monopoly more readily than it corrects judicial errors'.

and dynamic markets, authorities must weigh both the probability and the consequences of two distinct categories of error.

In competition enforcement, Type I errors (false positives) arise when authorities condemn conduct that is pro-competitive or benign. The economic consequences of over-enforcement can be durable: prohibitions may eliminate a business practice, chill experimentation, and foreclose associated efficiencies. Type II errors (false negatives), by contrast, occur when authorities fail to sanction anticompetitive conduct, potentially leading to supracompetitive prices or reduced output. As Judge Easterbrook observed, such errors may be partly self-correcting, because the prospect of monopoly profits attracts entry and competitive responses that erode market power over time.[2]

In digital markets, there are strong reasons to expect Type I errors to be particularly costly.[3] As Manne notes, uncertainty is 'further magnified when antitrust decisions are made in innovative, fast-moving, poorly understood, or novel market settings'.[4] Innovation in these markets is cumulative and path dependent. If a regulator mistakenly proscribes a business model (*e.g.*, integrated product features sometimes described as self-preferencing) or restricts a consumer-valued innovation (*e.g.*, AI-generated overviews in search) the resulting welfare loss may be difficult to reverse. The foreclosed line of development may not re-emerge once firms redirect investment elsewhere. In this way, Type I errors can durably distort innovation incentives in dynamic industries.

The compounding nature of innovation losses reinforces this asymmetry. As John Yun explains, even modest regulatory drag on the rate of technological progress can generate substantial long-term welfare losses.[5] Measures that merely slow innovation—without stopping it—still impose accumulating costs over time. Consumers bear these costs through foregone improvements in quality, functionality, and price.

By contrast, the effects of Type II errors may be moderated in markets characterised by rapid technological change. Supracompetitive returns attract entry and encourage disruptive innovation. The history of the digital economy—including the displacement of AOL by Google, Yahoo by

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[2] *Id.* at 15.

[3] Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 153, 165 (2010) (extending Easterbrook's error-cost framework to innovative markets and arguing that 'antitrust scrutiny of innovation and innovative business practices is likely to be biased toward assigning a higher likelihood that a given practice is anticompetitive than later literature and evidence ultimately justify').

[4] Geoffrey A. Manne, *Error Costs in Digital Markets*, in THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY 3 (Joshua D. Wright & Douglas H. Ginsburg eds., 2020) (observing that '[t]he risk of error is always present given the limits of knowledge, but it is magnified by the precedential nature of judicial decisions', and that this problem is 'further magnified when antitrust decisions address innovative, fast-moving, poorly understood, or novel market settings').

[5] *See* John M. Yun, *The Folly of AI Regulation*, in ARTIFICIAL INTELLIGENCE AND COMPETITION POLICY 247, 252 (Alden Abbott & Thibault Schrepel eds., 2024) ('Let us start, in period 0, with T = 100 and an annual growth of 30%. Due to compounding, after 10 years T grows to nearly 14× its original size. If the growth rate instead falls marginally to 25%, T grows to slightly over 9× its original size over the same period — still substantial, but about 5× lower than under 30% growth. Even a "modest" reduction in the growth rate of an emerging technology — e.g. 5% in absolute terms — can therefore produce significant long-run social-welfare losses, magnified over longer horizons').

Facebook, and MySpace by later social-media platforms—illustrates that apparently durable positions can erode when confronted by superior technology or business models.[6] This does not suggest that enforcement is unnecessary. Rather, it indicates that dynamic adjustment should inform the calibration of intervention, particularly where evidence of durable consumer harm remains uncertain.

The CMA's current proposals, particularly those addressing AI-related features and search-ranking conduct, risk underweighting Type I error costs. Several proposed conduct requirements assume that the authority can reliably distinguish between 'fair' and 'unfair' product-design choices in a setting characterised by emergent algorithmic outputs and rapid technological change. Yet, as F.A. Hayek observed, regulators necessarily lack access to the dispersed and contextual knowledge embedded in market processes.[7] The error-cost framework therefore supports a cautious approach: intervention should focus on clear and demonstrable consumer harm, rather than speculative concerns about potential competitive disadvantage.

### B. Competition, Not Competitors

A recurring theme in the CMA's consultation documents is the attention afforded to 'publishers' and 'rival search engines'—entities that often stand in a partly competitive and partly complementary relationship with the SMS firm. Promoting a contestable market is a legitimate regulatory objective. The analysis must nonetheless avoid drifting toward a 'competitor-welfare' approach, in which the practical aim becomes preserving rivals' revenues, rather than improving consumer outcomes.[8] Competition law has long distinguished between protecting competition and protecting competitors. Even in *Brown Shoe Co. v. United States*, the U.S. Supreme Court stated that '[i]t is competition, not competitors, which the [Sherman] Act protects'.[9]

This distinction has concrete implications. As Manne and Wright explain in the search context, conduct that disadvantages competitors—such as presenting a direct answer or an integrated feature

