



# **Google/Fitbit: Is Merger Control fit(bit) for purpose in digital markets?**

## **Reflections on the EU and Australian reviews, and current reform proposals**

**Alec Burnside**

5 February 2021

**Dechert**  
LLP

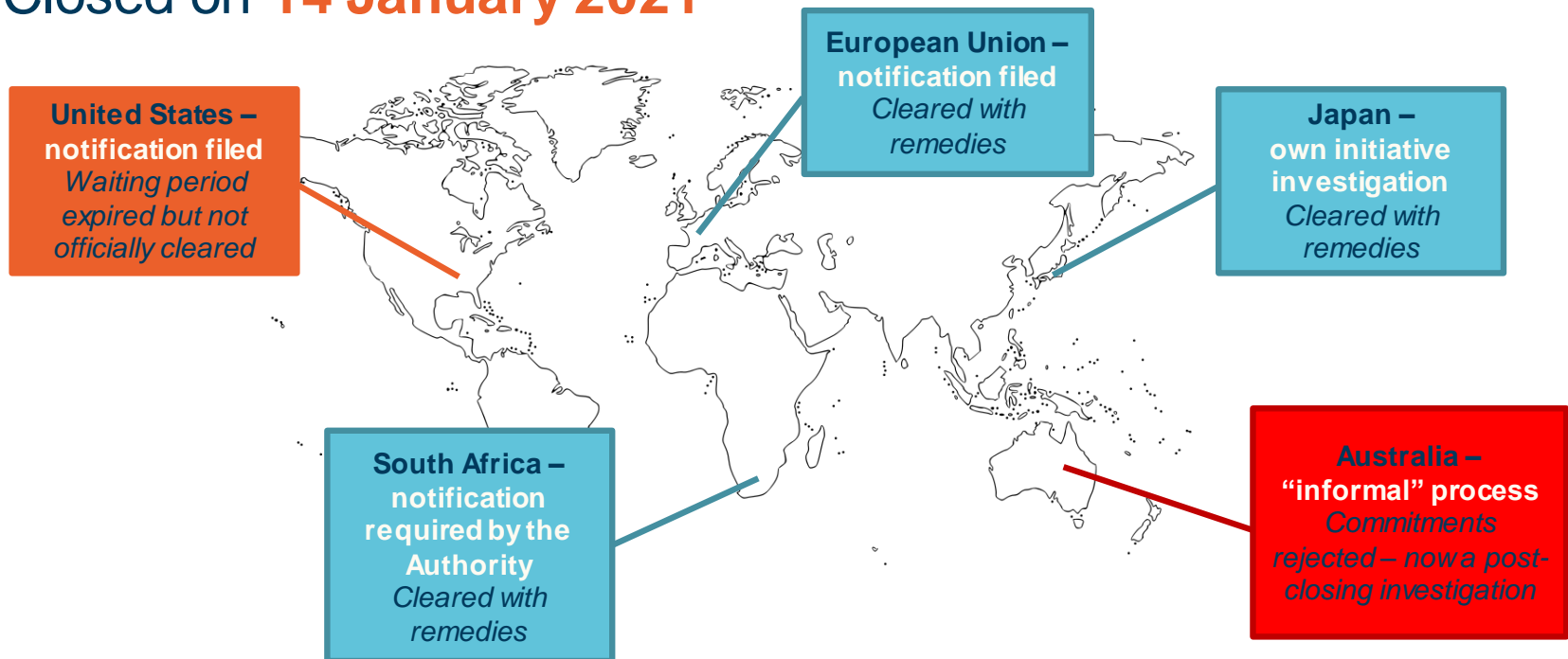
# Google/Fitbit: the challenges for merger review in digital markets

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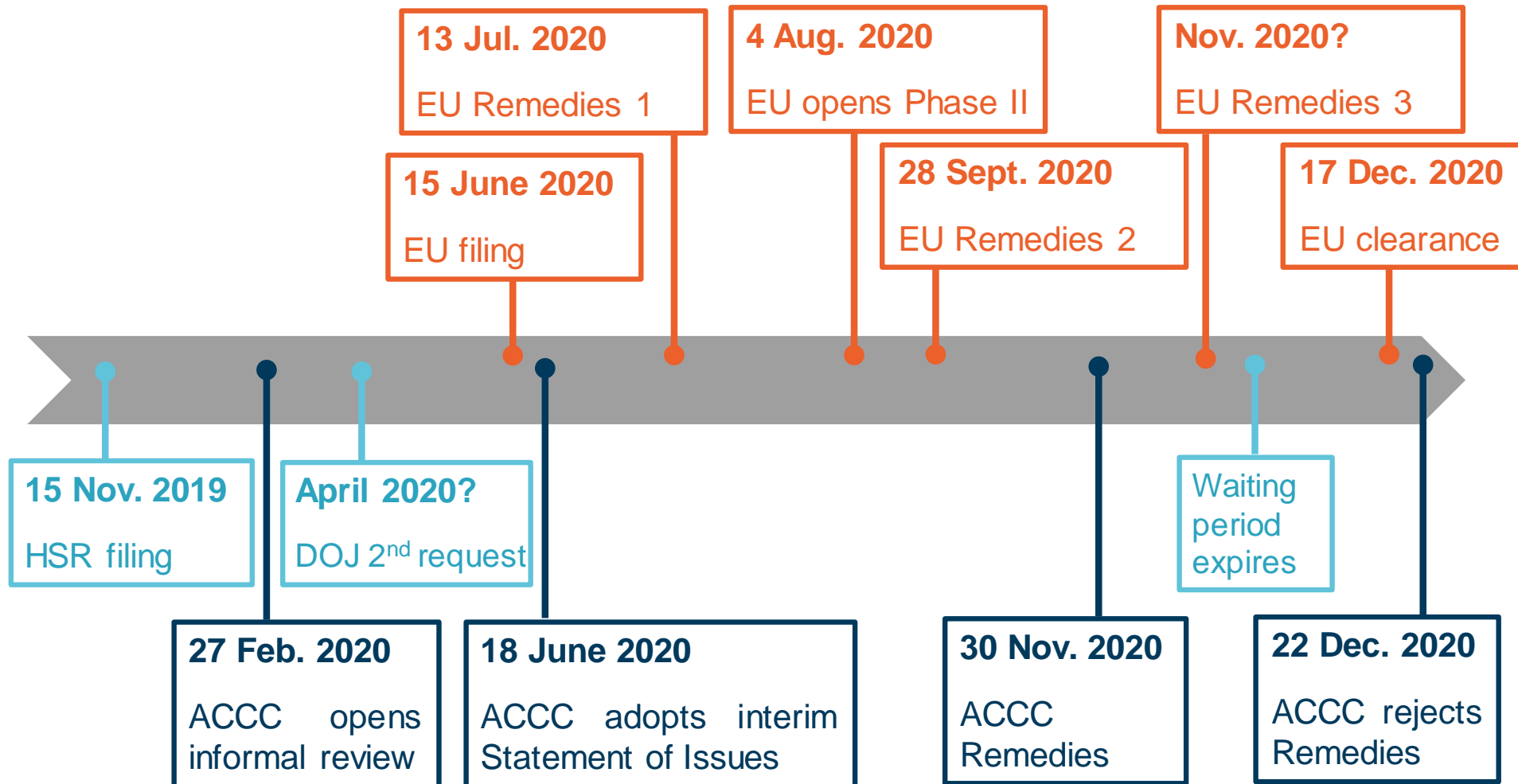
February 9, 2021

# Google/Fitbit: overview

- Deal announced in November 2019 for **USD 2.1 billion**
- Merger control review in **5 jurisdictions**
- Closed on **14 January 2021**



