The Consumer Voice in Europe

GOOGLE-FITBIT MERGER

Competition concerns and harms to consumers

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Why it matters to consumers

Consumers use wearables when going for a run, measuring their heart rate or tracking their sleep on a daily basis. BEUC is concerned that Google's proposed acquisition of Fitbit may be detrimental to consumers as a result of its impact on competition in a number of markets. We have seen in the past how strategic mergers in digital markets have led to unprecedented market power for a handful of tech giants, who have expanded this power into ever growing areas of consumers' lives in particular through the amassing of gigantic volumes of data and data analytics capacity. If Google acquires consumers' data generated by the use of Fitbit wearables, including now COVID-19 related data, it would be able to use that data for its own benefit and could undermine the ability of other companies to bring new products to consumers. This could harm innovation and consumer choice in several markets such as online advertising, search, health and wearables. The proposed merger therefore has the potential to touch not only digital markets but also a vital part of all European citizens' lives, their health and well-being.

Summary

The Google/Fitbit merger represents a test case for the European Commission in terms of analysing effects on competition of large-scale data accumulation through acquisitions.

Acquiring Fitbit, with its smartwatch functionalities, apps, exceptionally valuable health and location datasets and data collection capability, would be likely to further strengthen Google's dominance in online advertising, search and other digital markets and place it in an unassailable position in digital health and wearables markets. The loss of Fitbit as an independent player would eliminate the opportunity of a potential challenger to Google's powerful position.

Wearables are likely to be crucial to the future development of digital markets because they constitute a decisive access point to essentially everything consumers do online, in the same way that smartphones overtook personal computers as the main gateway to the digital world. Wearable devices' continuous 24/7 monitoring and interactive functions allow them to collect the most informative signals on consumers and to feed information and digital services back to them. The use of data from wearables in tracking COVID-19 infections and providing access to doctors and health information is a timely illustration of this.

Google's takeover of Fitbit requires the European Commission to address the immense power the tech giants exert over the digital economy and their ever-expanding ecosystems.

BEUC therefore requests the European Commission to consider in particular:

- *the impact on competition and innovation of Google acquiring Fitbit's exceptional data and data collection capabilities across all relevant horizontal and non-horizontal markets[1], given Google's already unparalleled market power across several digital markets;*
- *the horizontal and non-horizontal effects of the merger on the market of wearables/smartwatches and whether the acquisition will result in less consumer choice (including degrading data privacy options); and*
- *to reflect very carefully on the far-reaching and dynamic implications of this potentially game-changing merger for both digital and health markets. Some past merger control decisions in the tech sector have contributed to the rise of giants whose behaviour has subsequently had to be addressed in ex-post abuse of dominance enforcement proceedings. Such harms to consumers are far better prevented than cured.*

This paper outlines BEUC's position on the proposed Google/Fitbit merger based on publicly available information.

[1] Horizontal markets are any markets on which both Google and Fitbit are competitors (or potential competitors). A non-horizontal market could be (a) a market where one of the parties provides an input to the products or services of the other (vertical markets), or (b) where the parties operate on separate but in some way related markets (conglomerate markets).

Introduction

Google is in the process of notifying its proposed acquisition of Fitbit to the European Commission and other regulators around the world.

As this merger has significant implications for consumers, BEUC strongly requests the European Commission and other regulators to consider it very carefully. We urge the European Commission's investigation to reflect the fact that this acquisition has the potential to be a game-changer not only for how consumers interact with the online world but also for their health data and healthcare services.

The defining features of this merger are, on the one hand, Google's unparalleled market power across several digital markets and, on the other, Fitbit's exceptional dataset.

Data is the key to the competition analysis in this case: Google's business model is built on the use or exploitation of data. Through the Fitbit transaction, Google would acquire a unique, highly sensitive and valuable dataset and data collection capability. Google would have every incentive and indeed unique ability to use this data to strengthen its already dominant position in multiple markets, potentially significantly harming competition and thereby reducing consumer choice (including degrading data privacy options), limiting innovation and raising prices. The loss of Fitbit as an independent player eliminates the opportunity of a potential challenger to Google's powerful position.

Wearables could, in the near future, become a decisive access point to essentially everything consumers do online, in the same way that smartphones overtook personal computers as the main gateway to the digital world. Through wearable's continuous monitoring and interactive functions, they constitute the means to collect the most informative signals on consumers and to feed information and digital services back to them. The use being made of data from wearables in tracking COVID-19 infections and providing access to doctors and health information is a timely illustration of this. Acquiring Fitbit, with its smartwatch functionalities, apps, health and location datasets and data collection capability, could place Google in an unparalleled position in online advertising, search, health and wearables. This merger could thus have a far-reaching impact on consumers and their data.