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[6] *See* Geoffrey A. Manne & Dirk Auer, *Antitrust Dystopia and Antitrust Nostalgia: Alarmist Theories of Harm in Digital Markets and Their Origins*, 28 GEO. MASON L. REV. 1281, 1343–45 (2021) (reviewing economic evidence on data-related theories of harm and finding incumbent data advantages far less pronounced than commonly assumed); Geoffrey A. Manne & Dirk Auer, *From Data Myths to Data Reality: What Generative AI Can Tell Us About Competition Policy (and Vice Versa)*, CPI ANTITRUST CHRON. (February 2024), at 12 (arguing that 'competition or regulatory intervention to "correct" data barriers and data network and scale effects is liable to do more harm than good').

[7] *See* F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 526–27 (1945) (explaining that the price system communicates dispersed information unavailable to any single agent or planner). For an application in the competition-policy context, *see* Cento Veljanovski, *Hayekian Competition Policy: A Historical Perspective*, GW Competition & Innovation Lab Working Paper (2024).

[8] *See* Lazar Radic, Geoffrey A. Manne & Dirk Auer, *Digital Competition Regulation: Costs, Tradeoffs, and Consequences*, INT'L CTR. FOR L. & ECON. (2025) (arguing that digital-competition regulation's 'true objectives align more with redistributing economic power, protecting less efficient competitors, and diminishing the competitive advantages of dominant digital platforms' than with protecting consumer welfare).

[9] *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) ('It is competition, not competitors, which the [Sherman] Act protects'). *See also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (holding that plaintiffs must prove 'antitrust injury — injury of the type the antitrust laws were intended to prevent').

above a link to a third-party website—may benefit consumers by reducing search costs and improving relevance.[10] When a search engine displays a maps result, a knowledge panel, or an AI-generated summary, users obtain information immediately, rather than through additional navigation, delay, and cognitive effort. The resulting reduction in traffic to third-party sites reflects competition on the merits, not necessarily anticompetitive foreclosure.[11]

Restrictions designed to preserve traffic flows or advertising revenues for incumbent publishers would therefore risk prioritising competitor interests over consumer welfare. The empirical literature on self-preferencing remains mixed and context-specific, and vertical integration often produces measurable consumer benefits.[12] The CMA's assessment should accordingly focus on demonstrable consumer harm, rather than the commercial impact on rival firms.

## II. Assessment of the Proposed Publisher Conduct Requirement

The CMA's proposed Publisher Conduct Requirement (Publisher CR) governs Google's use of publisher content—crawled for general search—in generative-AI services such as AI Overviews, AI Mode, and the Gemini assistant.[13] The proposal has three components. First, opt-out controls would allow publishers to withhold 'Search Content' from grounding in search generative-AI features and from training and grounding in broader AI services. Second, transparency obligations would require disclosure of how content is used and provision of engagement metrics to publishers. Third,

[10] *See* Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 HARV. J.L. & PUB. POL'Y 171 (2011) (arguing antitrust should not infer consumer harm from conduct that disadvantages rivals, stressing the risk of false positives and the need for concrete evidence of consumer harm; identifying procompetitive rationales and welfare-enhancing design choices in search, and cautioning against condemning conduct merely because it reallocates traffic among competitors). *See also* Geoffrey A. Manne & Joshua D. Wright, *If Search Neutrality Is the Answer, What's the Question?*, 2012 COLUM. BUS. L. REV. 151, 155 (2012) (arguing that 'search bias' or editorial discretion often benefits consumers by reducing users' search costs and improving the search experience).

[11] *See* Robert H. Bork & J. Gregory Sidak, *What Does the Chicago School Teach About Internet Search and the Antitrust Treatment of Google?*, 9 J. COMPETITION L. & ECON. 663, 680 (2013) (discussing consumer-welfare benefits of product integration in search).

[12] *See, e.g.*, Brian Albrecht & Geoffrey A. Manne, *Self-Preferencing Isn't a Sin. It's Often the Way Competition Works.*, TRUTH ON THE MKT. (20 August 2025), https://truthonthemarket.com/2025/08/20/self-preferencing-isnt-a-sin-its-often-the-way-competition-works (explaining that self-preferencing often reflects technical or efficiency considerations rather than exclusionary intent); *see also* Juliette Caminade, Juan Carvajal & Christopher R. Knittel, *An Economic Analysis of the Self-Preferencing Debate*, 32 COMPETITION 1 (2022) (reviewing theoretical and empirical literature on self-preferencing and dual-mode platforms and concluding the evidence is 'mixed', warranting a careful, case-by-case approach); *see also* Austl. Competition & Consumer Comm'n, *Digital Platform Services Inquiry–Interim Report No. 5: Regulatory Reform* 94 (September 2022), https://www.accc.gov.au/system/files/Digital%20platform%20services%20inquiry.pdf ('Although self-preferencing conduct is often benign, conduct that leverages market power over a key online service into a related service, without a procompetitive rationale, can distort competition and decrease consumer welfare').