# Google/Fitbit - Timeline



# Google says: deal to acquire Fitbit devices

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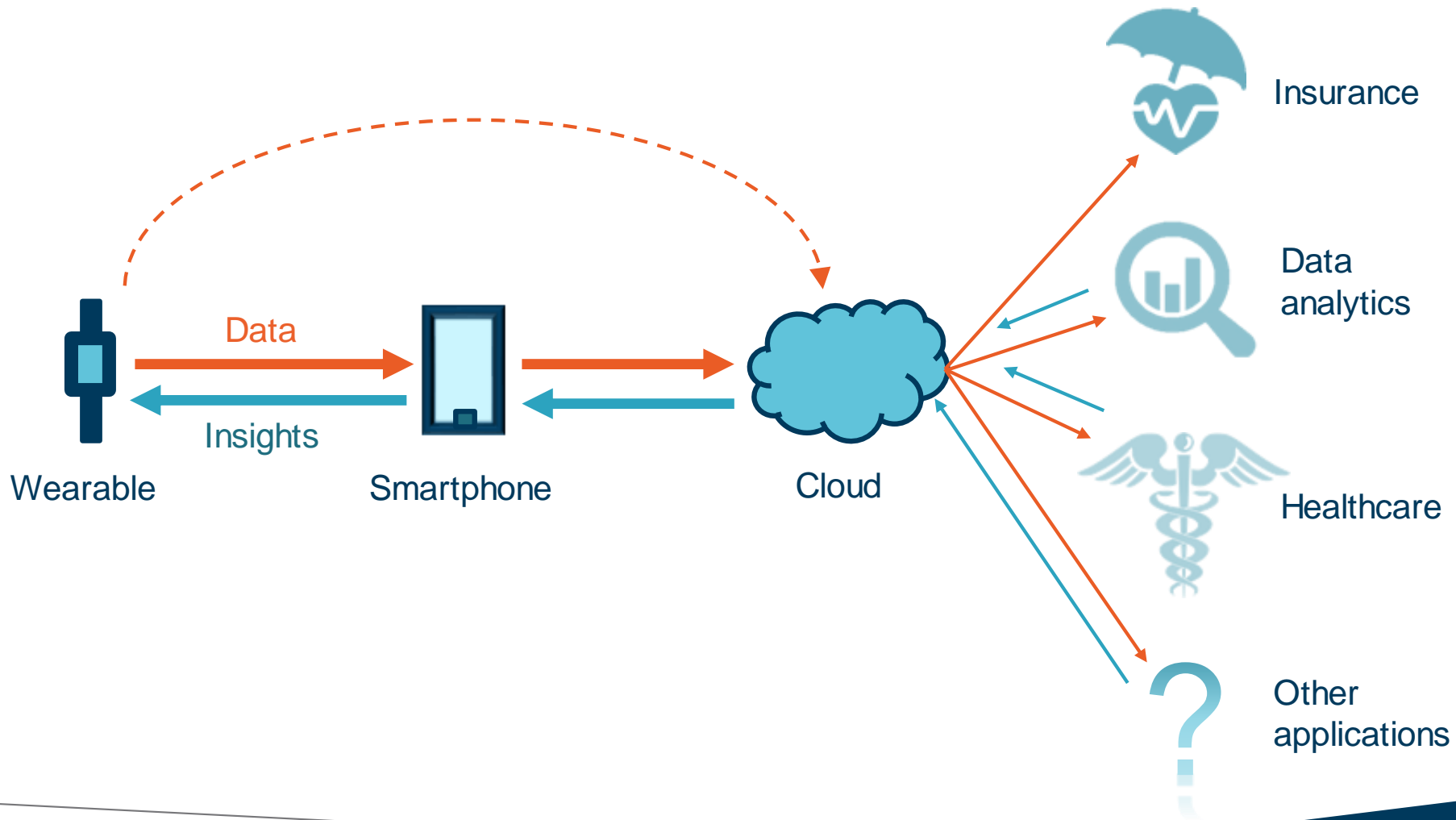
“By working closely with Fitbit’s team of experts, and bringing together the best AI, software and hardware, we can help spur innovation in wearables and build products to benefit even more people around the world.”

*R. Osterloh, Google Senior VP, November 2019*

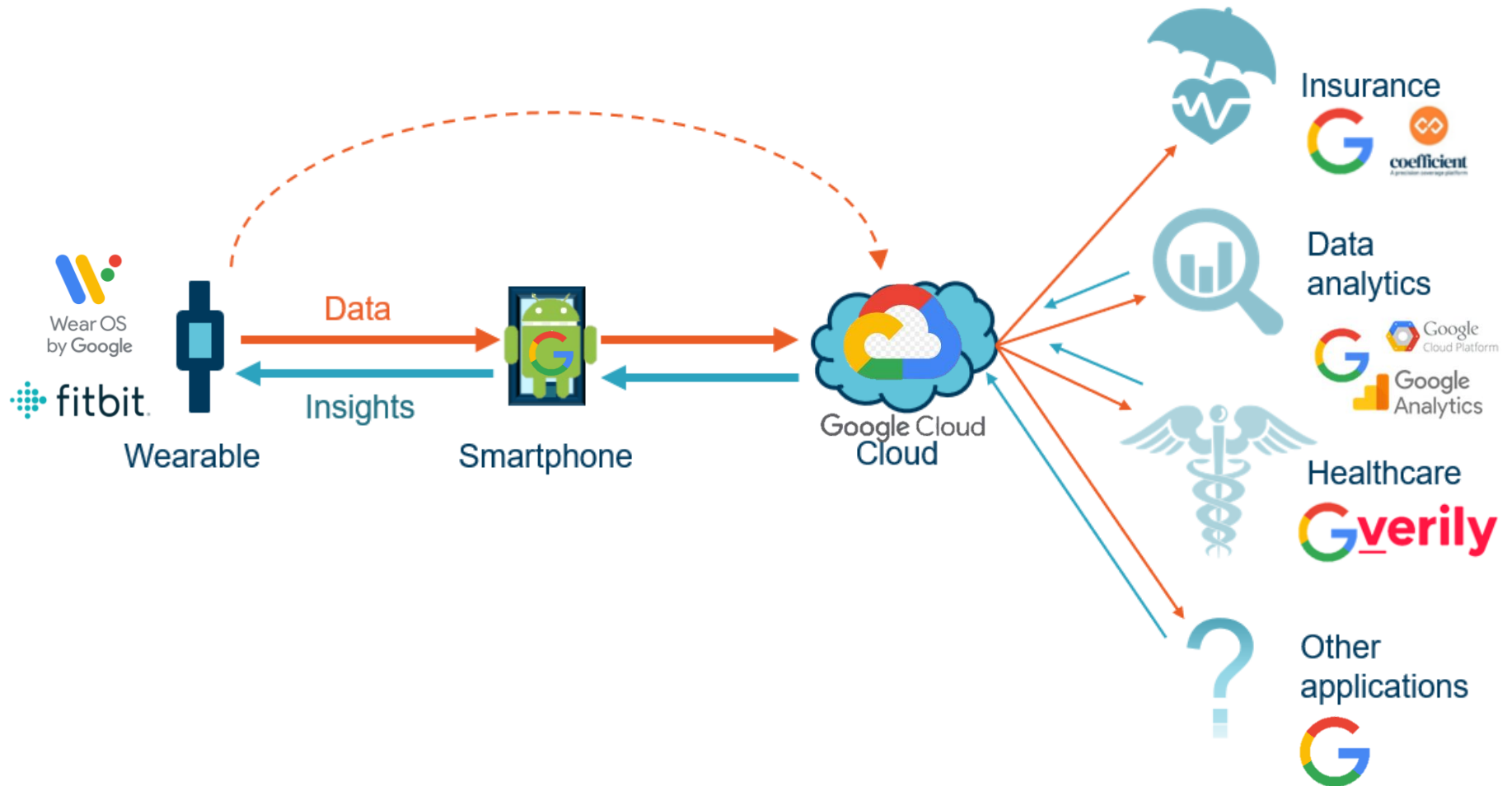
“This deal has always been about devices, not data”

*R. Osterloh, Google Senior VP, January 2021*

# The wearables ecosystem



# Third parties say: deal to expand Google's empire to another web entry point and to control the wearable data ecosystem



# Regulators, civil society: deal raises privacy concerns



## Statement



### Statement on privacy implications of mergers Adopted on 19 February 2020

The European Data Protection Board has adopted the following statement:

The EDPB has noted the intention of Google LLC to acquire Fitbit, Inc.

