



## Submission on behalf of FairSearch to the ACCC's Issues Paper

### Views on the roll-out of Google's search and browser choice screens following the European Commission's *Google Android* decision

22 April 2021

#### 1. INTRODUCTION

1. FairSearch is grateful for the opportunity to respond to the Australian Competition & Consumer Commission's ("ACCC") call for submissions of 11 March 2021 in relation to its issues paper for the *Digital Platform Services Inquiry – September 2021, Report on market dynamics and consumer choice screens in search services and web browsers* ("**Issues Paper**").<sup>1</sup>
2. FairSearch is a group of businesses and organizations united to promote economic growth, innovation and choice across the Internet ecosystem by fostering and defending competition in online and mobile search. FairSearch was the initial complainant triggering the investigation that led to the European Commission's 18 July 2018 decision in Case AT. 40099 – *Google Android* (the "**EU Android Decision**") and FairSearch and its members were actively involved in the investigation that led to the adoption of its 27 June 2017 decision in Case AT. 39740 – *Google Search (Shopping)*.
3. FairSearch has relevant knowledge and experience to share with the ACCC about the design and implementation of choice screens from the experience of its members in connection with investigations by the European Commission. In addition to FairSearch's involvement in the European Commission's investigations outlined above, members of FairSearch continue to be affected by the inadequate implementation of Google's choice screens and have considered participating in the auction of the search choice screen. One of its members also participated in the European Commission's investigation that led to its 16 December 2009 decision in Case COMP/C-3/39.530 – *Microsoft (Tying)* (the "**EU Microsoft Tying Decision**").
4. In January 2021, FairSearch and its members submitted an analysis of Google's choice screens to the European Commission to express their deep concerns about Google's purported implementation of the remedies for the tying abuses identified by the European Commission in the EU Android Decision. FairSearch highlighted that Google's choice screens wholly fail to meet the standards set out in the EU Android

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<sup>1</sup> See <https://www.accc.gov.au/media-release/feedback-sought-on-choice-and-competition-in-internet-search-and-web-browsers>, last accessed 8 April 2021.

Decision and urged the European Commission to commence non-compliance proceedings without delay.

5. The present submission focuses on the deficiencies with the design of both the browser and search choice screens proposed by Google for Android devices. We understand that Google's EU browser choice screen was only implemented for a short time in Europe, and the absence of such a choice screen in itself is a concern in relation to the implementation of the EU Android Decision. As further outlined below in para. 25, to the extent that the absence of the EU browser choice screen stems from the potential conflict between the choices made by the user first on Google's search choice screen and subsequently on Google's browser screen, any effective design of multiple co-existing choice screens should carefully consider the sequencing of the screens so as to respect the individual user's choice to a maximum extent. However, the shortcomings of Google's short-lived European browser choice screen help illustrate the measures that need to be implemented to ensure that any choice screens implemented in Australia are effective.
6. FairSearch welcomes that the ACCC wishes to also examine the contractual arrangements to secure default settings for browsers and search service offerings in Australia. While the focus of the present submission is on the design criteria for choice screens that could be implemented in Australia, FairSearch stresses that requiring Google to implement choice screens will not be sufficient to restore competition and safeguard consumer choice. FairSearch's view is that the ACCC should also take action against other anti-competitive arrangements Google currently has in place, including those highlighted by the U.S. Department of Justice's October 2020 complaint against Google, such as Google's payment to Apple of USD 8-12 billion per year in exchange for Google Search being maintained as the default search service on Apple devices.<sup>2</sup>

## 2. EXECUTIVE SUMMARY

7. In response to the relevant questions of the ACCC's consultation regarding the design criteria for effective choice screens:

*23) Would choice screens facilitate greater competition and/or improved consumer choice in Australia?*

8. Yes, an appropriately designed choice screen can help restore competition and provide consumer choice in circumstances where a vertically integrated gatekeeper platform

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<sup>2</sup> See Department of Justice, Justice Department Sues Monopolist Google For Violating Antitrust Laws: Department Files Complaint Against Google to Restore Competition in Search and Search Advertising Markets, 20 October 2020, accessed 19 April 2021.

provider has or threatens to leverage its platform market position into related markets. However, a choice screen will only work if it is properly implemented. As the UK's Competition and Markets Authority ("CMA") has found, "*design considerations can have a material impact on how users engage with choice screens.*"<sup>3</sup> Prevention is generally better than cure, however, and in markets where a vertically integrated provider, based on its ability and incentives threatens to, but has not actually implemented, leveraging conduct favouring its own products to the detriment of competing ones, a pre-emptive ban on engaging in such conduct is likely to be the most effective approach to safeguard competition and consumer choice.