[13] Competition & Mkts. Auth. (CMA), *Consultation: Publisher Conduct Requirement–Google's General Search Services* (28 January 2026) (UK) [hereinafter *Publisher CR Consultation*].

attribution requirements would require reasonable steps to identify and credit publisher material in AI-generated responses.[14]

The CMA's theory of harm rests on a leveraging concern: because Google holds SMS in general search, publishers allegedly have 'no realistic option but to allow their content to be crawled', enabling Google to extend that content into AI applications without meaningful choice.[15] Even accepting bargaining asymmetry in search, the proposed CR raises three concerns.

First, it risks distorting competition in generative-AI services by imposing obligations on a single firm while other AI developers relying on similar publicly available content remain outside the regime. Second, it addresses disputes about the use of copyrighted material that are more appropriately resolved through generally applicable intellectual-property law, rather than firm-specific competition rules. Third, the design of the controls may fragment AI-generated search responses and reduce their usefulness to users, undermining features intended to lower search costs.

These issues bear directly on proportionality. Intervention should address demonstrable consumer harm, not redistribute value among market participants or indirectly resolve copyright disputes, and the CMA should consider whether less distortive measures—particularly transparency and attribution—could achieve its objectives without degrading product quality or altering competitive conditions.

### A. Regulatory Asymmetry in Generative-AI Markets

The proposed Publisher CR would create a marked regulatory asymmetry in generative-AI services. Google would face legally binding obligations to provide granular opt-out controls for training and grounding, alongside transparency, reporting, and attribution requirements.[16] Competing providers of generative-AI systems—including OpenAI, Anthropic, Meta, and a growing ecosystem of open-source foundation-model developers—would face no equivalent constraints, because they are not designated with SMS in general search and therefore fall outside the DMCC regime.

The competitive implications are significant. Output quality in generative-AI systems depends on the breadth and recency of data used for training and grounding. If publishers exercise opt-out rights at scale—an outcome the low-friction design of the controls may facilitate—Google would either exclude large portions of web content from AI-generated search responses or produce responses with material gaps. Either outcome would reduce the quality of Google's AI Overviews and AI Mode relative to rival services that may continue to rely on the same publicly available web content without

[14] *Id.*, ¶¶ 1.5, 1.10–1.11.

[15] *Id.* ¶ 1.5(a) ('Given Google's SMS in general search services, publishers have no realistic option but to allow their content to be crawled').

[16] *Id.*, ¶¶ 4.6–4.12 (describing the covered use cases and distinguishing grounding of search generative-AI features from training or grounding of broader generative-AI services).

restriction. The proposal would therefore not merely affect product design; it would alter competitive conditions between providers of generative-AI services.[17]

This does not imply that Google lacks competitive advantages in general search, including efficient access to crawled content. It does indicate that proprietary search-index data is not a prerequisite for building competitive generative-AI products. Leading frontier models—ChatGPT, Claude, Llama, and DeepSeek—were developed without access to a dominant search index. Open datasets such as Common Crawl, together with commercial licensing arrangements, supply training material across the industry.[18] As prior ICLE submissions to this Authority and the U.S. Department of Justice note, 'being the firm with the most data appears to be far less important than having enough data', a threshold accessible to many firms.[19] Consistent with this, generative-AI markets exhibit rapid entry and substantial investment, and enforcement authorities have not identified concrete anticompetitive harm arising from incumbents' data holdings in AI markets.[20]

International experience also illustrates the risk of competitive distortion from asymmetric digital-market regulation. Under the EU Digital Markets Act, Google removed certain integrated features, including clickable map modules and embedded previews, from European search results to comply with self-preferencing rules. Reports indicate a slower and more fragmented user experience, without clear competitive gains for rivals.[21]

The proposed Publisher CR could produce similar effects. By introducing gaps in AI-generated search responses where opted-out content would otherwise appear, the measure risks degrading the UK search experience while leaving competing generative-AI providers unaffected.

### B. Copyright Issues Are Not Competition Issues

The Publisher CR appears motivated in part by concern that Google uses content crawled for search in AI applications without adequate publisher consent. The underlying issue—whether the use of

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[17] *See* Lazar Radic, Geoffrey A. Manne & Dirk Auer, *Digital Competition Regulation: Costs, Tradeoffs, and Consequences*, INT'L CTR. FOR L. & ECON. (2025) (documenting how asymmetric digital-competition regulation can produce perverse competitive outcomes that harm consumers it aims to protect).

[18] *See* Manne & Auer, *Antitrust Dystopia and Antitrust Nostalgia*, *supra* note 6.