There are concerns that the possible further combination and accumulation of sensitive personal data regarding people in Europe could lead to a serious risk to their fundamental rights to privacy and data protection.

The EDPB has previously expressed concerns regarding the economic, data protection and privacy implications of the proposed merger.



The Consumer Voice in Europe

### GOOGLE-FITBIT MERGER

Competition concerns and harms to consumers

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## CONSUMER AND CITIZEN GROUPS HAVE SERIOUS CONCERNS ABOUT GOOGLE FITBIT TAKEOVER

### Common Statement

Consumer and citizen groups have significant concerns that Google's proposed takeover of wearables manufacturer Fitbit would be a game-changer not only for how people interact with the online world but also for digital and related health markets. Regulators around the world – in particular those concerned with antitrust compliance and data privacy – must therefore give it their utmost attention. This will be a test case for how regulators address the immense power the tech giants exert over the digital economy and their ability to expand their ecosystems unchecked.

Dear Executive vice-president Vestager,

### EU COMMISSION ASSESSMENT OF THE GOOGLE-FITBIT MERGER MUST INCLUDE HUMAN RIGHTS RISKS

I am writing to you to raise Amnesty International's serious concerns over Google's planned takeover of the wearables company Fitbit. The merger risks further extending the dominance of Google and its surveillance-based business model, the nature and scale of which already represent a systemic threat to human rights. The deal is particularly troubling given the sensitive nature of the health data that Fitbit holds that would be acquired by Google.



# A (very) controversial deal

## Google/Fitbit review: Privacy IS a competition issue

Cristina Caffarra, Tommaso Valletti 04 March 2020



**Cristina Caffarra**

Senior Consultant, Charles River Associates

CENTRE FOR  
ECONOMIC  
POLICY  
RESEARCH

September 2020

## Google/Fitbit will monetise health data and harm consumers

Marc Bourreau, Cristina Caffarra, Zhijun Chen, Chongwoo Choe, Gregory S. Crawford, Tomaso Duso, Christos Genakos, Paul Heide, Martin Peitz, Thomas Rønne, Monika Schnitzer, Nicolas Schuchman, Michelle Sovinsky, Giancarlo Spagnolo, Otto Toivanen, Tommaso Valletti, and Thibaud Vergé



**Tommaso Valletti** @TomValletti · Jul 14, 2020

"This deal is about devices, not data."

Unbearable to hear these lies again. Same 'commitment' G made on date of announcement. Please @EU\_Competition don't fall into this usual trap

Exclusive: Google offers data pledge in bid to win EU okay for Fitbit buy



**Tommaso Valletti**

Professor of Economics at Imperial College Business School and the University of Rome Tor Vergata (Italy), and CEPR Research Fellow

## Fitbit/Google: Vestager confirms EDPB cannot participate in review after data warning

25 February 2020 | 18:42 CET

The European Commission's (EC) competition service cannot invite other agencies to review **Google's** proposed acquisition of wearable device-maker **Fitbit** [NYSE:FIT] after the EDPB issued a public warning about data implications, the bloc's antitrust chief told a newswire.

# Latest addition to the roll-call of dishonour?

- Various cases are pointed out as **merger enforcement failures**:
  - EU level
    - Google/DoubleClick
  - CMA level
    - Google/Waze
- US are currently reviewing past deals
- Will Google/Fitbit join this list? **Time will tell...**

There are widely-held concerns about historic underenforcement against digital mergers in the UK and around the world. For example, the Furman Review stated 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'

*UK task force advice, December 2020*

## FTC to Examine Past Acquisitions by Large Technology Companies

February 11, 2020

Agency Issues 6(b) Orders to Alphabet Inc., Amazon.com, Inc., Apple Inc., Facebook, Inc., Google Inc., and Microsoft Corp.

# Latest addition to the roll-call of dishonour? EU Parliament may say yes...



**Regrets** the European Commission's decision to approve Google's takeover of wearable fitness device company Fitbit. **Notes that the remedies proposed by Google and endorsed by the European Commission are insufficient to ensure effective competition** in wearables and digital health, which are becoming increasingly important in consumers' lives. Urges the European Commission to take a **broader view when evaluating digital mergers and assess the impact of data consolidation**. Notes that the acquisition of targets with specific data resources can bring about a concentration in control over valuable and non-replicable data resources and result in better data access for the merging parties than for their competitors. Stresses that data consolidation via mergers may strengthen a dominant position or allow the acquiring entity to leverage market power, and sometimes raise foreclosure concerns

*Proposed amendment to the Competition policy annual report 2020*

# Digital mergers and nascent markets: new challenges for merger review

The need to assess **future evolution** of complex and **fast moving sectors** creates new challenges



Google/Fitbit, EU  
press release

VS



Google/Fitbit,  
Australian  
Statement of issues

Some market participants who consider that Google has already a significant presence in the digital healthcare sector, raised a concern that Google may obtain a competitive advantage in this sector by combining Google's and Fitbit's databases to such a degree that competitors would no longer be able to compete. The Commission's in-depth investigation did not confirm such concerns because the digital healthcare sector is still nascent in Europe with many players active in this space. Moreover, Fitbit has a limited user community in the fast-growing smartwatch segment.

The proposed acquisition also further consolidates Google's leading position in relation to the collection of user data, which supports its significant market power in online advertising and is likely to have applications in health markets.

“Wearable devices such as smart-watches are becoming more important in Australians' online lives, and the user data these devices collect is likely to become increasingly valuable. The competition impacts of Google acquiring Fitbit to expand into these important markets needs to be very carefully considered.”

# Specific challenges and how to remedy them?

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- **Fast-moving technology markets:** need to shift from narrow focus on short-term (price/quantity) effects to longer term effects
- **Increasing importance of data:** requires comprehensive analysis of competitive impact of datasets as an asset and as an input for data analytics, in the near and longer term
- **A need for “new” types of remedies:**
  - Divestments may not be adequate in digital mergers
  - Remedies must address concerns and ensure that the merged entity’s data advantage will not cause markets to tip
  - “new” remedies: **data access, interoperability, data silo, non-discrimination**, etc.

# These challenges have already been identified in various reports



# But is the Commission practicing what it preaches?

## 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 but is impossible for competitors to replicate or if the combination may [provide] the basis of the leveraging of market power.

## DG COMP Google/Fitbit press release

Some market participants who consider that Google has already a significant presence in the digital healthcare sector, raised a concern that Google may obtain a competitive advantage in this sector by combining Google's and Fitbit's databases to such a degree that competitors would no longer be able to compete. The Commission's in-depth investigation did not confirm such concerns because the digital healthcare sector is still nascent in Europe with many players active in this space. Moreover, Fitbit has a limited user community in the fast-growing smartwatch segment.

# EU: reflections on conditional clearance decision

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# EC's concerns as described in the decision's press release

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- **Advertising:** *By acquiring Fitbit, Google would acquire (i) the database maintained by Fitbit about its users' health and fitness; and (ii) the technology to develop a database similar to that of Fitbit. By increasing the already vast amount of data that Google could use for the personalisation of ads, it would be more difficult for rivals to match Google's services in the markets for online search advertising, online display advertising, and the entire "ad tech" ecosystem. The transaction would therefore raise barriers to entry and expansion for Google's competitors for these services to the detriment of advertisers, who would ultimately face higher prices and have less choice.*
- **Access to Web Application Programming Interface ("API") in the market for digital healthcare:** *A number of players in this market currently access health and fitness data provided by Fitbit through a Web API, in order to provide services to Fitbit users and obtain their data in return. The Commission found that following the transaction, Google might restrict competitors' access to the Fitbit Web API. Such a strategy would come especially at the detriment of start-ups in the nascent European digital healthcare space.*
- **Wrist-worn wearable devices:** *The Commission is concerned that following the transaction, Google could put competing manufacturers of wrist-worn wearable devices at a disadvantage by degrading their interoperability with Android smartphones.*

# Third parties' views: EC decision ignores true impact of the transaction; and remedies insufficient

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- Impact of Google getting **proprietary access** to Fitbit data
  - Increases Google's competitive advantage in downstream markets which rely on this data such as digital healthcare
  - Accepting a remedy which only preserves the status quo for access to Fitbit data ignores the importance of combining data sets and data analytics opportunities
  - See slides 19-21
- **Privacy**
  - User exploitation arguments based on large digital players' incentives to interpret data protection rules to their own benefit
  - See slide 22
- Impact of Google's ability to imposed **conditions on rival wearable producers**
  - Seamless interaction with Google devices not sufficiently guaranteed to ensure that rival wearable producers are attractive to consumers and therefore to partners such as digital healthcare providers
- Impact on **advertising**: would need a whole separate webinar...