a) *How should the choice screen be designed to best achieve this objective?*

9. The selection criteria should meaningfully stimulate competition and be transparent, objective, and easy to implement. FairSearch therefore recommends the following set of minimum principles for the design of effective search and browser choice screens:
  - (a) ***Objective, neutral, and transparent selection criteria.*** Choice screen options should be included based on objective and neutral criteria that do not favour the choice screen provider. The basis on which options are included in the choice screen must be clear and transparent.
  - (b) ***Sufficient number of options.*** Users should be given the possibility to choose their providers from a sufficient number of options. The four options provided by Google's current Android search choice screen are too limited to allow consumers to exercise true consumer choice. Provision for a similar number of options as in the EU Microsoft Tying Decision (in that case twelve, with five of the most popular ones which were immediately visible, and further options accessible through scrolling) is recommended.
  - (c) ***Equal treatment.*** In order to avoid screen bias:
    - Search providers or browsers included in the choice screen should be given equal prominence on the screen, including by all being listed in a random order.
    - The user experience should be neutral and not predispose the user towards any one choice (or preserve the *status quo*). For example, a choice screen should not include a "Next" button (or any equivalent button: *e.g.*, "No thank you" or "Finish") that incites users to click and move on without making a choice, consolidating the *status quo* in favour

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<sup>3</sup> CMA, *Online platforms and digital advertising market study*, Appendix V, para. 57.

of the choice screen provider's default option. The design should not nudge the user to proceed without making a positive choice as to which option the user prefers. Similarly, after the user has made a choice, the choice screen provider should respect the user's choice, and not design the interface of its product in a way that nudges the user to use the choice screen provider's option, if the user did not choose that option.

- The search providers or browsers included in the choice screen should be accompanied by a short, neutral description to allow the user to make an informed choice.
- (d) ***Choice of default provider.*** The choice screen provider should make it possible for the user to select its provider of choice as the default. The choice screen provider must respect the default choices made by users and must in particular not seek by technical or other means to reverse the user's choice of an alternative option.
- (e) ***User friendly.*** Choice screen options should not lead to user fatigue. They should be simple to use and should enable users to implement their choices easily.
- (f) ***Offer of choice screen to new as well as existing users.*** The choice screen provider should be required to offer the choice screen to all users – for instance to all existing users of the provider's services and to all users periodically when a software update takes place and on the set-up of each new device.
- (g) ***No auction model or exclusion of providers based on revenues.*** FairSearch believes that any auction model is entirely inappropriate for a choice screen, for the reasons explained in paragraph 16, including the fact that it effectively excludes rivals whose business model generates less revenue per user but is otherwise consumer welfare-enhancing (*e.g.*, because it prioritizes user privacy over data monetization). The choice screen should not be based on a model which rewards only providers with high per-user revenues.
- (h) ***Expert to monitor compliance.*** To ensure the effectiveness of this remedy, the legislation should provide the ACCC with the power to appoint an appropriately qualified monitoring trustee to monitor compliance with the choice screen obligations. The trustee should report to the ACCC on a regular basis and those reports should be made public. This will facilitate the ACCC's enforcement of such obligations.

*b) What suppliers should the choice screen apply to?*

10. As the question does not specify to which "suppliers" it refers, there are multiple ways to interpret and therefore answer this question.
11. First, we understand that this question might be asking which suppliers of competing apps should be included in a particular choice screen, and on which basis. In FairSearch's view, choice screen options should be included based on objective criteria. Therefore, we would propose a similar approach to the one undertaken in the final commitments in the EU Microsoft Tying Decision, where the five largest browsers based on usage market share were placed randomly on the initial screen, and seven additional options were available by scrolling sideways, in a random order, with equal graphical features. These competing providers were selected by Microsoft by determining the highest usage shares semi-annually via publicly-available sources such as ComScore, NetApplications, and StatCounter (using monthly usage share averages for the previous six months for which such data was available).
12. Second, the question might also ask about the types of products for which a choice screen should be implemented. The choice screen should apply to suppliers of all types of products and services for which a vertically integrated provider of platform products in a monopoly position provides competing alternatives.
13. Third and finally, to the extent that this question asks which platform suppliers should be required to *implement* a choice screen, FairSearch considers that at least Google, as the supplier of the dominant search engine and browser, Google Search and Google Chrome, should be required to implement choice screens, based on its near-monopoly market share of licensable mobile operating systems with Android, its ability and incentive to leverage that position into other markets, and its history of implementing this type of leveraging conduct.

*24) Please provide feedback on the roll out of the Android choice screen in Europe. In particular:*

*a) What impact has the Android choice screen had on competition in search services and/or consumer choice? If you are referring to the impact of competition in a particular country, please specify that country. To the extent possible, please provide quantitative data.*

14. In FairSearch members' experience and based on FairSearch's observation of the relevant markets, Google's implementation of the Android choice screens has not had any positive effect on restoring competition on the merits. The ACCC should not conclude from Google's ineffective implementation that choice screens are generally

ineffective in improving competition and providing consumers with greater choice. Instead, as FairSearch highlights in this submission, the Android choice screens are flawed because of ineffective design.

*b) To what extent, if any, could the Android choice screen be improved?*

15. The Android choice screens should be improved by requiring Google to adhere to the principles set out above in the design of its choice screens, including the principles Google advocated itself in the context of the Microsoft Internet Explorer choice screen (explained in more detail below in Section 3).

