



Bundeskartellamt

7<sup>th</sup> Decision Division

B7-70/21

**Decision pursuant to  
Section 19a(2) sentence 4 in conjunction with  
Section 32b(1) GWB  
- Public version -**

## Decision

In the administrative proceeding

1. Alphabet Inc.  
1600 Amphitheatre Parkway  
Mountain View, CA 94043  
USA
2. Google Ireland Limited  
Gordon House, Barrow Street  
Dublin 4  
Ireland
3. Google Germany GmbH  
ABC-Straße 19  
20354 Hamburg

– Parties 1, 2 and 3 –

Legal representatives of the parties 1, 2 and 3:

Cleary Gottlieb Steen & Hamilton LLP  
Theodor-Heuss-Ring 9  
50668 Cologne

Rocan Rechtsanwälte PartG mbB  
Louise-Dumont-Str. 5  
40211 Düsseldorf

4. Oracle Corporation  
2300 Oracle Way  
Austin, TX 78741, USA

– Third parties admitted to the proceeding –

Legal representatives of the third parties admitted to the proceeding:

Clifford Chance  
Königsallee 59  
40215 Düsseldorf

for the examination of possible infringements of Section 19a(2) sentence 1 no. 4a of the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen* – GWB) with regard to data processing terms used by the parties 1, 2 and 3, the 7th Decision Division of the Bundeskartellamt decided on 5 October 2023:

1. The Commitments, which were offered by the parties 1, 2 and 3 in the legal document dated 7 September 2023 and which are included in the Annex of this decision, are binding.
2. Pursuant to Section 19a(2) sentence 4 in conjunction with Section 32b(1) sentence 2 GWB the proceeding is closed to the extent covered by the Commitments.
3. This decision is limited in time pursuant to paragraph 12 of the Commitments.
4. The fee for the proceeding and this decision amounts to €[...] (in words: [...] euros) and is payable by the parties 1, 2 and 3 as joint and several debtors.

## Reasons

### A. Facts

#### I. Parties involved

- (1) Alphabet Inc. is a publicly listed holding company based in Mountain View (USA), which was founded in 2015 to restructure the then-existing Google Group. Alphabet's subsidiaries are active in various technology sectors. As part of the restructuring, Google Inc. was also integrated into Alphabet Inc. In 2017, Google Inc. was then reorganised into Google LLC. In the meantime, the holding company XXVI Holdings Inc. has been interposed as the sole shareholder and a wholly-owned subsidiary of Alphabet Inc.
- (2) Alphabet Inc. is a multi-national group of companies which offers in particular internet services and software products. In Germany, it is represented by Google LLC through its subsidiary Google Germany GmbH, Hamburg. Google Ireland Limited is a subsidiary based in Ireland, which is responsible for processing the data of users whose habitual residence is in the EEA or Switzerland. In the following, the parties 1,2 and 3 and their affiliated companies are referred to as "Google".
- (3) The business segments "Google Services"<sup>1</sup> and "Google Cloud" are assigned to Google LLC. The services offered by Google LLC include Android, Android Auto, Android Automotive (OS), Android TV, Chrome, Gmail, Google Assistant, Google Calendar, Google Drive, Google Maps, Google News, Google Photos, Google Play, Google Search, Google Wallet, YouTube and Google Hardware (Pixel smartphones, Chromecast, Google TV and Google Nest Hub). Google's services are largely financed by advertising.<sup>2</sup> A comprehensive overview of Google's business areas is included in the Bundeskartellamt's decision of 30 December 2021 in the B7-61/21 case, to which reference is made in this respect.<sup>3</sup>

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<sup>1</sup> The term "Google Service" is used consistently with Google's terminology, which is not necessarily identical with the concept of services pursuant to Section 19a(2) sentence 1 no. 4a GWB.

<sup>2</sup> Google's 202 annual report, p. 6 f., available at: [https://abc.xyz/investor/static/pdf/20210203\\_alphabet\\_10K.pdf](https://abc.xyz/investor/static/pdf/20210203_alphabet_10K.pdf) (accessed on 20 July 2023).

<sup>3</sup> See Bundeskartellamt, decision of 30 December 2021, B7-61/21, *Google*, para. 5 ff.

## **II. Google's data processing terms**

- (4) Google's data processing terms<sup>4</sup> provide for the possibility of extensive data processing by Google when the various Google services are used. This includes in particular the processing of user data (see 1.). To some extent Google provides for setting options by which users can restrict data processing to a certain extent (see 2.).

### **1. Google's possibilities for processing user data**

- (5) Google provides a privacy policy for the use of its services by end users based in Germany.<sup>5</sup> This policy describes how Google collects and uses user data. In particular, Google explains which data are processed by Google, for what purposes, which data protection settings are possible and how long data can be stored by Google.
- (6) The selection dialogues shown to users when they set up a Google account and the selection dialogues shown to non-authenticated users also contain information on data processing.
- (7) The data processing possibilities described in Google's privacy policy and/or selection dialogues refer to comprehensive user data. Among other information, this includes data users provide to Google when using Google services (for example data uploaded by users when they use Google services) as well as data which Google collects when Google services are used. The latter category includes in particular data about apps, browsers and devices used by users (including unique identifiers), data about their activities (for example search terms and purchase activities) and users' location data.
- (8) Google collects these data via its services offered to end users. Furthermore, Google also collects user data via other services, in particular B2B services. Google also collects data on websites and in apps of third parties. Within the context of its advertising and analytics services in particular, Google not only collects data in its own services but also uses technologies such as cookies and pixel tags to collect user data on third-party websites of its advertising customers as well as software development kits (SDK)

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<sup>4</sup> For a definition of the term data processing terms see para. (44)f. and the definition provided in section A of the Commitment offer of 7 September 2023.

<sup>5</sup> See <https://policies.google.com/privacy?hl=de> (in German, accessed on 5 September 2023).

to collect user data in third-party apps of its advertising customers. Finally, Google also receives data from third parties, for example from its marketing and security partners.

- (9) Google processes data for different purposes. In its privacy policy Google mentions the following purposes: Provision of Google services, maintenance and improvement of Google services, development of new services, provision of personalised services including content and ads, measuring performance, communication with users, protection of Google, its users and the public.
- (10) Google also provides for the possibility of combining data across services and devices by using identifiers. In its privacy policy, at the end of the section "*Why Google collects data*", Google points out that the data collected can be combined across services and devices for the purposes described: "*We may combine the information we collect among our services and across your devices for the purposes described above. For example, if you watch videos of guitar players on YouTube, you might see an ad for guitar lessons on a site that uses our ad products. Depending on your account settings, your activity on other sites and apps may be associated with your personal information in order to improve Google's services and the ads delivered by Google.*"
- (11) Google has a number of identifiers to uniquely identify users across services and devices and to assign data collected from different sources to them in this way. The main identifiers used by Google include the Google account ID, the cookie ID of cookies stored in the browser and the advertising ID for mobile devices. In addition, Google uses a number of other identifiers such as the IP address and different features to identify a mobile device or SIM card.

## **2. Setting options regarding the processing of user data**

- (12) Google offers users of its end user services several setting options regarding the processing of user data. A differentiation is made between users signed into a Google account and non-authenticated users.

### **a) Setting options for signed-in users**

- (13) Signed-in users use Google's services with a Google account set up before using the services. When creating a Google account they can use different setting options offered by Google. The setting options depend on whether users choose "*Manual personalisation*" or "*Express personalisation*".

