THE ACCC SETS PULSES RACING ON KILLER ACQUISITIONS

The notion of a "killer acquisition" is one whereby a dominant or incumbent firm acquires a start-up or potential competitor with the ultimate purpose (or effect) of eliminating future or potential competition. In recent times, the notion of a "killer acquisition" has given rise to increasing levels of competition law concerns and discussion worldwide, particularly within the digital sector as incumbent tech firms, such as Google and Facebook, seek to acquire promising and innovative start-ups.

This briefing will canvass Google LLC's proposed acquisition of Fitbit Inc (**Proposed Acquisition**) and will consider the implications of the recommendations made by the Australian Competition & Consumer Commission (**ACCC**) in its Digital Platforms Inquiry Final Report (**DPI Report**) to the ACCC's assessment of the Proposed Acquisition and other "killer acquisitions" more generally under Australia's merger control regime.

Key issues

- Google's acquisition of Fitbit is likely to attract close regulatory scrutiny from a number of competition authorities, including the ACCC, due to competition and privacy concerns and because it could potentially be viewed as a "killer acquisition".
- Following on from its Digital Platform Inquiry, the ACCC has recommended that additional statutory considerations be incorporated into the section 50(3) merger factors and that large digital platforms be required to give advance notice of any proposed acquisitions proposed (where Australia's merger control regime is otherwise voluntary), to address concerns around killer acquisitions in the digital economy.
- Neither of the recommendations made by the ACCC materially change the current substantive merger control framework or test under Australia's competition laws.
- The ACCC's recommendations do signal that strategic acquisitions that give advantages of scope, remove potential competition and/or involve the combination of valuable data sets (in any industry) will receive close regulatory scrutiny and may be the subject of more extensive information requests.

GOOGLE'S ACQUISITION OF FITBIT INC

In early November 2019, Google announced that it was acquiring Fitbit Inc, the fitness tracking company, for US$2.1 billion in a bid to grow its share of the wearable device (computer) market and to compete with Apple and Samsung in respect of consumer wearables.

The Proposed Acquisition is subject to antitrust and competition approvals from the United States Federal Trade Commission (**FTC**), European Commission (**EC**), and the UK Competition and Markets Authority (**CMA**). The ACCC has also indicated that it will conduct a review of the Proposed Acquisition under section 50 of the Competition and Consumer Act 2010 (Cth) (**CCA**).

COMPETITION AND PRIVACY CONCERNS IN RELATION TO GOOGLE'S PROPOSED ACQUISITION

A number of politicians, public interest groups, privacy and antitrust advocates have called on regulators to block the Proposed Acquisition. Serious concerns have been raised around Google gaining access to a cache of data that would

feed its own growing health care business and create a new range of personalised health services that would give Google another way to surveil users and entrench its monopoly power online by combining Fitbit's sensitive and individualised health data with data from Google's current services.

The concerns raised have been centred on the importance of health data to the future of competition in the digital marketplace and the ability of competitors to actively participate in this space, the consumer privacy implications of Google gaining access to the sensitive data of Fitbit users when it has previously violated privacy laws, and the ability of Google to use such data to leverage its existing market power and dominance in other online advertising markets.

ACCC Chairman Rod Sims has publicly expressed concern around Google's commitment to transparency with respect to what data will be collected from Fitbit consumers and how it will be used. Sims stated that, "given the history of digital platforms making statements as to what they intend to do with data and what they actually do down the track, it is a stretch to believe any commitment Google makes in relation Fitbit users' data will still be in place five years from now"[1] .

Sims' concerns appear to stem from inadequate disclosures involving digital platforms and consumer data, and in particular, updates made by Google to its privacy policy removing a commitment not to combine Doubleclick data with personally identifiable data held by Google following its acquisition of Doubleclick in 2007, although at the time of the acquisition Google stated that such data would not be combined.

PROPOSED CHANGES TO THE FRAMEWORK FOR ASSESSING "KILLER ACQUISITIONS" IN THE DIGITAL ECONOMY

Acquisitions by incumbent and entrenched firms of innovative start-ups has become one of the most debated issues within competition law in recent times.

The UK and Europe

A number of reports have been commissioned globally, such as the Furman Report in the UK and the EC Report on Competition Policy for the Digital Era (**EC Report**), to examine whether existing merger control laws and notification thresholds are fit-for-purpose in respect of providing a suitable analytical and regulatory framework for assessing killer acquisitions.

These reports have recommended a number of changes to the substantive assessment of (and processes relating to) killer acquisitions, including but not limited to:

- a requirement to assess the scale (as well as likelihood) of anticompetitive effects, so that a merger giving rise to a low likelihood of large scale harm might nonetheless be blocked ("**balance of harms test**");
- the mandatory notification of all intended acquisitions by digital companies that have been designated with a "strategic market status" (in the case of the Furman Report); and
- for merger parties to bear the burden of showing pro-competitive efficiencies that offset anticompetitive effects and pursuing a policy of "over-enforcement" in the digital sector (in the case of the EC Report).

