Google/Fitbit: the starting point for a revolution in merger remedies in digital markets?

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Remedies constitute a tool in the hands of competition authorities, which empower the regulators to fix a competition concern generated by a merger while preserving the merger's economic rationale and efficiencies. Antitrust regulators across the world are, however, sceptical towards non-structural remedies and tend to reject them. In their view, non-structural remedies will generally not eliminate competitive concerns and are less efficient than divestiture remedies.

The European Commission (EC) is no exception to this approach. However, surprisingly in its recent decision regarding Google's acquisition of the fitness tracker company Fitbit, the EC accepted non-structural remedies despite its concerns regarding the competitive results of the merger. Unlike the EC, the Australian Competition and Consumer Commission (ACCC) rejected Google's remedies. Since both regulators share similar concerns with regard to non-structural remedies and because Google offered similar remedies in the EU and Australia, the different decisions and the EC's reasons to accept the remedies merit a closer look.

This article will provide an overview on the competition concerns of the EC and ACCC and the remedies proposed by Google. It will then proceed to find an answer to the question why "Google's plan to buy Fitbit has the ACCC's pulse racing"[1] and why the EC seems to be more lenient. It will, in particular, consider to what extent the EC's proposal for a regulation on contestable and fair markets in the digital sector, the Digital Markets Act,[2] might not only coincide with the *Google/Fitbit* merger but have influenced the EC's remedy assessment in the digital economy.

1. Introduction: the Google/Fitbit merger

Fitbit is a US-headquartered technology company which manufactures wearable devices, in particular, fitness trackers and smartwatches, and provides connected software and services in the health and fitness sector. Fitbit collects highly personal information, including users' sleep patterns, heart rate, active minutes, height and weight, date of birth, food logs, mobile numbers, biography and precise location data. In 2019, Google, "the company that helped make it fun to just sit around surfing the web, [decided to] jump (...) into the fitness-tracker business"[3] and to acquire Fitbit. In 2020, Google notified the merger to various competition authorities throughout the world and embarked on the adventurous journey of a multi-jurisdictional merger in digital markets.[4]

2. The antitrust regulators' concerns

When Google notified the acquisition, the EC and the ACCC raised more or less similar competition concerns.[5]

2.1 Competition concerns

The EC's first concern was about the business model of companies providing services to Fitbit users and access user data. Services from these companies are provided via the use of a web application programming interface (API). The EC feared that after the completion of the acquisition of Fitbit, Google, being able to control the web API, might restrict the access for other, competing service providers. The ACCC raised a similar concern, pointing out that Google may achieve the position of a "gatekeeper for wearables data".[6] However, while the EC focused on maintaining access to the web API to ensure continued access for third party service providers, the ACCC linked this aspect to a more general concern that Google might also become the "default provider of wearable operating systems for non-Apple devices".[7]

The second concern regarded Fitbit's competitors in the production of wrist-worn wearable devices and the interoperability of competing wearable devices with Android phones. The EC and ACCC feared that Google

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[1] K. Kemp, "Every step you take: why Google's plan to buy Fitbit has the ACCC's pulse racing" (23 June 2020) *The Conversation*, *https://theconversation.com/every-step-you-take-why-googles-plan-to-buy-fitbit-has-the-accc-pulse-racing-141052* [Accessed 12 April 2021].

[2] Commission, Digital Markets Act, COM(2020) 842 final.

[3] M. O'Brien, "One big step: Google buys Fitbit for $2.1 billion" (1 November 2019) *Associated Press*, *https://apnews.com/article/e5d41ca489514857af9f6faa154435bb* [Accessed 12 April 2021].

[4] Regarding the challenges for competition law in the digital economy see P. Picht, "Competition Law for the Digital Era — An Adventurous Journey" (2019) 50 I.I.C. 789.

[5] See Commission, Press Release IP/20/2484 "Commission clears acquisition of Fitbit by Google, subject to conditions" of 17 December 2020 and ACCC, Statement of Issue 18 June 2020—*Google LLC proposed acquisition of Fitbit Inc* and Press Release 280/20 "ACCC rejects Google behavioural undertakings for Fitbit acquisition" of 22 December 2020.