In the Apple/Shazam merger case, on 6 September 2018 Commissioner Vestager noted that: "Data is key in the digital economy. We must therefore carefully review transactions which lead to the acquisition of important sets of data, including potentially commercially sensitive ones, to ensure they do not restrict competition."[2]

The Commission's Report on Competition Policy for the Digital Era[3] and the Communication on a European Data Strategy of 19 February 2020[4] underline that, in the exercise of its merger control powers, the Commission will look closely at the possible effects on competition of large-scale data accumulation through acquisitions.

BEUC fully supports this approach, and the proposed Google/Fitbit merger, for the reasons set out in more detail below, falls precisely within its remit. It is therefore essential that the Commission considers the implications of this merger in terms of the dataset and data collection capabilities Google would acquire in multiple markets.

Without access to detailed market or company information, we cannot analyse the extent of the risks to competition. If competition concerns were substantiated however, the resulting consumer harms could be very significant. It is therefore imperative that, before

[2] https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5662
[3] Report on Competition Policy for the Digital Era by Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer, page 91; 108-109. The importance of data effects in merger control is also recognised in the Member States, for example in policy papers of the German and French NCAs.
[4] Commission Communication: A European strategy for data https://ec.europa.eu/info/sites/info/files/communication-european-strategy-data-19feb2020_en.pdf

concluding whether or not the proposed merger would "significantly impede effective competition", the Commission analyses this proposed transaction very thoroughly, not only across individual markets but also considering its potential implications in the context of its dynamic effects on the digital economy. BEUC stands ready to assist the Commission in its investigation.

What are the markets affected by the merger?

The proposed merger appears to concern at least the following: consumer data for use in several markets, online advertising, wearables, wearables OS, fitness apps, online fitness coaching, health (including insurance), data analytics, mobile payments. Many of these are directly consumer-facing products or services. This has three key implications:

1. In these markets, any negative effects would be felt directly by consumers and therefore, their voice must be heard in the analysis of this merger.
2. There would be no possibility of countervailing buyer power to defeat increased market power brought about by this merger.
3. Consumers could not negotiate with the merged entity in these markets, unlike businesses in other customer relationships. They would be left in a "take it or leave it" position.

The effects of the combination of Google's position in digital markets with Fitbit's exceptional dataset and data collection capability could be felt in multiple dimensions, through both horizontal and vertical relationships and also potential conglomerate issues.[5] In the following we consider some of the key concerns raised by the proposed merger. This is not however a comprehensive list.

1.1. Data

The proposed acquisition first and foremost would put into Google's hands a very valuable dataset and data collection capabilities that Google could exploit, in particular in online advertising and digital health.[6]

There is no doubt that data is key to the future of digital markets[7]. There is also no doubt that Google is already in a commanding, if not unassailable position, for the collection and use of data in some markets.[8] Google itself states that "Google has more data, of more types, from more sources than anyone else"[9], including through its health apps.[10] The acquisition of Fitbit would give Google access to what has been described in the Financial Times (FT) as "one of the most exquisite data sources"[11] comprising exceptionally valuable health and wellness, fitness and location data[12] that Google does not yet have.

[5] Mergers between companies active in closely related markets, for example, selling complementary products, can raise competition concerns through the combination of the parties' activities.
[6] Digital health is used in a general sense in this memo. Precise digital health and other related health markets would need to be identified to analyse the impact of this merger.
[7] BEUC position paper "Access to Consumers' Data in the Digital Economy", https://www.beuc.eu/publications/beuc-x-2019-068_european_data_policy.pdf
[8] For example, Google was found to be dominant in general search services in national markets in the EEA with market shares in most cases above 90%, AT.40099 – Google Android, para 674ff. https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf
[9] Appendix E to the CMA's Online platforms and digital advertising: Market study interim report", December 2019, "The Role of Data", see para 50. https://assets.publishing.service.gov.uk/media/5df9ecc040f0b609402e2838/Appendix_E_The_role_of_data.pdf
[10] Data sharing practices of medicines related apps and the mobile ecosystem: traffic, content, and network analysis - BMJ 2019; 364 doi: https://doi.org/10.1136/bmj.l920 (Published 20 March 2019) https://www.bmj.com/content/364/bmj.l920 . See Table 5. Note also: "Google reports data sharing partnerships with Nielsen, comScore, Kanta, and RN SSI Group for the purpose of "advertising and ad measurement purposes, using their own cookies or similar technologies."
[11] Financial Times (FT), "Can we ever trust Google with our health data?", 20 January 2020, https://www.ft.com/content/4ade8884-1b40-11ea-97df-cc63de1d73f4
[12] Fitbit wearables have inbuilt GPS in selected high-end models.

