Duck Duck Go, Inc.
20 Paoli Pike • Paoli, PA 19301, United States
+1 267.690.7758 • duckduckgo.com

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DuckDuckGo's contribution to the European Commission's Digital Services Act public consultation and New Competition Tool consultation

DuckDuckGo is a privacy technology company that helps consumers stay more private online. We're the leading provider of privacy protection tools, including our private search engine that is the fourth largest in the European Union and serves over two billion queries a month. Among other tools, we also make a private mobile browser as well as private browser extensions, which collectively are downloaded over one hundred thousand times a day. We believe that privacy is a human right and that getting privacy online should be simple and accessible to everyone. Established in 2008, we have been robustly profitable since 2014 as a result of revenue generated from contextual advertising, which is based on the context of a page you are viewing (e.g., generated from your search terms), as opposed to behavioral advertising, which is based on detailed profiling about you as a person.

We welcome the Commission's commitment to establishing an ex ante regulatory instrument for large online platforms with significant network effects acting as gatekeepers in the European Union's internal market. We concur that it is critical to dilute the power of online gatekeepers, for the good of society, innovation, and business. We also welcome the Commission's intention to introduce a New Competition Tool in order to strengthen its arsenal of measures to prevent markets from tipping.

Many of the issues that people are rightfully concerned about on the Internet all stem from the same root: a lack of privacy. That deficit leads to filter bubbles, discriminatory targeting, commercial exploitation, identity theft, misinformation campaigns, and chilling effects. As more people choose privacy, and as governments facilitate and buttress those choices, we can build a better society. While privacy-protective businesses will come from market innovators, governments need to ensure a market actually exists, that it is not so dominated by inappropriate or misleading commercial practices. Today, it means that privacy-respecting businesses cannot effectively reach users. **The three instruments – classic ex-post enforcement, ex-ante regulation, and the new competition tool – could form a comprehensive, effective, and practical architecture for tackling competition problems.**

We support the Commission's efforts towards restoring and preserving competition in digital markets, assuming the European Union will invest adequate resources in this effort. We agree that structural change is needed to combat privacy-intrusive, deeply integrated platforms that use personal data and foreclosure strategies to expand into additional markets and exclude rivals. However, to combat

this phenomenon, both regulatory speed and technical savvy are key to success. Strict deadlines must be imposed and followed; they must be measured in months, not years. The regulator must have substantial professional staff (lawyers, economists, engineers, researchers, technicians) and procedural power to obtain documents, data, code, and other information. Without these features, the regulator has no practical ability to understand and regulate entire industries and platforms.[1]It is therefore of primary importance for the successful enforcement of the new regulatory framework that the legislature dedicates the necessary resources to the regulator. Should that not occur, the problem is only exacerbated, much like the deeply flawed preference menu instituted as a remedy in the aftermath of the Commission's Android competition case has only entrenched Google's dominance.

In any event, the Commission's intention to work on long-term regulatory solutions should not jeopardize rigorous enforcement of existing competition law and decisions, such as the Commission's case against Google's anticompetitive practices with Android devices.[2] In a series of blog posts, we explained how Google only pretended to correct its illegal practices. Because we are directly experiencing the detrimental effect of Google's self-preferencing practices, we hope our suggestions for correcting these practices in mobile search can serve as an inspiration for the upcoming ex ante regulation. **Google's behavior with the Android remedy is the typical result of a lack of regulatory scrutiny against the aggressive foreclosure strategy of an integrated gatekeeping platform**. We demonstrated that:

- Google's decision to introduce a "pay-to-play" auction format is egregiously flawed.[3] This auction format incentivizes bidders to bid what they can expect to profit per user selection. The

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[1] For example, a business that relies on Google for core services is bound by contract to not disclose restrictive contract provisions in the absence of compulsory process. Similarly, companies dependent on large gatekeepers may be reluctant to jeopardize their business by affirmatively reaching out to regulators but may be eager to respond to a legal requirement to provide information.