[6] ACCC, Press Release 280/20 "ACCC rejects Google behavioural undertakings for Fitbit acquisition" of 22 December 2020.

[7] ACCC, Press Release 280/20 "ACCC rejects Google behavioural undertakings for Fitbit acquisition" of 22 December 2020.

might degrade the interoperability with Android phones of competing devices in order to favour Fitbit's products. The ACCC concluded that the merger "may result in Fitbit's rivals, other than Apple, being squeezed out of the market, as they are reliant on Google's Android system and other Google services to make their devices work effectively".[8]

The EC and the ACCC raised an additional concern referring to Google's market position as a provider of advertising space and related services. They took the view that through acquiring not only Fitbit's technology but also its database and the connected knowledge to further develop such databases, Google would increase its already vast data portfolio. Thus, Google would be able to provide even more personalised advertisements and further improve its position with regard to online search advertising, online display advertising and related technologies.

2.2 Privacy concerns

All over the world, privacy concerns were raised immediately after Google's announcement to acquire Fitbit.[9]

The ACCC questioned from the beginning whether "any commitment Google makes in relation [to] Fitbit users' data will still be in place five years from now". It alleged that Google's "assurances on data privacy are not believable"[10] and, therefore, appears to have taken into consideration privacy laws in its antitrust analysis. This approach points into the same direction as the approach taken by the German Federal Cartel Office (FCO) which is trying to include privacy considerations raised by the Big Tech companies' business model within the existing competition law framework.[11]

In contrast, the EC stated that privacy concerns are "not within the remit of merger control and there are regulatory tools better placed to address them".[12] This position is consistent with preceding cases[13] and the view of the European Court of Justice (ECJ).[14] However, Google has in fact committed vis-à-vis the EC to implement a data protection system. It remains unclear why Google should have done so had the EC not had any interest in privacy concerns.[15]

3. Google's remedy proposal

The commitments suggested by Google to meet the regulators' concerns do not imply any divestitures. They are essentially designed to guarantee a specific future behaviour and will require constant monitoring to ensure Google's compliance:

- First, Google undertook not to use user data collected from Fitbit devices for Google search and display advertising and advertising intermediation products and to technically separate such data from other Google data that is used for advertising purposes (the "Ads Commitment").[16]
- Secondly, Google assured that, following the acquisition, users would have an "effective choice" to grant or deny the use of health and wellness data by other Google Services (the "User Choice Commitment").[17]
- Thirdly, subject to the users' consent, Google undertook to continue to grant third party service providers access to users' health and fitness data via the Fitbit web API without charging for such access (the "Web API Access Commitment").[18]
- Fourthly, Google undertook to continue to license for free those public APIs covering all current functionalities that wrist-worn devices need to interoperate with an Android smartphone as well as future updates, improvements of functionalities and APIs that Google makes available to Android smartphone app developers without any degrading of the user experience or other discriminatory conditions (the "Android APIs Commitment").[19]

