



Reference: **B2011**

Ms Margrethe Vestager
Executive Vice-President
A Europe Fit for the Digital Age and Competition
European Commission

27 November 2020

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.

I am aware that the Commission is currently carrying out an investigation into competition concerns raised by the proposed acquisition under the EU Merger Regulation and is expected to take a final decision before the end of the year. As access to data is a parameter of competition,¹ the European Commission must take into account the EU's data protection principles,² when assessing the impact of access and use of data on the market.

The Commission must ensure that the merger does not proceed unless the two business enterprises can demonstrate that they have taken adequate account of the human rights risks and implemented strong and meaningful safeguards that prevent and mitigate these risks in the future.

In Amnesty's 2019 report *Surveillance Giants: How The Business Model Of Google And Facebook Threatens Human Rights*,³ we drew attention to Google and Facebook as pioneers of a business model that is predicated on harvesting, analyzing, and profiting from people's data on a mass scale. This surveillance-based business model fundamentally undermines the right to privacy and threatens other human rights, including the rights to freedom of expression and opinion, freedom of thought, and the right to equality and non-discrimination.

The wholesale nature of data collection on the internet amounts to "ubiquitous surveillance".⁴ Google's business model incentivizes the company to continuously seek more data on more people across the online world and into the physical world. The merger with Fitbit is a clear example of this expansionist approach to data extraction, enabling the company to extend its data collection into the health and wearables sector. The sheer scale of the intrusion of Google's business

¹ Bundesgerichtshof, *Bundesgerichtshof bestätigt vorläufig den Vorwurf der missbräuchlichen Ausnutzung einer marktbeherrschenden Stellung durch Facebook*, 23 June 2020, <https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2020/2020080.html?nn=10690868>.

² Bundeskartellamt, Facebook Inc. i.a. - The use of abusive business terms pursuant to Section 19 (1) GWB, B6-22/16 https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=6, "Monitoring the data processing activities of dominant companies is therefore an essential task of a competition authority, which cannot be fulfilled by data protection officers. In cases of market dominance a competition authority must take into account data protection principles, in particular in the assessment of whether terms and conditions for the processing of data are appropriate. In this respect there is an interface between competition law and data protection law."

³ Amnesty International, "*Surveillance Giants: How the Business Model of Google and Facebook Threatens Human Rights*", Nov. 2019, <https://www.amnesty.org/en/documents/pol30/1404/2019/en/>.

⁴ Bruce Schneier, *Data And Goliath*, 2015, p. 38.

model into our private lives is an unprecedented interference with our privacy, and in fact has undermined the very essence of privacy.

The company is also incentivized to merge and aggregate data across its different platforms. In 2012, Google introduced a sweeping change to its privacy policy allowing the company to combine data across its services, prompting a backlash among privacy advocates and regulators.⁵ In 2016, Google “quietly erased th[e] last privacy line in the sand” by combining data from its advertising network DoubleClick with personal data collected from its other platforms.⁶ The aggregation of so much data, combined with the use of sophisticated data analysis tools, can reveal very intimate and detailed information; in effect, the companies can know virtually everything about an individual. The Fitbit merger risks further expanding Google’s surveillance into the highly sensitive domain of health data, potentially enabling the company to combine intimate data on our health and habits with its existing data sets in order to make even more invasive inferences about people, with knock on impacts in the areas of insurance, health care and employment.⁷

The incentive to use Fitbit health data in ways that threaten human rights demonstrates the need to ensure that any safeguards put in place as a condition of the merger be subject to meaningful and effective oversight, notwithstanding that Google has committed it “will not use Fitbit health and wellness data for Google ads”.⁸ The company’s past practice around privacy further heighten the need for strict safeguards.⁹ The European Data Protection Board has recognized the risks of the merger, stating that the “combination and accumulation of sensitive personal data” by Google could entail a “high level of risk” to the rights to privacy and data protection.¹⁰

Google’s use of algorithmic systems applied to its vast data sets in order to predict and infer information about people not only undermines the right to privacy. Another inherent risk of profiling, which forms the basis of Google’s business model, is that serving targeted content to selected people or groups of people can fuel discrimination by private entities, or directly by the platforms themselves, undermining the critical principle that all people should enjoy equal access to their human rights. This risk is heightened when profiling is deployed in contexts that touch directly on people’s economic, social and cultural rights, such as the right to health where people may suffer unequal treatment based on predictions about their health, and as such must be taken into account in the context of health and fitness data.¹¹

One of our key concerns is how Google’s business model has enabled it to establish dominance over the primary channels through which people connect and engage with the online world, and access and share information online, making them gatekeepers to the “public square” for much of humanity. The dominance of Google (and Facebook) over core platforms of the internet poses unique risks for people’s human rights. In this context, the acquisition by Google of a company like Fitbit, a leader in the emerging healthcare and wearables sector, raises red flags.