[19] *See* Geoffrey A. Manne, Dirk Auer, Kristian Stout, Lazar Radic & Mario A. Zúñiga, *ICLE Comments to DOJ on Promoting Competition in Artificial Intelligence*, INT'L CTR. FOR L. & ECON. (15 July 2024), at 5–12. *See also* Geoffrey A. Manne, Dirk Auer & Mario A. Zúñiga, *ICLE Comments to UK Competition and Markets Authority on AI Partnerships*, INT'L CTR. FOR L. & ECON. (9 May 2024), https://laweconcenter.org/resources/icle-comments-to-uk-competition-and-markets-authority-on-ai-partnerships.

[20] Dirk Auer & Mario A. Zúñiga, *AI Partnerships and Competition: Damned if You Buy, Damned if You Don't*, ICLE White Paper 2025-08-19, at 4–5 (2025) (finding that AI partnerships are 'largely benign from a competition-law perspective' and that 'no enforcement body has found concrete evidence of anticompetitive harm' arising from them).

[21] Written Testimony of Dirk Auer, Director of Competition Policy, Int'l Ctr. for L. & Econ., Before the Subcomm. on Antitrust, Commercial & Admin. Law of the H. Comm. on the Judiciary, U.S. House of Representatives (16 December 2025) (documenting that DMA compliance forced Google to remove integrated features from European search results, producing 'a slower, more fragmented experience' without measurable competitive benefits).

publicly available web content for AI training and grounding infringes copyright—is, however, a matter of intellectual-property law, rather than competitive conduct.

Whether an AI developer's use of copyrighted material constitutes 'fair dealing' under UK law (or 'fair use' under U.S. law) applies uniformly across firms, irrespective of market position.[22] A start-up training a foundation model on publicly available web content confronts the same copyright question as Google. By using the DMCC framework to create what is effectively an opt-out regime applicable only to a designated firm, the CMA risks addressing an intellectual-property dispute through a competition-law instrument.

This approach would produce a two-tier structure of rights and obligations. Google would need to secure effective consent—through opt-out mechanisms—to use publisher content for AI grounding, while other AI developers would remain subject only to generally applicable copyright law. If grounding AI search responses in publicly available web content constitutes fair dealing, Google should be permitted to do so on the same basis as other market participants. If it does not, the appropriate remedy lies in copyright enforcement applied consistently across firms, rather than in an asymmetric competition-law obligation imposed on a single company.

### C. Technical Design and Consumer Effects of the Opt-Out Controls

The proposed controls also raise concerns about technical implementation and user impact. The Publisher CR distinguishes among three uses—training foundation models, fine-tuning derivative models, and grounding AI-generated responses—and applies different obligations to each.

The CMA acknowledges Google's submission that fine-tuning 'helps the model learn how to process information rather than what current information to display' and that permitting opt-outs from fine-tuning would 'raise the risk of downranking or mis-ranking publisher content in organic search results'.[23] The Authority has therefore provisionally excluded fine-tuning of search AI models from the opt-out regime. This reflects a proportionate assessment of product functionality. Similar considerations, though operating differently, arise in relation to grounding.

AI Overviews and AI Mode rely on retrieval-augmented generation, in which responses are corroborated by reference to material retrieved from the search index at query time. Allowing publishers to opt individual pages out of grounding, while remaining indexed for general search, would effectively give them a page-by-page veto over AI-generated responses. The likely consumer effect is a fragmented experience: authoritative information may appear as traditional links but be

[22] Giuseppe Colangelo, *A Competition Policy Analysis of Copyright Protection in Generative AI*, SING. J.L. STUD. 271 (2025). *See ICLE Comments on Artificial Intelligence and Copyright*, INT'L CTR. FOR L. & ECON. (30 October 2023) (analysing fair-use implications of AI training and concluding the issue is better addressed through uniform intellectual-property adjudication than firm-specific competition regulation).

[23] *Publisher CR Consultation*, *supra* note 13, ¶¶ 4.10(c)–(d) (summarising Google's submissions that fine-tuning 'helps the model learn how to process information rather than what current information to display' and that allowing publishers to opt out of fine-tuning would 'raise the risk of downranking or mis-ranking publisher content in organic search results').

absent from the AI-generated summary.[24] Because these features are intended to reduce search costs, such fragmentation would reduce their usefulness and quality. The CMA should weigh these foreseeable user costs against the more speculative benefits of the opt-out mechanism.[25]

For these reasons, the Publisher CR would benefit from revision. First, the controls should not extend to AI training. Questions about the use of publisher content for model training are properly addressed through generally applicable intellectual-property law rather than firm-specific competition regulation. Second, the CMA's proportionality analysis should account for competitive asymmetry. The CR imposes binding obligations on Google alone, while rival AI developers using similar web content remain unconstrained, creating incentives for publishers to withhold content selectively. Third, where intervention is warranted, priority should be given to transparency and attribution. Clear disclosure of how content is used, and proper attribution in AI-generated responses, would address many of the CMA's concerns, while avoiding the product degradation and competitive distortion associated with the proposed opt-out controls.

