Jean Monnet Network VISTA Teaching Case Study

Digital Single Market: The Google/Fitbit Merger

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Summary: This teaching assignment comprises a case study of a European Union competition case concerning the merger of Google and Fitbit, which took place in early 2021. The case has been subject to a substantial amount of debate and commentary since the European Commission launched its investigation and took a formal decision. It raises important issues relating to the behaviour of powerful online platforms, especially in the context of public health policies. The aims of this case study are to explore the key issues raised by the Google/Fitbit case and to draw out the wider implications of the case for understanding the conduct of 'big tech' in the context of the European Single market and the European Commission's role in regulating digital markets.

Student level: This teaching case is suitable for advanced undergraduate or postgraduate students.

Implementing the case study: This teaching case study would require 1-2 sessions.

Keywords: Digital Single Market; Fitbit; Google; big tech; mergers; public health.

1. Introduction

European Union (EU) competition law has been criticised for its failure to regulate adequately digital markets, and–more specifically—for allowing concentration (or monopoly power) within digital markets. Indeed, one of the rationales for the Digital Markets Act, agreed in 2022, was the shortcoming of the competition rules faced with the power of digital giants. But how fair a criticism is this? Are we asking too much of EU competition law?

This case study looks at one recent competition case concerning the merger of Google and Fitbit, which took place in early 2021. The case has been subject to a substantial amount of debate and commentary since the European Commission launched its investigation and took a formal decision.

The aims of this case study are two-fold:

- To explore the key issues raised by the Google/Fitbit case
- To draw out the wider implications of the case for understanding the conduct of 'big tech' in the context of the European Single market and the European Commission's role in regulating digital markets.

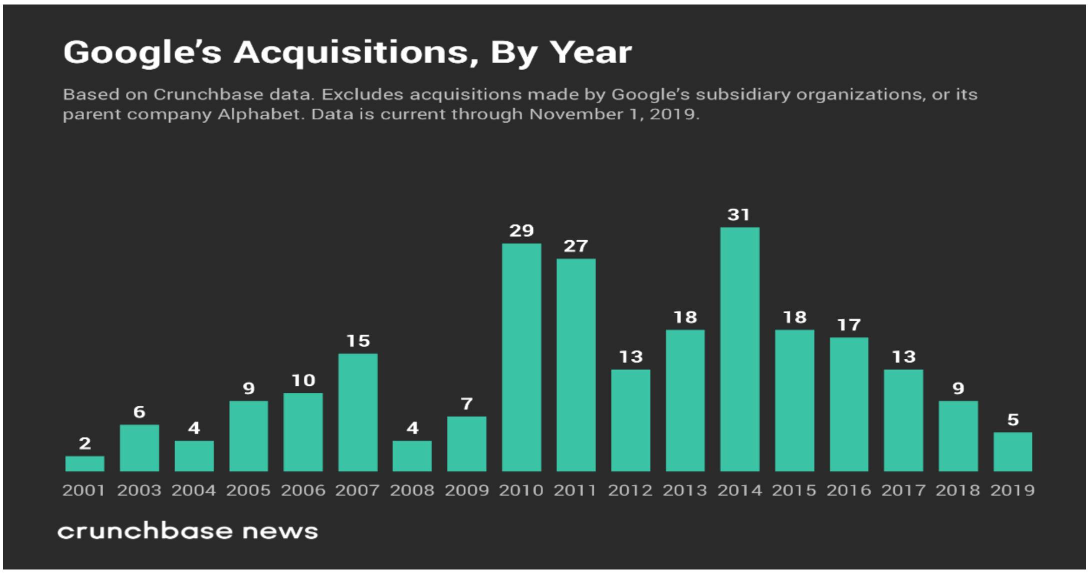
2. Context

Fitbit is a company specialising in consumer electronics and fitness. It is best known for its smartwatches (wearables). Until around 2017 Fitbit was the market leader in wearables, with approximately 40% of global sales in 2014, but since then it lost its leading position to new market entrants. As of 2022, the market for wearables is competitive. The market leaders are Apple and Garmin, with Fitbit now holding less than 5% of the market.