[8] ACCC, Press Release 280/20 "ACCC rejects Google behavioural undertakings for Fitbit acquisition" of 22 December 2020.
[9] Regarding the European Data Protection Board, an umbrella group of the EU's national data-protection authorities see Batchelor and Janssens, "Big data: understanding and analysing its competitive effects" (2020) 41(5) E.C.L.R. 217, 220.
[10] F. Hunter, "It is a stretch: ACCC's Sims questions Google assurances over Fitbit data" (19 November 2019) *The Sydney Morning Herald*, *www.smh.com.au/politics/federal/it-is-a-streich-accc-s-sims-questions-google-assurances-over-fitbit-data-20191119-p53by8.html* [Accessed 12 April 2021].
[11] With regard to FCO, *Bundeskartellamt* (B6-22/16) of 06.02.2019 and the courts' view on the FCO's decision which has been characterised as "bold", "revolutionary" and "innovative" see S. Frank and M. Frank, "A Facelift to the Abuse of Dominance — The German Perspective on Facebook" (2020) 28(3) A.J.C.C.L. 188; G. Schneider, "Testing Art. 102 TFEU in the Digital Marketplace: Insights from the Bundeskartellamt's investigation against Facebook" (2018) 9(4) *Journal of European Competition Law & Practice* 213; R. Podszun, "Regulatory Mishmash? Competition Law, Facebook and Consumer Protection" (2019) Eu C.M.L. 49; and R. Scheele, "Facebook: From Data Privacy to a Concept of Abuse by Restriction of Choice" (2021) 12(1) *Journal of European Competition Law & Practice* 34.
[12] Commission, Press Release IP/20/2484 "Commission clears acquisition of Fitbit by Google, subject to conditions" of 17 December 2020.
[13] Commission Decision of 06.12.2016 declaring a concentration to be compatible with the common market (COMP/M.8124—*MICROSOFT/LINKEDIN*) and Decision of 21.12.2016 declaring a concentration to be compatible with the common market (COMP/M.8180—*VERIZON/YAHOO*) according to Council Regulation 139/2004.
[14] *Asnef-Equifax v Ausbanc* (C-238/05) EU:C:2006:734; [2007] 4 C.M.L.R. 6 at [63].
[15] Commission, Initiation of proceedings (M.9660—*Google/Fitbit Commitments to the EC*) A.1(3)(d).
[16] Commission, Initiation of proceedings (M.9660—*Google/Fitbit Commitments to the EC*) A.1 and Undertaking to the ACCC, 5.1–5.6.
[17] Commission, Initiation of proceedings (M.9660—*Google/Fitbit Commitments to the EC*) A.1(3)(d) and Undertaking to the ACCC, 5.3(d).
[18] Commission, Initiation of proceedings (M.9660—*Google/Fitbit Commitments to the EC*) A.2 and Undertaking to the ACCC, 5.7–5.9.
[19] Commission, Initiation of proceedings (M.9660—*Google/Fitbit Commitments to the EC*) A.3 and Undertaking to the ACCC, 5.10–5.15.

Google agreed that all four commitments will remain in place for ten years[20] and that the Ads Commitments may be extended for up to additional ten years by the authorities.[21] A trustee will monitor the implementation of these commitments.[22]

4. The decisions

The EC and the ACCC reached different conclusions with regard to the remedies offered by Google in the Fitbit merger.

4.1 The ACCC's decision

The ACCC took the view that Google's commitments were mainly behavioural in nature and that it was "not satisfied that a long-term behavioural undertaking of this type in such a complex and dynamic industry could be effectively monitored and enforced in Australia".[23] On this basis, the ACCC rejected the remedies and decided to continue its investigation.

4.2 The EC's decision

In contrast, the EC approved the merger because "the commitments will ensure that the market for wearables and the nascent digital health space will remain open and competitive" and the "commitments will determine how Google can use the data collected for ad purposes, how interoperability between competing wearables and Android will be safeguarded and how users can continue to share health and fitness data, if they choose to".[24]

5. Where does this different assessment come from?

It is rare both for the ACCC and the EC to block a merger in its entirety. In Australia, this happened only in 27 cases during the last 14 years. However, since regulators are struggling with the effects of previous mergers they cleared in the digital industry,[25] such as the *Google/DoubleClick* merger,[26] it had to be expected that the *Google/Fitbit* merger could provoke in-depth competition reviews.[27] Yet, it is surprising that the EC and ACCC reached different conclusions regarding their assessment of Google's commitments. What is the reason for these inconsistent decisions?

5.1 Does the EC's and ACCC's approach to non-structural remedies differ?

Remedies are traditionally divided into structural and non-structural remedies. Structural remedies are definitive actions, such as the divestiture of a business or the termination of a long-term supply agreement, which eliminate regulatory concern once and for good. Non-structural or behavioural remedies are continuous actions designed to modify or constrain the future business conduct of the merging entities by modifying their dealings with other companies and/or regulating the price, quality or output of the merged entities' goods or services. The typical focus of non-structural remedies is reducing barriers to entry and expansion for competitors and thereby creating or maintaining a behavioural constraint on the merged entity.

