



## Google/Fitbit: Merger control unfit for purpose?

by **Alec Burnside, Marjolein De Backer and Delphine Strohl**

Google closed its acquisition of Fitbit in January 2021, 14 months after announcement. But controversy continues: the Australian Competition and Consumer Commission (ACCC) rejected the package of commitments that had been accepted by the European Commission (EC), and the CEO of the UK's Competition and Markets Authority (CMA) went public with the view that he would have rejected the offer. The ACCC investigation continues as a post-closing enforcement investigation. Similarly in the US, the Department of Justice (DOJ) investigation continues, albeit the parties were free to close after expiry of the HSR waiting period. DOJ officials no doubt awaiting direction from incoming Biden-era DOJ leadership.

The Google/Fitbit polemic offers a real-time case study in the current debate around the fitness of antitrust to address Big Tech.

### **Issues raised by the Google/Fitbit transaction: EC versus ACCC analysis**

#### **Data, machine learning and artificial intelligence – preserving competition in nascent markets**

According to Google, the Fitbit deal was “about devices, not data”. Google described the transaction as creating an opportunity to invest more in Wear OS and to launch “Made by Google” wearable devices. But recognising that the devices also provide access to consumer health and fitness data, Google declared from the outset that Fitbit health and wellness data would not be used for Google ads. That same data can though be exploited by Google for many purposes beyond advertising, such as digital healthcare, insurance or corporate fitness programmes, and more generally powering Google's machine learning and related AI products and services. And going beyond data, a wearable device also functions as an alternative web entry point. Google's self-imposed advertisement commitment did not address any concerns related to these other opportunities, which duly became the focus of debate.

The concerns in relation to markets using wearable data as an input, such as “digital healthcare”, are well identified in the ACCC's Statement of Issues (18 June 2020)<sup>1</sup> which outlined the ACCC's preliminary views. The ACCC states that Google has an established presence in health whereby Google Health brings together “groups from across Google and Alphabet that are using AI, product expertise and hardware to take on big healthcare challenges”. With the addition of Fitbit wearable data, the ACCC found that Google will be in a better position to develop applications for individually tailored health management services but also for the wider population via the insights its algorithms can derive about specific health conditions by analysing the different user types, categories of users, consumers, specific attributes or health conditions, etc. Fitbit and Google are active in these, as the ACCC states, important markets. This led the ACCC to conclude that there are concerns about actual or potential competition but, even more significantly, more generally about Google being able to build a strong position in the nascent digital healthcare markets due to the combination of consumer data already accessible to Google and the additional Fitbit data. This may deter, or foreclose, others from entering or expanding in the space, the ACCC found.<sup>2</sup>

So the ACCC recognised the importance of ensuring that nascent markets can develop in a competitive manner and are not monopolised from the start by companies with an entrenched strong position driven by their larger data access – and data related products and services – which provides these companies with an invaluable advantage in machine learning and related AI products and services. This contrasts starkly with the EC's findings at the end of its investigation. The EC's press release (the decision is so far unpublished) indicates that market participants raised concerns about digital healthcare markets and the risk that the Google/Fitbit merger would impede alternative providers seeking to compete with the merged entity. But the EC dismissed this claim seemingly on the basis that these markets were nascent. The Cambridge Dictionary defines nascent as “only recently formed or started but likely to grow larger quickly”. It is far from obvious why the EC should act to protect *potential* competition in mature

markets (as it often does – see, for example, the treatment of pipeline products in pharma cases or route network expansions in airline cases) but should believe it lacks the powers to protect *nascent* competition.

These two opposing approaches nicely epitomise the present debate around digital mergers, where successive reports have highlighted past failures of enforcement.<sup>3</sup> In particular when a merger involves the combination of datasets, competition authorities are faced with the challenge of analysing the competitive impact of the datasets as assets but also what the impact of the combination is for products and services in adjacent markets relying on insights derived from these data. An additional dataset may have a radical impact when acquired by a company able to leverage other large data troves. This has been recognised by, *inter alia*, the Crémer et al report: “Within the context of merger control, a combination of different data troves will raise competition concerns if this combination allows the dominant firm to extract information that provides for a significant competitive advantage [that] is impossible for competitors to replicate or if the combination may [provide] the basis of the leveraging of market power.”<sup>4</sup> One of Google’s own leaders – its chief clinical officer at Verily Life Sciences, an Alphabet company using data science and technology to create healthcare products and services – has indeed stressed Google’s advantage in being able to combine a wide variety of data points: “Our thinking has evolved to do personalisation at scale. So, when you look at a particular member, [you have a] set of data points about their clinical disease, but also about what their social stressors are, their living condition is, their education is, etc. All of those things really [inform] how a provider should approach an individual for them to have the best possible outcome and live their best possible lives.”<sup>5</sup>