*c) Are the auction arrangements determined by Google appropriate? Are the auction arrangements less favourable to some types of search services than others? If there were more options on a choice screen, and so the auction were not a fourth-price auction, how might that affect the price paid to Google by the winning bidders?*

16. The auction process for Google's search choice screen is inappropriate for a number of reasons (explained in more detail below in Section 5.1):

- (a) The auction process completely lacks transparency;
- (b) The auction model is costly for rivals and the auction process results in Google benefiting financially from the effects of its tying infringement;
- (c) The pay-to-play auction model effectively prevents rivals whose business model means that they make less money per user from participating (including differentiated providers offering, *e.g.*, a privacy-friendly search service); and
- (d) Google's auction introduces false scarcity, which unnecessarily limits consumer choice and drives up the price to the maximum rivals can afford to pay.

17. FairSearch believes that any auction model is entirely inappropriate for a choice screen.

*d) How have consumers, suppliers of search services, device manufacturers and other market participants reacted to the Android choice screen in Europe?*

18. Overall, search suppliers object to the ineffectiveness of the Android choice screens in Europe, and consumers have not yet seen any true benefits from them, as we outline below. In light of this ineffective implementation, the benefits of the choice screen to device manufacturers are not immediately apparent either. While device manufacturers might claim increased support costs, similar claims were overruled when the European Commission adopted its Microsoft Browser Choice Screen commitments decision in 2009. The EU Microsoft Browser Choice Screen, while flawed in some respects (as discussed below), did provide users more merit-based choice and did help in restoring competition in the market place that had been distorted by Microsoft's tying of Internet

Explorer. It illustrates that choice screens can have a positive impact, benefitting users and other market participants. FairSearch urges the ACCC to learn from that experience, adopt the instructive elements from the Microsoft Browser Choice Screen, and improve on its shortcomings.

19. The answers above are explained in more detail below.

### 3. REQUIREMENTS FOR AN EFFECTIVE CHOICE SCREEN

#### 3.1 The EU Microsoft browser choice screen provides an example that should be instructive to the ACCC

20. In the EU Microsoft Tying Decision relating to Microsoft's abuse of its dominant position in the market for client PC operating systems by tying its browser Internet Explorer to Windows, the European Commission negotiated commitments with Microsoft which resulted in an obligation on Microsoft to make a browser choice screen available on Windows operating systems. According to the European Commission, the commitments were "*suitable for providing rival web browsers with an effective opportunity to compete on the merits with Internet Explorer and for enhancing competition on the web browser market by removing Microsoft's artificial distribution advantage and by informing users about available web browser choices*"<sup>4</sup> and would "*carry benefits for consumers by improving choice and encouraging innovation.*"<sup>5</sup> The European Commission further pointed out that the browser choice screen would also address the European Commission's monopoly maintenance concerns.<sup>6</sup>

21. Google, the provider of the Chrome browser, itself played a central role in advocating for, commenting on, and thereby shaping the browser choice screen in the procedure leading to the adoption of the commitments decision. Google's CEO Sundar Pichai at the time hailed the commitments, stating that "*[m]ost consumers in the past have chosen Internet Explorer because it came on their computers. Now the decision will be made on the merits.*"<sup>7</sup>

22. At the insistence of Google and other competing browser providers, the following principles were reflected in implementing the final commitments in the EU Microsoft Tying Decision:

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<sup>4</sup> Case Comp/C-3/39.530 – *Microsoft (Tying)*, recital 104 (available here: [https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39530/39530\\_2671\\_3.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/39530/39530_2671_3.pdf)).

<sup>5</sup> *Ibid.*.

<sup>6</sup> *Ibid.*, paragraph 106.

<sup>7</sup> Leo Cendrowicz, "In E.U. Deal, Microsoft Allows Rival Browsers" (*TIME magazine*, 17 December 2009) <http://content.time.com/time/business/article/0,8599,1948381,00.html>, last accessed 7 April 2021.



- ***Objective, neutral, and transparent selection criteria.*** Microsoft's final browser choice screen presented the browser options based on objectively determined market share, which was reassessed every six months. A choice screen should not favour the choice screen provider and the basis on which options are included in the choice screen must be clear, neutral and transparent.
- ***Sufficient number of options.*** The five largest browser providers based on usage market share were placed on the initial screen and seven additional options were available by scrolling sideways. An effective choice screen requires that users should be given the possibility to choose their providers from a sufficient number of options.
- ***Equal treatment.*** In order to avoid screen bias:
  - The five largest browser providers were shown on the initial screen in a random order, with equal graphical features.<sup>8</sup> Critically, even though Internet Explorer was already installed, it was not afforded privileged treatment on the choice screen relative to the other options, but subjected to the same presentation and randomization as the competing options.
  - Moreover, the choice screen did not nudge users to preserve the Microsoft *status quo*. Indeed, the user experience should be neutral and not predispose the user towards any one choice (or preserve the *status quo*). For example, a choice screen should not include a "Next" button (or any equivalent button: e.g., "No thank you" or "Finish") that incites users to click and move on without making a choice, consolidating the *status quo* in favour of the choice screen provider's default option. The design should not nudge the user to proceed without making a positive choice as to which option the user prefers. For instance, in the case of the Microsoft Browser Choice Screen, users could delay their choice by clicking "select later", in which case the choice screen would keep appearing until the user made his or her choice.<sup>9</sup> Similarly, after the user has made a choice, the choice screen provider should respect the user's choice, and not design the interface of its product in a way that nudges the user to use the choice screen provider's option, if the user did not choose that option.