- (14) If users choose “*manual personalisation*” when creating an account, they are shown the following setting options in a series of selection screens: “*Web & App Activity*”, “*YouTube History*” and “*Personalised Ads*”.
- (15) According to Google’s information in the selection dialogue, the users’ activity data are stored within the context of “*Web & App Activity*”. This includes activities in Google services (for example search queries and linked information such as the user’s location). Google also stores the synchronised history in Google Chrome and activities on websites and apps that use Google services, that is third-party websites and apps (this includes activities on websites and apps of “*Google ad partners*” as well as app activities, including data Google receives from third-party apps). According to the information provided in the “*Web & App Activity*” selection dialogue, the stored activity data can be used for personalisation purposes in all Google services that are used by signed-in users. Ads displayed in Google services as well as on third-party websites or in third-party apps can also be personalised based on these data (depending on the setting for “*Ad personalisation*”). Users can choose between having their activity data stored by Google until they manually delete them or having their data stored for 18 months with the option to delete them manually at any time. As an alternative, users can choose the “*Don’t save Web & App Activity in my account*” setting. The “*YouTube History*” setting refers to the processing of data about users’ activities on YouTube.
- (16) The selection dialogue for the “*Ad Personalisation*” setting indicates that if this setting is activated, the data stored in the account can be used by all Google services for the personalisation of ads. Users are informed that this covers activity data from Google services such as Search, YouTube or Google Maps, but also data from websites and apps that are managed by Google’s “*partners*”. If users turn off “*Ad Personalisation*”, they will be shown “*generic ads*”. According to the information provided by Google, these are based on the content of the page users are looking at, their search query, current location, type of device and the time of day.
- (17) In a further step (“*Confirm personalisation settings and cookies*”) users are asked to agree (for the first time) to the previously selected settings and also to Google’s use of “*Cookies, IDs and data*”. At this stage users are informed that the user data will be used for the following purposes (apart from personalisation which depends on the above settings):

- “*deliver and maintain services such as tracking outages and protecting against spam, fraud and abuse*”,
- “*measure audience engagement and site statistics to understand how our services are used*”,
- “*improve the quality of our services and develop new ones*” and
- “*deliver and measure the effectiveness of ads*”.

In this selection dialogue users only have the option to select “*Confirm*”. They are not offered the option to reject the settings. This means that users have no option to refuse having their data processed for these purposes. The Google account set up can only be continued if users click on “*Confirm*”.

- (18) If users select “*Express personalisation*” when setting up the account, the “*Web & App Activities*”, “*YouTube History*” and “*Personalised Advertising*” sections, and thus the data processing possibilities described above, are automatically activated. The processing of “*Cookies, IDs and data*” is also automatically activated. In the “*Express personalisation*” setting users only have the option to select “*Confirm*”. Without this confirmation, the Google account set up cannot be continued. The only alternative is to select the “*Back*” option and switch to the “*Manual personalisation*” process.
- (19) Users also have the option to adjust the settings in their Google account after the account has been created.

#### **b) Setting options for non-authenticated users**

- (20) When using certain Google services without signing in, a pop-up window appears before the Google service can be used, providing a selection dialogue concerning Google’s data processing (unless a cookie with the relevant settings has already been placed on the device). The selection dialogue for non-authenticated users does not differ significantly between the various Google services.<sup>6</sup> It appears when the following

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<sup>6</sup> Google’s response of 1 August 2021 to question 1 of the request for information of 7 July 2021 regarding the previous selection dialogue.

Google services are used: Google Search, YouTube, Google Maps, Google News, Google Lens and Google Translate.<sup>7</sup>

- (21) In addition, there are Google services which can be used without signing in, but where no selection dialogues appear.<sup>8</sup> In these cases users cannot choose between options concerning data processing before using the services.<sup>9</sup>
- (22) Within the framework of the selection dialogues users are informed that Google uses “*Cookies and data*” for several purposes. While users are not offered any options for choosing between some of the data processing purposes, they have a choice regarding data processing for other purposes. Where users have a choice (for example “*Show personalised content, depending on your settings*”) they can choose between “*Reject all*”, “*Accept all*” and “*More options*”.
- (23) By clicking the “*More options*” button users can access the “*Personalisation settings & Cookies*” page where they can make further settings. The following settings can be activated or deactivated:
- “*Search customisation*”: When this setting is activated, users receive “*more relevant results and recommendations based on previous Google activity on this browser*”.
  - “*Personalised advertising in search*”: When this setting is activated, Google shows users „*personalised advertising in search based on previous activity*”. As an example of such activity Google states that this could be what users are looking for when using Google.
- (24) Non-authenticated users are shown the selection dialogue described above before their first-time use of a Google service. The settings of non-authenticated users are stored via a cookie. Whenever users visit the service via the same cookie again, the service

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<sup>7</sup> Google’s response of 8 September 2022 to question 1 of the request for information of 30 August 2022; Google’s response of 16 November 2022 to question 2 of the request for information of 2 November 2022. In these responses Google had also indicated the Google Chrome Web Store. However, Google later corrected this in its email of 23 November 2022, see attachment to the email.

<sup>8</sup> See Google’s email of 21 November 2022 and Google’s email of 23 November 2022.

<sup>9</sup> In this respect Google points out that some of these services can display other selection dialogues such as dialogue windows for confirming the terms of service or for consenting to the sending of usage and diagnostic reports, see Google’s email of 21 November 2022.



“remembers” and applies these data protection settings. Users will not be shown the selection dialogue for as long as this cookie is stored on the browser they use.

### **III. Course of the proceeding**

- (25) The Bundeskartellamt’s Decision Division initiated the proceeding on 11 May 2021 and notified Google of this in a letter dated 25 May 2021. Upon its application of 17 June 2021, Oracle Corporation was admitted to the proceeding on 14 December 2021 pursuant to Section 54(2) no. 3 GWB.
- (26) From July 2021 to November 2022 the Decision Division carried out investigations by sending several requests for information and conducting talks. In addition, sections of the B7-61/21 case file were consulted.
- (27) In the course of the proceeding the Decision Division maintained regular and close contact with the European Commission. Also in anticipation of the DMA’s<sup>10</sup> entry into force, the aim was to cooperate closely pursuant to Article 37(1) DMA and to coordinate future enforcement measures in order to ensure the coherent, effective and complementary enforcement of legal instruments applicable to gatekeepers within the meaning of the DMA. The Bundeskartellamt also exchanged information with Hamburg’s Commissioner for Data Protection and Freedom of Information and the Federal Commissioner for Data Protection and Freedom of Information.
- (28) In the period from May to September 2022 Google proposed several Commitments to the Decision Division. In the Decision Division’s view, however, these could not dispel the competition law concerns as the proposals merely covered Google services which Google at that time considered to be designated by the European Commission as relevant core platform services (in the following: “relevant core platform service”) in a designation decision pursuant to Article 3(9), (1)(b) in conjunction with Article 2(2) DMA, and which would therefore in the future be subject to the obligations pursuant to Article 5(2) DMA, which aims at the provision of sufficient choice options.

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<sup>10</sup> REGULATION (EU) 2022/1925 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

- (29) On 23 December 2022 the Decision Division sent Google a detailed preliminary assessment notice including a draft of the operative part of the decision. The Decision Division informed Google about its concerns based on its preliminary assessment of the case and gave Google the opportunity to comment on the prohibition decision envisaged by the authority. According to the preliminary assessment notice Google would be prohibited from using and implementing the company's data processing terms applicable at the time of the decision for the use of services offered to Google's end customers to the extent that the terms provide Google with the possibility to process user data across services. The company would also be prohibited from using and implementing data processing terms which fail to give end users sufficient choice as to whether or not they wish to consent to cross-service data processing.
- (30) At the date the notice was sent, Google was granted access to the file as at 30 November 2022. On 23 January 2023 Google was granted further access to the file as at 31 December 2022 as well as access to the supplementary file which includes the consulted documents relating to the B7-61/21 proceeding.
- (31) On 10 January 2023 the preliminary assessment notice and the draft of the operative part of the decision were sent to the third party admitted to the proceeding. At the same date it was granted access to the file as at 30 November 2022. On 26 January 2023 the third party admitted to the proceeding was granted access to the supplementary file which includes the consulted documents relating to the B7-61/21 proceeding. The preliminary assessment notice and the draft of the operative part of the decision were also sent to Hamburg's Commissioner for Data Protection and Freedom of Information. The Federal Commissioner for Data Protection and Freedom of Information was informed about this.
- (32) In its letter dated 24 February 2023 Google commented on the preliminary assessment notice. In its letter dated 1 March 2023 the third party admitted to the proceeding commented on the preliminary assessment notice.
- (33) On 19 April 2023 the Computer & Communications Industry Association filed an application to be admitted to the proceeding, which the Decision Division rejected on 31 May 2023.
- (34) On 28 April 2023 Google again expressed its interest in a commitment solution and presented some first guiding principles. From May to September 2023 the Decision Division and Google exchanged views on several occasions, both in letters and in talks.

