FIT/GOOGL: Australian and European Delays Create Uncertainty About Behavioral Commitments

Takeaways

- The Australia Competition & Consumer Commission, or ACCC, has not received a remedy proposal from Google and Fitbit, according to an agency spokesperson. “Any remedy proposal offered would be subject to public consultations as part of the informal public merger review process,” the spokesperson said.
- Potential remedies could include a commitment by Google not to favor Fitbit devices in search results or a proposal to share Fitbit data with rivals of the merging companies.
- However, behavioral remedies can be difficult to enforce, and companies sometimes aim to undo or modify behavioral commitments after the merger closes. For example, T-Mobile earlier this summer asked for flexibility from California regulators on issues such as job creation and network speed, which were part of the Sprint/T-Mobile remedy package in that state.
- The Fitbit/Google transaction has a termination date of Nov. 1, which may be extended until May 1, 2021.

Recent regulatory delays in the review of Google’s proposed acquisition of Fitbit likely reflect the difficulty of finding an appropriate behavioral remedy package, according to a merger opponent and a law professor.

“It’s about behavioral remedies,” said Tracy Rosenberg, executive director of Media Alliance. “And they aren’t simple, in part because of the size and scope of Alphabet,” she said, referring to Google’s parent company. Together with other groups, the Media Alliance is opposing the Fitbit/Google merger.

Yesterday, Tuesday, Aug. 11, the Australia Competition & Consumer Commission, or ACCC, announced that it extended its review of the transaction until Dec. 9. That follows an extension of the review in Europe, also to Dec. 9.

According to an ACCC spokesperson, the agency has not received a remedy proposal from Google and Fitbit. “Any remedy proposal offered would be subject to public consultations as part of the informal public merger review process,” the spokesperson said.

Although the ACCC is often seen as less prominent on the regulatory front than its U.S. and European peers, the agency has been investigating tech monopolization issues for years. Calling Google and Facebook “gateways to reaching Australian consumers,” the ACCC has raised questions about whether these companies compete on a level playing field and “whether they have the ability to give themselves advantages by favoring their own products,” according to a report the agency issued last year. “As Google and Facebook continue to expand into adjacent markets through acquisitions and organic expansion, these risks increase,” the agency stated in the report.

In terms of merger remedies, third parties have said there are various possibilities, as reported. For example, Google could commit not to favor Fitbit products when consumers search for wearable devices. Another possibility is that Google could share Fitbit data with rival companies.

However, Rosenberg said she objects to both of these potential remedies. A commitment not to favor Fitbit products would be difficult to enforce, and Google could say that any apparent favoritism is merely the result of its complex algorithms that are designed to show the best search results. Meanwhile, the sharing of Fitbit data would create concerns about how other companies make use of
the data, Rosenberg said. It is also the “wrong question,” she added, arguing that regulators should focus on why Google itself needs access to the Fitbit data.

Rosenberg also pointed out the difficulty in unwinding a transaction that was approved on the basis of behavioral conditions that the parties later seek to modify post-merger. For example, T-Mobile earlier this summer asked for flexibility from California regulators on issues such as job creation and network speed, which were part of the Sprint/T-Mobile remedy package in that state.

Although Google has committed not to use Fitbit data for advertising purposes, the ACCC has said it would “not put significant weight” on that pledge. Google’s commitment is not binding, and the company’s intentions could change over time, the ACCC said.

Chris Sagers, an antitrust professor at Cleveland-Marshall College of Law, noted that a major issue for the Fitbit/Google transaction is the apparent lack of a structural remedy. “Not only would a behavioral remedy seem likely, it’s hard to see how there could be any other remedy short of blocking the merger outright,” he said.

European and Australian antitrust authorities are likely exploring the theory of harm that the transaction would enhance Google’s market power by giving the company “a big pile of valuable consumer data that no one else has,” Sagers said.

“What competitors would need in that space is access to all the data on fair terms,” he added. “So a conduct remedy seems hard to avoid.”

Google and Fitbit did not respond to requests for comment. The termination date for their transaction is Nov. 1, which may be extended until May 1, 2021.

Reorg’s previous coverage of this transaction can be found HERE.

--Ryan Lynch