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<sup>8</sup> Case Comp/C-3/39.530 – *Microsoft (Tying)*, Annex: The Commitments.

<sup>9</sup> It should be noted that, in the EU Microsoft Tying Decision context, the user retained the ability to click away the browser choice screen and thereby definitively dismiss the choice screen.



- Finally, Microsoft's browser choice screen included basic descriptions of each of the competing browsers. In general, any providers included in the choice screen should be accompanied by a short, neutral description to allow the user to make an informed choice.
- ***No auction model or exclusion of providers based on revenues.*** There was little or no doubt at the time of discussions around the Microsoft browser choice screen that Microsoft would need to include browser choice options at no cost. Indeed, in its final commitments, Microsoft explicitly committed to *not* charging for the inclusion of a third party web browser in its browser choice screen.<sup>10</sup> This approach ensured that the choice screen was open to all based on objective criteria without regard to the browser provider's business model or financial situation. FairSearch believes that the principle of applying fair, objective and transparent criteria to the selection of service providers for a choice screen mandates that no provider should be excluded from the choice screen simply on the basis of its revenues. Therefore, any auction model is entirely inappropriate for a choice screen, for the reasons explained further in paragraph 16 and below in Section 5.1 in relation to Google's auction model choice screen. In particular, the auction model effectively excludes rivals whose business model generates less revenue per user but is otherwise consumer welfare-enhancing (*e.g.*, because the rival prioritizes user privacy over data monetization). The choice screen should not be based on a model which rewards only providers with high per-user revenues.
- ***Offer of choice screen to new as well as existing users.*** The Microsoft browser choice screen was presented to acquirers of new copies of the Windows OS (*e.g.*, when purchasing a new PC) as well as to existing users, via Windows Update. That approach ensured that Microsoft would not unduly benefit from its past behaviour by accepting the *status quo* for existing users.
- ***User friendly.*** The Microsoft choice screen was designed with ease of use in mind. The interface was simple, presented itself automatically, and was separated from other interfaces in the Windows OS. The ease and quality of the user's experience is important in order to prevent users from being put off by complexity.

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<sup>10</sup> Case Comp/C-3/39.530 – *Microsoft (Tying)*, Commitments Annex, paragraph 17.

23. The Microsoft browser choice screen incentivised Microsoft to innovate, as it had failed to introduce meaningful improvements to Internet Explorer for years,<sup>11</sup> and provided true opportunities for the different browser providers to compete on the merits over the period the choice screen was in place.
24. Although the Microsoft browser choice screen was not perfect, as discussed below, the experience with the Microsoft browser choice screen shows that an *appropriately designed* choice screen can be an effective and proportionate means to restore competition and provide consumer choice in response to a tying or preferencing infringement. The effectiveness of this regulatory response to Microsoft's tying infringement was demonstrated by what happened during a period of approximately 14 months in 2011-2012, when Microsoft inadvertently failed to implement its browser choice screen, as a result of which the European Commission issued a decision against Microsoft for non-compliance with the commitments outlined above.<sup>12</sup> During this period, the effects on browser competitors were significant, *e.g.*, with downloads of Mozilla Firefox decreasing 63% until the glitch was fixed by Microsoft, after which the number of downloads increased again.<sup>13</sup>

### 3.2 Additional requirements that a choice screen should reflect

25. The Microsoft browser choice screen, although in many ways superior to the choice screens Google is proposing, did leave room for improvement. Moreover, there are concerns highlighted by Google's choice screen designs that did not arise (at least not in the same way) in the context of the Microsoft browser choice screen. An effective choice screen should comply with the following further requirements:
  - ***Choice of default provider and respect of user choice.*** It appears that the Microsoft choice screen did not explicitly state that a user's choice should be set as the default application. Nevertheless, FairSearch understands from the European Commission that the mock-ups provided by Microsoft to the European Commission for the design of its browser choice screen would, by operation of the choice screen, allow the rival browser provider to have their

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<sup>11</sup> Case Comp/C-3/39.530 – *Microsoft (Tying)*, recital 56 "Due to the fact that Internet Explorer lagged behind its competitors in a number of areas and was the least standards-compliant of the main web browsers, the Commission took the preliminary view that the tying of Internet Explorer to Windows limited innovation in web development."

<sup>12</sup> See European Commission's press releases, "Antitrust: Commission sends Statement of Objections to Microsoft on non-compliance with browser choice commitments" dated 24 October 2012 and "Antitrust: Commission fines Microsoft for non-compliance with browser choice commitments" dated 6 March 2013, last accessed 7 April 2021.