Google submitted several proposals for Commitments. On 7 September 2023 Google finally proposed the present Commitments to the Decision Division — without prejudice to the company's view that the intervention requirements of Section 19a(2) sentence 1 no. 4a GWB are not fulfilled.

- (35) On 5 September 2023 the European Commission designated Google, among other companies, as a gatekeeper within the meaning of Article 3 DMA. The designation decision lists the following services as relevant core platform services pursuant to Article 3(9) DMA: Google Maps, Google Play, Google Shopping, YouTube, Google Search, Chrome, Google Android and Googles advertising services (including the parts of Google Analytics that can be used for advertising purposes).
- (36) On 8 September 2023, pursuant to Article 38(3) DMA, the Decision Division communicated its draft decision based on Section 32b GWB to the European Commission. On 11 September 2023 the Decision Division invited Google, Oracle, which was admitted to the proceeding, and Hamburg's Commissioner for Data Protection and Freedom of Information as well as the Federal Commissioner for Data Protection and Freedom of Information to comment on its draft decision.
- (37) Google, Oracle and, in a joint statement, Hamburg's Commissioner for Data Protection and Freedom of Information and the Federal Commissioner for Data Protection and Freedom of Information commented on the draft decision on 20 September 2023.
- (38) On 27 September 2023 the European Commission commented on the draft decision, which had been communicated to it pursuant to Article 38(3) DMA.

## **B. Preliminary legal assessment**

- (39) According to the Decision Division's preliminary assessment, Google fulfils the criteria under Section 19a(2) sentence 1 no. 4a GWB by using and implementing the data processing terms. The data processing terms Google uses for end users provide for the possibility of processing user data across services without giving users sufficient choice options. The Decision Division therefore informed Google of its preliminary intention to prohibit Google from using and implementing the company's data processing terms applicable at the time of the decision for the use of Google's services offered to end users to the extent that they provide Google with the possibility to process user

data across services, and to prohibit Google from using and implementing data processing terms that do not give users sufficient choice as to whether or not they wish to consent to cross-service data processing.

- (40) The preliminary assessment notice referred to all of Google's services offered to end users, that is also to the services which have now been designated as relevant core platform services. In order to ensure the coherent application of Section 19a GWB and the DMA, the Decision Division maintained close contact with the European Commission and waited for the designation of the core platform services so as to be able to limit its assessment to those services which are not relevant core platform services. To the extent that Google will in the future be subject to the obligations under the DMA pursuant to Article 5(2), these services are not covered by the Decision Division's preliminary assessment and the present Commitments.
- (41) The preliminary assessment of the Decision Division is based on Section 19a(2) sentence 1 no. 4a GWB.<sup>11</sup> Google is the norm addressee of this provision as the Decision Division determined on 30 December 2021 that Google is of paramount significance for competition across markets pursuant to Section 19a(1) sentence 1 GWB.<sup>12</sup>
- (42) The criteria of Section 19a(2) sentence 1 no. 4a GWB concern exploitative conduct in the relationship between large digital companies and their users, which is regularly accompanied by the impediment of other companies.<sup>13</sup> According to the preliminary assessment of the Decision Division Google's exploitative conduct in this case is based on the fact that Google makes the use of services conditional on users agreeing to the processing of user data, i.e. in any case personal data, across services without giving them sufficient choice as to whether, how and for what purpose such data are processed (see I). According to the preliminary assessment these practices are accompanied by the impediment of other companies (see II). The power to prohibit such conduct

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<sup>11</sup> The Decision Division refrained from examining Article 102 TFEU or Section 19 GWB due to the additional time and effort this might entail.

<sup>12</sup> See Bundeskartellamt, decision of 30 December 2021, B7-61/21, *Google*.

<sup>13</sup> See Recommended resolution and report of the Committee on Economic Affairs and Energy, Bundestag printed paper 19/25868, p. 117.

based on Section 19a(2) sentence 1 no. 4a GWB does not cease to apply because Google's conduct would be objectively justified (see III below).

**I. Making the use of services conditional on the users' consent to the processing of data from other services without sufficient choice**

**1. Making the use of services conditional on the users' consent to cross-service data processing**

(43) The Decision Division's preliminary assessment relates to data processing terms stipulated by Google that apply to the use of services directed at end users based in Germany.<sup>14</sup> According to the preliminary assessment of the Decision Division, Google makes the use of its services directed at end users within the meaning of Section 19a(2) sentence 1 no. 4a GWB conditional on the users' consent to Google's data processing terms which provide for cross-service data processing possibilities.

(44) For its services offered to end users Google provides for terms and conditions concerning the data processing possibilities.<sup>15</sup> Google describes in various sections how the company processes user data. A summarised description of the data processing possibilities stipulated by Google is included in the Google Privacy Policy<sup>16</sup>, which in turn links to further information pages. In addition, Google explains its data processing possibilities in the dialogue boxes displayed when a Google account is set up and in the

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<sup>14</sup> Data processing terms for services that are not directly aimed at end users, but exclusively at commercial users are not the subject matter of the proceeding. However, the data processing terms addressed by the proceeding also (potentially) have an impact on Google's B2B services. This is because the data processing terms for end users addressed by the proceeding not only concern the possibilities for the comprehensive processing of end user data from or in B2C services, but also the processing of end user data from or in B2B services. In particular, the data processing terms also cover the processing of end user data obtained by Google in the context of its advertising and analytics services as well as the processing of end user data from B2C services in B2B services. In this respect, the processing of end user data from or in B2B services is also the subject matter of the present proceeding.

<sup>15</sup> In the Decision Division's preliminary assessment, this applies without prejudice to a classification of the data processing terms under civil law and also without prejudice to Google's view that the data processing terms and the possibilities for data processing they provide for are of declaratory nature only. See also the definition in Section A of the Commitments offered by Google of 7 September 2023.

<sup>16</sup> See <https://policies.google.com/privacy?hl=de> (accessed on 20 July 2023).

dialogue boxes that appear before certain Google services can be used by non-authenticated users.

- (45) According to the preliminary assessment of the Decision Division, both the privacy policy (including the linked further information pages) and the texts contained in the dialogues mentioned above are to be classified as terms and conditions within the meaning of competition law. Google makes it clear that the business relationship between Google and its users with regard to data processing is to be further defined by the privacy policy and the dialogues. This information can therefore be qualified as Google's data processing terms, at least within the meaning of competition law.
- (46) According to the preliminary assessment of the Decision Division, Google makes the use of services conditional on the users' consent to Google's data processing terms. Google sets its data processing terms unilaterally. In this respect, users have no possibility to negotiate and, in particular, they cannot take any steps to obtain sufficient choice options. Users must accept (and thus at least implicitly agree to) the framework conditions set by Google's data processing terms if they wish to use Google's services. Otherwise they are excluded from using Google's services ("take it or leave it"). The fact that Google provides certain setting options with regard to data processing is irrelevant in this respect. These options can only be taken into account in the context of the "sufficient choice" criterion.
- (47) According to the preliminary assessment of the Decision Division, Google's data processing terms which make the use of services conditional on the user agreeing to the processing of data include the processing of data from other services of the company or from third-party providers pursuant to Section 19a(2) sentence 1 no. 4a GWB. Data processing relevant within the meaning of this provision covers scenarios in which not only data collected within the scope of using a certain service can be processed, but also data obtained by the company within the scope of or from the use of one or several of its services or from services of a third-party provider, regardless of whether this occurs openly in the foreground or — not easily recognisable to end users — in the background. It is thus possible that data from different services are processed across services (cross-service data processing). Among other possibilities this also includes the possibility of combining data from different services. This does not only include the cross-service processing of data between services offered to end users, but also the

cross-service processing of data from services offered to end users with data obtained from internal services or systems or from services directed at commercial users.

