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Dear Interested Party

Google's proposed acquisition of Fitbit – proposed undertaking

The Australian Competition and Consumer Commission (**ACCC**) is currently reviewing the proposed acquisition of Fitbit, Inc (**Fitbit**) by Google LLC (**Google**) (the **proposed acquisition**). The ACCC published a Statement of Issues in relation to the proposed acquisition on 18 June 2020.

In Australia, Google has offered a draft proposed undertaking to the ACCC pursuant to section 87B of the *Competition and Consumer Act 2010* (the **Act**) (the **proposed undertaking**) in order to address the ACCC's competition concerns.

The purpose of this letter is to seek the views of interested parties on the proposed undertaking.

The proposed undertaking

Broadly, the proposed undertaking requires Google to:

- not use certain user data collected through Fitbit and Google wearables or input manually by consumers, for Google's advertising purposes for 10 years (with an option for the ACCC to extend this obligation for up to a further 10 years);
- maintain access for third parties, such as health and fitness apps, to certain user data collected through Fitbit and Google wrist-worn wearables for 10 years; and
- maintain access to Android APIs that enable interoperability between third party wearables and Android smartphones for 10 years.

The ACCC has decided to commence consultation on the proposed undertaking in parallel with its ongoing consideration of the terms of the proposed undertaking, and while the ACCC's review of the proposed acquisition continues.

The ACCC has not yet formed a concluded view as to whether the undertaking adequately addresses the competition concerns identified and therefore whether it will ultimately

accept the proposed undertaking in its current or any amended form. The market consultation process should not be taken as an indication that the ACCC will accept the proposed undertaking, that the proposed undertaking's terms are likely to be acceptable to the ACCC, or that any remedy will address its competition concerns.

The ACCC may require changes to the proposed undertaking depending on its ongoing consideration of the matter and the nature and extent of any concerns raised during the market consultation process. The ACCC will only accept the proposed undertaking if it is satisfied that it will sufficiently address its competition concerns, and after consideration of the monitoring and compliance risks and costs.

Making a submission

The ACCC seeks comments from interested parties to inform its decision on whether the proposed undertaking is capable of addressing competition concerns arising from the proposed acquisition. **Attachment A** to this letter outlines the background to the ACCC's preliminary competition concerns and provides an overview of the proposed undertaking.

A list of specific questions that interested parties may wish to address when making a submission can be found at **Attachment B**.

The proposed undertaking is provided at **Attachment C**.

Please provide your response by no later than **5pm on 9 December 2020**. Responses may be emailed to mergersru@acc.gov.au with the title: *Submission re: Google's proposed undertaking - attention David Wang/Rachel Goldfeld*. If you would like to arrange a time to discuss the matter with ACCC officers, or have any questions about this letter, please contact David Wang at david.wang@acc.gov.au or on (03) 9658 6587 or Rachel Goldfeld at rachel.goldfeld@acc.gov.au or on (03) 9290 1438.

This matter is public and you can forward this letter to anybody who may be interested.

Updates regarding the ACCC's investigation will be available on the ACCC's Public Mergers Register at ([ACCC mergers register](#)).

Confidentiality of submissions

The ACCC will not publish submissions regarding the proposed acquisition. We will not disclose submissions to third parties (except our advisors/consultants) unless compelled by law (for example, under freedom of information legislation or during court proceedings) or in accordance with s155AAA of the *Competition and Consumer Act 2010*. Where the ACCC is required to disclose confidential information, the ACCC will notify you in advance where possible so that you may have an opportunity to be heard. Therefore, if the information provided to the ACCC is of a confidential nature, please indicate as such. Our [Informal Merger Review Process Guidelines](#) contain more information on confidentiality.

Yours sincerely



Sheridan de Kruiff
General Manager (Acting)
Merger Investigations Branch

Attachment A

Background – the ACCC’s review

The ACCC commenced a review of the proposed acquisition on 27 February 2020. On 18 June 2020 the ACCC published a Statement of Issues (**SOI**) outlining preliminary concerns regarding Google’s proposed acquisition of Fitbit.