# The use of Fitbit data in downstream markets

The Commission's in-depth investigation did not confirm such concerns because the digital healthcare sector is still nascent in Europe with many players active in this space. Moreover, Fitbit has a limited user community in the fast-growing smartwatch segment.

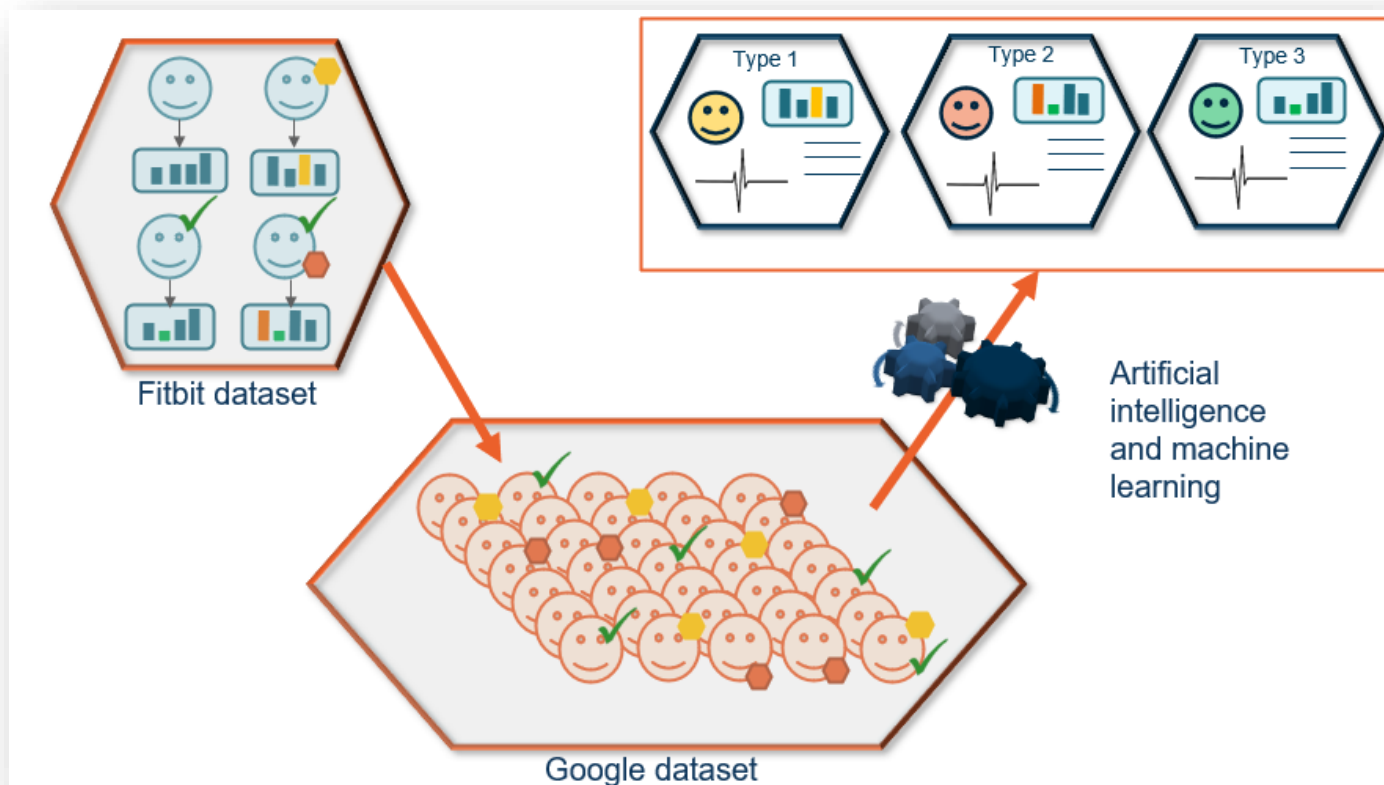
*DG COMP, Google/Fitbit Press Release*

- Is the Commission failing to act on the **Crémer report**?
- Could **Hutchison** have had a deterrent effect?
- And most of all, does this ignore the **exponential effect** of combining datasets with AI/Machine learning?

**Do we need a different standard of proof for digital mergers?**

# The importance of data analytics

- AI and ML can derive insights from data. Combining even a small dataset (Fitbit's) with a big data set (Google's) could generate **exponential insights**



# Importance of non-health data points

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## PERSONALIZING AT SCALE

“Our thinking has evolved to do **personalization 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 form how a provider should approach an individual for them to have the best possible outcome and live their best possible lives.”

VINDELL WASHINGTON, CHIEF CLINICAL OFFICER, VERILY LIFE SCIENCES

**verily**

 CBINSIGHTS

# Privacy not an antitrust concern?

The Commission's investigation found that Google will have to ensure compliance with the provisions and principles of the GDPR, which provides that the processing of personal data concerning health shall be prohibited, unless the person has given explicit consent. Such concerns are not within the remit of merger control and there are regulatory tools better placed to address them.

*DG COMP, Google/Fitbit Press release*



## Online platforms and digital advertising

Market study final report  
1 July 2020

Our concern is that such platforms have an incentive to interpret data protection regulation in a way that entrenches their own competitive advantage, including by denying third parties access to data that is necessary for targeting, attribution, verification and fee or price assessment while preserving their right to use this data within their walled gardens.

# Australia: reflections on ACCC's examination

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February 9, 2021

# Status of the Australian case

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- The ACCC rejected Google's commitments in December 2020

“While we are aware that the European Commission recently accepted a similar undertaking from Google, we are 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”

*Rod Sims, Chairman, ACCC, 22 December 2020*

- Case transformed into **a post-closing investigation** after Google completed the deal on 14 January 2021

“The market for wearable devices like those made and sold by Fitbit is rapidly evolving. We are concerned that Google's acquisition of Fitbit, an innovative company with its own wearables operating system and high standards for privacy protection, could prevent or hinder future competition.”

*Rod Sims, Chairman, ACCC, 15 January 2021*



# ACCC's concerns – A broader approach (1)

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- Combination of datasets and impact of AI/ML:
  - *Google holds and collects an extensive amount of high-quality consumer data. Google combines many of these data points to develop **unique profiles of individual users** which are in-turn used to supply a range of services [...]*
  - *Google is also a market leader in **artificial intelligence and machine learning***
  - *Acquiring Fitbit would provide Google with one of the **largest and most detailed existing fitness and health datasets**, as well as another avenue through which it can continue to gather consumer data.*
  - *Google will likely also utilise the data at an aggregate level, using its analytical tools to draw **broader insights about groups of people** (beyond just Fitbit users) with specific attributes, then **apply these insights across different parts of its business.***

# ACCC's concerns – A broader approach (2)

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- Data-dependent health services and future outlook
  - *[nascent data-dependent health services] are fledgling markets, but with the **potential for high growth in the near future**. Current information also suggests that competitors in these markets are likely to be significantly advantaged if they have access to comprehensive data from wearable devices*
  - *the ACCC raised concerns about both the **loss of potential competition**, as well the loss of any existing competition between Fitbit and Google in these fledgling markets*
  - *And worried that the **combination of the consumer data currently accessible to Google, its analytical capability and Fitbit's data**, may result in **Google developing a strong foothold in such emerging markets**.*

# ACCC's concerns – A broader approach (3)

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- As the EC, the ACCC noted risks of foreclosure with regards to competing wearable producers
- BUT the concerns encompassed more Google products: the ACCC raised “*concerns about rival wearables continuing to have access on the same terms to **Wear OS, Google Maps, the Google Play store** and interoperability with Android phone software.*”
- And the ACCC flagged the need to ensure interoperability for additional critical functions, e.g. **voice-activated assistants**

# Can Australia do anything?

- An enforcement investigation will take time and in the meantime the deal has closed
- Tensions are already high between Google and the ACCC: the **proposed media code**



# Japan, South Africa and the US

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February 9, 2021

# Deal conditionally cleared in Japan and South Africa with remedies similar to those accepted by the EC

## Press Releases

### The JFTC Reviewed the Proposed Acquisition of Fitbit, Inc. by Google LLC

January 14, 2021  
Japan Fair Trade Commission

This case concerns a proposed transaction in which Google LLC (JCN3700150072195) (hereinafter referred to as “Google”) headquartered in the U.S. planned to acquire Fitbit, Inc. headquartered in the U.S. Google Group (a group of companies held by Google’s ultimate parent headquartered in the U.S.) is active in a wide range of areas, notably in search, advertising, internet search, cloud computing, software and hardware. Fitbit (a group of companies held by Fitbit, Inc.) is mainly active in development, manufacturing and distribution of fitness trackers and other wearable devices.