In December 2019, Google (owned by Alphabet) announced that it was planning to buy Fitbit. Google is an American multinational company, a digital "gatekeeper" (or online platform), which is a leading member of the 'big tech' community. It is active in many product areas, including online advertising technology, internet search, cloud computing, software and hardware. It develops operating systems for smartphones and smartwatches, as well as apps, including on health and fitness. Google also offers services to the healthcare industry. As a company it is highly acquisitive. You can find out more about acquisitions by "big tech" companies by reading this article from 2021:

https://www.washingtonpost.com/technology/interactive/2021/amazon-apple-facebook-google-acquisitions/

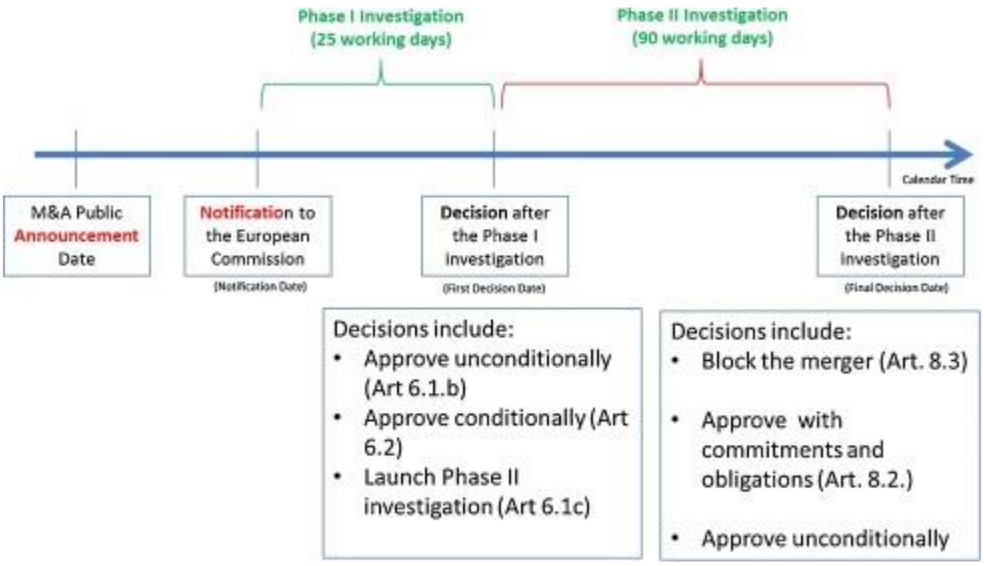
Figure 1: Google's Acquisitions, by year



Source: Crunchbase News, 21 November 2019. https://twitter.com/bayareawriter/status/1190309822706651138/photo/1 (credit: @Jason_Rowley)

Under EU competition law, planned mergers and acquisitions must be notified to the European Commission if they have a "Community" dimension (i.e. are over certain thresholds). The companies involved in the proposed merger provide information to the Commission. Having notified the Commission on the correct form, the formal procedure, with its clear time-limits, begins. The procedure has two-stages (see Figure 2), though most mergers will be approved after Phase 1. Where the Commission has concerns about a merger it can launch a full investigation, however, at Phase II. There can be no completion of the merger before there is a clearance from the Commission, and there are heavy fines for failing to suspend a merger or providing incorrect or misleading information. The department within the Commission responsible that deals with mergers is DG Competition (or DG COMP). Commission decisions are subject to review in the European Courts.

Figure 2: EU Merger Decision-Making Procedure



Source: Deshpande S., Svetina, M & Zhu, P. (2016). The impact of European Commission merger regulation on US domestic M&As. *Journal of Multinational Financial Management*, *36,* 1-15. https://www.sciencedirect.com/science/article/abs/pii/S1042444X16300184

The proposed acquisition of Fitbit by Google was notified to the Commission on 15 June 2020. The case was also to review in four other jurisdictions. In the EU, the Commission first of undertook their preliminary investigation. Because Google and Fitbit do not operate in the same markets the investigation largely focused on the **data** collected via Fitbit's wearable devices and the **interoperability** of wearable devices with Google's Android operating system for smartphones. The Commission raised various concerns.

On completion of the Commission's investigation Google offered some concessions to the Commission, but its offer was rejected. The Commission placed further demands on Google. These conditions were accepted, and the merger was approved, albeit subject to full compliance with the agreed commitments package. The Commission produced a 254-page decision which set out the terms of the agreement. The conditions set by the Commission (i) limited how Google could use the data collected for advertising purposes; (ii) safeguarded; interoperability between wearables and Android; and (iii) allowed users to choose how to share data. The Commission did not find that Google would gain a competitive advantage in the digital healthcare sector by combining Google and Fitbit's databases. This, the Commission argued, is because the healthcare sector is highly competitive and Fitbit's market share was limited.

Having also been approved in other jurisdictions beyond Europe, Fitbit became part of Google's hardware division in January 2021. It reportedly cost Google $2.1 billion.

