Computer & Communications
Industry Association
Tech Advocacy Since 1972

The ACCC's Google/Fitbit Merger Inquiry:
CCIA's Comments Responding to the Public Consultation

10 July, 2020

1. Introduction

The Computer and Communications Industry Association ("CCIA") is grateful for the opportunity to share its views on the Australian Competition and Consumer Commission ("ACCC") consultation regarding Google's acquisition of Fitbit ("the Transaction").[1]

CCIA represents large, medium, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services.[2] Our members employ more than 750,000 workers and generate annual revenues in excess of $540 billion.

To ensure that tech-related innovation continues to play a positive role in the global economy, both sound competition policy and antitrust enforcement must play a crucial role in protecting competition across markets. Merger control, as part of the antitrust toolkit, remains a key element in maintaining a dynamic economy. To that end, competition authorities have applied

[1] See the ACCC's public consultation announcement at: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/google-llc-proposed-acquisition-of-fitbit-inc.
[2] A complete list of CCIA's members can be found here: http://www.ccianet.org/about/members/.

merger control rules vigorously in recent years, and the ACCC represents no exception to this trend.[3]

CCIA supports vigorous antitrust enforcement and understands that merger control frameworks are essential to ensure that market competition functions to the benefit of consumers. By the same token, in line with the work that the ACCC has traditionally advanced in the area of merger review, CCIA believes that maintaining a merger control regime that encourages investment and facilitates market-exit when competition is not lessened substantially helps promote economic growth through competition by promoting and facilitating new investments and market entry.

To strike the right balance between scrutinizing transactions without disincentivizing investments CCIA understands that merger review and retrospective analysis must be evidence-based and take into account legal and economic analysis that accurately portray the relevant market dynamics. By conducting evidence-based analysis, the ACCC ensures that due process rights and fairness principles in line with best international practices are respected. CCIA's comments are herewith submitted with this principle's approach to antitrust enforcement and merger review processes in mind.

CCIA contends that based upon publicly available information, the Transaction would not be expected to result in a substantial lessening of competition to the detriment of customers. CCIA understands that the Transaction represents a vertical integration as neither the acquirer nor acquired currently compete meaningfully against each other or plan to do so. As discussed further below, this type of vertical transaction typically brings about synergies and efficiencies that enhance the welfare of consumers and positively benefit competition.

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[3] For information relating to the ACCC's merger control activity please see: https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews.

CCIA understands that Google has made public commitments not to use Fitbit's data for advertising, so that potential concerns relating to the use of Fitbit health data won't exist in a post-Transaction context. Therefore, CCIA views the Transaction as a pro-consumer business arrangement, strengthening competition in the wearables sector as well as in other segments where parties involved in the Transaction operate such as digital advertising.

The remainder of this submission is organized in four sections that discuss, namely: (i) vertical mergers; (ii) market dynamism; (iii) public commitments; and (iv) concluding remarks. The analysis provided in these sections suggests that consumers would benefit from the Transaction, and therefore it should be approved.

2. Vertical Mergers

For years, competition agencies have been correct to recognize that vertical mergers are typically procompetitive in nature and require a different approach when enforcing antitrust. Vertical mergers usually bring about substantive pro-consumer efficiencies.

The ACCC's Merger Control Guidelines as updated as a result of the 2017 Harper reforms to the Competition and Consumer Act 2010 (the "Merger Guidelines") acknowledge the presumptive neutrality of vertical mergers in paragraph 5.4 by stating that "*Although horizontal, vertical and conglomerate mergers can all potentially give rise to unilateral effects, it is recognised that vertical and conglomerate mergers are generally less likely than horizontal mergers to raise competition concerns.*"[4] Furthermore, the Merger Guidelines clearly state that "*It is often the case that vertical mergers will promote efficiency by combining complementary assets/services*

[4] The ACCC's Merger Control Guidelines as amended in 2017 are available at: https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF, at 5.4.

which may benefit consumers"[5] and that "*In the majority of cases, non-horizontal mergers will raise no competition concerns*".[6] The Merger Guidelines explain that the reason for prohibiting vertical transactions that give rise to a Substantial Lessening of Competition ("SLC") is that "*the merged firm has the ability and incentive to use its position in one market to anti-competitively foreclose rivals in another market in a way that lessens competition.*"[7] In this regard, the Merger Guidelines clarify that "*Foreclosure lessens competition when the merged firm — and, in some cases, certain of its rivals — finds it profitable to increase the price charged to intermediate and end consumers or decrease the price paid to upstream suppliers below competitive levels.*"[8] CCIA agrees with this focus on the effects that a merger will have on consumers and suppliers.