[2] In 2018, the Commission imposed a record fine on Google for illegal practices on Android mobile devices. The Commission found that Google leveraged its control of the mobile operating system (Android) and the app store (Play Store) to require device makers to pre-install Google's browser (Chrome) and search app, therefore securing default positions. As required under the law, Google is also required to take action to reverse the improper advantage it obtained with a behavioral remedy, which led to the search preference menu.

[3] Every quarter, Google asks market participants to bid a price per user that selects them on the preference menu. The 3 highest bidders win and appear on the menu for the following quarter, paying Google for each user the price bid by the fourth (and losing bidder). See more on Google's page: https://www.android.com/choicescreen/

long-term result is that the participating Google alternatives must give all their preference menu profits to Google! Google's auction further incentivizes search engines to be worse on privacy, to increase ads, and to not donate to good causes because, if they do those things, then they could afford to bid higher.

- Although many search engines exist, Google only allows three choices in addition to Google itself. User testing demonstrates that users will in fact scroll through multiple screens to see a full list of search engines. Even without scrolling, ninety-six percent of Android phones in Europe can display five search engines on the first screen, and 51% can display six or more, while still showing descriptions for all. Just 4% can only display four options – yet the Google-designed preference menu only displays four search engines.
- The Google-designed preference menu uses dark patterns to give users the impression of choice, when in fact subtle cues are driving those users toward Google. This can be corrected with a scrollable menu, logos, simpler language, company descriptions, and an introductory screen. Another Google-deployed dark pattern is the decision to activate the preference menu only once, during user activation of new Android phones certified by Google after March 2020. Users are unable to access the preference menu ever again without doing a complete factory re-set of the device — yet Google makes it extremely easy to change from a Google search alternative to Google Search.
- Even using the flawed Google design, a search preference menu — one that changes all search defaults and includes the most common Google alternatives — can deliver meaningful search engine choice to consumers and significantly increase competition in the search market. User surveys show that people select the Google alternatives at a rate that could increase their collective mobile market share by 300%-800%, with overall mobile search market share immediately changing by over 10%. Using our proposed design, 24% of Europeans choose a Google alternative, which is 8 times higher than the 3% today.

The contemplated regulation and tools should prohibit gatekeeping platforms from establishing their own services as a default setting. This would effectively ban Google's self-preferencing practices, as most plainly seen in the default setting of Google Search in its products (e.g., the Android default home screen search bar and the Chrome browser on both mobile and desktop devices). When a company has such dominance in one gatekeeping market (e.g., browser or mobile operating system), it should not be permitted to obtain automatic domination (default setting) in another core, embedded gatekeeping market (search engine). **To enforce this ban, direct regulator intervention will be critical.** The regulator should ensure genuine competition is present in the market – we think preference menus are an excellent fix to defaults and should be mandated, with granular attention to design and

implementation.[4] The regulator should also be empowered to counter other strategies the gatekeeping platform might deploy to maintain market dominance via self-preferencing (e.g., exclusion of Google's Pixel phones from a preference menu incentivizes Google to funnel consumers to Pixel phones).

We also believe that the regulator should be able to mandate preference menus to all users at once in order to swiftly address competition problems, and not just progressively over time. For example, with Android devices, Google delayed the preference menu for over 19 months after the liability decision, and then only displayed the search preference menu on some new devices. While Google has apparently claimed that it is impossible to display an effective preference menu on existing devices (i.e., one that would change all the search defaults including the home screen search bar), we find this hard to believe given the common practice of pushing out important Android software updates for other reasons that change all aspects of the device software (e.g., recent COVID exposure notification updates), and the fact that Google was able to successfully deploy a preference menu on all Android devices in Russia in 2017. Even if technological barriers prevent a change to the home screen search bar on existing devices, those barriers certainly do not prevent Google from displaying an alert box on existing devices to change the Chrome search default or replace the Google app with an alternative within the Play Store. Of course, we have opinions on how that alert can be designed to be effective and not more visual clutter that nudges consumers to dismiss without due regard.