While Fitbit and Google have stated that Fitbit never sells personal information, and Fitbit health and wellness data will not be used for Google ads[13], it must be noted that:

(1) only Google ads are referenced in this statement on health and wellness data, not other Google services;
(2) data collected by Fitbit which is not "health and wellness" data, including location data, could be used for Google ads;
(3) the statement would not appear to preclude Fitbit health and wellness data from being sold by Google to third parties for any purpose, including advertising;
(4) there is no clear definition of what is, and what is not, included in "health and wellness" data. It can be argued that for example dietary or activity information constitutes health and wellness information as it can provide indications on a person's likely state of health;
(5) Fitbit states that it does not "sell personal data". This does not appear to preclude the sale of "non-personal information".[14] Fitbit currently shares information with Facebook and Google entities.[15]

The wording of Google and Fitbit's statements may give some indication of Google's plans. Non-health and wellness data could be exploited to further strengthen Google's dataset in online advertising, search and other markets. Health and wellness data could be used to expand Google's already substantial activities in digital and other health-related markets.

However, the above indication relies on these statements remaining Google's true intention and the ability to enforce them meaningfully in the future. It is noteworthy that Google has previously changed its position on data usage, even in the face of regulatory opposition.[16] "At the time of Google's acquisition of DoubleClick, DoubleClick reportedly denied that the data it collects through its system for serving ads would be combined with Google's search data. Eight years later, Google updated its privacy policy and removed a commitment not to combine DoubleClick data with personally identifiable data held by Google."[17] Google has also changed previously announced strategy in relation to health data.[18]

It must therefore be assumed that, through the merger, Google would utilise the entirety of Fitbit's currently independent and exceptional data asset in combination with its own. **The merger analysis should therefore consider all possible uses of this data asset not only from a horizontal perspective but also as a vertical input, and should not rely on any usage restrictions that Google may promise.**

Both Google and Fitbit collect data from user activity on their websites, from apps, wearables and other services and use this to improve their services or monetise it in other ways.

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[13] https://www.cnet.com/news/a-google-fitbit-means-new-possibilities-and-questions-for-the-smartwatch/
[14] "We may share non-personal information that is aggregated or de-identified so that it cannot reasonably be used to identify an individual. For example, in public reports about exercise and activity, to partners under agreement with us, or as part of the community benchmarking information we provide to users of our subscription services." https://www.fitbit.com/us/legal/privacy
[15] https://reports.exodus-privacy.eu.org/en/reports/com.fitbit.FitbitMobile/latest/ What exactly Fitbit does in terms of selling data is unclear.
[16] See footnote 51 below.
[17] Rod Sims, ACCC Chair, https://www.accc.gov.au/speech/data-revolution-consumer-welfare-and-growth-in-the-digital-economy.
"Don't trust Google's commitments on Fitbit data use, top Australian competition official says", MLex 19 Nov 2019. There are also precedents for other players with significant market power in tech markets going back on previously stated positions, e.g. M. 7217 and M. 8228 - Facebook/WhatsApp (Art. 14.1 proc.).
[18] Google's actions with regard to DeepMind as set out in more detail in footnote 51.

1. Where Google and Fitbit use (or could use) this data in the same markets, the proposed merger would **eliminate Fitbit as an independent competitor** in data collection and supply. This is particularly critical in **online advertising** given the market structure.[19]

2. The merger would also not only further **increase Google's market power, scale and network effects**, in the supply/use of data in online advertising (with increased accuracy of targeting), search and other markets, but also increase barriers to entry/expansion in these markets for actual or potential competitors, who would likely need this data to operate on these markets.[20] Google's strength in data is already unmatched. Fitbit's website notes that:

   "Fitbit has the world's largest database of validated health data.
   - *181 billion hours of heart rate data*
   - *9 billion nights of sleep*
   - *457 billion minutes of exercise*
   - *175 trillion steps*
   - *10 million added female health tracking"*

   The website further notes that:
   - *"Fitbit engages with people 24/7 through one of the world's largest health and fitness social network."*
   - *"Fitbit's ecosystem lets people connect to thousands of the most popular health and fitness apps and programs."*

   Fitbit gathers data not only from its 24/7 wearables but also from its other products such as its apps and scales. Unlike the Apple Watch wearable, Fitbit has an integrated sleep tracker. Fitbit also has a model for children (Fitbit Ace), unlike Apple Watch.

   While Apple's wearable may be the leading player, Fitbit's open (unlike Apple's proprietary, non-data monetising) nature coupled with its depth and scope of health and fitness data[21], and the fact that its community of users share their activity data[22] give it a unique character.

