

Kelkoo Group's Response to the CMA Consultation
on the
Fair Ranking Conduct Requirement
in relation to
Google's general search services

1. Introduction

1.1 This document is Kelkoo Group's response to the CMA Consultation dated 28th January on the Fair Ranking Conduct Requirement ("the CR") in relation to Google's general search services.

1.2 As a comparison shopping service ("CSS") helping consumers to make better shopping choices, we are heavily impacted by the ways in which Google ranks results on its search engine results page ("SERP"). Having been involved in regulatory proceedings and national litigation against Google on these issues for well over a decade, we have significant experience and understanding of how Google applies (or more importantly does not apply) fair ranking principles in the operation of its general search engine, and how this behaviour can distort markets and impact consumers.

1.3 Our response focusses on two key aspects of the consultation:

1.3.1 The scope of the proposed CR and particularly:

1.3.1.1 how the exclusion from the CR of Google's operation of its specialised search features on the SERP may impact the effectiveness of the CR, allowing market distortions caused by Google's presentation of comparison shopping results to continue, and how a joined up approach is needed to avoid disconnect between the CMA's proposed Category 1 and Category 2 interventions; and

1.3.1.2 how the exclusion from the CR of ranking of paid results may impact the effectiveness of the CR and the need to address ranking of paid results through alternative measures if not addressed through this CR.

1.3.2 The ways in which Google has historically applied, and currently still applies, unfair ranking criteria which significantly impact markets for consumer services like CSSs, as well as how that will likely impact the operation of the proposed CR and how the CMA could gather further evidence in this area.

2. Scope of the CR

2.1 The CR excludes from its scope the operation of (and eligibility for) search features like the rich format product results boxes which Google displays in response to shopping queries ("Shopping Units"), whilst nonetheless applying to the positioning of such features on the

SERP relative to 'organic' search results and other features. In simple terms, we understand this to mean that, under the CR, Google will be required to apply fair ranking principles to determine where on the page the search feature appears, but not to determine who is eligible to operate it, or how the results within the search features are produced.

Dealing with position of special features but not their operation and eligibility means trying to separate two sides of the same coin

- 2.2 Whilst we understand that the CMA plans to deal with the operation of vertical search features (and the problem of Google's self-preferencing in relation to them), as a Category 2 intervention, we consider that separating the positioning of search features (dealt with here) from the operation of them (awaiting further measures) risks trying to separate two sides of the same coin.
- 2.3 For almost two decades now, Google's self-preferencing in the CSS market has taken two forms:
 - 2.3.1 The promotion of its own CSS either by linking to it from, or embedding it in, specialised boxes on the SERP, most recently in the form of Shopping Units, with no equivalent opportunities available for rival services. This effectively embeds Google's CSS on the SERP, providing the service directly to consumers through the SERP, whilst excluding rivals from any equivalent capability;
 - 2.3.2 The demotion of rival services in organic search results by demotion algorithms and unfair ranking criteria which either target or are highly likely to demote CSSs, notwithstanding that those CSSs have the same or similar characteristics to Google's promoted CSS.
- 2.4 These two forms of self-preferencing each have a significant effect, distorting the market for comparison shopping services in Google's favour: the demotion meaning that Google's rivals miss out on the chance to compete, even for the much less attractive positions on the page; and the promotion making it significantly more likely that consumers will choose to use Google's CSS (with its attractive formats and positioning) even when rivals do appear on the SERP.
- 2.5 At present, the scope of the CR means that it could be used to deal with issues around demotion. That is positive and could clearly have value in preventing competitor CSSs from being excluded from results pages where Google's CSS appears prominently, helping to remedy one element of the distortion.
- 2.6 However, by not dealing with the operation of Shopping Units, the CR only deals with one side of the coin. Because consumers are drawn to rich features on the SERP, they are far more likely to interact with those features than with rival services who do not appear with such rich features. Because of this, under the current scope of this CR and without further action in relation to Shopping Units, it will remain very difficult for competitor CSSs to compete on a level playing field to attract users: users who see Google's service embedded in the SERP and rival services appearing only in less attractive forms on the page are far more likely to interact with Google's service. Because the Fair Ranking CR does not deal

with this issue, Google's self-preferencing behaviour will continue to distort the comparison shopping market.