- (48) According to the preliminary assessment of the Decision Division, Google provides for such a possibility of processing user data across services in the company's data processing terms. In its privacy policy Google states that the company has the possibility to combine the collected data across services and devices for the purposes described in the privacy policy.<sup>17</sup> This possibility provided for by Google not only covers data from the various services the company offers to end users (for example Assistant, Google Hotels, Google TV), but also data which Google obtains on third-party websites and apps.<sup>18</sup> Google obtains these data for example through its advertising and analytics services used by third parties. In addition, Google's possibilities for cross-service data processing also cover data about users that Google obtains from third parties. Google's ability to process data across services is also described in the selection dialogues for signed-in users as well as for non-authenticated users.

## **2. No sufficient choice**

- (49) According to the preliminary assessment of the Decision Division, Google does not give end users sufficient choice as to whether, how and for what purpose data are processed across services. Google's data processing terms were the subject of the examination pursuant to 19a(2) sentence 1 no. 4a GWB. However, the fact that or to what extent data processing actually takes place is not a necessary criterion under this section and therefore did not have to be examined.
- (50) In this respect, the Decision Division identified various deficiencies each of which, in its preliminary view, already support the prohibition of the data processing terms. It could

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<sup>17</sup> See para. (10).

<sup>18</sup> Under the hyperlink of the privacy policy "Your activity on other sites and apps" Google states: "This activity might come from your use of Google services, like from syncing your account with Chrome or your visits to sites and apps that partner with Google. [...] For example, a website might use our advertising services (like AdSense) or analytics tools (like Google Analytics), or it might embed other content (such as videos from YouTube). These services may share information about your activity with Google and, depending on your account settings and the products in use (for instance, when a partner uses Google Analytics in conjunction with our advertising services), this data may be associated with your personal information."

therefore be left open whether there were any further deficiencies with regard to the granting of sufficient choice options.

- (51) First of all, there is a lack of sufficient granularity in the setting options both when a Google account is created and when Google's services are used by non-authenticated users. Users do not have the option to opt out of *cross-service* data processing and to limit the processing of data to the Google end user service in which the data were generated. Users only have the choice to accept personalisation across all services – including data Google collects on third-party websites and apps as well as data Google obtains from third parties – or to opt out of personalisation altogether, also including personalisation based on the data collected in the specific service used. Due to this lack of fine-tuning users cannot make a free choice.<sup>19</sup> As a result, they may be tempted to consent to more extensive data processing than they actually wish to accept. The Decision Division has thus reached the preliminary view that insufficient granularity of the choices offered can also result from the fact that no differentiation is possible with regard to different processing purposes.
- (52) Furthermore, users are not given sufficient choice within the meaning of Section 19a(2) sentence 1 no. 4a GWB with regard to Google's data processing terms as in some cases Google offers users no choice at all as to the data processing options, thus not giving any choice with regard to cross-service data processing. When users use a service either by signing in to an account or without an account, Google provides for the possibility of (cross-service) data processing for certain areas without giving users the option of rejecting this.<sup>20</sup> Users who wish to use one of Google's services thus have no choice but to accept cross-service data processing ("take it or leave it").

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<sup>19</sup> See Court of Justice of the European Union, decision of 4 July 2023, case C-252/21, Meta, para. 151.

<sup>20</sup> For signed-in users this applies to cross-service data processing for the following purposes: *"to deliver and maintain services such as tracking outages and protecting against spam, fraud and abuse," "to measure audience engagement and site statistics to understand how our services are used", "to improve the quality of our services and develop new ones"* and *"to deliver and measure the effectiveness of ads"*. For non-authenticated users, this applies to the following purposes indicated by Google: *"to deliver and maintain services", "tracking outages and protecting against spam, fraud and abuse," and "to measure audience engagement and site statistics. With the information we collect we want to understand how our services are used and improve the quality of those services"*. Also not included in the opt-out options is the background data processing automatically performed by Google on Android end devices through the Google Play services and the Android configuration service.



- (53) Furthermore, the setting options offered by Google - both for signed-in users and for non-authenticated users - lack sufficient transparency. There is a lack of sufficiently concise and comprehensible indications which could provide users with sufficient information as to whether, how and for what purpose Google processes data across services. The information provided by Google is not sufficient to make users understand the far-reaching possibilities Google provides for cross-service data processing. In particular, Google does not explain to users which of their data are processed, how they are processed and what is included in the processing purposes. The use of imprecise or unclear terminology and the exclusive reference to examples instead of conclusive definitions contribute to this. In addition, data processing enabled by the users' consent is presented from a one-sided positive perspective whereas the significant extent of cross-service data processing is not disclosed to users. Users can thus not easily comprehend the scope of the choice options.
- (54) Finally, when creating a Google account there is no equivalence of consent and rejection. This is because in the context of the so-called "*Express personalisation*" users can only accept the data processing option provided for, but have no possibility of rejecting this. Rejection is only possible in the context of the so-called "*Manual personalisation*", which requires considerably more clicks. For users it is therefore easier to consent than to reject. In this way, Google exerts an unreasonable influence on the users' decision so that they have no free choice and no sufficient choice within the meaning of Section 19a(2) sentence 1 no. 4a GWB.
- (55) In exercising its discretionary power the Decision Division has refrained from examining certain specific cross-service data processing possibilities within the framework of the present proceeding and from analysing them in its preliminary assessment. These include the possibility of data processing resulting from the fact that, in the context of the use of a Google service offered to end users, functions of another service are triggered as well as the possibility of data processing for so-called "*security purposes*", to the extent that this takes place for a specific reason. However, the preliminary assessment examines the general and indiscriminate data retention and processing across services for "*security purposes*".
- (56) In application of general legal principles, data processing terms that fall under Article 6(1) c) to e) GDPR are not the subject matter of the preliminary legal assessment.

## II. Impediment

- (57) In the case covered by Section 19a(2) sentence 1 no. 4a GWB the impediment already results from the significant possibility obtained as a result of the exploitative conduct to process data that are relevant for competition across services.<sup>21</sup> The legislative materials point out that the exploitative conduct described in Section 19a(2) sentence 1 no. 4a GWB makes it possible to collect large amounts of personal user data, which are of particular importance in the realisation of economies of scale in the digital economy.<sup>22</sup> In addition, the preliminary assessment of the Decision Division has also shown that Google's exploitative conduct is objectively capable of appreciably affecting the competitive situation.<sup>23</sup> The personal user data for which Google asks users to consent to the option of data processing across services are particularly relevant to competition in the digital economy. Google can use the data across services, thus generating economies of scale in its ecosystem and integrating its services ever more closely. This allows Google to expand its already existing competitive advantages to the detriment of third parties whose competitive opportunities are diminished in direct contrast, and to further strengthen the Google ecosystem. The threat to competition this involves does not solely arise from data processing in the context of the core platform services covered by the DMA. Rather, the breadth and depth of the services covered by the present Commitments relate to a variety and diversity of different facts of life, so that data processing between the services that are not covered by the DMA can also contribute to strengthening Google's ecosystem even further (for example better personalisation of services, other improvement and further development of services, development of new areas of activity).