   The real time location data generated by Fitbit is also of high value to Google in online advertising, enabling it to enhance its knowledge of where people are to target ads at them (e.g. are they in a specific shop or doing a certain activity). As it comes from a wearable, Fitbit's location data has the particular characteristic that it is generated 24/7, unlike smartphone data. The same data cannot be obtained through other means because consumers normally carry only one wearable. Google already has a huge amount of visibility via data tracking in Android. The other

[19] Prat, Andrea and Valletti, Tommaso M., Attention Oligopoly (May 30, 2019). Available at SSRN: https://ssrn.com/abstract=3197930 or http://dx.doi.org/10.2139/ssrn.3197930; http://antitrustdigest.net/ndrea-pratt-and-tommaso-valetti-attention-oligopoly/

[20] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (Horizontal Mergers Notice), para 36 and 71ff. Google could also further strengthen its position in online advertising and search by denying competitors in these markets access to Fitbit wearables.

[21] "We believe a lot of the value today is because of the insights you get by specifically monitoring, whether it's your sleep or activity and heart rates can actually influence what we suggest you do to improve any of those healthy metrics. And so we believe that's where the real value comes from. And similarly, the insights that we get from the data that we get from the devices. So I think one of the things that is a significant asset of the company is the massive amounts of data that we have around heart rate, sleep and activity across large demographics allow us to our research team identify key insights and behaviors that can drive change. And so tying it to that data allows us to bring that intelligence to the insights. And so I think that's what the key differentiator is." Ronald W. Kisling, Fibit Chief Financial Officer, Fitbit, Inc. Company Conference Presentation, September 10, 2019.

[22] "I think one of the biggest differentiators is most Fitbit users have one or more people at which they share their activity with, that they compete with. And I think that differentiates us from some of the other players like Apple and Garmin." Ronald W. Kisling, Fibit Chief Financial Officer, Fitbit, Inc. Company Conference Presentation, September 10, 2019.

significant player in location data generation (Apple) is not really active because of its focus on privacy and its non-data monetising approach to data gathered by its devices.

In the near future, it is likely that wearables, through their monitoring and interactive functions, could become a decisive access point to essentially everything consumers do (such as communication, searching for, recording and receiving information, shopping, paying, identification and so on). Fitbit's dataset and data collection capability are thus particularly valuable and powerful as they contain some of the most informative signals on individuals. The unique advantages of wearables/smartwatches to automatically collect data is illustrated by the use of these devices in the COVID-19 pandemic. "Indicators of virus infection from [worn] sensor data are more reliable than manually entering symptoms of the disease into the smartphone." (Oliver Amft, founding director of the Chair of Digital Health, Friedrich Alexander University Erlangen-Nuremberg).[23]

The content of Fitbit's dataset in terms of the variety of data composing the dataset; the speed at which the data are collected (velocity); the size of the data set (volume); and the economic relevance (value), the key parameters used to assess the commercial and thus competitive relevance of large datasets, would suggest that the acquisition of Fitbit's dataset by Google raises significant competition questions.[24]

The quantity of user data that is valuable in particular for advertising purposes and that would not be within the parties' exclusive control post-merger[25] would likely be limited, including health data for the reasons set out above.[26] Google already has visibility on a very significant percentage of European consumers' smartphone devices.[27] Google's acquisition of Fitbit's additional data **would deprive third parties of the ability to use this data to compete**[28] in advertising, significantly affecting for example their ability to perform as effective targeted advertising. This in turn would reduce revenues, depriving competitors of the funds to improve their services with a view to eroding Google's dominance.

Furthermore, it is potentially relevant that in statements issued in January 2020, Google seems to suggest that it will in future no longer allow third-party cookies in Chrome. (Apple, Microsoft and Mozilla have already done this.) This will restrict the flow of data to third parties in the ad tech business such as ad agencies and brokers, where Google already also has significant market power.[29] Whilst this could potentially be a positive development from the consumer privacy and personal data perspective, it could also increase Google's gatekeeper power towards user data, making the data that Google itself holds increasingly valuable. What this means and what the implications are will need to be considered. It seems likely that these changes will have implications across the entire supply chain of digital advertising, including search engines. Google has also recently announced that it will impose location tracking restrictions on Android apps, apparently including its own. Apple's iOS has already done this. The Commission's assessment should also consider

[23] https://www.scmp.com/tech/apps-social/article/3079035/germany-turns-fitness-tracking-app-help-monitor-coronavirus ; https://www.thestar.com.my/tech/tech-news/2020/04/09/covid-19-germany-turns-to-fitness-tracking-app-to-help-monitor-coronavirus-infections-nationwide
[24] Case M.8788 - Apple/Shazam, para 317ff.
[25] Case M. 8124 - Microsoft/LinkedIn, para 180.
[26] M.7217 – Facebook/WhatsApp, para 140; Case M. 8124 - Microsoft/LinkedIn, para 180. The extent of the overlap in Google's and Fitbit's user data is unknown.
[27] For example, http://gs.statcounter.com estimates that Android has a Mobile Operating System Market Share in Europe of around 70%.
[28] Case M. 8994 - Microsoft/GitHub, para 133; Case M. 8124 - Microsoft/LinkedIn, paras 369-71.
[29] https://www.forbrukerradet.no/out-of-control/ p.121.

whether Google's policy changes have any implications in the context of the proposed merger, including with regard to Fitbit's location data.