It goes without saying that a commitment not to enter into anti-competitive agreements or not to abuse a dominant position as such, is unsuitable because it only restates general duties under antitrust laws. However, the regulators' reluctance to accept non-structural remedies goes far beyond this principle. Both the EC and the ACCC assume that, despite all precautionary measures, non-structural remedies will generally be associated with the risk that the merging entities might ultimately evade or subvert the commitment whilst maintaining technical compliance or that the non-structural remedy may itself restrain competition and prevent the merging entities to react efficiently to market conditions.[28] In addition, both regulators have reservations to bear the costs and devote the resources associated with the continuous monitoring of non-structural remedies.[29]

The ACCC's position

While 20 years ago, it appeared that the ACCC was more willing to consider and accept non-structural remedies, nowadays the ACCC clearly prefers structural remedies. The ACCC explicitly declares its faith in the greater effectiveness, certainty and the lower monitoring costs of structural remedies.[30] Since 2006, when the ACCC first started to publish statements of issues, the ACCC accepted non-structural remedies only in a handful of cases. Of 27 merger cases which required a remedy, only six were cleared on standalone non-structural remedies.[31]

[20] Commission, Initiation of proceedings (M.9660—*Google/Fitbit Commitments to the EC*) D(36) and Undertaking to the ACCC, 4.1.
[21] Commission, Initiation of proceedings (M.9660—*Google/Fitbit Commitments to the EC*) D(37) and Undertaking to the ACCC, 4.2.
[22] Commission, Initiation of proceedings (M.9660—*Google/Fitbit Commitments to the EC*) B and Undertaking to the ACCC, 6.
[23] ACCC, Press Release 280/20 "ACCC rejects Google behavioural undertakings for Fitbit acquisition" of 22 December 2020.
[24] Commission, Press Release IP/20/2484 "Commission clears acquisition of Fitbit by Google, subject to conditions" of 17 December 2020.
[25] For an overview of mergers in the digital industry and the effects of merger control see E. Argentesi et al, "Merger Policy in Digital Markets: An ex post Assessment" (2020) 17(1) J.C.L.& E. 95.
[26] See Commission (Case M.4731—*Google/DoubleClick*) and ACCC, Public Competition Assessment 06 December 2007—*Google Inc proposed acquisition of DoubleClick Inc.*
[27] See ACCC, Statement of Issue 18 June 2020—*Google LLC proposed acquisition of Fitbit Inc.*
[28] Commission, Notice on remedies acceptable under Council Regulation 139/2004 and under Commission Regulation 802/2004 (Remedy Notice) COM(2008) C267/01; ACCC, Merger Guidelines, Appendix 3 para.20.
[29] Commission, Remedy Notice, para.15 and ACCC, Merger Guidelines, Appendix 3 para.20.
[30] ACCC, Merger Guidelines, Appendix 3 para.11.
[31] S. Katdare and A. Willekes, "Recent trends in complex ACCC merger review cases", Fourth Report 2020, *https://jws.com.au/getattachment/6aa83d1a-49fd-470c-8392-87f43b8f7c9c/ACCC-red-lights-not-fatal-for-mergers* [Accessed 12 April 2021].

The EC's position

Contrary to the ACCC, 20 years ago, the EC did not accept standalone non-structural remedies at all.[32] Until the publication of the EC's first Remedy Notice in 2000[33] and the 2004 revision of the EU Merger Regulation (EUMR), the EC only accepted structural remedies.[34] While the first EU Merger Regulation did not explicitly prohibit non-structural remedies, the EC derived its requirement for structural remedies from the structural nature of merger control.[35] Unlike in antitrust proceedings in which it prefers non-structural remedies over structural remedies,[36] the EC assumed that, in merger cases, only structural remedies could preserve competitive market conditions and prevent the creation or strengthening of dominant positions.[37]

In 1999, the European General Court (GC) forced the EC to revise its established practice. Although the GC confirmed that, as a general rule, structural remedies were preferable, it noted that

> "the possibility cannot automatically be ruled out that commitments which prima facie are behavioural (...) may (...) also be capable of preventing the emergence or strengthening of a dominant position".[38]