As discussed further below, when describing the market dynamics, CCIA understands that after the proposed Transaction is completed, competition will remain at least as intense as prior to the merger, because there will be limited changes in the different market structures where the parties to the Transaction operate. In fact, because Google and Fitbit do not compete against each other, the outcome of the Transaction will generate the kinds of efficiencies that are typical for non-horizontal mergers and in particular bring positive outcomes for consumers, and does not represent an opportunity for Google to substantially lessen competition as the acquisition won't allow Google to foreclose rivals.

To the contrary, based upon publicly available information, it is expected that the Transaction will allow the parties to combine the talent from their different work forces. As a result, one may expect new ideas, improved services, and better products to be introduced in the markets. For example, Fitbit's expertise in wrist-worn wearable devices combined with Google's engineering

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[5] *Id.* at 5.20.
[6] *Id.* at 5.21.
[7] *Id.* at 5.22.
[8] *Id.* at 5.39.

resources and industry-leading software development could lead to a more compelling smart-watch product for consumers.

The market dynamics as described in the following section show that as a result of the merger, competitors will not be deterred from innovating, entering, or expanding the markets. Furthermore, taking into account that the market players will remain the same, there will be no incentives for market players to pass on higher prices to consumers, reduce quality, or otherwise compete less aggressively against each other. In fact, the merged firm will not foreclose the market, or raise rivals' costs. On the contrary, the Transaction will enhance market competition, especially through the combination of human capital, and investments that Google is likely to make in Fitbit to provide customers with even more innovative products and services. The Transaction is also likely to increase competition in the provision of ad-tech services and create even more economic incentives for competition to explore emerging health data markets.

Therefore, it seems reasonable to conclude that the acquisition of Fitbit by Google falls under the classic vertical merger that by all means will inject innovation and even more dynamism in the relevant markets to the ultimate benefit of consumers.

3. Market Dynamics Evidence Intense Competition in the Wearables Sector

The ACCC's merger review endeavors should be based on current market conditions, and avoid engaging in speculative theories of harm or business strategies. As evidenced by the publicly available information, the segments impacted by the Transaction are highly dynamic and the post-merger effects would only increase the currently existing market dynamisms. Relying on hypothetical theories of harm based on speculation regarding future business decisions should not be the basis for conducting any merger review, and it is suggested that the ACCC's concerns are analyzed based upon available evidence and existing market conditions.

a) Multiple Players

According to publicly available sources, Fitbit represents one market player of at least nine other companies active in the wearable devices sector. Fitbit competes in a crowded field which includes Apple, Samsung, Xiaomi, Polar, Fossil, Amazfit, BBK, Garmin, and Huawei.[9] Apple is by far the market leader,[10] with Fitbit competing for customers against many other providers:[11]

Top 5 Wearable Companies by Shipment Volume, Market Share, and Year-Over-Year Growth, Q4 2018 (shipments in millions)

Company	4Q18 Shipments	4Q18 Market Share	4Q17 Shipments	4Q17 Market Share	Year-over-Year Growth
1. Apple	16.2	27.4%	13.3	29.6%	21.5%
2. Xiaomi	7.5	12.6%	5.2	11.6%	43.3%
3. Huawei	5.7	9.6%	1.6	3.6%	248.5%
4. Fitbit	5.5	9.4%	5.4	11.9%	3.0%
5. Samsung	4.0	6.8%	2.0	4.3%	105.6%
Others	20.3	34.3%	17.6	38.9%	15.6%
Total	**59.3**	**100.0%**	**45.1**	**100.0%**	**31.4%**