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<sup>21</sup> See Recommended resolution and report of the Committee on Economic Affairs and Energy, Bundestag printed paper 19/25868, p. 117. The report states that exploitative conduct within the meaning of Section 19a(2) sentence 1 no. 4a GWB in the relationship between large digital companies and their users is regularly accompanied by the impediment of other companies.

<sup>22</sup> See Recommended resolution and report of the Committee on Economic Affairs and Energy, Bundestag printed paper 19/25868, p. 117.

<sup>23</sup> Google has a different view, see for example para. 507 ff. of Google's statement on the preliminary assessment notice of 24 February 2023.

### III. No objective justification

- (58) According to the preliminary assessment, the respective conduct is also not objectively justified (Section 19a(2) sentences 2 and 3 GWB). The examination of the objective justification is carried out by weighing up the interests in the light of the objective of the law, which is directed towards the freedom of competition.<sup>24</sup> Compared to (in particular short-term) efficiencies for the benefit of the affected companies and consumers, the long-term legal objectives of limiting economic positions of power, keeping markets open and protecting competitive process opportunities must regularly be given particular weight.<sup>25</sup> Pursuant to Sec. 19a(2) sentence 3 GWB, the burden of presentation and proof for the objective justification in the individual case lies with the addressee of the law.
- (59) According to the preliminary assessment of the Decision Division, the technical implementation effort claimed by Google was not eligible for consideration, as Google neither presented this in a concrete and sufficiently substantiated manner nor provided evidence to the satisfaction of the Decision Division. Apart from that, the preliminary weighing of interests has shown that Google's interests are set aside in the context of the weighing of interests. In particular, the protection of the end users' right to informational self-determination, which is also relevant under competition law, is given special weight. According to the Decision Division's preliminary assessment, Google's commercial interest in cross-service data processing without sufficient choice as well as Google's interest in a general and indiscriminate, preventive cross-service data processing for "*security purposes*" are not able to justify the failure to grant sufficient choice options for cross-service data processing.

### C. Discontinuation pursuant to Section 32b(1) GWB

- (60) Pursuant to Section 19a(2) sentence 4 GWB, the Decision Division was able to decide, applying Section 32b(1) GWB *mutatis mutandis* and exercising its due discretion, to declare the Commitments offered by the parties in their letter of 7 September 2023 and

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<sup>24</sup> See legislative intent of the 10th amendment to the GWB, Bundestag printed paper 19/23492, p. 77 (3rd paragraph).

<sup>25</sup> Legislative intent of the government bill of the 10th amendment to the GWB, Bundestag printed paper 19/23492, p. 77 (3rd paragraph).

shown in the Annex binding and to close the proceeding in accordance with Section 32b(1) sentence 2 GWB to the extent covered by the Commitments. In the assessment of the Decision Division, the Commitments offered by Google are, to the extent of their coverage, sufficiently suitable to address the concerns communicated after the preliminary assessment (see I. below). In the exercise of its due discretion, the Decision Division carried out an overall weighing of the circumstances that speak for and against discontinuing the proceeding in accordance with Section 32b(1) sentence 2 GWB (see para. II.). In accordance with Section 32b(1) sentence 3 GWB, the order was to be limited in time to the duration of the Commitments offered (see III. below).

## **I. Commitments offered**

- (61) The Decision Division deems Google's Commitment offer sufficiently suitable to meet its concerns under Section 19a(2) sentence 1 no. 4a GWB, which it had expressed to Google in its preliminary assessment.

### **1. Commitments**

- (62) Essentially, the Commitments Google has offered provide that Google will no longer apply data processing terms to users allowing Google to (i) combine personal data from a service covered by the Commitments with personal data from other Google services (with the exception of the relevant core platform services under the DMA) or with personal data from third-party services or (ii) cross-use personal data from a covered service in other services provided separately by Google (with the exception of the relevant core platform services under the DMA) and vice versa without giving users sufficient choice options to consent to or decline consent to such cross-service data processing (para. 1(1)). The data from other Google services do not only comprise data which Google obtains in other services directed at end users, but also data from all other Google services. This means that the Commitments also cover the cross-service processing of data which Google obtains via its services (e.g. via its analytics services)<sup>26</sup> on websites and apps of third parties.

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<sup>26</sup> In its designation decision of 5 September 2023 the European Commission designated parts of Google Analytics, which can be used for advertising purposes, making them part of Google's advertising services, as a relevant core platform service pursuant to Article 3(9) DMA. These parts of Google Analytics are thus not covered by the Commitments.

- (63) Pursuant to the Commitments, sufficient choice exists if the users are given a specific choice to consent to or decline cross-service data processing in each of the cases pursuant to para. 1 and if they can consent to the processing of personal data within the meaning of Article 4 no. 11 and Article 7 GDPR (para. 1 sentence 2). Google has to design the choice options in a way that users can provide consent in a freely given, specific, informed and unambiguous manner (para. 4). In this regard, the Commitments provide non-exhaustive explanations on the minimum requirements for ensuring the transparency and equivalence of the choice options to be offered and on how to withdraw consent (paras. 5 to 7).
- (64) Google also undertakes to refrain from cross-service data processing as covered by the Commitments unless the data processing terms give users sufficient choice options within the meaning of the above and the relevant user has consented to cross-service data processing on the basis of the choice options to be offered (para. 2).
- (65) A choice option is not required if the cross-service data processing in question falls under Article 6(1), points (c), (d) or (e) (para. 1 sentence 3). In addition, to the extent that Google does not engage in the type of cross-service data processing set out in the Commitments and provided that Google discloses this limitation in its data processing terms in a transparent manner, Google is not required to offer a choice option (para. 3).
- (66) In principle, Google has to fulfil its Commitments to either introduce new choice options or specify its data processing terms for the covered services by 30 September 2024 (para. 15 sentence 2). The Commitments with regard to the services Assistant and Contacts have to be fulfilled as early as 6 March 2024 (para. 15 sentence 1), with the Bundeskartellamt having the option to extend the implementation period upon Google's substantiated request (para. 17).
- (67) The Commitments contain an obligation to submit a detailed implementation plan (para. 14), accompanying reporting obligations (paras. 18 to 20) and a non-circumvention clause (para. 21). Google is free to request the Bundeskartellamt to revoke or modify this decision declaring the Commitments binding in whole or in part or to release Google from individual Commitments if the circumstances that were the basis for the Commitments have changed significantly (para. 13 sentence 1). This paragraph is in line with the legal stipulations under which the Bundeskartellamt may rescind its decision to de-

clare Commitments binding *in favour* of the affected company without necessarily applying the criteria of Section 32b(2) nos. 1-3 GWB. Said paragraph does not create a right to any such decision (para. 13, sentence 2). The Bundeskartellamt's legal scope to withdraw or rescind the decision declaring the Commitments binding in whole or in part or to reopen the proceeding or refrain from enforcing this decision remains otherwise unaffected by para. 13.

- (68) The Commitments meet preliminary concerns under competition law in connection with the provisions of Section 19a(2) sentence 1 no. 4a GWB. In line with the DMA, they apply without prejudice to the application of other regulatory provisions such as the GDPR to Google's data processing terms and Google's data processing thereunder. In particular, the tasks and powers of the competent data protection authorities remain unaffected.