2.7 In addition, we understand that a significant part of the calculation of search ranking is linked to user interaction¹. If a given format or search feature is more attractive, it would be expected to attract more clicks than a result in standard format. On that basis, the 'ranking' of the search feature would therefore likely be higher than those results in standard format – not because the result has any greater relevance or utility to the user, but simply because of its format. If search features are only available to Google's own services, then Google's services with rich features have an unfair advantage, even when the same ranking criteria are applied. 'Fair and non-discriminatory ranking' under the CR must therefore take account of how any special formats or display features impact the measures of relevance used by Google in ranking; but the only completely fair way to deal with these issues is through ensuring that the operation of search features does not allow Google to self-preference at all. Dealing only with positioning on the page is, at best, only a partial solution.

2.8 Finally, the scope of the CR excludes paid results. It is unclear whether this means that (i) search features which are operated on a paid basis (like Shopping Units) are completely excluded, or (ii) simply that the operation of ranking within paid features is excluded, such that positioning of paid features themselves remains in scope;

2.8.1 If it is the latter, then the same concerns expressed above apply;

2.8.2 If it is the former, then the most important search features in the CSS market – Google's Shopping Units – will remain completely out of scope of the Fair Ranking CR.

2.9 Overall, whilst we understand the desire to keep the scope narrow, dealing with only the positioning of search features, and not other aspects of their operation, will significantly limit the value of the Fair Ranking CR in helping to avoid market distortion in the comparison shopping market. Depending on the intended approach to paid results, the exclusion of paid results may further limit the value the Fair Ranking CR. The limited scope could, in this case, mean limited effectiveness in relation to queries relating to vertical search.

3. How Google ranks rival CSSs vs its own

3.1 It is well documented that Google applies search ranking adjustment algorithms (also known as penalty algorithms) which have a significant impact on the ranking of rival CSS websites but which do not apply to the ranking of Google's own CSS. This issue formed a significant part of the European Commission's Decision in the Google Shopping case², as well as in the litigation which follows on from that Decision in the UK and EU courts,

¹ See for example the testimony of Professor Whinston in US v Google (2020), where there is discussion based on internal documents from Google that Navboost uses user click data to determine ranking, and that Navboost is one of 'the most powerful components of Google's ranking system: transcript available here with Navboost discussed from page 5792: <https://thecapitolforum.com/wp-content/uploads/2023/10/101623-USA-v-Google-AM.pdf>

² Case AT.39740 – Google Shopping: https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf

including the proceedings brought by members of Kelkoo Group in the Competition Appeal Tribunal (the “CAT”).

3.2 Kelkoo Group is restricted by Rule 102 of the Competition Appeal Tribunal Rules 2015 from using documents disclosed to it in the CAT proceedings other than in the course of those proceedings. However, it would of course be open to the CMA to request relevant documents directly from Google. Given the largely follow on nature of the Kelkoo Group’s proceedings, the CAT has made various orders for disclosure of documents relating to the demotion elements of the Shopping Decision which may be of interest to the CMA when considering issues around the implementation of the Fair Ranking CR.

3.3 [REDACTED]

Documents explaining how certain algorithms work

3.3.1 [REDACTED]

3.3.2 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Penalty server data

3.3.3 [REDACTED]

3.3.4 [REDACTED]

[REDACTED]

3.3.5

[REDACTED]

3.3.6

[REDACTED]

4. Summary

- 4.1 Kelkoo Group understands the CMAs wish to deal with the wide ranging issues with Google in a manageable way, but is concerned about the specific limitations on the scope of the CR – particularly if paid results are entirely excluded, but also if the CR only deals with positioning of search features on the page but ignores the impact of preferential formats and results types.

- 4.2 These limitations could mean that the impact of the CR is either limited or entirely neutralised in sectors like the CSS market where Kelkoo Group operates, where there is significant impact on consumers and significant market distortion caused by Google’s unfair ranking of rival services.

- 4.3 There is clear evidence in the public domain that Google applied, and continues to apply unfair demotion algorithms to its competitors without applying them to its own services. The European Commission has examined these issues in detail and they continue to be the subject of proceedings in the CAT, where there are a number of useful public transcripts and disclosure orders which may assist the CMA in investigating further.