3. Increasing the size of datasets held uniquely by an already super dominant player, could **harm innovation**, particularly by SMEs who may not have the same access to these data to offer innovative services to consumers.

4. Finally, if Fitbit collects data on users of third-party apps, and in particular, fitness apps, installed on the same smart mobile devices where the Fitbit app is installed, Google could derive a list of customers of rivals on iOS (and Microsoft) devices. The merged entity could, by vertically integrating, gain **access to commercially sensitive information** regarding the upstream or downstream activities of rivals, enabling Google to target customers of rivals with ads to encourage them to switch to Google products in these markets. This could also put competitors at a competitive disadvantage, thereby dissuading them from entering or expanding in the respective market, again reducing innovation and consumer choice.[30]

Although Google is not yet as powerful in **digital health** as it is in other digital markets, it is massively expanding its digital and other health business (including insurance) and is considered to be "already the largest provider of healthcare information".[31] Google has agreements to collect vast amounts of patient health data from healthcare providers, including public health systems such as the NHS in the UK.[32] It is conceivable that Google's main driver for the proposed transaction is large scale expansion into the $8.7 trillion healthcare market[33] through its market strength in data and data analytics.

The value of health data from smartwatches/wearables is demonstrated by public authorities using fitness apps on these devices to help monitor and predict the spread and containment of COVID-19 infections. Germany, for example, has developed an app to collect information on activities like walking, exercise and rest; blood pressure, heart rate and temperature; and socio-demographic data such as age, gender and weight to identify various symptoms in user data, which are linked, among other things, to COVID-19 infection.[34] Whilst this is clearly a positive tool in the fight against this pandemic, it also illustrates the importance of data and the need to ensure that it is not concentrated in the hands of only powerful market players. The COVID-19 crisis has also accelerated the use of healthcare apps enabling remote diagnosis, further underlining the increasing importance of digital health.[35]

Fitbit's focus has to date been primarily on the hardware enabling data collection. The combination of Google's software/AI capabilities and already considerable health dataset with Fitbit's currently unregulated 24/7 real time consumer health, daily behaviour and

[30] Non-Horizontal Mergers Notice, para 78; Case M. 8788 Apple/Shazam, para 191ff.
[31] Christine Lemke, founder Evidation (health measurement platform). (FT: Can we ever trust Google with our health data?); "Google is already a health company" according to the Head of Google Health. Google announced its broader health mission at a recent conference, demonstrating why it may be the most ambitious of the companies trying to use technology to transform healthcare. It also noted that it has 10 companies with 1bn users and 5 with 5bn users. (FT: Can we ever trust Google with our health data?) "Google seems to be going after the healthcare space from every possible angle." (CB Insights: How Google Plans to Use AI to Reinvent The $3 Trillion US Healthcare Industry, https://www.cbinsights.com/research/report/google-strategy-healthcare/). It, and its parent company Alphabet, have multiple subsidiaries active in various aspects of digital healthcare. Further details available in CB Insights.
[32] https://www.theguardian.com/world/2020/apr/30/google-executive-took-part-in-sage-meeting-coronavirus-tech-firm-confirms?CMP=Share_iOSApp_Other. For further details on UK NHS data provided to Google/DeepMind, see footnote 51 below.
[33] This market is estimated to be worth $8.7 trillion worldwide, FT: Can we ever trust Google with our health data?
[34] See footnote 23.
[35] https://on.ft.com/2W8oqvJ

bodily rhythms data collection capability[36] could lead to a material increase in Google's market power in digital health and related markets.

Big technology companies have a history of not sharing research data with others.[37] This runs contrary to the Commission's Communication on a European data strategy of 19 February 2020 which seeks to establish open health data spaces.[38] Were Google, through this transaction, able to create a non-replicable heath dataset, there could be digital health markets, where this data would significantly strengthen Google's position such as to foreclose competitors and stifle innovation. It would be a very bad deal for consumers if Google were able to collect their health data "for free" from patient/public health data and combine this, again for free, from consumers using Fitbit products and then use the resulting market power to sell health products at high (monopoly) prices back to the very consumers and (public) health services who provided them with the data to enable them to create the products in the first place.

This merger could also impact health insurance. Fitbit has over 100 partnerships with health care plans.[39] Its products and data collection capabilities are highly attractive to health insurers.[40] It also bundles health products with other products in its range such as coaching.[41] Fitbit has recently announced a new COVID-19 functionality in its Fitbit app to allow users in the US to access health information and directly make a doctor's appointment which can be paid for through most major insurers.[42] Acquiring these assets would enable Google to strengthen its health insurance activities.