Since then, the GC repeatedly called on the EC to consider behavioural remedies.[39] In 2005, the GC was confirmed by the ECJ. The ECJ rejected the EC's narrow interpretation, saying that

> "the [GC] was right to hold (...) that (...) commitments relating to (...) future conduct [are] a factor which the [EC] ha[s] to take into account when assessing the likelihood that the merged entity would (...) create a dominant position".[40]

Since the ECJ ruling and a detailed assessment of structural remedies adopted in mergers between 1996 and 2000,[41] the EC has become more open to accepting non-structural remedies.[42] It still gives priority to divestitures.[43] However, it will take into consideration non-structural remedies when fixing a competition concern generated by a merger. While in the wholesale and retail sector it usually prefers divestitures, the EC tends to accept remedy packages mixing both structural and non-structural commitments especially in the information and communication sectors. It is, however, also nowadays rare for the EC to accept standalone non-structural remedies.

Conclusion

In principle, the EC and ACCC share the same reservations with regard to non-structural remedies. Their approach to non-structural remedies does, therefore, not explain the inconsistent decisions.

5.2 Does the EC's and ACCC's classification of remedy types differ?

The ACCC only classifies divestitures as structural remedies.[44] By contrast, the EC's notice on remedies suggests that granting access to infrastructure and technologies or licensing technology or intellectual property rights also constitute structural remedies.[45] However, this divergence in terminology does not explain the different decisions regarding the *Google/Fitbit* merger.

While the divestiture of a business on the one hand and promises by the parties to abstain from certain commercial behaviour on the other can be clearly assigned to one of the two categories of remedies, some remedies, such as access remedies, include elements of both categories. It is, therefore, difficult to categorise such "hybrid remedies"[46] in the remedy nomenclature.[47]

However, the classification is ultimately insignificant. Regardless of whether such remedies are denominated as structural or non-structural remedies, they do not constitute a "one-off" remedy. The designation as a structural remedy therefore does not overcome the concerns regarding non-structural commitments. As purely behavioural remedies, "hybrid remedies" will always be associated with the risk that the merging entities will evade or subvert the commitment whilst maintaining technical compliance or that the non-structural remedy

[32] Prior to the 2004 review of the EUMR a combination of structural and non-structural remedies was accepted in Commission (IV/M.009—*Fiat Geotech/Ford New Holland*) at [25]–[30]; Commission (IV/M.235—*Elf Aquitaine-Thyssen/Minol*) at [13]; Commission (IV/M.214—*Du Pont/ICI*) at [48] and Commission (IV/M.190—*Nestlé/Perrier*) at [136]–[138].
[33] Commission, Notice on remedies acceptable under Council Regulation 4064/89 and under Commission Regulation 447/98 [2001] OJ C68/03.
[34] See Commission (IV/M469—*MSG Media Services*) at [94].
[35] See recitals 7 and 14 and art.2(1)(a) Council Regulation 4064/89.
[36] See W. Wang, "Structural Remedies in EU Antitrust and Merger Control" (2011) 34(4) *World Competition* 571.
[37] See G. Drauz, "Remedies under the Merger Regulation" in B.E. Hawk (ed.), *Annual Proceedings of the Fordham Corporate Law Institute 1997* (Yonkers, NY: Juris Publications, 1999), p.219.
[38] *Gencor Ltd v Commission* (T-102/96) EU:T:1999:65; [1999] 4 C.M.L.R. 971 at [319].
[39] *ARD v Commission* (T-158/00) EU:T:2003:246; [2004] 5 C.M.L.R. 14 at [193]; *Tetra Laval BV v Commission* (T-5/02) EU:T:2002:264; [2002] 5 C.M.L.R. 28 at [161].
[40] *Commission v Tetra Laval* (C-12/03 P-DEP & C-13/03 P-DEP) EU:C:2010:280 at [86], [89].
[41] Commission, *Merger Remedy Study* (2005), *https://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf* [Accessed 12 April 2021].
[42] See Papandropoulus and Tajana, "The Merger Remedies Study—In Divestiture We Trust?" [2006] E.C.L.R. 443 who provide an overview on the discussion of these years.
[43] Commission, Remedy Notice, para.61.
[44] ACCC, Merger Guidelines, Appendix 3 para.13.
[45] Commission, Remedy Notice, para.17.
[46] C. Bengtsson, J. Capi-Badia and M. Kadar, "Mergers", in Faull and Nikpay (eds), *The EU Law of Competition*, 3rd edn (Oxford: Oxford University Press, 2014), para.5.1049.
[47] M. Motta, M. Polo and H. Vasconcelos, "Merger Remedies in the European Union: An Overview" in F. Lévêque and H. Shelanski (eds), *Merger Remedies in American and European Union Competition Law* (Cheltenham: Edward Elgar Publishing Ltd, 2003), pp.106, 117.