(\*JCN: Japan Corporate Number

The acquisition did not meet the notification criteria stipulated in Article 10, paragraph (2) of the Antimonopoly Act and therefore was not required to be notified to the Commission (hereinafter referred to as the “JFTC”) in advance, but the total acquisition was large and domestic consumers were expected to be affected by the acquisition.

As a result of its review, based on the premise that Google Group and Fitbit proposed remedies, the JFTC concluded that the acquisition would not substantially lessen competition in any particular fields of trade.

The European Commission and other foreign competition authorities also reviewed the acquisition. The JFTC conducted the review in cooperation with these foreign competition authorities.



**competition commission**  
south africa

**Media Statement**  
**For Immediate Release**  
**22 December 2020**

**Competition Commission conditionally approves the Google/Fitbit merger**

The Commission has conditionally approved the proposed merger whereby Google LLC (USA) (Google) intends to acquire Fitbit Inc. (USA) (Fitbit). This is a global merger, notified in several jurisdictions, including the EU, USA, Australia, Canada and Japan.

# US review still on-going but not much hope

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The Antitrust Division's investigation of Google's acquisition of Fitbit remains ongoing

*Alex Okuliar, DOJ, 14 January 2021*

We complied with the DOJ's extensive review for the past 14 months, and the agreed upon waiting period expired without their objection [...] We continue to be in touch with them and we're committed to answering any additional questions.

*Google, 14 January 2021*

# Google promises to apply remedies worldwide

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A **voluntary** non-enforceable commitment:

These commitments will be implemented globally so that all consumers can benefit from them.

*R. Osterloh, Google Senior VP, 14 January 2021*



Rick Osterloh

Senior Vice President, Devices  
& Services

Published Jan 14, 2021



Digital Markets: is merger control fit for purpose or are reforms needed?

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February 9, 2021

# Google/Fitbit: a plea for change?

DG COMP, Google/Fitbit Press release

The commitments offered by Google are based on an earlier commitment package that was significantly improved following the feedback received by market participants. The Commission concluded that the proposed transaction, as modified by the commitments, would no longer raise competition concerns. This decision is conditional upon full compliance with the commitments, **It 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.**

Route 2,  
new  
enforcement  
powers

So to keep our markets fair and open to competition, it's vital that we have the **right toolkit** in place. And that's what the second set of rules we're proposing – what we call the Digital Markets Act – is for.

*M. Vestager, 15 Dec. 20*

3rd route? Use the current tools?

Route 1, amendment of merger control

Digitisation, for instance, can transform the way markets work. It can give the biggest companies more power than ever – thanks to the insights from huge collections of data, or the big networks that make a service attractive to users. So we want to see if digitisation means we need to change some aspects of the way we assess how a merger affect competition.

*M. Vestager, 11 September 2020*



# EC Proposal for a Digital Market Act

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- EC proposal published on **15 December 2020**
- Going through legislative process at EU Parliament and Council
- Proposal focuses on protecting “contestable markets” with lists of practices so-called **gatekeepers** must not adopt
- Any reform in relation to merger control is limited to an obligation for gatekeepers **to inform the EC before any acquisition**:
  - No authorisation process: EC cannot intervene if acquisition does not meet the existing merger control thresholds
  - **No change to substantive test** for acquisitions by gatekeepers
  - No change to **burden of proof**



# UK proposal for a Digital Market Unit

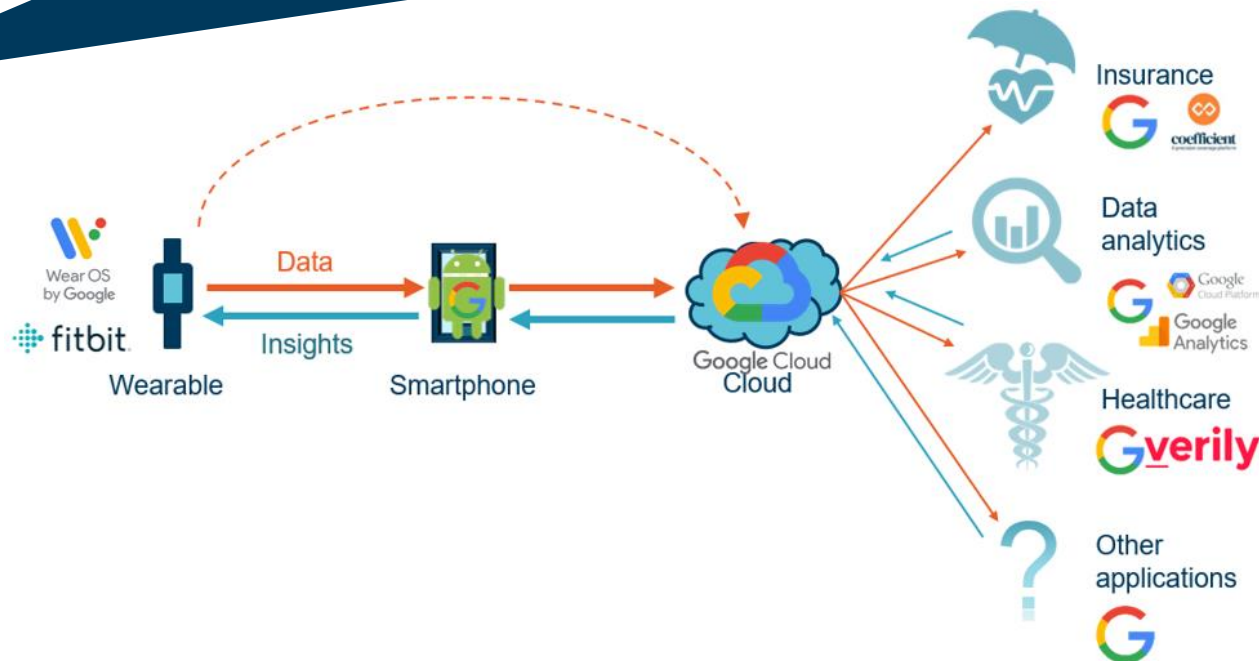
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- Advice of the Digital Market Taskforce published in **December 2020**. Government committed to establish a Digital Market Unit by **April 2021** with legislation to follow
- Recommended **specific merger rules** for firms with **Strategic Market Status (SMS)**
  - Reporting of **all** transactions by SMS firms
  - **Mandatory suspensory** notification for acquisition of “control” meeting specific thresholds (not specified, likely transaction value and UK nexus – revenue/users/assets)
  - **Lower standard of proof**: *likely to result in an SLC (current) vs realistic prospect of an SLC (new rules)*