BEUC urges the Commission to closely investigate whether the above factors could result in Google obtaining sufficient market power in any relevant digital health or related markets such that the proposed merger would raise significant competition concerns and thus potential harm to consumers. This is particularly important as healthcare, according to the Nuffield Council on Bioethics, may be becoming more consumerist as a result of "the rise of internet based medical services; and increasingly personalised advice from algorithms and data for wearable technology and genetic testing." The players in these

[36] "[W]e're focusing on 4 particular areas of health, those that can be impacted by activity: mental health, sleep, diabetes and heart health. And we believe that this focus across all of those aspects gives us the competitive advantage against a lot of the other solutions out there that tend to be more focused on a particular behavior or particular condition" Ronald W. Kisling, Fibit Chief Financial Officer, Fitbit, Inc. Company Conference Presentation, September 10, 2019.
[37] EDPS opinion on research: https://edps.europa.eu/sites/edp/files/publication/20-01-06_opinion_research_en.pdf , in particular pages 9 and 26.
[38] Commission communication: A European strategy for data https://ec.europa.eu/info/sites/info/files/communication-european-strategy-data-19feb2020_en.pdf
[39] Fitbit, Inc. Company Conference Presentation, September 10, 2019.
[40] "First and foremost, the wearable market is very healthy. Growth is driven primarily by the smartwatch segment of that market, growing at about 30%. In addition, you're seeing insurance providers and payers increasingly incentivize their members for increasing their activity. This drives increased interest in these members in terms of obtaining a smartwatch or a wearable to take advantage of these incentives." Ronald W. Kisling, Fibit Chief Financial Officer Fitbit, Inc. Company Conference Presentation, September 10, 2019.
[41] "Fitbit Care, again, is our health coaching offering that allows health plans and employers and their employees and members to manage chronic disease conditions like diabetes. So that pipeline is continuing to grow, and we've already started the rollout of bundled offerings where our devices are actually coupled with Fitbit Care and its associated digital interventions along with a coach, and we've seen promising initial stats with that offering." James Park, Co-Founder, Chairman, CEO & President, Fitbit, Inc. FQ2 2019 Earnings Call, July 31, 2019.
[42] https://blog.fitbit.com/covid-19-resource-tab/

markets "are using all the technologies of modern marketing, not merely to respond to consumer demand but also to reshape such demand to create and sustain a market".[43]

BEUC's recommendation:

The European Commission should consider in its assessment of the merger the potential uses of the data that Google would acquire and how this would be likely to impact different horizontal and vertical markets in which access to data from Fitbit would confer a major competitive advantage or potentially essential asset for the development of new products and services.

1.2. Wearables - wearable activity trackers/smartwatches

The proposed merger could have a significant negative effect on competition in wearable activity trackers/smartwatches, including wearable operating systems and fitness apps markets, if Google could leverage its market power, including its immense datasets, into these markets. Google is, if not an actual competitor in smartwatches/wearables, at least a potential competitor.

1. The proposed merger could lead to the **elimination of potential competition** in smartwatches/activity tracker wearables. A number of scenarios could be considered here:

   Fitbit has continually expanded from its fitness origins into the functionalities of a smartwatch, (including multiple apps, music, Amazon Alexa, payments, etc) which it believes to be the fastest growing segment of the wearables market.[44] The Commission should address whether the proposed transaction amounts to a "killer acquisition"[45] of a potential challenger to the Apple and Android duopoly. The increasing importance of wearables to how consumers live their lives (monitoring and interaction with multiple online services) should not be underestimated.

   Alternatively, while Apple has a strong position in relation to smartwatches, [50-60]% by shipment in the EEA in 2017[46], one could consider the relevant market to be the market for "smartwatches/fitness wearables for use with non-Apple devices" on the basis that Apple Watch has poor interoperability with Android devices (which 70% of Europeans use).[47] Fitbit is likely to have a considerable market share on such a market. Google has been trialling health-related wearables, for example, its Study Watch[48] but with this merger, it would be acquiring a wearable device which it has not previously

[43] FT, "Tech blurs lines for public and private healthcare systems", https://www.ft.com/content/5521a0ca-f975-11e9-a354-36acbbb0d9b6
[44] "the wearable market is very healthy. Growth is driven primarily by the smartwatch segment of that market, growing at about 30%"....."some of the large platform players as they move into wearables, is going to drive people to adopt smartwatches and bring new users into our community." Ronald W. Kisling, Fibit Chief Financial Officer Fitbit, Inc. Company Conference Presentation, September 10, 2019.
"I think as we look across the consumer business, as we continue to innovate in trackers and add features, we see that the lines are really blurring between trackers and smartwatches." Ronald W. Kisling, Fibit Chief Financial Officer Fitbit, Inc. Company Conference Presentation, September 10, 2019.
[45] The acquisition of a new competitor before it can establish itself as a rival competitive force on the market.
[46] Case M.8788 - Apple/Shazam, para 341.
[47] See footnote 27.
[48] A wearable device that captures biometric data. CB Insights: How Google Plans to Use AI to Reinvent The $3 Trillion US Healthcare Industry, p.3.