may restrain pro-competitive behaviour and prevent the merging entities to react efficiently to market conditions. Furthermore, they require a constant monitoring.[48]

Consequently, the different classification of access remedies does not overcome the concerns regarding their lower effectiveness and higher monitoring costs and does not explain the different views taken in the EU and Australia.

5.3 Has the EC introduced a new approach towards non-structural remedies in the digital industry?

The EC must have believed that the concerns could be eliminated in the *Google/Fitbit* merger while the ACCC did not see this option. It appears that the EC may have taken into consideration its newest regulatory proposal for the digital industry and have introduced a new approach to non-structural remedies in the digital industry.

Effectiveness of the Google Remedies

The ACCC seems to have relevant doubts that the remedies proposed by Google will effectively overcome competitive detriments of the *Google/Fitbit* merger. Despite Google's various unsuccessful attempts to build up a social media platform which show that not every service backed by Google is successful,[49] the ACCC took the view that it is likely for Google to become "the default provider of wearable operating systems for non-Apple devices" and "a gatekeeper for wearables data".[50] The EC, on the other hand, did not raise similar concerns.

In this context the EC's proposal for a new regulation of digital platforms comes into play. On 15 December 2020, two days before "giv[ing] Google a Christmas gift"[51] and clearing the *Google/Fitbit* merger, the EC published its proposal for a rulebook for the digital age, the Digital Markets Act.

The Digital Markets Act is the EC's solution to preserve effective competition in digital markets through additional regulation on large "gatekeeper" platforms. The regulation is designed to capture large players having a strong economic impact on the EU internal market, a strong intermediation power linking a large user base to a large number of businesses and an already entrenched or durable position in the market.[52] It is thus tailored to regulate the market conduct of platforms such as Google. If the EC qualifies a platform as a gatekeeper under the Digital Markets Act, such a company will have to comply with a set of prohibitions and obligations regarding its behaviour which are deemed as unfair practices, including prohibitions to discriminate in favour of own services, obligations to ensure interoperability with its platform for third parties, and obligations to share, in compliance with privacy rules, data that is provided by or generated through business users' and their customers' interactions on the gatekeepers' platform.[53]

Since with regard to the Fitbit acquisition, Google committed not to discriminate in favour of its own services and to ensure interoperability with and access to its platform and devices and, therefore, offered remedies that are structured in a similar way as the prohibitions and obligations under the Digital Markets Act, there was not a lot that the EC could have invoked against Google. Since the EC apparently assumes that the obligations of the Digital Markets Act are the key to preserve effective competition in digital markets and to "put order into chaos",[54] the EC would have run the risk of undermining its prestige project if it had deemed Google's remedies to be ineffective.

It could have been that, against this background, the EC had to declare Google's commitments to be effective.