<sup>13</sup> See the blog post of Harvey Anderson (at the time the General Counsel of Mozilla) of 30 October 2012: <https://lockshot.wordpress.com/2012/10/30/windows-eu-ballot-screen-technical-glitch/>, last accessed 7 April 2021.

browser designated as the default browser on the user's machine. The European Commission would have regarded any effort by Microsoft to undermine the user's choice of default browser as circumvention of the commitments. Indeed, FairSearch submits that it is important that the user's choice is respected, and that the choice screen provider should therefore make it possible for the user to select its chosen provider as the default. The impact of default positions on user choice has been well-documented, particularly in relation to search services. The UK CMA has outlined that consumers: (i) "*may not understand*" that they can change the default search engine or browser on their device; (ii) may be discouraged or "*put off by complexity or other hassle factors*"; and (iii) may not appreciate the advantages of changing defaults if the alternatives to Google Search, as market leader, are not well understood.<sup>14</sup> Moreover, the CMA further notes that mobile defaults are "*likely to be more powerful than desktop defaults, for example because consumers are less likely to take steps to change or bypass defaults when faced with a smaller screen.*"<sup>15</sup> This demonstrates the importance of preventing default bias, and presenting the user with a clear choice to enable them to select its provider of choice as the default. The choice screen provider must respect the default choices made by users and must in particular not seek by technical or other means to reverse the user's choice of an alternative option. Finally, to the extent multiple choice screens are put in place (*e.g.*, for search services and for browsers), which could result in a potential conflict between the choices made by the user (*e.g.*, a choice of default search provider that is overruled by the choice of a browser with its own default search service), the sequencing of the screens should ensure that the individual user's choice is respected to a maximum extent (*e.g.*, by presenting the browser choice screen before the search choice screen, and applying the choice of default search service to all search interfaces including browser search boxes and address bars).

- ***Expert to monitor compliance.*** The experience with the Microsoft browser choice screen, including the adoption of a decision against Microsoft for months of non-compliance, highlights the importance of providing for a monitoring mechanism to ensure that the choice screen provider fully complies with the ACCC's requirements for a choice screen. In the present case, any legislation should, therefore, provide the ACCC with the power to appoint an appropriately qualified monitoring trustee to monitor compliance. The trustee should report

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<sup>14</sup> See UK Competition and Market's Authority's *Online platforms and digital advertising Market study final report*, dated 1 July 2020: [https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final\\_report\\_1\\_July\\_2020\\_.pdf](https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf), paragraph 3.113, last accessed 15 April 2021.

<sup>15</sup> *Ibid*, paragraph 3.103.

to the ACCC on a regular basis and those reports should be made public. This will facilitate the ACCC's enforcement of such obligations.

26. Google's implementation of choice screens in response to the European Commission's EU Android Decision illustrates how it approaches the design of such screens. Assessed against the light of the common-sense principles for choice screens outlined in Section 3, Google's implementation falls far short, leading to ineffective choice screens. The shortcomings of Google's EU choice screens should also be instructive to the ACCC in formulating its choice screen policy.

4. **GOOGLE'S EU ANDROID CHOICE SCREENS**

4.1 **The EU Search Choice Screen**

27. On 18 April 2019, Google stated that it would introduce a choice screen for Search (the "EU Search Choice Screen").<sup>16</sup> The initial description of the EU Search Choice Screen provided by Google at that time stated that it would show five search app providers "based on their popularity" and shown in a random order.<sup>17</sup>

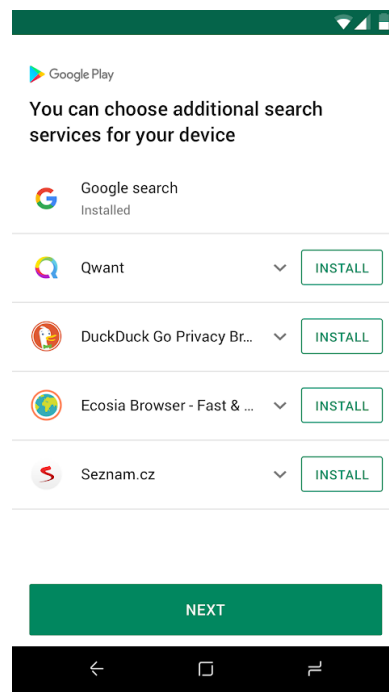
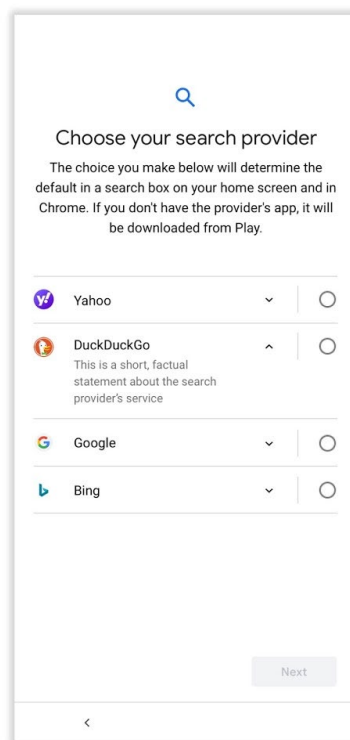


Figure 1: Google's mock-up of its implementation of the EU Search Choice Screen before the August 2019 amendment

<sup>16</sup> Google blog post of 18 April 2019: <https://www.blog.google/around-the-globe/google-europe/presenting-search-app-and-browser-options-android-users-europe/>, last accessed 7 April 2021.

<sup>17</sup> *Ibid.*

28. On 2 August 2019, Google publicly stated that, in fact, the EU Search Choice Screen would be an auction-model choice screen – a recurring country-based auction where only the *three* highest bidders will be displayed alongside Google on the Search Choice Screen which prompts users to choose a search engine during the configuration of a new device (or a reset of an existing device).<sup>18</sup> For each country's auction, Google requires bidders to "*state the price that they are willing to pay each time a user selects them from the choice screen in the given country.*"<sup>19</sup> According to Google, the provider that is selected by the user during the set-up of the device will pay the amount of the fourth-highest bid to Google (*i.e.*, the highest *losing* bid). Google also delayed the commencement date for the Search Choice Screen to 2020.