Source: IDC Worldwide Quarterly Wearables Tracker, March 5, 2019

[9] Hitesh Bhasin, *Top 7 Fitbit Competitors – Fitbit Alternatives*, Marketing91 (Nov. 13, 2018), https://www.marketing91.com/top-7-fitbit-competitors/
[10] *Apple Watch and AirPods dominate wearables market share*, MacDailyNews (Mar. 11, 2020), https://macdailynews.com/2020/03/11/apple-watch-and-airpods-dominate-wearables-market-share/
[11] *IDC Worldwide Quarterly Wearables Tracker* (Mar. 5, 2019), https://www.idc.com/getdoc.jsp?containerId=prUS44901819.

Against this background, and taking into consideration that the acquirer is not present in this sector, it is challenging to anticipate how the Transaction will have an impact upon the current market dynamics other than to make it more competitive.

The ACCC raises concerns with respect to the elimination of potential competition between Fitbit and Google.[12] Based upon speculative theories and lack of publicly available supporting evidence, the ACCC anticipates that Google is likely to enter the wearables devices segment at some point in the future absent the Transaction.[13] Despite the ACCC's business assumptions with regard to Google's intention, under the current Australian competition framework, merger analysis should be performed under the analysis of market dynamics as they stand at the time of the merger, and not based on speculation over business strategies.

In this respect, and taking into account the current market structure, it is evident that the sector will continue to operate under intense innovation-focused competition with multiple players innovating and offering enhanced goods and services as the market players won't be impacted by the Transaction. Further, even if Google were to hypothetically enter the market of wrist-worn wearables in the future, the combined share of Google (as a new entrant) and Fitbit would have no impact on the market that is clearly led by Apple.

Notwithstanding the aforementioned, the ACCC's preliminary view is that the proposed acquisition may have the effect, or may be likely to have the effect, of substantially lessening competition in the supply of data-dependent health services, and/or the supply of certain ad-tech

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[12] *See* the ACCC's Statement of Issues, *available at* https://www.accc.gov.au/system/files/public-registers/documents/Google%20Fitbit%20-%20Statement%20of%20Issues%20-%2018%20June%202020.pdf, at para. 15.
[13] In this respect it is worth noting that when Google entered the smart mobile device sector, it did so via acquisition. Jon Russell, *Google completes its $1.1B deal to buy a chunk of HTC's smartphone division*, TechCrunch (Jan. 30, 2018), https://techcrunch.com/2018/01/29/google-htc/.

services in Australia that rely on the collection of large amounts of individual data that enable targeting of online display advertising to consumer segments.[14]

In the following sections CCIA explains why the concerns raised by the ACCC are not based upon the current market dynamics. In fact, the market dynamics and Google's publicly made commitments relating to the use of data demonstrate that the ACCC's concerns are unlikely to represent a market reality in the post-Transaction context.

b) Data-Dependent Health Markets and Barriers to Entry

CCIA recognizes that there have been some concerns raised with respect to access to data and barriers to entry once Google completes the Transaction. Specifically, the ACCC contends that the Transaction may limit entry into data-dependent health markets. The ACCC assumes that absent the Transaction, Fitbit would partner with other businesses to develop new and innovative services in the data-dependent health markets but fails to provide evidence that supports these assumptions.[15] These speculative assumptions are exacerbated by the broadly defined "data-dependent health markets" of concern.

CCIA cautions against intervention in broadly defined innovation-driven markets that involve user data without evidence of harm to competition that could disadvantage consumers and deter innovation, especially when based upon a misunderstanding or incorrect understanding of the role data plays in these markets.

CCIA contends that the Transaction will bring about the opposite effects. Through the combination of know-how and investments that Google is likely to make in Fitbit, it is expected

[14] *See supra* note 12 at 14, 81-102.
[15] *Id.* at 88.

that Fitbit will be able to innovate and provide consumers with even better goods and services, and maybe create new innovative markets. As such, as a result of the Transaction, the wearable devices segment might benefit from market dynamics that force competition to become even more innovative to the benefit of consumers, including exploring new markets. In addition to increased market competition in the wearables sector, it is likely that innovative emerging health markets might become a reality to the benefit of consumers.