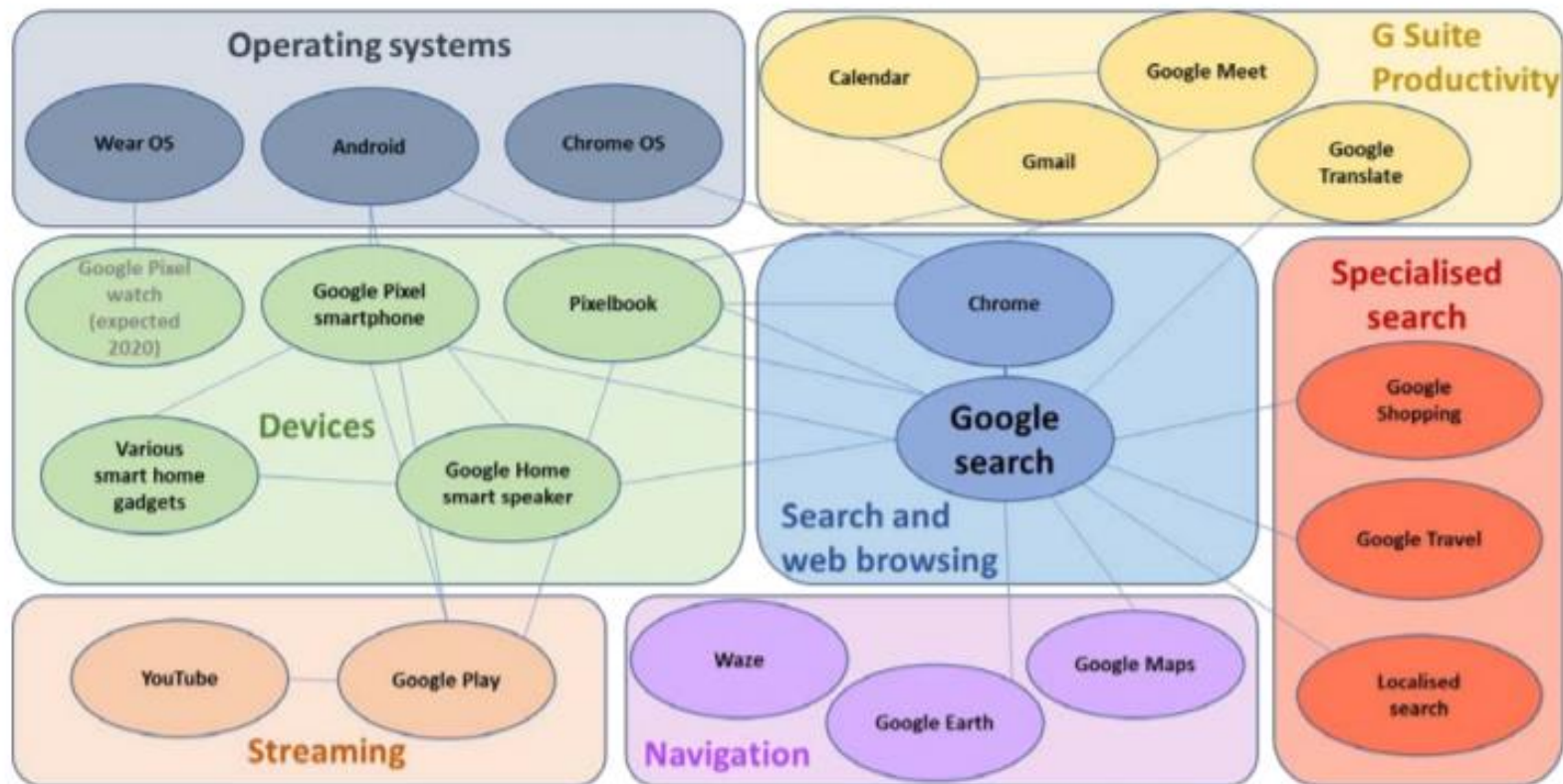
# Goal: preventing reinforcement of ecosystems

Mergers and acquisitions are also an important part of the business model of these firms, with strategic acquisitions being used to build-up a strong position and to reinforce it, for example by building '**ecosystems**' of complementary products and services around their core service, insulating it from competition.

*UK digital task for advice,  
December 2020*



# Google online consumer-facing ecosystem



Source: CMA's interpretation of a selection of Google's products and services



# And on the other side of the Atlantic

- Recommendations of the US Subcommittee – **Anticompetitive presumptions**

To address this concern, Subcommittee staff recommends that Congress consider shifting presumptions for future acquisitions by the dominant platforms. Under this change, any acquisition by a dominant platform would be presumed anticompetitive unless the merging parties could show that the transaction was necessary for serving the public interest and that similar benefits could not be achieved through internal growth and expansion. This process would occur outside the current Hart-Scott-Rodino Act (HSR) process, such that the dominant platforms would be required to report *all* transactions and no HSR deadlines would be triggered. Establishing this presumption would better reflect Congress's preference for growth through ingenuity and investment rather than through acquisition.

To respond to this concern, the Subcommittee recommends that Members consider codifying bright-line rules for merger enforcement, including structural presumptions.<sup>2481</sup> Under a structural presumption, mergers resulting in a single firm controlling an outsized market share, or resulting in a significant increase in concentration, would be presumptively prohibited under Section 7 of the Clayton Act.<sup>2482</sup> This structural presumption would place the burden of proof upon the merging parties to show that the merger would not reduce competition. A showing that the merger would result in efficiencies should not be sufficient to overcome the presumption that it is anticompetitive. It is the view of Subcommittee staff that the 30% threshold established by the Supreme Court in *Philadelphia National Bank* is appropriate, although a lower standard for monopsony or buyer power claims may deserve consideration by the Subcommittee.

Thank you! Any questions?

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# Alec Burnside

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Alec Burnside practices in the area of EU competition law, with a particular focus on covering merger clearances, state aid, cartel defense, abuse of dominance, and damages litigation.

Over the past three decades, Mr. Burnside has played a key role in cases for leading corporations, global industries and governments on issues arising across a broad spectrum of industries, including consumer products, energy and natural resources, financial services, manufacturing, military, pharmaceuticals, technology, telecoms, and transport and logistics. In particular, Mr. Burnside represents **a number of complainants in the Google investigations by the EU Commission.**

Currently he is particularly invested in the themes around **Big Data and the tech industry**, as well as antitrust and sustainability, focusing also on the new EU FDI regulation.

He co-authors the Dechert Antitrust Merger Investigation Timing Tracker (DAMITT), which is the leading source of analysis for significant U.S. and EU antitrust merger investigation and litigation trends. Further, Mr. Burnside is one of the firm's leading authorities on **Brexit**, helping to shape strategy and provide critical guidance to clients.

### Awards/Recognitions

Clients noted Mr. Burnside as "one of the icons of the competition Bar in Brussels" because of his "strong analytical skills and intellectual curiosity." (*Chambers Global 2018*)

Mr. Burnside has been recognized and recommended over many years as a leading lawyer for competition law in publications such as *Chambers Global*, *Chambers Europe*, *Legal 500 EMEA*, *Global Competition Review*, *International Financial Law Review*, and *Best Lawyers in Belgium*. He was named a "thought leader" in competition by *Who's Who Legal* in 2018 and 2019.

### Education

University of Cambridge, Downing College, 1982

College of Law, London, 1983

Institut d'Etudes Européennes, Brussels, 1984

### Bar Admissions/Qualifications

Brussels

England and Wales

### Languages

English

German

French

# Annex - A (critical) review of the commitments

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*The devil is in the detail*

# Commitments – General principles

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- Remedies notice

- *“The commitments have **to eliminate the competition concerns** entirely and have to be **comprehensive and effective** from all points of view.”*
- *“Where, however, the parties submit remedies proposals that are **so extensive and complex** that it is not possible for the Commission to determine with the requisite degree of certainty, at the time of its decision, that they will be fully implemented and that they are likely to maintain effective competition in the market, **an authorisation decision cannot be granted.**”*

# Do Google commitments meet this threshold?

- Length and complexity?
  - 9 pages of commitments, **10 pages of definitions**, 6 annexes
  - References to many other documents that can be **unilaterally modified by the parties** (e.g. Google API User Data Policy, Fit Developer Guidelines, Google Fit terms of service, Fitbit Platform terms of services)
  - Does this merit the description “complex”?