*Figure 2: Google's mock-up of its implementation of the EU Search Choice Screen following the introduction of an auction mechanism (August 2019)*

29. According to Google, unlike the choice presented by the EU Browser Choice Screen (described below), a choice made in the EU Search Choice Screen automatically

<sup>18</sup> Google blog post of 2 August 2019: <https://www.blog.google/around-the-globe/google-europe/update-android-search-providers-europe/>, last accessed 7 April 2021.

<sup>19</sup> Google blog post of 1 June 2020 (updated 8 February 2021): <https://www.android.com/choicescreen/>, last accessed 7 April 2021.

changes the default provider and makes certain other changes to the default options for searches using the device (e.g., the home search bar).

#### 4.2 The EU Browser Choice Screen

30. On 18 April 2019, Google stated that it would introduce the browser screen presenting Android users in Europe with an option to download browsers (Figure 3 below) in response to feedback received from the European Commission (the "**EU Browser Choice Screen**").<sup>20</sup> According to Google's public statements, the EU Browser Choice Screen shows a total of five browsers. Those browsers that are not already installed on the device "*will be included based on their popularity and shown in a random order.*" Based on the example screenshot provided by Google, the top slot(s) of the five available slots would be taken up by the browser (or browsers) that is (or are) already installed on the device – in virtually all cases, because of Google's tying conduct, Chrome.

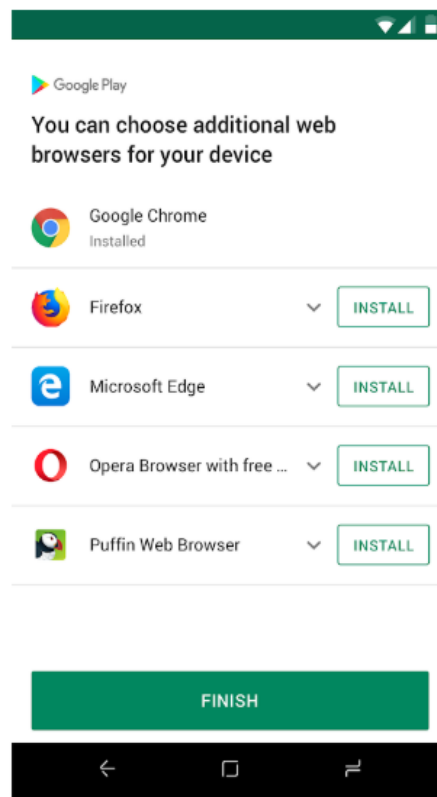


Figure 3: Google's mock-up of an implementation of the EU Browser Choice Screen (August 2019)

<sup>20</sup> Google blog post of 18 April 2019: <https://www.blog.google/around-the-globe/google-europe/presenting-search-app-and-browser-options-android-users-europe/>, last accessed 7 April 2021.

31. The EU Browser Choice Screen would be shown to both new and existing users of Android phones in Europe. As noted above, we understand that Google is not currently presenting any browser choice screen to users in Europe, which FairSearch believes is a concern in relation to the implementation of the EU Android Decision.

5. **GOOGLE'S EU ANDROID CHOICE SCREEN DESIGN IS SEVERELY FLAWED**

32. The way that Google has designed its EU Browser and Search Choice Screens in response to the European Commission's Android decision as described above is severely flawed and as a result, entirely ineffective.

5.1 **The design of the EU Search Choice Screen is ineffective**

33. Google's EU Search Choice Screen fails to comply with the EU Android Decision. While it appears that the options presented by the EU Search Choice Screen including Google Search will all be randomized regardless of the existing default, and that a choice automatically changes the default search service on the home screen and in Chrome, Google has otherwise designed the EU Search Choice Screen in a way that removes transparency from the search services selection process and turns the remedy for its infringement into a revenue source. As a result, Google's EU Search Choice Screen fails to offer any effective remedy to the anticompetitive effects of Google's abusive conduct.

34. Many of the EU Search Choice Screen's deficiencies result from its auction-based procedure for selecting just three search service alternatives to appear alongside Google Search:

(a) ***The auction process completely lacks transparency.*** The auction process determining inclusion in the EU Search Choice Screen is a black box controlled by Google without any oversight. There is no means of assessing whether the process of selecting the "winners" is fair and accurate. As a result, the options included in the choice screen are not based on objective and transparent selection criteria.