### Interoperability and competitive markets – data foreclosure in adjacent markets

Wearable devices do not exist in isolation. They form part of an ecosystem where, generally, the mobile phone is the gateway which: (1) collects, stores and transfers the data collected from users through their wearable devices; and (2) returns insights derived from the data through data analysis to the user. The collected data will, as a minimum, be shared with the device producer but, subject to user consent, may also be used by partners of the device producer who may be active in, for example, the insurance or healthcare sector.

Both the EC and the ACCC found that, post-acquisition, Google could put competing manufacturers of wearables at a disadvantage by degrading their interoperability with Android smartphones. The ACCC’s Statement of Issues explains further that, in addition to the Android operating system, Google also supplies and controls some key parts of the wearables ecosystem, including Wear OS, Google Maps and the Google Play Store. The ACCC added that Google already has the *ability* to degrade interoperability for third-party wearable providers but the Fitbit acquisition also gives it an *incentive* to “foreclose or otherwise inhibit access to

some of these products in order to increase the sales of its own wearables at the expense of its rivals”. Further, Google’s incentives to foreclose competing wearables will also increase if wearables “are found to be important for another segment of Google’s business (for example, health).”<sup>6</sup>

The latter concern could be characterised as “data foreclosure” by impeding the interoperability of third-party wearable devices with any of the key features Google controls in the wearables ecosystem. Google could introduce various limitations on data sharing with, for example, healthcare partners of the third-party wearable devices; or make certain functionalities dependent on sharing data collected by the third-party wearable devices exclusively with Google. The EC’s decision, once published, will reveal how it characterised the corresponding concerns.

### Google/Fitbit commitments: too little, too complex?

Google offered remedies to alleviate the identified concerns, which were accepted by the EC (as well as Japan and South Africa). The EC process went into Phase 2 but there was no Statement of Objections (which likely deprived the EC of useful leverage as matters progressed). Notably the EC did not market test changes to the Phase 2 remedy package, which can now be seen to feature significant carve-outs limiting its effectiveness. The commitments will run in principle for 10 years and are three-fold:

1. The **Ads commitment** specifies a silo structure to maintain a separation between the health and wellness data collected by Fitbit devices on the one hand, and Google advertising services on the other. However, a number of important data types are carved out of the silo, eg background geolocation data, allowing Google to leverage these for its advertising purposes. This lacuna aside, the silo device may be of interest as a device for data issues on other occasions.
2. The **Web API Access commitment** maintains access that existed to users’ health and fitness data through the Fitbit Web API, for certain software applications. Access is free of charge but is essentially limited to the types of data Fitbit currently shares with third parties and does not apply to eg data collected from users with a Fitbit Premium account or another paid service. Based on press reports it appears that Google is already considering expanding the scope of Fitbit Premium services and thus hollowing out the effective scope of the Web API commitment.<sup>7</sup>
3. The **Android APIs commitment** ensures free access for Android OEMs to certain APIs (so not all) that wrist-worn devices (not any other types of wearables) need to interoperate with an Android smartphone; and for wearable device manufacturers to those Android APIs which Google makes available to smartphone app developers. Access is thus only guaranteed to a subset of APIs and for specific types of wearables only. In

addition the linked non-discrimination commitment addresses only discrimination between different third parties, not between third parties' products and Google/Fitbit products.

These remedies have been heavily criticised in Europe and elsewhere. In particular, the ACCC rejected them and Andrea Coscelli, CEO of the CMA, said at a conference in early February 2021 that the remedies Google had offered would probably not have been accepted by the CMA.<sup>8</sup> Some members of the European Parliament have proposed including a statement in their annual report on Competition Policy regretting the EC's approval on the basis of commitments deemed insufficient to ensure effective competition in wearables and digital health. The report would also call on the EC to take a broader view when evaluating digital mergers and assessing the impact of data consolidation.<sup>9</sup>