Monitoring of the Google Remedies

Besides the conviction that structural remedies are more effective, the EC usually rejects non-structural remedies because they require an ongoing monitoring long after a merger has been cleared and executed. Indeed, it seems inconsistent to accept the emergence or strengthening of a dominant position and to then engage over years in a continuous abuse control which would use up the authorities' scarce resources.[55]

However, since the EC is proposing such a continuous monitoring exercise in its Digital Markets Act anyway,[56] this argument might have a decreased significance for mergers in digital markets which involve "gatekeeper" platforms, such as Google. If an entity's commercial behaviour is under constant monitoring, monitoring compliance with non-structural remedies of a merger case which essentially replicates the same standards does not require extensive additional resources. Moreover, the potentially drastic measures that may be taken by the EC on the basis of the Digital Markets Act might have a deterrent effect increasing the discipline to remain compliant. Notably, the tools set out in the EC's proposal for the Digital Markets Act would allow to set fines of up to 10 per cent of a company's global turnover, or, in cases of systematic infringements and as a last resort

[48] Bengtsson, Capi-Badia and Kadar, "Mergers" in Faull and Nikpay, *The EU Law of Competition*, 3rd edn (2014), para.5.1049.
[49] See R. Erskine, "Google+ Never Really Stood A Chance (And That's Okay)" (15 October 2018) *Forbes*, *www.forbes.com/sites/ryanerskine/2018/10/15/google-never-really-stood-a-chance-and-thats-okay/?sh=1093226f4c7c* [Accessed 12 April 2021].
[50] ACCC, Press Release 280/20 "ACCC rejects Google behavioural undertakings for Fitbit acquisition" of 22 December 2020.
[51] T. Larger, "EU gives Google a Christmas gift, clears Fitbit deal" (5 January 2021) *Politico*, *www.politico.eu/article/eu-gives-google-a-christmas-gift-clears-fitbit-deal/* [Accessed 12 April 2021].
[52] Article 3 Digital Markets Act, COM(2020) 842 final.
[53] Article 5 Digital Markets Act, COM(2020) 842 final.
[54] Commission, Statement 20/2450 "Statement by Executive Vice-President Vestager on the Commission proposal on new rules for digital platforms" of 15 December 2020.
[55] N. Hacker, in J.L. Schulte (ed.), *Handbuch Fusionskontrolle*, 3rd edn (Cologne: Carl Heymanns, 2020), para.1641.
[56] Article 24 Digital Markets Act.

option, even to break up its business.[57] Therefore, rejecting Google's commitments for the acquisition of Fitbit, could have been deemed to be disproportionate.

Conclusion

The Digital Markets Act creates a new setting for digital markets and the EC's concerns raised against non-structural remedies in such contexts. It appears, therefore, to be the explanation for the differing decisions in the *Google/Fitbit* merger in the EU and in Australia.

6. Outlook

On the one hand, the *Google/Fitbit* merger confirms a major principle of multi-jurisdictional mergers and, on the other, it may be the starting point for a new approach to non-structural remedies.

With regard to the Australian merger regime, it confirms that the geographical centre of gravity of a merger has little weight with the ACCC and that neither the remoteness nor the limited size of the Australian market will let a merger between non-Australian companies slip through Australian merger control.[58] For the European merger regime, the *Google/Fitbit* merger could be the starting point for a fundamental change of course in the EC's approach to non-structural remedies in digital markets. The EC appears to have already taken into consideration the implications of the Digital Markets Act for merger control. In view of the EC's proposal for a Digital Markets Act, the arguments that have so far been used against non-structural remedies may be called into question.

While the EC's current antitrust cases in the digital sector including proceedings against the other potential "gatekeepers", i.e. Apple[59] and Amazon,[60] remain ongoing, and "gatekeeper" platforms will in future have to comply with a set of additional prohibitions and obligations, the Digital Markets Act may unveil new opportunities for them in merger proceedings.

The field is open for speculation whether, once the Digital Markets Act is enacted, the EC will also decrease its focus on antitrust proceedings against gatekeeper platforms, knowing that it may strike harder based on the enforcement measures of the Digital Markets Act.

[57] Articles 16, 26 Digital Markets Act.
[58] See W. Hellmann (2001) *WuW* 1055.
[59] Commission, Press Release IP/20/173 "Commission opens investigations into Apple's App Store rules" of 16 June 2020 and Commission, Press Release IP/20/1075 "Commission opens investigation into Apple practices regarding Apple Pay" of 16 June 2020.
[60] Commission, Press Release IP/20/2077 "Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices" of 10 November 2020.