## III. Assessment of the Proposed User Choice Conduct Requirement

The proposed User Choice CR—including periodic choice screens, information screens, and 'test-drive' functionalities—rests on the premise that such interventions reliably promote competition.[26] The CMA identifies two objectives: '(i) increasing competition in general search services and (ii) having more people use a general search provider that better matches their preferences'.[27]

The consultation states that the obligations are supported by evidence showing that choice screens increase engagement, improve comprehension, and enable active decision-making in digital markets.[28] This evidence relies substantially on experimental and survey-based studies, including research by Mozilla[29] and recommendations issued by Bureau Européen des Unions de Consommateurs (BEUC),[30] which examine user interaction with designed choice interfaces. By contrast, longitudinal analyses of observed market behaviour receive less weight. Evidence from earlier EU remedies, including the Microsoft browser ballot and the Android choice screen, indicates more limited effects on market shares. These studies generally find modest changes in usage

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[24] *See* Manne & Wright, *If Search Neutrality Is the Answer, What's the Question?*, *supra* note 10.

[25] *See* Manne, *supra* note 4.

[26] Competition & Mkts. Auth. (CMA), *Consultation: User Choice Conduct Requirement–Google's General Search Services* (28 January 2026) (UK) [hereinafter *User Choice CR Consultation*].

[27] *Id.* at 52.

[28] *Id.* ¶ 4.4.

[29] Mozilla, *Can Browser Choice Screens Be Effective? Experimental Analysis of the Impact of Their Design, Content and Placement* (September 2023), https://research.mozilla.org/files/2023/09/Can-browser-choice-screens-be-effective_-Mozilla-experiment-report.pdf.

[30] Bureau Européen des Unions de Consommateurs (BEUC), *An Effective Choice Screen Under the Digital Markets Act: BEUC Recommendations*, BEUC-X-2023-131, at 10 (19 October 2023).

patterns, suggesting that users often continue to select their preferred service when presented with alternatives.

As Omar Vásquez Duque observes in a recent empirical assessment:

> [A] key assumption behind choice screens is that consumer inertia sustains market dominance. However, the findings here suggest that consumers may not be as inert as conventionally assumed…This raises questions about the "true" effectiveness of choice screens… If effectiveness is defined as "encouraging users to consider alternative options," and the browsers' assessments are accurate, then choice screens have been partially successful. However, if the goal is to increase market contestability, the evidence suggests that choice screens alone are ineffective.[31]

These mixed findings raise proportionality concerns. Requiring recurring prompts imposes certain costs on users, including time and interruption, while the benefits to competition remain uncertain. Behavioural research also indicates that repeated prompts may produce habituation rather than deliberation, and that users with settled preferences may treat such screens as obstacles rather than meaningful opportunities to choose.

The CMA acknowledges that 'focusing solely on levels of switching to alternative providers may be a misleading measure of a choice screen's effectiveness'.[32] That observation underscores the central question: if switching is not the relevant metric, it is unclear how the intervention's benefits should be measured or whether the associated user costs are justified.

### A. Empirical Evidence on the Effectiveness of Choice Screens

The CMA's proposal assumes that presenting users with a choice will materially shift market shares. The empirical record from EU choice-screen remedies suggests otherwise: observed changes in share are typically small and rarely exceed a few percentage points.[33]

A relevant precedent is the Android choice screen introduced following the European Commission's *Google Android* decision.[34] An econometric analysis by Francesco Decarolis, Muxin Li, and Filippo Paternollo, using difference-in-differences methods, finds a statistically significant reduction in Google's mobile search share in the European Economic Area (EEA). The magnitude, however, is modest—less than one percentage point in the headline estimate, with some variation across

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[31] Omar Vásquez Duque, *The Magical Number 2 (Minus Two): An Empirical Analysis on the Efficacy of Choice Screens to Increase Competition in Digital Markets*, at 17 (15 January 2026) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5264993.

[32] *User Choice CR Consultation*, *supra* note 26, ¶ 4.5 ('[F]ocusing solely on levels of switching to alternative providers may be a misleading measure of a choice screen's effectiveness, given that it should allow consumers to find a provider in line with their preferences, which may result in them staying with their existing (or incumbent) provider').