These criticisms reflect a challenge for merger review which is particularly acute in digital and nascent markets: how will these markets develop in the future? Reports have observed that "digital" markets are complex and subject to extremely fast evolution.<sup>10</sup> This is the more so since they are often data dependent, and the combination of different datasets for machine learning and AI training can multiply the speed and impact of the merger effects. This means that markets which are not mature yet and may pre-merger – in their nascent state – have many players, can quickly become concentrated with ineffective competition.<sup>11</sup>

These are not illusory concerns. There is significant consensus, for example, that recent sector and other enquiries into the advertising sector would never have been necessary had the EU (and others) blocked the Google/DoubleClick merger. The Furman review, for example, as cited in the UK Digital Markets Taskforce advice from December 2020, states that "over the last ten years the five largest digital firms have made over 400 acquisitions globally with none of these being blocked by competition authorities, leading the review to call for a 'reset' in digital merger assessment and 'more frequent and firmer action to challenge mergers'".<sup>12</sup> The US Federal Trade Commission (FTC) also announced in February last year that it will examine past acquisitions by large technology companies. The FTC's press release mentioned that "This initiative will enable the Commission to take a closer look at acquisitions in this important sector, and also to evaluate whether the federal agencies are getting adequate notice of transactions that might harm competition. This will help us continue to keep tech markets open and competitive, for the benefit of consumers".<sup>13</sup>

None of these are novel concerns: the effects of digital mergers and the impact of the conduct and acquisitions by large tech companies have, some years ago, provoked debate about the effectiveness and boundaries of antitrust enforcement, with several antitrust authorities, governments, and institutions commissioning studies and expert reports. These reports are the precursor to current reform initiatives discussed further below.

## Google/Fitbit: a different outcome in the future?

The EC's own press release mentioned that its Google/Fitbit decision is "without prejudice to the Commission's efforts to ensure fair and contestable markets in the digital sector, notably through the recently proposed Digital Markets Act". However, the Digital Markets Act (DMA) does not include any relevant reforms to merger control. The proposal provides no more than an obligation on "gatekeepers" to inform the EC of any acquisitions they make. But there is no change to their notifiability or to the substantive test to be applied by the EC, ie that a merger will significantly impede effective competition (SIEC-test), or the associated standard of proof.

On this basis, there is no reason to believe that the EC would come to a different conclusion on the Google/Fitbit merger if the DMA were to be adopted as presently proposed. On the other hand one may well argue that the Fitbit transaction could and should have been dealt with more effectively under existing EU Merger Regulation powers. In any event the clearance would not prevent the EC from opening an abuse of dominance investigation – or DMA investigation – after the merger, as happened shortly after the Thomson/Reuters clearance. Such a course of action would though be *ex post* enforcement, whereas the reports and regulatory reforms have identified a need for more *ex ante* action in digital markets. Otherwise experience has shown that the extension of ecosystems, and the combination of network effects and market tipping, may render it impossible to devise corrective measures which would, after the event, enable the re-emergence of a competitive market.

The EC's regulatory initiative contrasts starkly with, for example, the UK's approach. The UK government has committed itself to establish a Digital Market Unit by April 2021 with specific legislation about the UK's approach to antitrust enforcement in the digital sector to follow. As for merger control, the CMA's Digital Market Taskforce has recommended a number of actions, with the UK government currently considering these proposals. Firms with a "strategic market status" – SMS – will have to report all their transactions. For transactions by which the SMS firm acquires control and where a number of (yet unspecified) criteria are met, a merger filing will have to be made which will suspend closure of the deal – this being a novelty in UK law. In addition, the taskforce has recommended lowering the standard of proof for merger investigations involving SMS firms. At present, the CMA has to prove that a transaction will likely result in a substantive lessening of competition (SLC-test). The proposal is to lower this standard to require only a "realistic prospect" of an SLC.

Antitrust law reforms are also centre stage in the US. For example, Democratic Senator Amy Klobuchar, who chairs the Senate's Antitrust Subcommittee, has introduced the "Competition and Antitrust Law Enforcement Reform Act of 2021" on 4 February 2021 to "overhaul and modernise" US

antitrust.<sup>14</sup> The bill includes many far-reaching proposals which would change the US antitrust framework, including strengthening “the prohibition against anticompetitive mergers” and to “address competitive problems in their ‘incipiency’ before they cause harm”. To do so, the bill proposes to:

- Update the legal standard for permissible mergers – the standard of proof in the Clayton Act for harmful mergers would be lowered from “substantially lessen[ing]” competition to “creat[ing] an appreciable risk of materially lessening competition” where materially is defined as “more than a *de minimis* amount”. In addition, the bill explicitly states that mergers creating a monopoly are unlawful.
- Shift the burden of proof to the merging parties – for certain mergers, the burden will be on the parties to prove that their merger will not violate the law rather than for the government to prove the opposite. This would apply to three types of mergers: (1) mergers that significantly increase market concentration; (2) acquisitions of competitors or nascent competitors by a dominant firm (defined as a 50 per cent market share or possession of significant market power); and (3) mega-mergers valued at more than \$5 billion.