[1] Speech made to the Consumer Policy Research Centre Conference on 19 November 2019.

It remains to be seen the extent to which such recommendations will be implemented. In particular, the recommendation to adopt a balance of harms test is, at this stage, unlikely to be implemented in the UK, as the CMA's response to this recommendation was that it would give rise to "practical challenges", potentially "unintended consequences" and a "fundamental shift in merger policy"[2].

Australia

The ACCC has also recently considered killer acquisitions in the context of its Digital Platform Inquiry. The ACCC's analysis found that the acquisition of potential competitors by Google (and Facebook) and economies of scope created via control of data sets were two factors that had contributed to the dominant market positions of Google (and Facebook).

The ACCC made the following recommendations in its DPI Report in respect of updating Australia's merger control framework to ensure that factors relevant to the competition impact of acquisitions in digital markets are taken into account in a merger assessment and that the ACCC is properly notified of such acquisitions:

- **Recommendation 1**: Amend section 50(3) of the CCA to incorporate the following additional merger factors to be considered when assessing acquisitions (not limited to digital markets):
  - the likelihood that the acquisition would result in the removal from the market of a potential competitor;
  - the nature and significance of assets, including data and technology, being acquired directly or through the body corporate.
- **Recommendation 2:** Large digital platforms to agree to a notification protocol to provide advance notice to the ACCC of any proposed acquisitions potentially impacting competition in Australia. The details of the protocols would be agreed between the ACCC and each large digital platform business. If such a commitment is not forthcoming the ACCC has reserved its right to make further submissions to the Government on this issue.

The ACCC has also indicated that it is increasingly concerned about its ability to oppose anticompetitive mergers in court (and the capacity of behavioural undertakings to solve structural competition concerns), particularly in digital markets where market dynamics are fast-moving and undertaking a counterfactual analysis is more challenging.

Separate to the recommendations above, the ACCC is considering whether it is appropriate to advocate for legislative change that may introduce a rebuttable presumption that applies to merger cases in Australia, similar to that contained in the US Horizontal Merger Guidelines.

[2] CMA Response to Digital Competition Expert Panel recommendations – 21 March 2019.

CHANGES TO THE ACCC'S APPROACH TO ASSESSING KILLER ACQUISITIONS?

Implications of the ACCC's recommendations on the substantive merger control framework

Neither of the recommendations put forward by the ACCC in the DPI Report change the current substantive merger control framework or test under the CCA.

However, the ACCC's findings and recommendations in the DPI Report do suggest that strategic acquisitions undertaken by incumbents that give advantages of scope or remove potential competition and/or involve the combination of valuable data sets (in any industry) will receive close regulatory scrutiny by the ACCC.

The ACCC's concerns around the effectiveness of behavioural undertakings also casts some doubt over the ACCC's willingness to accept remedies such as those offered by Transurban in its acquisition of WestConnex, moving forward.

As the merger factors set out in section 50(3) of the CCA are non-exhaustive, the current legislation (that does not incorporate Recommendation 1) does not preclude the ACCC from considering the proposed factors in its merger analysis of the Proposed Acquisition or any other acquisition in any industry.

Implications of the ACCC's recommendations on the merger review process and approach

The ACCC has publicly expressed the need to think more creatively about where information about decision making may be for such acquisitions and the role for strategic data analysis in the early stages of merger reviews to inform the ACCC's decision making and to focus on the evidence-gathering process well before commencing court proceedings for contentious mergers (in the digital sector). This could result in merger parties receiving more extensive information requests for different and/or unusual types of documents and data.

Should Recommendation 2 be implemented, it will change the current voluntary nature of Australia's merger control regime for "large digital platforms". Whilst the ACCC suggests that this obligation would be principally aimed at Google and Facebook, it has not ruled out the application of this recommendation to other market participants.

THE PROPOSED ACQUISITION: A KILLER OR TO BE KILLED?

As the Proposed Acquisition involves sensitive and personalised heath data and has the potential to tip the relevant personalised health and wellness market(s) in favour of the large tech companies, the ACCC (and other competition regulators) are likely to undertake a detailed assessment of the Proposed Acquisition, particularly since the ACCC has openly acknowledged that through a series of acquisitions, Google has obtained advantages of scope and reduced potential competition.

Whilst a cautious and methodical approach towards the assessment of any acquisition is essential, factors such as the extent of barriers to entry, network effects, the availability and ability to multi-home the health data in question and the potential for Google to foreclose or neutralise potential future

competitors in related or adjacent markets will be critical considerations to determining the competitive effect of the Proposed Acquisition. Only competition authorities have the powers to track that.

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