had.[49] Should Google withdraw either its planned product or those of Fitbit from the market, this could amount to a material elimination of potential competition.[50]

2. Through the acquisition of Fitbit, despite statements to the contrary, in particular based on previous history in relation to location and health data[51], Google could **degrade Fitbit's current relatively better privacy rights and security protections[52], leading to reduced consumer choice in privacy options.**[53] This is particularly critical given the highly sensitive nature of Fitbit's health and location data.

   Consumers do not trust big tech with health data. A Rock Health survey found that only 11% of consumers are willing to share health data with tech companies.[54] A survey in

[49] There are indications that Google had plans for a smartwatch/wearable device, e.g. Google apparently entered into an agreement with Fossil for $40 million to buy intellectual property related to cutting edge smartwatch technology (https://www.wareable.com/smartwatches/best-smartwatch-buyers-guide-2019-7283); it was recruiting for wearables employees and has wearable glasses. Googles' Head of Hardware (Rick Osterloh) confirmed that there are "Made by Google wearables to come".

[50] Horizontal Mergers Notice, para 59; Case M.4731 Google/DoubleClick, para 222ff – although it should be noted that with hindsight, this decision significantly underestimated the subsequent harm to competition of this merger.

[51] Google has previously reneged on data privacy commitments and been found in breach of/is the subject of pending proceedings in relation to data and consumer protection laws, for example:

- The French Date Protection Regulator (CNIL) fined Google Euro 50 million for breach of the GDPR (for lack of transparency, inadequate information and lack of valid consent regarding ad personalization) in January 2019.
- In November 2018, the Norwegian Consumer Council found that Google continuously tracks its users through tracking devices including mobile phones, a practice that may well breach European data protection law. Several consumer protection organisations across Europe have complained to data protection authorities about this practice. This is now being investigated by the Irish Data Protection Authority.
- On 29 October 2019, Google was accused by the Australian Competition and Consumer Commission (ACCC) of misleading consumers regarding its collection and use of location data in breach of consumer protection laws. The ACCC's case is premised on the fact that individuals were not warned that by switching off their "Location History" they would not be stopping Google from continuing to track their location through Android and the web browser, https://www.accc.gov.au/media-release/google-allegedly-misled-consumers-on-collection-and-use-of-location-data.
- Google was asked by the Article 29 Data Protection Working Party in 2012 not to change its privacy policies given the concerns that these raised. Google however went ahead with these changes.
- An independent panel reviewing Google's DeepMind and its use of public UK NHS health data highlighted that "there would be considerable sensitivity if DeepMind Health's business model involved selling data, either in a depersonalised form or in a raw form." It also recommended that DeepMind Health should "look at ways of entrenching its separation from Alphabet and DeepMind more robustly so that it can have enduring force to the commitments it makes" – a recommendation that seems to have been ignored given that Google has now apparently fully integrated DeepMind Health within it (Wired, 14 November 2018). Furthermore, DeepMind's integration with Android, exacerbates the problem of establishing what Google is doing with such individual personal data.
- DeepMind Health has been reported to have pledged that data will never be connected to Google accounts or services, or used for any commercial purposes like advertising or insurance. However, an independent panel tasked with looking into this highlighted a mammography partnership with Royal Surrey County Hospital NHS Foundation Trust in the UK, where digital images of historic mammograms, stripped of their personal data, were hosted on Google's Cloud service – "which might lead some to think that this promise was already being broken," (Wired, 14 November 2018). Furthermore, Google has announced that the data and AI from another NHS project could go global in that its resulting Streams app "could become an essential healthcare tool for medical professionals across the globe". https://interestingengineering.com/google-absorbs-streams-app-to-create-an-ai-powered-assistant-for-nurses-and-doctors

[52] The Norwegian Consumer Council report on Consumer Protection in Fitness Wearables, November 2016 found:
FitBit was ahead of competitors in a number of (though not all) privacy T&C aspects.
FitBit shares data with named third parties, including Google Analytics and unnamed third parties – Facebook.
https://www.forbrukerradet.no/side/fitness-wristbands-violate-european-law/
See also the German consumer analysis of fitness wearables:
https://www.marktwaechter.de/sites/default/files/downloads/mw-untersuchung_wearables_0.pdf

[53] Case M. 8124 - Microsoft/LinkedIn, para 350

[54] FT, "Can we ever trust Google with our health data?"; The CMA identified that heath data is considered among the most sensitive for consumers. The commercial use of consumer data (2015),

Germany by our member organisation vzbv found that 78% of consumers are unhappy with their inability to control personal data collected online. Similar percentages of consumers have concerns about the use of their data and the fact that this data is shared with others without the consumer's permission.[55] In the UK, consumer group Which? found that consumers were uneasy with how their data is used online.[56] In these circumstances, the transaction could degrade an important competitive parameter of wearables and reduce consumer choice.