While we strongly advocate for preference menus, the regulator should also have the power to require gatekeeping platforms to give users the possibility to easily switch search engines outside the context of the initial preference menu display. For example, the Chrome browser and the Android operating system should be updated such that consumers can easily change their search engine themselves by a simple click (i.e., get back to the preference menu setting). Right now, when consumers visit DuckDuckGo.com or download our app, we have no simple, programmatic way to help them change their default search engine across their Android device (e.g., both the home screen search bar and in Chrome). Instead, these are multi-step, non-intuitive changes, with the home search screen bar change not even possible without very advanced technology skills. We should be able to prompt the consumer (e.g., "do you want to change your default search engine to DuckDuckGo? click here") to jump directly to the preference menu such that, if the consumer selects DuckDuckGo, all those defaults would change at once with one tap.

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[4] We commend the analysis of the UK Competition and Market Authority (CMA). In its landmark market study on online platforms and digital advertising, the CMA argued that the regulator should have the power to enforce such positive obligations, including to "introduce choice screens."

In addition, Google should be required to untie the home screen search bar from their search app. Today, Android's home screen search bar is an app-based functionality tied to the Google Search app, and cannot be changed in Android Settings. Following the EU-mandated preference menu, consumers can, on new-device activation, change that to a non-Google search engine — but if the consumer later deletes the non-Google search app, the home screen search bar automatically reverts to Google Search.

Beyond preference menus, the regulator should also address practices that unfairly draw consumers back to the dominant platform. For instance, in general search, we've seen how other Android features (like Google Assistant and other Google widgets) and other Google products (like Gmail), coupled with Google prompts to users (such as pop-up boxes), can have such effect.

The regulator also needs to address underlying business dynamics whereby dominance reinforces dominance. It is even more so the case in digital markets, where data-hungry gatekeeping platforms build up their advantage through a massive user base. In the general search market, Google's billions of daily user queries means it accumulates invaluable data on users' preferences and is able to refine its search results at a larger scale. As suggested by the UK CMA, the regulator should therefore be empowered to "*require Google to provide click and query data to third-party search engines to allow them to improve their search algorithms.*" This would be done on the basis of a provision in the gatekeeping regulation mandating API access under certain terms.

We also support a prohibition of user tracking for the purpose of behavioral advertising. Unchecked data-harvesting practices are a threat to competition just as they are a threat to people's privacy rights, freedom of speech, and access to information. Business models based on user tracking and the monetization of personal data fundamentally incentivize viral content and trap people into their "filter bubble" on content they can or cannot see. These conglomerates are then able to further cement and expand their market position.

In reality, user profiling is not indispensable to provide users with more relevant organic results and make money through advertisement. Our own business shows that it is possible to provide users with a competitive search experience and be robustly profitable, solely based on contextual advertising. Outlawing behavioral advertising (in whole or in part) would open up significant competition for advertising to these users, because they could only be served by contextual advertising. Because contextual advertising does not require massive troves of personal data, many more firms could compete within this sector, and contextual advertising would finally get the investment it needs (from big corporations, venture capital, etc.) to compete on a level playing field with behavioral advertising. In 2019, we crafted a "Do Not Track" law for the U.S. Congress in which we proposed to make consumer

opt-out decisions from online tracking mandatory for all online service providers – the regulator could use this proposal as a starting point for consideration.

Independently, we also suggest limiting the data sharing between business units for the dominant firms, e.g., no user data sharing between Google Search and YouTube or Instagram and Facebook. Similarly, any mergers or acquisitions that would strengthen data monopolies' uses for behavioral advertising should be prohibited. Taken together, these prohibitions would further increase competition in the digital advertising market by lessening the draw to behavioral advertising relative to contextual advertising.

We applaud the Commission's ambition to comprehensively address platform regulation, towards fair, competitive, and rights-protective digital markets. We stand ready to provide additional insights and data to the Commission as it shapes the Digital Services Act.