7. Google commits to maintaining access, subject to user consent consistent with applicable laws and without charge for access, to **Supported Measured Body Data** for API Users subject to the following conditions:

- API Users' continued compliance with the Fitbit Platform Terms of Service (where access is made available via the Fitbit Web API) or the Terms of Service and the **Services User Data Policy** (where access is made available via the Relevant Google API)
- API Users' continued compliance with the Fitbit Platform Terms of Service (where access is made available via the Fitbit Web API) or the Terms of Service and the **Services User Data Policy** (where access is made available via the Relevant Google API)

**Supported Measured Body Data:** as of the Effective Date, Supported Measured Body Data consists of **Measured Body Data** collected from any global Google or Fitbit user (and not just from EEA Users) and made available to third parties through the Fitbit Web API under the Fitbit Platform Terms of Service. Such data types are listed in **Annex 6**.

**Services User Data Policy:** the user data policies for Google API (e.g., the **Google API User Data Policy** available at <https://developers.google.com/terms/api-services-user-data-policy> and the Fit Developer Guidelines available at <https://developers.google.com/fit/overview>) as may be updated from time-to-time, for instance to comply with changes to applicable privacy laws or regulations. Any updates to the Services User Data Policy following the Effective Date will be posted to the [Google API Services User Data Policy](#) page.

**Google API Services User Data Policy**  
Last updated September 3, 2020

Google API Services, including Google Sign-In, are part of an authentication system that gives the developer, the ability to connect directly with Google users when you work with Google APIs. The policy below, as well as the **Google APIs Terms of Service**, governs the request access to Google user data. Please check back from time to time for updates.

**Google APIs Terms of Service**  
Last modified: November 18, 2020 ([see previous version](#))

Thank you for using Google's APIs, other developer services, and associated software (collectively, "APIs"). By accessing or using our APIs, you are agreeing to the terms below. If there is a conflict between these terms and additional terms applicable to a given API, the additional terms will control for that conflict. Collectively, we refer to the terms below, any additional terms, terms within the accompanying API documentation, and any applicable policies and guidelines as the "Terms." You agree to comply with the Terms and that the Terms control your relationship with us. So please read all the Terms carefully. If you use the APIs as an interface to, or in conjunction with other Google products or services, then the terms for those other products or services also apply.

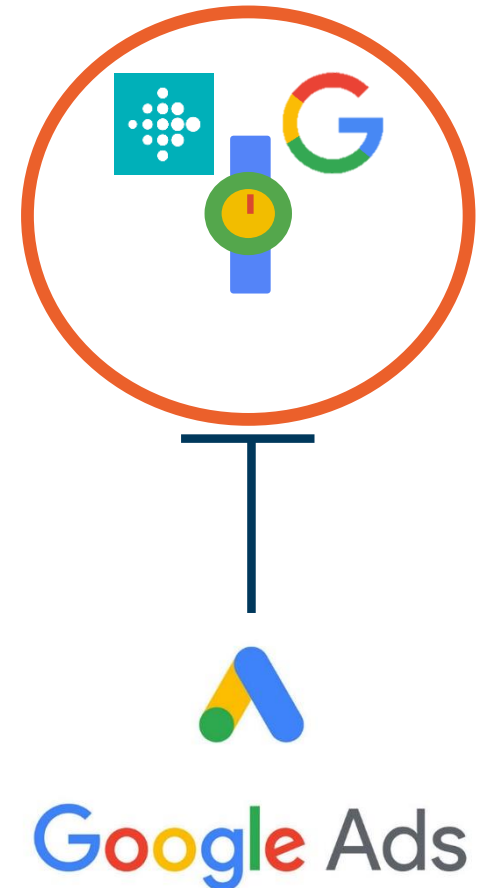
**Measured Body Data:** any data (including processed data and derived data) relating to identified or identifiable (as defined under applicable data protection laws) EEA Users that measures and tracks the user's body functions, physical condition, fitness activity, nutrition or wellness, and similar functions, and that is sent to:

- Google or Fitbit, from sensors on **First-Party Wrist-Worn Wearable Devices**, **First-Party Connected Scales**, or **Fitbit Other Devices**; or
- Fitbit, having been manually inputted into a **Fitbit Account** through a **Fitbit Health and Fitness App**; or
- Google, having been manually inputted into a **Google Account** through a **Google Health and Fitness App**, where such app is installable with **Fit-Party Wrist-Worn Wearable Devices**, **First-Party Connected Scales**, or **Fitbit Other Devices**.

**Other definitions**

# Commitment 1 – Advertising – EC’s Theory

- Google **will not use the health and wellness data** collected from wrist-worn wearable devices and other Fitbit devices of users **for Google Ads**
- Google will maintain a **technical separation** of the relevant Fitbit's user data
- Google will ensure that EEA users will have an **effective choice** to grant or deny the use of health and wellness data stored in their Google Account or Fitbit Account by other Google services



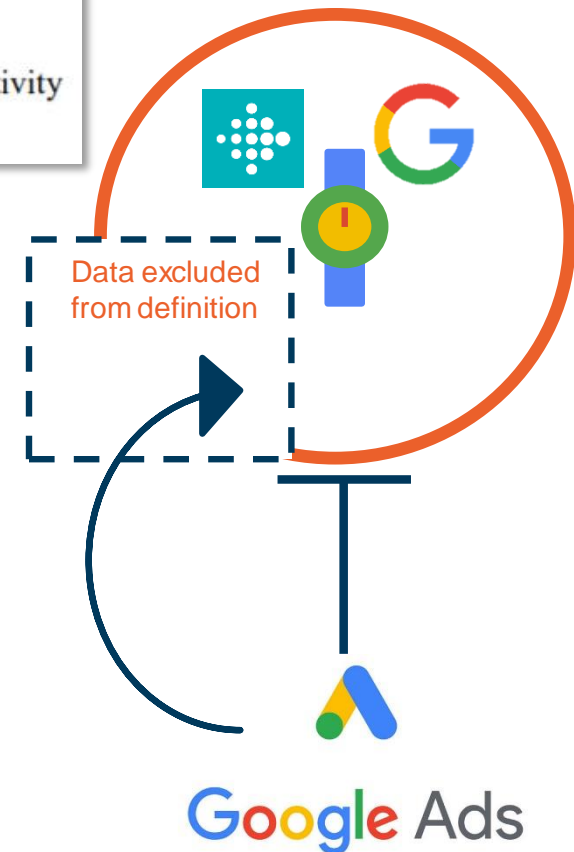
# Commitment 1 – Advertising – In practice

## A.1 Ads Commitments

1. Google commits not to use any Measured Body Data or Health and Fitness Activity Location Data in or for Google Ads.

### ▪ BUT

- Different rules for data written to a Fitbit account or a Google account
- Definition of data types excludes some data (e.g. background geolocation data)



# Commitment 1 – User’s choice provision

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- A **significant step** forward in principle

5. Google commits to present each EEA User the choice to grant or deny use by Other Google Services of any Measured Body Data stored in their Google Account or Fitbit Account.

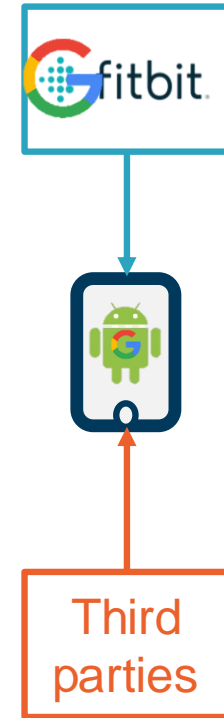
- BUT with a strange caveat

6. The commitment set out in paragraph 5 above is without prejudice to, and **should not be interpreted based on, any privacy or data protection laws or regulations**, and does not come under the jurisdiction or purview of any privacy or data protection regulators.

- And some more definitional questions (e.g. Other Google Services)

# Commitment 2 - Android APIs – EC's theory

- Google will continue to **license for free** to Android OEMs those **public APIs** covering all current core functionalities that wrist-worn devices need to interoperate with an Android smartphone.
- Google will grant OEMs access to all Android APIs that it will make available to Android smartphone app developers including those **APIs that are part of Google Mobile Services (GMS)**, a collection of proprietary Google apps that is not a part of the Android Open Source Project.
- Google will **not degrade users experience** with third party wrist-worn devices through the display of warnings, error messages or permission requests in a discriminatory way or by imposing on wrist-worn devices OEMs discriminatory conditions on the access of their companion app to the Google Play Store.