(b) ***The auction process results in Google benefiting financially from the effects of its tying infringement,*** whereas the precise purpose of a choice screen as discussed in Section 3 above is to eliminate the consequences of Google's infringement. Previously, the European Commission has explicitly stressed that the implementation of monetary compensation should not reflect the strategic



value stemming from the dominant firm's market power.<sup>21</sup> Google is exploiting exactly that value with the imposition of an auction-based selection model for the EU Search Choice Screen. The only reason firms are compelled to bid in the auction in the first place is the sway Google holds over Android and the market share of Android-based devices. The economics of an over-subscribed auction (exacerbated by artificial scarcity: see below) push prices up to the maximum revenue that participating search engine bidders forecast they would earn from an acquired user over the lifetime of that user, thereby increasing the financial benefit Google draws from the auction process. The pay-for-play auction model thus enables Google to achieve the exact same goal its long-lasting tying abuses were designed to accomplish, namely to draw as much financial value from each user as possible.<sup>22</sup> Quite contrary to Google's approach, in the market-tested EU Microsoft commitments case Microsoft explicitly committed to *not* charging for the inclusion of a third party web browser in its browser choice screen.<sup>23</sup>

- (c) ***The auction model is costly for rivals.*** Alternative search engines are forced to pay for traffic they would otherwise have generated organically in the absence of such a pay-for-play auction, reducing their resources to compete and innovate, and weakening their ability to challenge Google.
- (d) ***The model effectively prevents rivals whose business model means that they make less money per user from participating (including differentiated providers offering, e.g., privacy-friendly search services).*** Google's pay-to-play auction model requires bidders to submit bids based on an assessment of per-user revenue. As a result, the design of the auction model inherently and significantly disadvantages search engine providers with lower per-user revenues, who are often likely to be outbid by companies with higher per-user revenues in Google's auctions.<sup>24</sup> Search engines with lower per-user revenues include those which prioritise privacy or other purposes over profit maximisation.

Google's auction mechanism is particularly egregious because it multiplies the consumer harm of Google's illegal conduct: privacy-protective search services,

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<sup>21</sup> T-167/08, *Microsoft Corp. v European Commission* (2012), recital 29; Case COMP/C-3/37.792, recital 1008(ii).

<sup>22</sup> See also the CMA's report, *Online platforms and digital advertising market study*, Appendix V, para. 75.

<sup>23</sup> Case Comp/C-3/39.530 – *Microsoft (Tying)*, Commitments Annex, paragraph 17.

<sup>24</sup> Ecosia blog post of 12 August 2019 (updated 28 July 2020): <https://blog.ecosia.org/google-android-choice-screen-auction-eu-ecosia/>, last accessed 7 April 2021. See also DuckDuckGo blog post of 10 March 2020: <https://spreadprivacy.com/search-preference-menu-auctions/>, last accessed 7 April 2021.

which do not exploit users' data to maximize profits, generate lower revenues per user. Under the pay-to-play auction-based system designed to maximize Google's own revenue streams on the back of its rivals, this results in consumers largely being denied convenient access to these privacy-focused options that they might prefer.

The design of Google's auction process has the effect of obstructing the meaningful consumer choice that Google's remedy was supposed to provide.<sup>25</sup> The effect of this system can notably be observed in Google's latest quarterly auction in March 2021, which resulted in the elimination of rivals focused on privacy or other purposes such as Ecosia and DuckDuckGo from search menus in most European countries.<sup>26</sup>

- (e) ***Google's auction introduces false scarcity.*** Google's auction-model EU Search Choice Screen is limited to four search providers (including Google), meaning that *only three alternative* search providers can compete with Google for a place on the choice screen. By having only three alternatives, Google has manipulated the EU Search Choice Screen to introduce false scarcity. This scarcity is designed to result in over-subscription to the auction, further inflating the cost to competitors of participating (and thus the financial benefit to Google of them doing so). It has the further effect of unnecessarily reducing choice for consumers.<sup>27</sup> The comparison with the Internet Explorer browser choice screen in the case of the EU Microsoft Tying Decision is, again, striking: the choice screen in that case allowed users to select one of five options on the first screen and scroll to select from seven further alternatives.<sup>28</sup> Provision for a similar number of options is recommended if the ACCC does request Google to implement a choice screen for either or both search and browser services.

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<sup>25</sup> See TechCrunch blog post of 30 July 2020: <https://techcrunch.com/2020/07/30/googles-no-choice-screen-on-android-isnt-working-says-ecosia-querying-the-eus-approach-to-antitrust-enforcement/?guccounter=1>, last accessed 7 April 2021.

<sup>26</sup> See the results of Google's Q2 2021 auction: <https://www.android.com/choicescreen-winners/>, last accessed 7 April 2021. This effect of obstructing consumer choice can be observed quarterly: see also DuckDuckGo blog post of 28 September 2020: <https://spreadprivacy.com/search-preference-menu-duckduckgo-elimination/>, last accessed 7 April 2021.

<sup>27</sup> DuckDuckGo blog post of 20 May 2020: <https://spreadprivacy.com/search-preference-menus-scrolling/>, last accessed 7 April 2021; See also Ecosia blog post of 3 March 2020 (updated 29 September 2020): <https://blog.ecosia.org/google-auction-choice-screen/>, last accessed 7 April 2021.

<sup>28</sup> See Case Comp/C-3/39.530 – *Microsoft (Tying)*, Commitments Annex, paragraph 13 under the heading “Commitments with regard to a browser choice screen” on page 5.

## 5.2 The design of Google's EU Browser Choice Screen is also ineffective

35. Google's EU Browser Choice screen is ineffective because it is heavily biased towards a choice for Google's own browser Chrome, thereby failing to help restore competition on the merits (and indeed unlikely to have any positive effect at all on competition or consumer choice).