With respect to speculations relating to data-dependent health markets evolution, it is challenging to anticipate how Fitbit's user-generated data is the only essential input for these emerging markets to be created. It is important to note that the mere accumulation of data is generally pro-competitive as it can lead to increased efficiency and more innovative services. For competitive foreclosure, the real question is whether the accumulation of data raises barriers to entry. In this regard, because there are numerous companies in the wearable devices sector, as well as many more companies that collect similar data through services such as fitness apps, it is hard to anticipate that Google's access to Fitbit's data will have a competitive impact on the wearables market or in any other health-emerging data that is likely to benefit from wearable devices' generated data.

Therefore, when it comes to data generated by user wearables, it does not seem that accessibility to the data produced by users acts as a barrier to entry to innovative market players. Any stakeholder that wishes to enter into new data-related health markets to the benefit of consumers will still be able to engage in business partnerships with multiple companies that compete against Fitbit and that access similar information. There are also other ways for potential competitors to get similar data, whether through data-portability, interoperability, or otherwise. Hence, one may conclude that any assumption leading to suggest that only Fitbit's users' generated data is key to developing emerging markets doesn't reflect real market analysis that characterizes the wearable devices sector.

Finally, it is worth mentioning that competition in the wearable devices segment seems to be focused on the ability to provide customers a better user experience, so success depends upon the ability and capacity of market participants to improve the services and products offered to the users. Consequently, it is reasonable to conclude that the Transaction might provide for more incentives to this sector and encourage market players to continue to innovate and offer users new or improved products and services that would allow them to effectively compete. This, in turn, would generate more interesting data for those stakeholders wishing to develop health-data emerging markets. As such, it is hard to imagine how the Transaction could harm competition or limit incentives with regard to health-emerging markets.

c) Display Advertising and Ad-Tech Market Dynamics

Despite the advertising sector being highly competitive thanks to the emergence of digital advertising, the ACCC raises concerns with regard to the supply of certain ad-tech services that enable targeting of online display advertising to consumer segments.[16] In particular, the ACCC focuses on demand-side platforms ("DSPs").

The ACCC raises concerns about Google's alleged data advantages it has with respect to its rival in the DSP sector and how the Transaction might give Google access to even more data that would entrench its position in this sector. In this respect, the ACCC assumes that Google has market power and that markets may not be contestable, despite referring to multiple competitors in the DSP sector such as MediaMath, AppNexus, Adobe, and Trade Desk.

[16] *Id.* at 103.

Based on the assumption that Google's market power is strong, the ACCC analyzes potential theories of harm related to vertical mergers such as the ability to foreclose competitor access to a vital input or distribution channel.

In line with this theory of harm, the ACCC is concerned with regard to ad-tech suppliers and their lack of access to Fitbit's data in the post-Transaction context that would allow them to improve their targeted advertising and increase the competitive constraints on Google. In this respect, the ACCC does not appear to analyze whether Fitbit currently does, or plans to, partner with Google's advertising rivals to use Fitbit data to improve their offerings to advertisers and intermediaries. Nor does it appear to assess whether there are any data protection or contractual limitations on Fitbit using its user data in this way. The ACCC's concerns that, absent the transaction, Fitbit will partner, or otherwise enter a commercial arrangement, with current rivals of Google to use its health and fitness data to improve their offerings to advertisers and intermediaries should be substantiated. This is especially true given that Fitbit's existing commitment to not sell such data to third parties, including for advertising, makes clear that Fitbit is highly unlikely to act in this hypothetical manner.

Nevertheless, in this particular transaction none of these unsubstantiated theories seem to be applicable. In fact, one of the characteristics of the digital space that makes the digital economy so innovative is that there are limitless opportunities to create input, with none of the products or services being essential for the proliferation of innovative goods and services to enter the markets.