In the context of the Google/Fitbit merger it is worth highlighting that the proposed reforms in the EU and the US identify vertical integration or consolidation as problematic and one of the key reasons to propose enforcement changes. The Klobuchar bill explicitly states that “vertical consolidation .... [has] potential to increase market power and cause anticompetitive harm.”<sup>15</sup> In Europe, the DMA proposal mentions “vertical integration” as one of the “characteristics which can be exploited” by the providers of core platform services, and that “gatekeepers are often vertically integrated”. These concerns are easily identified in the Google/Fitbit transaction which incorporates into the Alphabet group the health and fitness data supply chain for downstream markets, such as digital healthcare and insurance, giving Alphabet the incentive to foreclose competitors on these downstream markets from data access. The DMA will though not create any tools to tackle these type of concerns at their inception, despite identifying these as significant issues.

### Testing limits

Google’s acquisition of Fitbit has tested the limits of existing merger controls, already found wanting in the context of digital mergers, and confirmed the importance of pending reforms. Perhaps the Fitbit story is not quite closed, though, with Australian and US merger reviews still pending.

Among many aspects of the digital economy under debate, the Fitbit case highlights the need to focus better on the creation of ever larger datasets and the risk associated with their combination with existing powerful digital positions, either by way of vertical integration or more generally in the creation of digital ecosystems – two critical issues identified in the reports and proposals for reform.

**Alec Burnside** is a partner at Dechert LLP, **Marjolein De Backer** and **Delphine Strohl** are associates. They advise several clients adverse to Google (<https://www.dechert.com/>).

### Endnotes

1. Google/Fitbit Statement of Issues, ACCC, Canberra, 2020, <https://www.accc.gov.au/system/files/public-registers/documents/Google%20Fitbit%20-%20Statement%20of%20Issues%20-%2018%20June%202020.pdf>.
2. See ACCC Statement of Issues, paras 94 to 100.
3. See for example, the *Furman Report: Unlocking Digital Competition* which includes a recommendation to update the CMA’s Merger Assessment Guidelines to address under enforcement in the digital sector, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf).
4. Crémer, J, de Montjoye, YA and Schweitze, H, *Competition policy for the digital era*, 2019, at p 108.
5. Vindell Washington, chief clinical officer, Verily Life Sciences, CB Insights, 2020.
6. See ACCC Statement of Issues, para 19.
7. Android Central, “So that’s how Google is going to monetize your Fitbit data”, Johnson, J, 21 February 2021.
8. Mlex, “Google-Fitbit’s EU behavioral remedies would likely have failed in UK, CMA chief says”, Ibitoye, V, 9 February 2021.
9. MLex, “Google-Fitbit deal approval by EU faces potential censure from lawmakers”, Hirst, N, 4 February 2021.
10. The Crémer et al Report, for example, identifies the “very fast moving” character age as an important change in which markets function in the digital age (see page 15).
11. The Furman report, for example, states that in many cases, digital markets are subject to “tipping”. It expects markets to stabilise ever more quickly because of AI and machine learning as “companies most able to take advantage of it may well be the existing large companies because of the importance of data for the successful use of these tools.”
12. CMA, Advice of the Digital Markets Taskforce, A new pro-competition regime for digital markets, December 2020, 4.121.
13. FTC, Press release, “FTC to Examine Past Acquisitions by Large Technology Companies”, 11 February 2020.
14. US Senator Amy Klobuchar, “Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement”, 4 February 2021, <https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement>.
15. Proposed Competition and Antitrust Law Enforcement Reform Act, [https://www.klobuchar.senate.gov/public/\\_cache/files/e/1/e171ac94-edaf-42bc-95ba-85c985a89200/375AF2AEA4F2AF97FB96DBC6A2A839F9.sil21191.pdf](https://www.klobuchar.senate.gov/public/_cache/files/e/1/e171ac94-edaf-42bc-95ba-85c985a89200/375AF2AEA4F2AF97FB96DBC6A2A839F9.sil21191.pdf).