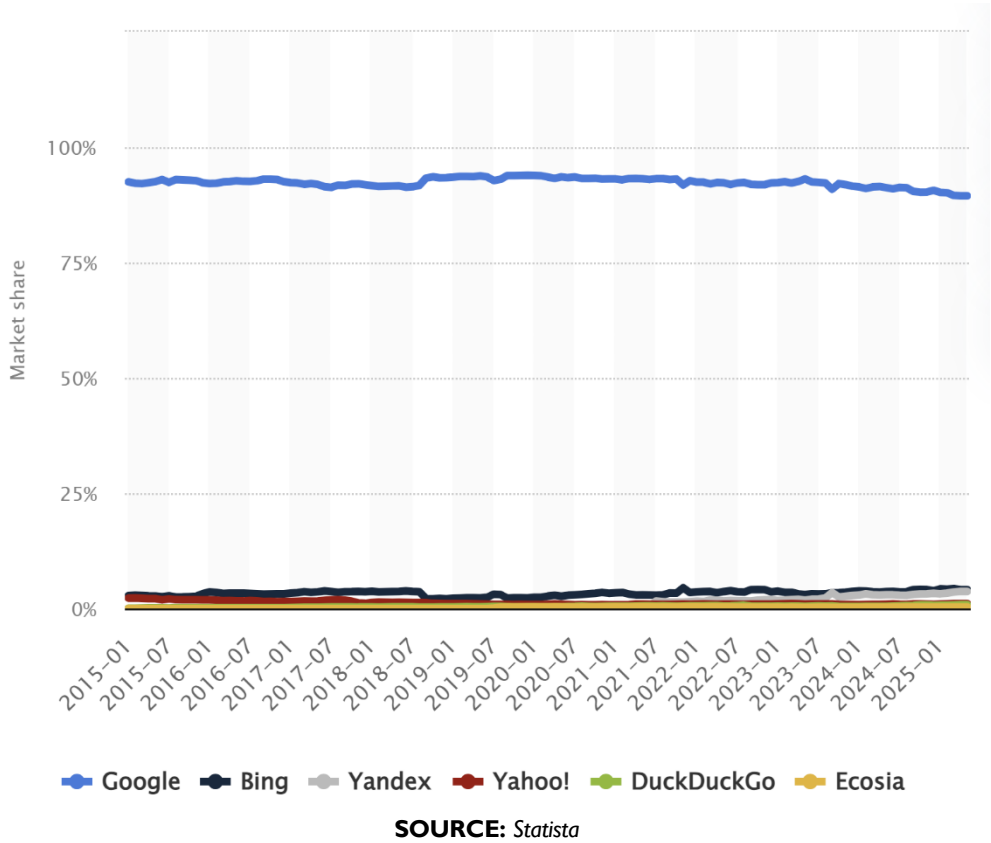
[33] *See* Vásquez Duque, *The Magical Number 2*, *supra* note 31, at 3 ('When choice screens have affected a dominant actor's market share at all, the effect size has been, at most, 2%').

[34] Comm'n Decision 2019/C 402/08, Case AT.40099—*Google Android*, 2019 O.J. (C 402) 19.

specifications.[35] Although rivals with greater pre-remedy awareness (proxied by desktop share) benefited somewhat more, the overall effect falls short of materially deconcentrating the market.[36]

Market-share data point in the same direction. Figure 1 reports European search-engine shares from January 2015 to May 2025, based on Statista data derived from the StatCounter tracking environment.[37] Over this period, Google's share remains relatively stable, generally between roughly 90 and 95 per cent. Competing providers, including Bing, Yandex, and Yahoo!, remain clustered at low levels and rarely exceed a combined 5 to 8 per cent share.

**FIGURE 1: Search Engine Market Share in Europe, January 2015 to May 2025**




**SOURCE:** *Statista*

The CMA has acknowledged similar outcomes in its SMS Decision:

> Since August 2019, following the European Commission's *Google Android* decision, Google has introduced choice screens for general search providers on all new Android phones in the EEA and UK. However, notwithstanding Google's submissions that this

[35] Francesco Decarolis, Muxin Li & Filippo Paternollo, *Competition and Defaults in Online Search*, 17 AM. ECON. J.: MICROECONOMICS 369 (2025).

[36] The study found larger market-share shifts in Russia and Turkey (>10%), driven primarily by the presence of a strong local incumbent (Yandex) able to compete on quality, rather than by the choice screen itself. *See id.* at 389–93.

[37] Statista, *Market Share of Leading Search Engines in Europe from January 2015 to May 2025*, https://www.statista.com/statistics/1386805/search-engines-market-share-all-devices-europe (last visited 16 February 2026).

> created opportunities for third-party providers to be set as the default (see paragraph 5.164(c)), data provided by Google shows that in every month since April 2020, a large majority ([redacted]%) of UK users have selected Google Search as their default when presented with the Android choice screen.[38]

These results are consistent with users selecting a preferred service when presented with alternatives. A choice screen that does not materially affect user preferences may therefore add friction without improving contestability.

Evidence from earlier remedies is similar. Retrospective analysis of the 2010 Microsoft browser ballot screen finds that Internet Explorer's share declined during the remedy period, but comparable declines occurred globally due to the growth of Chrome and Firefox. Using non-EEA countries (the United States, Canada, and Australia) as a control group, Vásquez Duque estimates a causal effect of roughly 1.4 to 2 percentage points.[39]

Overall, the empirical literature does not show that choice screens reliably transform market outcomes. As Vásquez Duque concludes in more recent work, observed effects appear to reach a ceiling, suggesting that 'choice screens do not meaningfully alter users' preferences'.[40]

### B. Behavioural Economics and Repeated Choice Screens

The CMA proposes requiring choice screens not only at device set-up but 'at regular points thereafter'. The rationale draws on behavioural economics. But the proposal does not sufficiently consider related concepts, including rational apathy and status-quo efficiency.