Against this background, and as CCIA submitted in response to the ACCC's Digital Advertising Inquiry,[17] CCIA remains skeptical regarding proposals to classify data as an essential input, as they are unfounded and rest on a misunderstanding of the concept of data that is, among other things, non-rivalrous and non-exclusive. One firm collecting data does not impede on another firm's ability to collect data. An advertising platform can so easily obtain consumer data that the data which one player holds hardly excludes others from entering the market. Incumbent online providers do not have exclusive domain over user data, nor do they have exclusivity clauses in terms of service with users.[18]

The aforementioned clearly describes the market dynamics the Transaction is concerned with. As previously mentioned, the wearable devices segment is highly competitive and ad-tech services count on numerous alternatives to enter into business partnerships that would grant them access to data that they could use to improve their services and better target display advertising to certain consumers. Ad-tech providers could also obtain data from a multitude of other potential providers, such as the many fitness apps on the market today. The incentives for ad-tech services to enter into these business arrangements is unchanged in a post-Transaction context, given Google has publicly committed to not use Fitbit's data for advertising purposes much like Fitbit's existing commitment to not do the same.

Therefore, contrary to the ACCC's conclusion, the Transaction would create even more market dynamism in the ad-tech services sector. As such, it seems logical to conclude that the Transaction will not affect competing ad-tech services' ability to compete or grow in any form,

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[17] CCIA's submission before the ACCC relating to the Digital Advertising Inquiry is available at: https://www.accc.gov.au/system/files/Computer%20%26%20Communications%20Industry%20Alliance%20%28CCIA%29%20%282%20May%202020%29.pdf.
[18] D. Daniel Sokol, *Antitrust and Regulating Big Data*, 23 George Mason L. Rev. 119 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2834611.

nor would the merged entity have any incentives to engage in any conduct that may violate the competition norms.

4. Publicly Made Commitments Regarding Health Data

Because wearable devices generate users' health data, it is important to note that Google has publicly made commitments not to use this highly sensitive information for advertising. In particular, Google has publicly stated that "Fitbit health and wellness data will not be used for Google ads. And we will give Fitbit users the choice to review, move, or delete their data."[19]

Despite these commitments being more relevant for privacy-related enforcement, rather than in the context of merger reviews which should exclusively focus on the analysis of harms to competition, it seems that Google's intentions with regard to data are clearly pro-consumers, and respectful of consumers' privacy.

User trust is critical in digital markets, especially those involving health data, meaning that Google does not have an incentive to renege on this promise. Doing so could cause it to lose potential customers.

CCIA contends that the market incentives for market players to advance in the wearable devices segment and to explore emerging health-data markets are so evident that the ACCC should not take further action on this front. However, with the acknowledgment that the ACCC is devoting a lot of its capacity to ensure that competition governs/reigns over the digital economy, and that consumers' privacy is preserved in the digital economy, CCIA believes that Google's publicly made commitments are an important element to be taken into account when analyzing the

[19] Rick Osterloh, *Helping more people with wearables: Google to acquire Fitbit* (Nov. 1, 2019), https://www.blog.google/products/hardware/agreement-with-fitbit/.

merger. This is especially the case with respect to the ACCC's competition concerns regarding the use of health data for targeted advertising as previously described.

By taking into consideration Google's commitments, the ACCC would strike an appropriate balance by approving the merger and remaining vigilant about Google keeping to its public commitment, rather than opting to block the merger, which would inevitably harm innovation, investments, and consumers. On the other hand, exhaustive examination of overly speculative theories of harm and unnecessarily extended reviews of all technology industry transactions would be unfair, and will mean investors get lower valuations and even lose money in the form of invested time. Eventually, investors will be discouraged from making investments in technology markets in the future to the ultimate detriment of consumers.

5. Conclusion

CCIA believes the impact upon innovation and the positive outcomes for consumers are a core element of analysis of this Transaction. Publicly available information indicates that there is vigorous competition in the wearables sector, with the presence of multiple players innovating in the market to the benefit of consumers.

Consequently, the Transaction will not substantially lessen competition or negatively impact consumers. To the contrary, competition law and economics applied to the Transaction indicate that the integration will likely bring about pro-consumer efficiencies. Any other theory of harm that the ACCC may want to apply to this pro-competitive Transaction should be clearly articulated and based on evidence, not speculation or assertion of potential harms. Hence, CCIA submits that the Transaction should be approved.