Access to the internet has long been recognised as a critical enabler of human rights in the digital age.¹² The dominance of the companies’ platforms means it is now effectively impossible to engage with the internet without “consenting” to their surveillance-based business model. This has created a paradoxical situation in which, in order to access the internet and enjoy their human rights online, people are forced to submit to a system predicated on interference with privacy on an unprecedented scale, with corresponding impacts on a range of other human rights.

The abuse of privacy and other rights has also helped concentrate power and enable Google’s dominance. The business model’s extraction and analysis of data results in specific data-driven network effects.¹³ The accumulation of greater amounts of data enables a company to be better able to train the machine learning models and algorithms which produce behavioural predictions. In turn, these predictive functions are deployed to keep people on the platform,

⁵ The Verge, *Google's 2012 Privacy Policy Changes: The Backlash and Response*, February 2012, <https://www.theverge.com/2012/2/1/2763898/google-privacy-policy-changes-terms-of-service-2012>

⁶ Julia Angwin, *Google Has Quietly Dropped Ban on Personally Identifiable Web Tracking*, ProPublica, 21 October 2016

⁷ Marc Bourreau, Cristina Caffarra et al, CEPR Policy Insight No 107, *Google/Fitbit will monetise health data and harm consumers*, September 2020.

⁸ Google, *An update on Fitbit*, 4 August 2020, <https://blog.google/around-the-globe/google-europe/update-fitbit/>

⁹ Amnesty International, *Surveillance Giants*, 2019, p. 23.

¹⁰ European Data Protection Board, *Statement on privacy implications of mergers*, 19 February 2020, https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_statement_2020_privacyimplicationsofmergers_en.pdf.

¹¹ Kathryn Montgomery, Jeff Chester and Katharina Kopp, *Journal of Information Policy*, *Health Wearables: Ensuring Fairness, Preventing Discrimination, and Promoting Equity in an Emerging Internet-of-Things Environment*, 2018.

¹² Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Report to the Human Rights Council, 16 May 2011, UN Doc A/HRC/17/27.

¹³ Gormsen and Llanos, 2019.

generating further data and maintaining control over data flows. Better predictive functions also lead to greater advertising revenue, enhancing the value of the platform and the company's power in the market. This system of feedback loops, combined with traditional network effects, has been instrumental in rapidly expanding the scale and impact of the platforms, and thereby concentrating the power of Google (and Facebook) over the digital world.

This power of the platforms has not only exacerbated and magnified their rights impacts but has also created a situation in which it is very difficult to hold the companies to account, or for those affected to access an effective remedy. Although there have been numerous regulatory actions against the big technology companies by data protection, competition and tax authorities worldwide, to date these have largely failed to disrupt the fundamental drivers of the surveillance-based business model. In relation to the Google-Fitbit merger, a group of twenty consumer and human rights organizations have set out recommendations for minimum remedies that regulators should guarantee before it is approved.¹⁴

The Google and Fitbit merger is taking place at a critical juncture where the EU is considering a raft of new regulations over the digital world and the tech sector. Amnesty International calls on the Commission to:

- Assess the potential impacts of the merger on human rights, in particular the right to privacy as protected by Article 8 of the Charter of the Fundamental Rights of the European Union and the EU's data protection regime;
- Only allow the merger to proceed if Google and Fitbit can demonstrate they have carried out human rights due diligence and put in place effective safeguards to prevent and mitigate the human rights risks of the merger in the short term and long term.

Yours sincerely,

Eve Geddie



Head of Office and Advocacy Director
European Institutions Office
Amnesty International

¹⁴ BEUC, *Consumer and citizen groups continue to have serious concerns about Google Fitbit takeover*, 15 October 2020 <https://edri.org/our-work/consumer-and-citizen-groups-continue-to-have-serious-concerns-about-google-fitbit-takeover/>.