## **2. Services covered by the Commitments**

- (69) The Commitments cover in principle all services operated by Google and directed to end users in Germany with more than one million monthly active users (MAU) in Germany.
- (70) For the purposes of the Commitments, the delineation of the different services is based on the principles set out in the DMA (cf. para. 8). However, in order to avoid problems with delineating and discussions when it comes to implementing the Commitments, the Commitments include an annex listing the services initially covered by the Commitments. In the spirit of a pragmatic approach and for the purposes of the Commitments only, it seemed acceptable for the Decision Division in individual cases to treat data processing between services or service components of certain "service groups" as data processing within one service. Accordingly, the "service group" is to be treated "like" a service for the purpose of the Commitments. This applies without prejudice to any other legal requirements for data processing within the relevant "service group", namely the respective requirements under the GDPR. In implementing this pragmatic approach, the Bundeskartellamt expressly does not intend to comment on the definition and delineation of the services/service components contained in these "service groups".
- (71) The relevant MAU threshold is calculated based on the average number of users who have signed in over a period of 12 months in the previous calendar year and whose Google account location is Germany. The Bundeskartellamt considers the number of

signed-in end users to be an appropriate reference value for the Commitments at hand, because, at least in this case, compared with the methodological weaknesses of looking at users who have not signed in or the sum of users who have signed in and those who have not, it shows the relative development of the size ratios on the one hand and allows to make workable delineations on the other. Upon exceeding the relevant MAU threshold by the end of a calendar year, a service will automatically fall under the Commitments.

- (72) The Fitbit service is not covered by the Commitments. The European Commission handed down a merger control decision when this service was acquired by Google, which included obligations.<sup>27</sup> As a consequence, Fitbit is already subject to far-reaching obligations regarding the cross-service processing of health and wellness data collected through wrist-worn devices and other devices which are comparable to the obligations in this case and monitored by the European Commission. Google must not use the collected data for Google advertising, including search engine advertising, display advertising and mediated search engine advertising. This also includes data collected through sensors (including GPS) and data which have been entered manually. Google has to ensure that the relevant Fitbit user data are technically separated from other data. Google also has to ensure that users in the EEA are effectively given the choice of whether or not to allow Google to use the health and wellness data saved in their Google or Fitbit account for other Google services (e.g. Google Search, Google Maps, Google Assistant and YouTube).
- (73) Conversely, in the Decision Division's view the Android Automotive (OS) service has a very high growth potential and thus falls under the Commitments whether it reaches a certain threshold number or not.
- (74) As soon as the European Commission, in a decision pursuant to Article 3(9) DMA, designates a core platform service by Google as a further relevant core platform service under the DMA, this service no longer falls under the Commitments to the extent to which the service or parts of the service are subject to Article 5(2) DMA. Conversely, if a core platform service ceases to be a relevant core platform service, it will fall under the Commitments if it exceeds the aforementioned threshold.

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<sup>27</sup> See European Commission, decision of 17 December 2020, Case M.9660 – *Google/Fitbit*.

- (75) In its decision of 5 September 2023 the European Commission designated Google as a gatekeeper and listed the relevant core platform services under Article 3(9) DMA which are provided by the company and which in themselves constitute an important gateway for business users to reach end users under Article 3(1)(b) DMA. On this basis, the following services currently do not fall under the Commitments: Google Maps, Google Play, Google Shopping, YouTube, Google Search, Chrome, Google Android and Googles advertising services (including the parts of Google Analytics that can be used for advertising purposes).

### **3. Coherent, effective and complementary application in addition to Article 5(2) DMA**

- (76) The application of Section 19a(2) sentence 1 no. 4a GWB by the Bundeskartellamt and the application of Article 5(2) DMA by the European Commission touch upon each other at various levels. The Commitments take this into account. In the spirit of Article 37(1) DMA, they are intended to ensure coherent, effective and complementary enforcement of Section 19a(2) sentence 1 no. 4a GWB and the obligations arising for Google from Article 5(2) DMA.
- (77) To the extent that relevant central platform services or parts thereof are subject to obligations under Article 5(2) DMA, they are – as already mentioned – not covered by the Commitments. It is therefore ruled out that the areas of application of the two regulatory areas overlap.
- (78) Furthermore, in order to avoid practical conflicts of application and to enable Google to implement the Commitments and Google's obligations under Article 5(2) DMA in a uniform manner, Google's Commitments are intended to correspond in substance to an extension of Google's obligations under Article 5(2) DMA to the covered services as defined in the Commitments. Therefore, in case of doubt, the terms used in the Commitments are to be interpreted in accordance with their meaning in the DMA (see para. 8). The requirements for sufficient choices under para. 1 of the Commitments are fully consistent with those under Article 5(2) of the DMA.<sup>28</sup> The statements on minimum requirements for transparency and equivalence of the choices to be offered as well as

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<sup>28</sup> For the sake of good order it is noted that the interpretation and implementation of the Commitments by the Bundeskartellamt cannot, in any way, bind the European Commission in its interpretation and implementation of Article 5(2) DMA.



on how to withdraw consent once given (cf. paras. 4-7) likewise do not contain any stricter requirements. This means that Google *can* implement the requirements under para. 1 of the Commitments and under Article 5(2) of the DMA in uniform technical solutions and choice dialogues (see also para. 9), but it does not mean that Google *must* always use uniform technical solutions and choice dialogues in each individual case in order to meet the requirements.

- (79) Pursuant to Article 37(1) DMA, the European Commission and the Bundeskartellamt are also required to work in close cooperation in the subsequent enforcement of the Commitments and of Article 5(2) DMA and to coordinate their enforcement activities.

#### **4. Scope and duration**

- (80) The Commitments do not prevent the Bundeskartellamt from conducting antitrust proceeding for practices that are neither covered by Article 5(2) of the DMA nor by the present Commitments (para 11). For example, with regard to cross-service data processing for “*security purposes*” in the broader sense Google has, in the course of the proceeding, raised the question whether and to what extent Article 5(2) DMA covers all data processing purposes or whether the provision is limited to certain data processing purposes. To the extent that there is a possibility that also the Commitments do not cover certain data processing purposes, the Decision Division has reserved the right to initiate a new proceeding in the context of the agreement with Google. With regard to this possibility, the Decision Division will work in close cooperation with the European Commission and coordinate, within the meaning of Article 37(1) DMA, any measures to enforce the relevant competition rules, if any.
- (81) The Bundeskartellamt is also free to take up practices at an early stage which affect new or rapidly growing services operated by Google before they have reached the threshold of 1 million MAUs (cf. para. 20).
- (82) The Commitments are valid until 30 September 2029 (cf. para. 12). The duration is thus five years from the implementation date of 30 September 2024. Their validity is not dependent on whether a decision pursuant to Section 19a(1) GWB is effective during their entire duration, i.e., in particular on whether the Decision Division extends the final determination of the status as norm addressee of Section 19a(1) GWB at the time this decision is issued during the duration of the Commitments.

## **II. Discretion**

- (83) In the exercise of its due discretion, the Decision Division carried out an overall assessment of the circumstances for and against discontinuing the proceeding pursuant to Section 32b GWB.
- (84) Despite the fact that the administrative proceeding was already well advanced, the first argument in favour of discontinuing the proceeding was that the Commitments, to the extent that the scope of the Commitments appears sufficiently suitable to meet the concerns based on Section 19a(2) sentence 1 no. 4a GWB and expressed to Google in the preliminary assessment. It appears acceptable that the Commitments only cover services with a certain number of monthly active users. This is because the Bundeskartellamt is at liberty to also take action below this threshold with regard to new and particularly fast-growing services. Additionally, as soon as a relevant service exceeds the relevant threshold while the Commitments are in force, it is automatically covered. The exception is thus limited to services with relatively low, and in some cases very low, user numbers, which are also not growing strongly and, in some cases, are even in decline.
- (85) Furthermore, to the extent that certain service-related practices are not covered by the scope of the Commitments, this is due to the primacy of application of the DMA, which covers the practices in question.
- (86) Finally, attention had to be paid to avoiding a court dispute lasting many years and probably accompanied by extraordinary complexities, which could have had an adverse effect on the immediate enforceability and thus the practical effectiveness of a disputed prohibition decision. In light of this, the possibility of clarifying in subsequent court proceeding important fundamental questions concerning the application requirements of Section 19a(2) GWB, which are of significance for other cases, had to be set aside.

