

Google closes its acquisition of Fitbit following European Commission conditional clearance

Linklaters

Earlier this month Google closed its acquisition of Fitbit, following an in-depth investigation by the European Commission resulting in conditional clearance late in 2020.

The EC's decision brings a new approach to merger review in data intensive industries. The EC accepted a "data silo" remedy and an access remedy of an unprecedented duration, both of which are innovative.

It also shows that the EC's more interventionist approach to big tech is not limited to the DMA proposal and that there will remain a role for the more traditional competition law instruments to support the EC's digital agenda.

We consider some interesting aspects of the case, while we await publication of the detailed decision.

Data, data, data... The EC's concerns

The EC's [press release](#) highlights the following concerns:

- Google could use Fitbit's health and fitness data and technology to further personalise Google Ads and foreclose competitors, in particular in online advertising.
- Google could restrict access to Fitbit's users' health and fitness data to foreclose competing digital healthcare service providers.
- Google could foreclose Fitbit's competitors by degrading interoperability between Android smartphones and third-party wearables.

The EC also considered, but ultimately dismissed, concerns that the combination of the parties' databases could give Google a competitive advantage enabling it to foreclose competing digital healthcare service providers.

Data protection, access, interoperability... The remedies

At their core, the commitments require the following:

- Ads commitment. Google commits not to use certain health and fitness data that are generated from Fitbit devices in or for Google Ads. To comply, Google will maintain these data in a separate data silo. Google will also provide users with an "effective choice to grant

or deny the use” of certain data by other Google services such as Google Search, Google Maps, Google Assistant, and YouTube. This commitment will last for 10 years, and the EC may extend it by up to an additional 10 years.

- Web API access commitment. Google will provide third parties access to the data types made available in the Fitbit Web API, subject to certain privacy and security requirements. It will update the types of data available through the API during the lifetime of the commitment based on an update mechanism that reflects what data types other industry participants make available through their APIs. The commitment will last for 10 years.
- Android interoperability commitment. Google will continue for 10 years to make available to wrist-worn wearable OEMs (i) a set of APIs that relate to “current core functionalities that wrist-worn devices need to interoperate with an Android smartphone” and (ii) all Android APIs that Google will make available to other Android smartphone app developers.
- **What’s new?**

Like most competition authorities, the EC generally prefers divestitures over access or other behavioural remedies. The reason is that these provide structural and permanent fixes that do not require the monitoring of future behaviour.

The remedies in this case are different. They are a set of complex behavioural commitments to the benefit of third parties for many years that will require constant monitoring. Once they lapse, there will be no solution should the problem persist despite the fast pace of change in digital markets. Should the problem disappear because of such fast change, Google can ask for the remedy to be revised.

The EC has accepted behavioural remedies in a number of cases including, recently, in the tech sector (Microsoft/LinkedIn, Intel/McAfee, Qualcomm/NXP, and Discovery/Scripps). While the EC has previously looked at data as a potential source of a competitive advantage, this is the first time that it has accepted a “data silo” commitment. This may pave the way to the use of virtual data-separation behavioural remedies to address concerns about the combination of datasets.

The decision is also an important development in the EC’s approach to access remedies. In the past, such remedies aimed to preserve existing supply relationships for clearly defined input factors to avoid input foreclosure. The decision goes further and accepts a “forward-looking” access commitment that may, in the future, extend to capturing inputs that did not exist yet at the time of the decision.

The decision also departs from the traditional 5-year duration of behavioural commitments and opens the door to an unprecedented, potential 20-year duration. The justification is Google’s “entrenched position” in “online advertisement”. But it is interesting to note that the EC opts to rely on such long-term constraints in markets that are not mature and have undergone a rapid pace of innovation and change.

What's next?

The published decision will no doubt provide further guidance on the EC's review of tech transactions that raise data-related concerns. It will be interesting to see whether it follows the frameworks used in Apple/Shazam and Microsoft/LinkedIn or whether it develops this framework to assess the role of data in online advertising.

Open jurisdictions

Google also notified the deal in Australia, Canada, Japan, South Africa, and the U.S. It decided to close before obtaining clearances in Australia and the U.S. Reportedly the waiting period agreed with the U.S. Department of Justice Antitrust Division had already expired.

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