Overview of the proposed undertaking

Google has offered a draft section 87B undertaking to address the ACCC’s competition concerns. Capitalised terms used below are defined in the proposed undertaking.

Broadly, the proposed undertaking requires Google not to use certain health and location data, predominantly sourced from wearables, for advertising, to maintain access via APIs for third parties to certain user data Fitbit makes available through its Web API today, and to maintain Android APIs providing functionality to enable interoperability between third party wearables and Android smartphones. The proposed undertaking also requires Google to appoint an ACCC-approved Monitoring Trustee (auditor) to monitor Google’s compliance with the undertaking.

Google’s obligations in relation to Ads

- Not use Measured Body Data or Health and Fitness Activity Location Data in or for Google’s advertising business.
- Maintain a strictly permissioned virtual storage environment consisting of auditable technical and process controls.
- Provide each Australian User the choice to grant or deny use by Other Google Services (such as Google Search, Google Maps, Google Assistant, and YouTube) of any Measured Body Data stored in their Google Account or Fitbit Account.

Google’s obligations in relation to Web API access

- Maintain access, subject to user consent, to Supported Measured Body Data for API Users.
- Update the definition of Supported Measured Body Data via an Update Mechanism.

Google’s obligations in relation to Android APIs

- Make Core Interoperability APIs available under the same licence terms and conditions that apply to all other Android APIs that Google makes available as part of AOSP.
- Not degrade the Core Interoperability APIs by reducing their functionality to Third Party Wrist-Worn Wearable Devices relative to Google or Fitbit Wrist-Worn Wearable Devices.
- Not discriminate against Wrist-Worn Wearable Device OEMs:
 - by withholding, denying, or delaying Wrist-Worn Wearable Device OEM’s access to functionalities of Android APIs that Google makes generally available.
- Not to discriminate between Wrist-Worn Wearable Device OEMs and other Android Smartphone App Developers:
 - in relation to changing, replacing or retiring Android APIs.
 - in terms of the access it provides to Developer Previews and Developer Documentation.
- Not circumvent the requirements by:
 - discriminating between Wrist-Worn Wearable Device OEM’s and other Android Smartphone App Developers in terms of displaying warnings, error messages, or permission requests in Android Apps used by third parties.
 - imposing discriminatory conditions on access to the Google Play Store by Wrist-Worn Wearable Device OEM’s Companion Apps.

Attachment B

1. Please provide a brief description of your business or organisation.

Undertaking

2. Do you consider the proposed undertaking, which will place obligations on Google, will adequately address any or all of the competition concerns the ACCC has raised?
3. Do the monitoring provisions provide sufficient mechanisms to ensure that the undertaking will be complied with?
4. Please comment on whether the language of the proposed undertaking means it is sufficiently specific to be capable of being monitored and enforced.

Ads obligations

5. Do the definitions of Measured Body Data and Health and Fitness Activity Location Data adequately and clearly describe all relevant data types?
6. Will the implementation of the proposed data storage and auditable technical and process controls be effective in ensuring that Measured Body Data and Health and Fitness Activity Location Data will not be accessible in or for Google's advertising business?
7. Are there any risks associated with the proposed approach to Data Separation, including the possibility that Google may be able to circumvent the objectives of this obligation?

Web API obligations

8. Please comment on how the Update Mechanism is likely to operate in practice and whether it will be an effective mechanism for updating the data types treated as Supported Measured Body Data from time to time.
9. Are there any risks associated with the Web API Access obligations, including the possibility that Google may be able to circumvent its obligations?

Android API Obligations

10. Do the definitions of Core Interoperability APIs and Android APIs capture the APIs and functionalities necessary for maintaining interoperability between Wrist-Worn Wearable Devices and smartphones running the Android operating system?
11. Are there circumvention routes or ways to discriminate that have not been covered by this obligation?
12. Does the proposed commitment in clause 5.13 address any concerns about future access to the Google Play Store?

Other information

13. Please provide any additional information or comments, or identify other competition issues, that you consider relevant to the ACCC's consideration of the proposed undertaking.