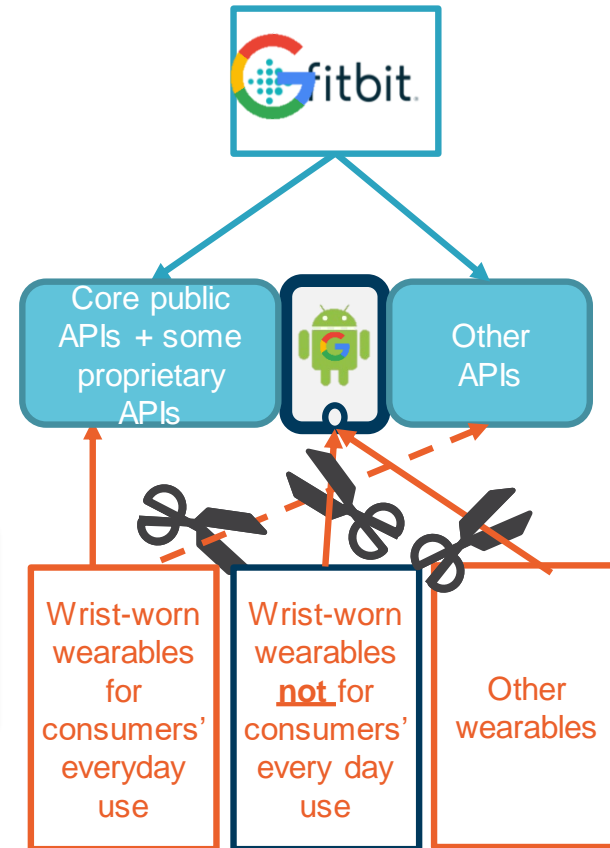


# Commitment 2 – Android API – In practice

- Access and interoperability but limited to
  - A subset of APIs
  - Specific types of wearables
- A commitment not to discriminate between third-parties but not between third and first party products, e.g.

13. Google will not circumvent these requirements:

- a. By discriminating between Wrist-Worn Wearable Device OEMs and other Android Smartphone App Developers in terms of warnings, error messages, or permission requests displayed in Android Apps.

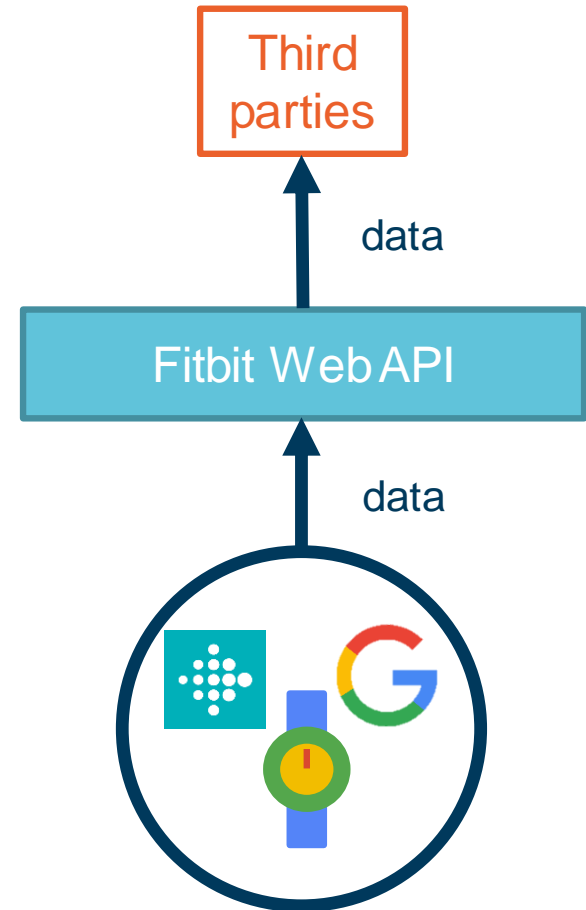


# Commitment 3 – Web API access – EC’s theory

- Google will maintain **access to users' health and fitness data to software applications** through the Fitbit Web API, without charging for access and subject to user consent.

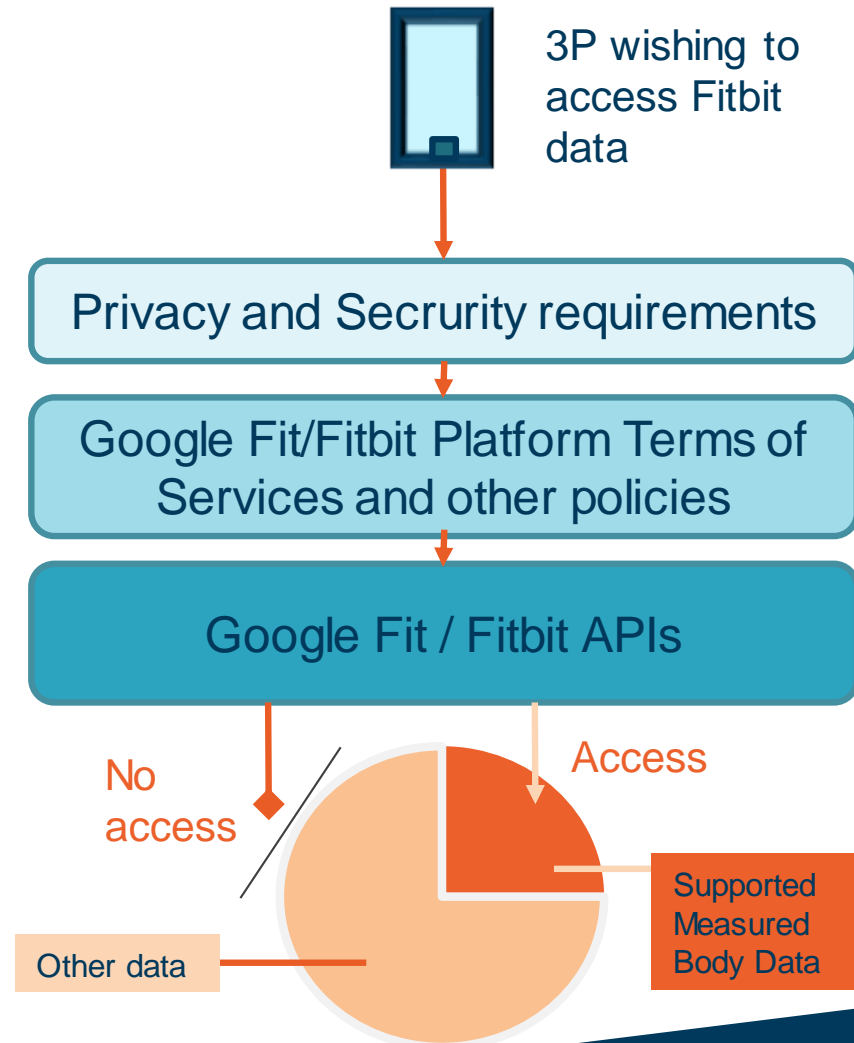
## A.2 Web API Access Commitment

- Google commits to maintaining access, subject to user consent consistent with applicable laws and without charge for access, to Supported Measured Body Data for API Users subject to the following conditions:
  - API Users' continued compliance with the Fitbit Platform Terms of Service (where access is made available via the Fitbit Web API) or the Terms of Service and the Services User Data Policy (where access is made available via the Relevant Google API).
  - API Users' continued compliance with the Privacy and Security Requirements.
  - Google can terminate access for violation of these requirements where Google has established such a violation or temporarily suspend access where Google has a reasonable belief of violation of such requirements. Google will notify the termination or suspension to the Monitoring Trustee within 14 days and indicate the reason for the termination or suspension.
- Access may be provided through: (i) the existing Fitbit Web API (conditioned on the user whose Supported Measured Body Data are being accessed using a Fitbit Account); or (ii) the Relevant Google API (conditioned on the user whose Supported Measured Body Data are being accessed using a Google Account).



# Commitment 3 – Web API access – In practice

- Strict limitation on the **accessible data** (e.g. no location data)
- Requirement to comply with **various sets** of conditions
- Strict **purpose limitations**



# Dechert LLP

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