## **III. Time limit**

- (87) In accordance with Section 32b(1) sentence 3 GWB, the decision had to be limited to the duration of the Commitments. Accordingly, with regard to the Commitments' scope of application, the Bundeskartellamt may again take unrestricted action on the basis of Section 19a(2) sentence 1 no. 4a GWB after their expiry. The validity of this decision is not dependent on whether a decision pursuant to Section 19a(1) GWB is effective during their duration, i.e., in particular on whether, during the duration of the Commitments,

the Decision Division extends the current final determination of the status as norm addressee of Section 19a(1) GWB.

## **D. Fees**

- (88) The decision on fees is based on Section 62(1) sentence 2 no. 2 GWB. Pursuant to Section 62(2) sentence 1 GWB, the amount of the fee is determined based on the personnel and material expenses incurred by the Bundeskartellamt and the economic significance of the subject matter of the act subject to fees. Pursuant to Section 62(2) sentence 2 no. 2 GWB, the fee rates may not exceed 25,000 euros in the case of Section 32b(1) GWB. If the personnel and material expenses of the competition authority are unusually high in a particular case, taking into account the economic importance of the act subject to fees concerned, the fee may be increased up to twice its amount pursuant to Section 62(2) sentence 3 GWB. [...]
- (89) The parties under 1 to 3 are liable to pay this fee as joint debtors pursuant to Section 62(6) sentence 1 no. 2 in conjunction with sentence 3 GWB.
- (90) The fee is due upon service of this decision and is to be transferred within one month of service of this decision to the following account:

**Beneficiary: Bundeskasse Trier**

**IBAN: DE81 5900 0000 0059 0010 20**

**BIC: MARKDEF 1590**

**Bank: Deutsche Bundesbank , Filiale Saarbrücken**

- (91) Please indicate the following cash reference number as the purpose of payment:

[...]

- (92) The payment cannot be processed without specifying the cash reference number.
- (93) If the fee is not paid within one month of the date of service, a late payment surcharge of one per cent of the amount in arrears will be charged for each month or part of a month in arrears. International transfers are usually subject to bank charges. In such cases, it must be ensured that the full fee is credited to the Bundeskartellamt's account.

- (94) The expenses incurred by the required publication of this decision in the Federal Gazette (Section 61(3) sentence 1 GWB) will be charged separately (Section 62(1) sentence 3 GWB).

## **E. Information on the right to appeal**

The decision is eligible for appeal. The appeal must be filed with the Bundeskartellamt, Bonn, within a period of one month beginning with the formal service of the decision. However, it is sufficient if it is received by the court of appeal, the German Federal Court of Justice, Karlsruhe, within this period.

The appeal must be substantiated. The statement of the grounds of appeal must be filed with the Bundeskartellamt or the court of appeal. The time limit for filing the statement of the grounds of appeal is two months. It begins upon receipt of the decision under appeal and may be extended, upon application by the presiding judge of the court of appeal. The statement of the grounds of appeal must contain a statement of the extent to which the decision is contested and its amendment or revocation is requested, and state the facts and evidence – including any new facts and evidence – on which the appeal is based.

The parties must be represented by a lawyer for the filing and substantiation of the appeal.

Dr. Krauß

Hoeltzenbein

Dr. Hartog

## Content

<b>A. Facts</b>	<b>2</b>
I. Parties involved	2
II. Google's data processing terms	3
1. Google's possibilities for processing user data	3
2. Setting options regarding the processing of user data	4
a) Setting options for signed-in users	4
b) Setting options for non-authenticated users	6
III. Course of the proceeding	8
<b>B. Preliminary legal assessment</b>	<b>10</b>
I. Making the use of services conditional on the users' consent to the processing of data from other services without sufficient choice	12
1. Making the use of services conditional on the users' consent to cross-service data processing	12
2. No sufficient choice	14
II. Impediment	17
III. No objective justification	18
<b>C. Discontinuation pursuant to Section 32b(1) GWB</b>	<b>18</b>
I. Commitments offered	19
1. Commitments	19
2. Services covered by the Commitments	21
3. Coherent, effective and complementary application in addition to Article 5(2) DMA	23
4. Scope and duration	24
II. Discretion	25
III. Time limit	25

<b>D. Fees</b>	<b>26</b>
<b>E. Information on the right to appeal</b>	<b>27</b>



~~Confidential~~

7 September 2023

**B7-70/21**

**Commitment Offer pursuant to Sec. 32b GWB**

In order to find an amicable solution in Case B7-70/21, Google offers the following voluntary commitments (the Commitments) to resolve the Bundeskartellamt's preliminary concerns under Sec. 19a(2) sentence 1 no. 4a GWB regarding Google's approach to cross-service processing of personal data.

Nothing in these Commitments may be construed as implying that Google agrees with any preliminary views expressed by the Bundeskartellamt in the proceeding at hand, including on the application and scope of Sec. 19a(2) sentence 1 no. 4a GWB or the application of any other laws.

Against the background of the preliminary concerns expressed by the Bundeskartellamt in the preliminary assessment notice of December 23, 2022 on the basis of Sec. 19a(2) sentence 1 no. 4a GWB with regard to Google's terms and conditions for cross-service data processing, Google commits to make changes to its data processing terms and to introduce new choice options for cross-service processing.

The Commitments are without prejudice to Google's position should the Bundeskartellamt or any other party conduct proceedings or commence other legal action against Alphabet and affiliated companies in a matter covered by these Commitments.

The Commitments are based on the understanding that the Bundeskartellamt and the Commission will cooperate closely and coordinate their enforcement in order to enable Google to adopt a consistent approach for implementing the Commitments and its obligations under Article 5(2) DMA, also with regard to, for example, the design of consent options and technical implementing measures.

**A. Definitions**

**Commission** means the European Commission.

**Covered Services** means Android Automotive and any user-facing Non-CPS-service operated by Google with more than 1 million MAU with the exception of Fitbit. If a Covered Service becomes a CPS, it is no longer a Covered Service. Conversely, a CPS that exceeds the aforementioned threshold becomes a Covered Service if it ceases to be a CPS. A list of Covered Services as of the Effective Date is attached to these Commitments.

**CPS** means any Google service which has been designated in an effective designation decision pursuant to Article 3(9) DMA as an important gateway for business users to reach end users, to the extent that such services or parts thereof are subject to obligations under Article 5(2) DMA.

**Data Processing Conditions** means, in the specific context of these Commitments, Google's terms and conditions for data processing for the use of services directed to Users.

The concept of terms and conditions comprises all parameters of the business relationship that cannot be associated with payment, i.e., all written and unwritten parameters of the provider-demand relationship, regardless of the classification under civil law or the GDPR.

The content of the Data Processing Conditions refers to terms and conditions relating to the processing of data.

Google's Data Processing Conditions include, in particular, Google's Privacy Policy (including the linked information texts), the data processing explanations contained in the choice dialogues shown to Users when setting up a Google account, the data processing explanations contained in the choice dialogues shown to non-authenticated Users, and other data processing information directed by Google at Users.

**DMA** means the Digital Markets Act (Regulation 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828).

**Effective Date** means the date upon which the Commitments are declared binding by the Bundeskartellamt in a final decision.

**Google** includes Alphabet Inc. and all its affiliated companies.

**MAU** means monthly active users in Germany (identified based on IP address or similar IDs), calculated based on the average number of monthly signed-in users in the respective preceding calendar year.

**Non-CPS** means a Google service that is not a CPS (including parts of a service that has been designated as a CPS and that do not fall under the obligations of Article 5(2) DMA).

**Personal Data** means personal data within the meaning ascribed to it in the General Data Protection Regulation (GDPR - Regulation (EU) 2016/679).

**User(s)** means signed-out end users (B2C) that access Google's services with a German IP address and signed-in end users whose Google Account location is Germany.

## **B. Commitments**

### **I. Obligation to either grant new choice options or clarify the Data Processing Conditions**

1. For Covered Services, Google will not use Data Processing Terms that provide Google with the possibility to

- a. combine Personal Data from a Covered Service with Personal Data from other Non-CPSs or with Personal Data from third party services; or
- b. cross-use Personal Data from a Covered Service in other Non-CPSs provided separately by Google and vice versa;

without giving Users sufficient choice options to consent to or decline consent to such cross-service data processing.