3. If Google were to modify Fitbit's current **data portability** to/from other services, this could lead to **competitor foreclosure, act as a barrier to entry or expansion** in the wearables/smartwatches market, further harming competition and consumer choice.

   Discontinuing the licencing of Google's operating system, Wear OS, (or other Google products) or significantly increasing the cost of these, to competing independent smartwatch makers, or discriminating against rivals who offer better data protection terms, with the intention of encouraging sufficient numbers of customers to switch to Fitbit[57] could also result in competitor foreclosure.

   Pre-installing Fitbit on Android phones, thereby making consumer switching to competing fitness wearables (or other fitness applications) more difficult, in view of users' inertia which leads to the so-called "status quo bias", together with ecosystem issues, could also amount to a barrier to switching to the detriment of Fitbit competitors.[58]

BEUC's recommendation:

The European Commission should consider the horizontal and vertical effects of the merger in wearables/smartwatches and related markets, and whether the acquisition would result in less consumer choice (including degrading data privacy options).

1.3. Conglomerate issues

In laying out the rationale for this acquisition, Google stated that "Fitbit has been a true pioneer in the industry" and Google "is looking forward to…bringing together the best hardware, software and AI".[59] The potential conglomerate effects of bringing together Google's and Fitbit's complementary strengths in digital health have been described above. To the extent that this "bringing together" could also affect other markets beyond horizontal and vertical overlaps, it would be important to also review the potential foreclosure of competitors through tying/bundling (for example, giving away hardware

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/435817/The_commercial_use_of_consumer_data.pdf

[55] https://www.marktwaechter.de/pressemeldung/wearables-und-fitness-apps-daten-ausser-kontrolle (See also embedded English factsheets and full study in German, page 37ff https://www.marktwaechter.de/sites/default/files/downloads/mw-untersuchung_wearables_0.pdf); See also https://www.marktwaechter.de/sites/default/files/downloads/180131-wearables-auskunftsersuchen.pdf

[56] Which?, "Control, Alt or Delete? The future of consumer data", June 2018, https://www.which.co.uk/policy/digitisation/2659/control-alt-or-delete-the-future-of-consumer-data-main-report

[57] Case M. 7047 - Microsoft/Nokia, para 92ff.

[58] Case M. 8124 - Microsoft/LinkedIn, para 351; Case M.7217 – Facebook/WhatsApp, para 111ff.

[59] https://www.businesswire.com/news/home/20191101005318/en/

devices for free to build longer term relationships with users)[60], product integration or pre-installations, other potential technical restrictions[61] and ecosystem issues. In this regard, platform envelopment theories could merit consideration.[62]

BEUC's Recommendations

Whilst some previous merger control decisions in digital markets were clearly taken by the Commission (and at Member State level) in line with pre-existing legal and economic theories, the results of unfortunate merger control decisions in the past have contributed to the rise of tech giants and subsequent competition concerns that need to be addressed through more costly and extensive ex-post abuse of dominance enforcement proceedings. Such harms to consumers are far better prevented than cured, particularly in markets in danger of tipping. We therefore strongly urge the Commission, within the scope of its merger control competence, which will very likely require the opening of an in-depth investigation, not only to analyse all the relevant horizontal and non-horizontal overlaps for potential competitive and consumer harms, but also to think very carefully about the potentially far-reaching and dynamic implications of the proposed merger. The Commission must not let this become another Google/DoubleClick or Facebook/WhatsApp moment.

[60] "With the launch of premium services currently in a couple of key test markets and a full launch in the fall, we feel that that's a critical part of changing our model from, again, one that's episodic to one that's long term. And one of the ways that we're going to accelerate that in the fall is, as you mentioned, through bundling. So there'll be different types of bundling strategies, but one that's definitely on the table is the ability to give away certain hardware devices for free and then having a recurring revenue stream on the services side with that user for a longer period of time." James Park, Co-Founder, Chairman, CEO & President, Fitbit, Inc. FQ2 2019 Earnings Call, July 31, 2019.
[61] Non-Horizontal Mergers Notice, para 93ff.
[62] See for example, in the context of unilateral conduct, Eisenmann, 2011 and Condorelli & Padilla, 2019; see also the Report on Competition Policy for the Digital Era by Jacques Crémer, Yves-Alexandre de Montjoye, Heike Schweitzer, page 108.

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