

Response to Consultation

Fair Ranking Conduct Requirement

CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For more than 50 years, CCIA has promoted open markets, open systems, and open networks. In our response to this and the other consultations, our focus for this first set of conduct requirements is where the conduct requirements raise concerns for the wider digital economy, or where its analysis sets a concerning precedent for future SMS investigations.

Do you agree with the proposed scope of the fair ranking CR?

Regulation without evidence of a problem.

The motivation for a fair ranking conduct requirement (CR) is concerning. The CMA does not present any evidence of bias in Google's decision-making; rather it privileges unevidenced publisher concerns about the potential impact on investment. This despite acknowledging Google policies that prohibit discriminatory ranking behaviours. This risks motivating other un- or minimally-evidenced complaints across a broad range of digital services as a means to secure regulation of counterparties, instead of focusing on tangible consumer concerns.

Rather than risk imposing a cumbersome regulatory process that may complicate improvements and product developments to the Google Search engine, the CMA could rely on its extensive investigatory powers to directly reassure publishers that it has not seen evidence to substantiate such allegations.

Naive view of relationships among publishers and with consumers

The CMA seems to take the view that publisher expenditures to secure a prominent search position represent a cost imposed by Google, which is then expected to be passed on to consumers, instead of an attempt to secure an advantage in a competitive multi-sided market for consumer attention.

In many cases, the best outcome for consumers will not be maximising the efficiency of search engine optimisation:

- intermediaries, such as specialised search engines, may attempt to insert themselves between consumers and sellers (e.g. airlines), consumers might prefer to reach sellers directly. The cited example of a specialised search engine that spent 500-1000 man-hours responding to algorithm changes may well be an example of this kind of behaviour;
- some sources have more scope to invest in search engine optimisation, consumers might find content from other sources under-represented in results. The cited policy change to prioritise user-generated content may well be an example of addressing this kind of imbalance (Reddit users are less likely to optimise their posts than professional publishers); or

- sources are promoting misleading or malicious material, those doing so will innovate and experiment with ways to get their content in front of users. This is particularly relevant to all kinds of policies around abuse of the search engine.

Economic analysis of multi-sided market incentives has generally found that there is a strong incentive to balance the interests of different market participants efficiently: “the price structure, the relative prices charged to each side of the market) is independent of the type of network governance (proprietary or not for profit) or indeed the level of competition between networks.”¹ While the issue is not a formal price in this instance, the same logic applies to balancing the interests of publishers seeking to promote their work and consumers seeking to find useful content. If Google overly favours the interests of particular publishers or consumers, engagement with the network as a whole will suffer, and Google will lose out overall.

Interaction with other regulations

There are interactions between many of the issues reported here and other regulations. Google could face consequences under the Online Safety Act (OSA), for example, if it is found not to have taken appropriate steps to mitigate risks relating to sensitive or malicious content.

At a minimum, if the CMA goes ahead with this regulation, it should establish a clear understanding with Ofcom that measures required to satisfy the Fair Ranking CR will not be taken as a breach under OSA and vice-versa.

Do you have any views or evidence on the benefits or costs of the Fair Ranking CR?

It considers technical costs to Google versus benefits to publishers, essentially arguing that publishers will be able to optimise their services to reach consumers more affordably. The CMA further assumes that these savings will be passed on to consumers without making an assessment of an appropriate pass-through rate.

This analysis ignores a much more direct impact on consumers, who will likely lose out with a more manipulable search engine. Given the number of consumers using Google Search and the consumer welfare associated with that use, the negative impact on the quality of the consumer experience is likely to be greater than other potentially positive impacts of this measure.

The simplest way for the CMA to address these concerns would be to assess optimisation for the search engine on a balanced basis:

- If investments in search engine optimisation become more efficient, what content is more or less likely to be featured in Google Search? Do consumers prefer the more optimised content, or would they prefer results less distorted by this kind of third-party investment?

¹ Gonçalves, R. Policy Challenges in Two-Sided Network Industries, Europe Economics Staff Working Paper, 2003.

- If search engine optimisation becomes more predictable, will it reduce costs or lead to a competitive increase in investment as other publishers react?
- What potential does the published information have to be used to promote malicious content? What kind of social harms might result from this and how should this be weighed against marginal anticipated improvements in ROI for legitimate businesses?

The CMA should take the time to understand all these points, or accept a more proportionate voluntary approach, before adopting proposed regulations that risk undermining the quality of the Google Search service. Otherwise, overly burdensome regulations may ultimately hurt the interests of consumers and publishers less focused on Google Search (e.g., direct sellers). Such a regulatory approach is responding to the relatively narrow set of publishers that engage with consultations of this sort.

Third party audit is generally a requirement that the CMA should approach cautiously. It is not clear that the CMA can use the necessarily high-level principles it has set out for fairness in search rankings to define “suitable criteria”² against which a third party auditor can test behaviour. The fast-evolving technology of search (relative to, for example, financial accounts) is also a poor fit for third party audit, as standards might need to change repeatedly.

Do you have any views on the non-discrimination part of the Fair Ranking CR?

Are the requirements sufficiently comprehensive?

Criteria (iii) states that Google should not take into account whether a publisher has chosen to opt out of its search generative AI features, or any other service outside Google search. However, this should not preclude, for example, companies seeing less prominence in search generative AI features because they have opted out of search generative AI features. At the moment this does not seem to be clear in the rules or interpretative notes.

Are there other factors which should be included in paragraph 4?

The CMA should be clear that nothing in the rules precludes Google responding to the expectations of other regulators, as it understands them, or requires Google to incur risks to consumer trust or its corporate reputation. Operators of digital services should have the discretion to act quickly where there is content that might harm the interests of its users, or where it believes the general public would expect it to act.

² This concept is described here:

<https://www.icaew.com/technical/audit-and-assurance/assurance/process/scoping/what-is-feasible/criteria>

Do you have any views on the transparency part of the Fair Ranking CR?

What should the concept of a “material change” cover?

Google should only be required to update publishers where there is something practical that publishers can do in response and that information is therefore actionable. Otherwise there is no practical benefit to publishers (e.g. improved planning) that justifies the risks associated with these disclosures (revealing information about ranking that could be used to manipulate search results and promote lower-quality content).

What are the advantages or risks of including your suggested changes?

No response.

Do you have views on the non-distortion and complaints part of the Fair Ranking CR?

What are your views on our proposed complaints-led process for addressing concerns about distortions, including advantages and risks?

A complaints-led process is positive to the extent that it ensures specific concerns, more likely to be actionable, are foremost in the process.

However, the risk with systems of this sort is that a small number of complainants drive severely disproportionate costs (a concern raised about the subject access regime, for example). Among the consequences would be a lengthier process to respond to legitimate complaints. The CMA should be clear that Google is entitled to limit unreasonable high volume or low quality complaints.

What factors should inform whether the materiality threshold has been reached?

As for reporting changes, the threshold for materiality in complaints should be where there is something practical that can be done in response, and that distortion is therefore actionable. Otherwise there is no practical benefit to publishers (i.e. mitigating that distortion) that justifies the risks associated with these processes (revealing information about ranking that could be used to manipulate search results and promote lower-quality content).

Do you have views on our proposals for introducing a general complaints process covering manual exclusions from Google's search index?

Manual exclusions are particularly likely to relate to other regulatory or social expectations of Google. The CMA should ensure that its process does not preclude Google responding efficiently to other regulators.