A sufficient choice option is given when Users have been presented with the specific choice to permit or decline the cross-service data processing under para 1(a) and (b) and can give consent within the meaning of Article 4 no. 11 and Article 7 of the GDPR.

A choice option is not required if the cross-service data processing in question falls under Article 6(1), points (c), (d) or (e) of the GDPR.



2. Google will refrain from engaging in the cross-service data processing set out in para. 1 unless its Data Processing Conditions provide Users with sufficient choice options pursuant to para. 1 and either the relevant User has consented to cross-service data processing on the basis of the choice options to be offered pursuant to para. 1 or the conditions of para. 3 are met.

3. To the extent that Google does not engage in the type of cross-service data processing within the meaning of para. 1 for a given Covered Service and provided Google discloses this limitation in its Data Processing Terms, Google is not required to offer a choice option within the meaning of para. 1. The relevant statements in the Data Processing Terms must be transparent. i.e., they must be written in an intelligible and easily accessible form, using clear and plain language. It must also be explained to Users to what extent, if any, cross-service data processing takes place even without granting a choice.

## **II. Free and Informed Choice Options**

4. Google undertakes to design the choice options to be offered to Users pursuant to para. 1 under these Commitments in a way that Users can provide consent in a freely given, specific, informed, and unambiguous manner.

5. Google commits in this regard in particular to design the choice options to be offered to Users pursuant to para. 1 for cross-service data processing in a transparent manner. This requires that Users are informed about the consent options in an intelligible and easily accessible form, using clear and plain language. This entails in particular:

- providing Users with concrete information on the choices to be offered to them with regard to cross-service data processing, including specific information on the circumstance, the purpose and the manner of the cross-service data processing, and - if this is the case - to what extent cross-service data processing also takes place without offering a consent option,
- setting up the choice options in a technical and/or visual manner to ensure that it is not too complex for Users to easily understand them, in particular when using multi-step consent processes,
- designing the choice options in a way that it is clear to the Users how the consent options relate to each other,
- phrasing the choice options objectively.

6. Where Google asks Users for consent in line with para.1, Google will not make it easier for Users to give consent to cross-service data processing than not to give it. This includes in particular:

- a. Ensuring that visually, the option to reject cross-service data processing is presented at least equally to the option to consent, in particular in terms of colour, layout or font size;
- b. Ensuring that technically, the option to reject cross-service data processing is designed at least equally to the option to consent to cross-service data processing, in particular with a view to the number of clicks required;
- c. Ensuring that consent is not set as the default option; and
- d. Not offering a service at a lower quality to Users who decline to consent, unless the reduction in quality is a direct consequence of Google's inability to process Personal Data across services.

7. Google will provide Users a transparent, easily accessible and simple way to withdraw consent to cross-service data processing.

### **III. Coherent application with the DMA**

8. In order to enable Google to implement these Commitments and Google's obligations under Article 5(2) DMA in a consistent manner, the concepts and terms used in these Commitments are to be, in case of doubt, interpreted according to their meaning in the DMA. This applies in particular to the covered Personal Data, the covered cross-service data processing operations (combination and cross-use in services provided separately), the processing purposes covered thereby, the definition and delineation of services, and the handling of Personal Data of existing customers. The requirements for sufficient choice options in para. 1 correspond to those of Article 5(2) DMA. Likewise, paras. 4-7 do not contain stricter requirements.

9. In order to ensure a consistent user experience, Google may implement the requirements under para. 1 of these Commitments and under Article 5(2) DMA in consistent choice dialogues.

#### **C. Existing customers**

10. Google commits to provide Users who already have a Google account at the time of implementation of these commitments, or who already have a cookie set for the privacy setting for unauthenticated use, with the new choice options for cross-service data processing pursuant to para. 1 in a choice dialogue automatically presented to them, providing them with the opportunity to exercise sufficient choices with respect to Google's cross-service data processing.

#### **D. Scope and duration**

11. Nothing in these Commitments shall prevent the Bundeskartellamt from initiating proceedings for practices not covered by these Commitments.

12. These Commitments shall apply until September 30, 2029.

13. Google is free to request the Bundeskartellamt to revoke or modify the order declaring these Commitments binding, in whole or in part, or to release Google from individual commitments if the circumstances that were the basis for these Commitments have changed significantly. Google acknowledges that this does not create a right to any such decision.

#### **E. Implementation**

14. Google will submit an implementation plan to the Bundeskartellamt within three months after the Effective Date, setting out in detail which measures Google seeks to take at which point in time to comply with the Commitments.

This in particular entails:

- An updated list of services falling under para. 1 / para. 3,
- The planned design of the choice options under para. 1 (taking into account paras. 4, 5 and 6) by providing screenshots of all planned choice dialogues,
- To the extent necessary, the planned additional changes in the Data Processing Conditions that should accommodate paras. 5 and 6,
- The planned changes of the Data Processing Conditions under para. 3 and a meaningful explanation how it will be ensured that cross-service data processing is prevented and – if that is the case – which possibilities for cross-service data processing continue to exist for what reason.

15. Google has to fulfil the obligations from para. 1-3 of these Commitments with regard to its services Assistant and Contacts by March 6, 2024. The rest of the Commitments are to be fulfilled by September 30, 2024.

16. Should a service become a Covered Service after the Effective Date, Google will implement the obligations for this service within 6 months after the service becomes a Covered Service, but not before September 30, 2024.

17. Upon a substantiated request by Google, the Bundeskartellamt may extend the implementation period of para. 15 sentence 1.

#### **F. Reporting**

18. On the Effective Date, Google shall inform the Bundeskartellamt, by way of an indicative overview, of

- a. for which services the company plans at that time to introduce new choice options pursuant to para 1, and
- b. for which services the company plans at that time to stipulate in its data processing conditions that there is no possibility of cross-service data processing within the meaning of para 1.

19. Google will provide the Bundeskartellamt by 30 September 2024 and after that annually by 30 September with a report describing in a detailed and transparent manner the measures it has implemented to ensure compliance with the obligations laid down in paras. 1-7.

20. The updates will include a list of Non-CPS which increased their respective MAU by at least 250% in each of the two preceding years and have more than 250,000 MAU. Nothing in these Commitments prevents the Bundeskartellamt from initiating proceedings under Sec. 19a(2) no. 4 GWB in relation to such services or in relation to new Non-CPS launched by Google in Germany after the Effective Date.

#### **G. Non-Circumvention**

21. Google must not circumvent or attempt to circumvent these Commitments either directly or indirectly by any act or omission.

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## **Annex - Covered Services as of the Effective Date**

As of the Effective Date, the following Google services will be covered by the Commitments:

- Accommodations (comprising Hotels and Vacation Rentals: The data processing between these services/service components will solely for the purposes of the Commitments be treated like the data processing within one service)
- Assistant
- Android Auto
- Android Automotive (OS)
- Android TV
- Authenticator
- Calculator
- Chrome Web Store
- Clock
- Contacts
- Files by Google
- Flights
- Gallery Go
- Gboard
- Google One
- Google Photos
- Google Sign-In
- Google TV
- Jobs
- News
- Translate
- Wallet
- Workspace Communications (comprising Chat and Meet: The data processing between these services/service components will solely for the purposes of the Commitments be treated like the data processing within one service)
- Workspace Document Processing (comprising Drive, Docs, Sheets, Slides, Drawing, Keep, Jamboard, Forms and Sites: The data processing between these services/service components will solely for the purposes of the Commitments be treated like the data processing within one service)
- Workspace Email & Scheduling (comprising Gmail, Calendar and Tasks: The data processing between these services/service components will solely for the purposes of the Commitments be treated like the data processing within one service)

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