3. The European Commission and the Google/Fitbit merger: the critique

Critics have condemned the Commission's merger decision in this case on various grounds. They have argued that concerns raised throughout the investigation were not fully addressed in the decision. One argument made is that the Commission's analysis was faulty; that it was too static, and that the Commission should have made sure that Fitbit's data gathering capabilities was not placed in Google's hands. The argument made here is that this would seem to risk "platform envelopment", an extension of monopoly power and consumer exploitation extending into the relatively competitive market space of healthcare and health insurance, with risks to privacy too. Some also doubted that Google could be trusted to comply with the conditions or that the Commission would be able to design effective remedies. Some critics saw the Google/Fitbit merger as an attempt by Google to expand its empire to another web entry point and (ultimately) to control the wearable data ecosystem. Others stressed that Google's argument that the merger was about **devices not data** was unlikely to be true. The case, critics argues, was a missed opportunity on the part of the Commission.

Based on the Commission's decision and on arguments made by critics of the Commission's decision, the case raises a host of issues that illuminate the EU digital market. Amongst others, it highlights the significance of data to large-scale digital players; it points to how competitive markets become concentrated; and it demonstrates the limits of Commission power vis-à-vis powerful market actors.

Implementing the case study

Seminar Tasks:

In advance of the seminar, you should reflect on how you will answer the following questions:

Why was the Google/Fitbit merger so controversial?

What does this case tell us about the role of "big tech" (and Google in particular) within digital markets?

What does this case tell us about (a) the capacity of competition law to regulate digital markets; (b) the role of the Commission in regulating digital markets.

In preparation for this seminar, students should read the following texts:

1. European Commission. (2020, December 17). *Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions* [Press Release]. .https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484

2. Bourreau, M., Vergé, T., Peitz, M., Valletti, T., Chen, Z., Choe, C. W., Crawford, G., Genakos, C., Dusco, T., Caffarra, C., Heidhu, P., Schnitzer, M., Ronde, T., Sovinsky, M., Schutz, M., Tovianen, O. & Spagnolo, G. (2020). Google/Fitbit will monetise health data and harm consumers. *CEPR Policy Insight no. 107.* https://cepr.org/sites/default/files/policy_insights/PolicyInsight107.pdf

Further sources and recommended readings:

For those looking for further and more technically detailed reading, you may wish to look at the following:

Afilipoaie, A., Donders, K. & Ballon, P. (2021). The European Commission's approach to mergers involving software-based platforms: towards a better understanding of platform power. *Telecommunications Policy*, *46*, 1-18. https://www.sciencedirect.com/science/article/abs/pii/S0308596121001920

BEUC. (2020). *Consumer and citizen groups have serious concerns about Google Fitbit takeover* [Common Statement]. https://www.beuc.eu/publications/beuc-x-2020-060_joint_ngo_statement_on_google_fitbit_merger.pdf

European Commission. (2020, December 17). *Commission Decision of 17.12.2020 declaring a concentration to be compatible with the internal market and the EEA agreement (Case M.9660 – GOOGLE/FITBIT), C(2020) 9105 final*. https://ec.europa.eu/competition/mergers/cases1/202120/m9660_3314_3.pdf

European Commission. (2021a). *Opinion of the Advisory Committee on Mergers at its meeting of 1 December 2020 concerning a preliminary draft decision relating to Case M.9660 – Google/Fitbit – Rapporteur: Poland, 2021/C 194/03*. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2021:194:FULL&from=EN

European Commission. (2021b). *Summary of Commission Decision of 17 December 2020 declaring a concentration compatible with the internal market and the functioning of the EEA Agreement (Case M. 9660 – Google/Fitbit) (notified under document C (202) 9105), 2021/C 194/05*. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2021:194:FULL&from=EN

Financial Times. (2020, January 20). *Can we ever trust Google with our health data?*. https://www.ft.com/content/4ade8884-1b40-11ea-97df-cc63de1d73f4

Modrall, J. (2021, June 17). Google/Fitbit – the EU Commission misses a step. Kluwer *Competition Law Blog*. http://competitionlawblog.kluwercompetitionlaw.com/2021/05/17/google-fitbit-the-eu-commission-misses-a-step/

Turgot, C. (2021). Killer acquisitions in digital markets: evaluating the effectiveness of the EU merger control regime. *European Competition and Regulatory Law Review*, *5*(2), 112-121.

Vande Walle, S. (2021). The European Commission's approval of Google/Fitbit – a case note and comment. *Concurrences Competition Law Review, no. 3-2021, August.* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3893079#:~:text=Simon%20Vande%20Walle,-University%20of%20Tokyo&text=The%20note%20summarizes%20and%20comments,behavioural%20remedies%20binding%20on%20Google