Research on behavioural interventions ('nudges') indicates that they can influence behaviour in low-stakes or uncertain settings but are less effective where users hold stable preferences for an experience good, such as a search engine.[41] As Vásquez Duque explains:

> A rational user would search for an option as long as the alternative's expected benefit is higher than the search costs, including the user's time. But for many if not most users, it may make sense to stick to an option that meets a satisfactory level of quality. If this were the case, any option that met such a satisfaction level would become the user's preferred default. And this choice may form a habit, which is likely to persist until the user experiences negative feedback or a more attractive option is brought to her attention.[42]

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[38] Competition & Mkts. Auth., *Strategic Market Status Investigation into Google's General Search Services: Final Decision* ¶ 5.173(c) (10 October 2025) (UK).

[39] Omar Vásquez Duque, *Active Choice vs. Inertia? An Exploratory Assessment of the European Microsoft Case's Choice Screen*, 19 J. COMPETITION L. & ECON. 60 (2023).

[40] *See* Vásquez Duque, *supra* note 31, at 17.

[41] *See* Vásquez Duque, *supra* note 39, at 77–78.

[42] *Id.* at 78.

For many users, the marginal benefit from switching search providers may be small, while switching costs—learning a new interface or losing personalisation history—remain non-zero. Although the CMA estimates the value of users' time,[43] the analysis gives limited attention to established research on mandated disclosure, choice fatigue, and banner blindness.[44] The consultation addresses these concerns briefly:

> Google has raised a concern that the repeated display of choice screens leads to user fatigue. However, we do not consider that a relatively short prompt to consider their search choice once a year is too onerous for users. [45]

Evidence on habituation suggests that repeated prompts may not prompt careful deliberation. Users frequently respond by selecting the most familiar option simply to remove an interruption.[46] Increasing the frequency of prompts may therefore not expand effective choice but instead increase friction for users who already have settled preferences.

Recent meta-analyses of nudge interventions also indicate that effects observed in controlled or pilot settings often diminish when implemented at scale, partly because of publication bias and contextual variation.[47] Even where behavioural policies appear effective, results require cautious interpretation.

The aggregate burden is also relevant. If the UK has roughly 50 million adult mobile users and approximately 90 per cent are satisfied with Google Search, an annual mandatory choice prompt would interrupt about 45 million users who have no intention of switching, in order to reach a smaller group who might otherwise use existing device settings. This 'time tax' should be weighed in the proportionality assessment.

Requiring all users to make an annual active choice would therefore impose recurring costs on many users who are already satisfied with their service. The measure may address a perceived competitive concern without clear evidence of corresponding consumer harm, and its effectiveness as an instrument for altering market outcomes remains uncertain.

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[43] *User Choice CR Consultation*, *supra* note 26, ¶ 5.14 ('When combined with an estimate of the average value of a UK consumer's time, this gives an average time cost per showing of the choice screen of a little under 14p').

[44] Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 651 (2011) (arguing that 'mandated disclosure not only fails to achieve its stated goal but also leads to unintended consequences that often harm the very people it intends to serve').

[45] *User Choice CR Consultation*, *supra* note 26, ¶ 4.34.

[46] Rainer Böhme & Stefan Köpsell, *Trained to Accept? A Field Experiment on Consent Dialogs*, in PROCEEDINGS OF THE SIGCHI CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 2403 (2010) (finding that interruption dialogs foster habituation and heuristic responses, as users are 'trained' to dismiss them and consent becomes increasingly 'blind').

[47] Bo Hu *et al.*, *Assessing Nudge Impact: A Comprehensive Second-Order Meta-Analysis*, 38 J. BEHAV. DECISION MAKING, no. 5, art. e70053 (2025).

## IV. Assessment of the Proposed Fair Ranking Conduct Requirement

The proposed Fair Ranking Conduct Requirement (Fair Ranking CR)[48] seeks to ensure that Google's ranking decisions are 'objective', 'non-discriminatory', and 'transparent', supported by a publisher complaints mechanism and reporting obligations concerning ranking policies that may affect other markets.[49] These objectives are understandable. The design of the intervention, however, raises concerns about its implications for innovation and consumer welfare.

The CMA's investigation has not identified direct evidence that individual ranking decisions are unfair. As the consultation explains:

> We have not seen direct evidence that Google's individual ranking decisions are unfair. However, taken in the round: the role of Google's general search as a critically important digital tool for people and businesses; the lack of trust and perception of unfairness in Google's ranking; the lack of sufficient transparency about how Google implements and operationalises its ranking in practice; and the direct impact this lack of trust has had on publishers, including deterring investment, leads us to consider that there is merit in introducing a formal requirement.[50]

The proposal therefore responds primarily to perceptions of potential unfairness and their effects on publisher behaviour.[51] This context underscores the need for caution in imposing obligations on a product whose core function is selective ranking.