- (a) ***Screen bias in favour of the Google option.*** While public reporting about the functioning of the EU Browser Choice Screen is limited, according to Google, the browsers that are not already installed on the device will be shown in a random order on the EU Browser Choice Screen. From Google's illustrations in its blog post about the choice screen, it appears that those apps that *are* already installed on the device will be listed at the top of the choice screen. As is the case in Google's illustrations (see Figure 3 above), Google Chrome is likely to be *the* browser that is already (pre-)installed on virtually all existing Android devices due to Google's long-standing tying abuses. As a result, Google Chrome will be consistently listed at the top of the EU Browser Choice Screen. Google's premium positioning is a classic form of anticompetitive screen bias. It skews users towards maintaining the default, pre-installed browser in favour of another option. It is well-established that placing an option first in a list of choices renders that option far more likely to be chosen than options further down the list.<sup>29</sup> Google itself is well aware of this screen bias in other contexts; for example, it exacts higher fees for Search ads that are featured as the first ad in its list of search results than for ads that are ranked lower in its list of results. The EU Microsoft commitments decision also emphasized that the design and implementation of the choice screen should not express any bias for Internet Explorer or any other web browser.<sup>30</sup> If the Browser Choice Screen includes Chrome, this browser option should be subject to the same randomized placement as the other browsers, regardless of whether it is preinstalled or not.

In addition, the design of the Browser Choice Screen interface does not invite users to make a choice but rather nudges users to click on a big "Finish" button.

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<sup>29</sup> Case AT.39740 - *Google Search (Shopping)*, European Commission Decision of 27 June 2017, paragraphs 455 and 460. The *Google Search (Shopping)* decision also refers to the UK Competition and Markets Authority's review of existing literature on "Online Search: Consumer and Firm Behaviour", 7 April 2017, paragraph 1.6(c), LoF Response, Annex 21.19: "[o]n average, the first three links seem to account for 40-65% of the total clicks on desktop devices. On mobile devices, this tendency is even more accentuated, with the top three links on average accounting for more than 70% of the total clicks. The evidence suggests that [...] consumers seem to display an inherent bias to click on links in higher positions".

<sup>30</sup> Case Comp/C-3/39.530 – *Microsoft (Tying)*, paragraph 63 and 72(a), and Annex: The Commitments, paragraphs 7, 10 and 18.

This preserves the *status quo*, as clicking the Finish button without making a selection of a browser from the available choices completes the Browser Choice Screen process. Users do not need to make a choice but are instead encouraged by the design of the screen *not* to do so. By contrast, in the case of the EU Microsoft Tying Decision, users could delay their choice by clicking "select later," in which case the choice screen would keep appearing until the user made his or her choice.<sup>31</sup> Google's EU Browser Choice Screen does not operate in this manner. By presenting the choice screen to users *only once*, and by implementing a user interface for this single encounter with the choice screen that encourages users simply to bypass it, Google pushes users towards maintaining the pre-installed option without any further changes. Google's implementation of the choice screen interface means that Google preserves Chrome's preeminent market position obtained through its tying with Play and Search.

- (b) ***Chrome remains on the phone's display.*** In the EU Microsoft Tying Decision, when the choice screen was launched, the Internet Explorer icon would automatically be unpinned from the task bar. In contrast, Google has not affirmed that the Google Chrome icon is removed from the phone's display and it is assumed that it would be unlikely for this to occur.
- (c) ***Chrome is likely to remain the default search engine due to the design of the screen process.*** The EU Browser Choice Screen is designed in a manner which is likely to maintain Google Chrome as the default browser. When a user selects an alternative browser on the initial choice screen, the user is presented a further screen that explains – in a lengthy and descriptive text – how manually to change the default settings on the Android device to another browser. This series of manual steps must be memorized by the user since the explanatory screen disappears once the user clicks on the "I understand" button at the bottom of the screen. It is very unlikely that, if a consumer did select another browser, he or she would then also complete this series of manual steps to give effect to the selection.
- (d) ***Non-transparent selection of included browsers.*** The manner by which Google has selected the list of competing browsers to be included in its EU Browser Choice Screen is unclear. This non-transparent selection of browsers fails to restore a competitive, level playing field by only selectively granting

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<sup>31</sup> It should be noted that, in the EU Microsoft Tying Decision context, the user retained the ability to click away the browser choice screen and thereby definitively dismiss the choice screen.

*some* browsers the opportunity to be listed in the EU Browser Choice Screen on the basis of criteria that are neither transparent nor objective.

36. These various forms of bias thus individually and collectively skew the EU Browser Choice Screen in favour of Google, counteracting the very purpose underpinning a choice screen of ensuring a merit-based choice of browsers.

6. **CONCLUSION**

37. As demonstrated above, the design of Google's EU Search and Browser Choice Screens is ineffective and does not restore competition on the markets affected by Google's abusive conduct. Google's proposals in the EU allow it to retain the benefits and even profit from its abusive infringements of competition law.

38. As outlined in Section 3, an appropriately designed choice screen can be an effective and proportionate means to help restore competition and provide consumer choice. FairSearch would therefore support the adoption of a set of minimum principles for the design of effective search and browser choice screens under the oversight of the ACCC, as outlined above in Section 3.

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