The requirement of 'objectivity' risks misunderstanding how search operates. As Manne and Wright explain, the value of a search engine derives from its ability to prioritise some results over others.[52] Search is an exercise in curation: from billions of web pages, the system promotes a small number of results based on predicted relevance. Because ranking is inherently relative—elevating one result necessarily lowers another—differentiation is not itself evidence of anticompetitive conduct, but a necessary feature of the product.[53]

The non-discrimination obligation also presents practical enforcement difficulties. The proposal would prohibit Google from considering, among other things, whether a publisher advertises with Google, enters commercial arrangements, or exercises statutory rights. Modern search ranking, however, depends on the interaction of thousands of signals processed through machine-learning systems. Determining whether any single prohibited factor affected a particular outcome will often

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[48] Competition & Mkts. Auth. (CMA), *Consultation: Fair Ranking Conduct Requirement–Google's General Search Services* (28 January 2026) (UK) [hereinafter *Fair Ranking CR Consultation*].

[49] *Id.* ¶ 2.1.

[50] *Id.* ¶ 1.11.

[51] *Id.* ¶¶ 1.9–1.10.

[52] *See* Manne & Wright, *If Search Neutrality Is the Answer, What's the Question*, *supra* note 10.

[53] *Id.* at 158.

be infeasible. A publisher experiencing reduced traffic after a dispute may infer retaliation, but the change may equally reflect an algorithmic update, shifting user behaviour, or changes in content quality. The result could be persistent and difficult-to-resolve disputes.

Related concerns arise from the requirement that Google apply the same criteria to its own services and those of third parties. Research frequently finds that vertical integration on digital platforms produces efficiencies.[54] Integrated features—such as map results or flight modules—can reduce search costs by allowing users to obtain information directly within the search interface. As Robert Bork and Gregory Sidak observe, the consumer-welfare benefits of integration arise precisely from the immediate availability of the integrated result.[55] A categorical restriction on self-preferencing would risk sacrificing these efficiencies in order to preserve competitor distinctiveness.[56] The CMA's interpretative notes recognise that designing a feature containing only Google inputs is not itself a breach, but its placement in rankings may be.[57] In practice, placement and design are closely connected: the usefulness of an integrated feature depends on where it appears.

The Fair Ranking CR therefore risks constraining product design in ways that reduce functionality. By attempting to mandate neutrality in a process defined by curation, and by treating integration as presumptively problematic, the proposal may degrade the user experience without clear gains in market contestability.

## V. Conclusion

The CMA's proposed Conduct Requirements for Google's general search services constitute a significant intervention in a rapidly evolving sector. ICLE does not question the Authority's mandate to promote competitive and contestable digital markets, nor the relevance of Google's position in general search within the DMCC framework. As currently drafted, however, the three CRs risk imposing durable costs on UK consumers and on innovation in digital and AI services.

Across the proposals, a common concern is calibration. The measures would address uncertain or indirect harms with obligations that carry clear and immediate effects: degraded product functionality, fragmented search results, recurring user friction, and altered competitive conditions between firms subject to the regime and those outside it. The Publisher CR risks creating asymmetric regulation in generative-AI markets and using competition law to resolve copyright disputes. The User Choice CR relies on behavioural assumptions not strongly supported by real-world evidence and may impose recurring time costs on users without materially improving contestability. The Fair

[54] *See* Manne & Wright, *Google and the Limits of Antitrust*, *supra* note 10.

[55] *See* Bork & Sidak, *supra* note 11.

[56] Manne & Wright, *If Search Neutrality Is the Answer, What's the Question*, *supra* note 10, at 189.

[57] *Fair Ranking CR Consultation*, *supra* note 48, interpretative note 5 ('[T]he fact that a search feature (e.g. the Flights Module) might be designed and presented to include only Google inputs would not be relevant to paragraph 4.b. of the conduct requirement, but Google's decision about where that search feature is ranked on the page would be').

Ranking CR seeks to regulate ranking neutrality in a process defined by necessary curation and integration, creating practical enforcement difficulties and potential reductions in product quality.

These concerns reflect the broader insight of the error-cost framework. In dynamic markets characterised by uncertainty, the costs of mistaken intervention may be persistent, while some competitive harms may diminish through entry, innovation, and technological change. Proportionality therefore requires particular caution where conduct may benefit consumers, even if it disadvantages rivals.

ICLE respectfully encourages the CMA to anchor its final measures in demonstrable consumer harm, to rely primarily on real-world evidence, and to prefer less distortive tools—particularly transparency and attribution—over restrictions on product design. A framework that protects competition rather than competitors, and that recognises the limits of regulatory knowledge in complex markets, will better advance the DMCC Act's objective of improving outcomes for UK consumers.