



June 29, 2020

The Honorable William P. Barr
Attorney General of the United States
The United States Department of Justice
950 Pennsylvania Ave, N.W. Washington, D.C., 20530

Dear Attorney General Barr:

Consumer Reports writes in support of your reported decision to pursue a more in-depth investigation of the proposed \$2.1 billion acquisition of Fitbit by Google parent company Alphabet.¹ This acquisition raises significant competition concerns that warrant thorough evaluation.

As the Department is recognizing, the online platform marketplace has unique characteristics that can magnify the anticompetitive effects of high market concentration. When a centralized platform that connects providers and consumers of products, services, and information achieves market dominance, it stands to displace alternative means of connecting them. This is due to “network effects,” which act as a gravitational pull of everyone finding it more useful to be on the same platform where everyone else is participating. For an *online* platform, the network effects can be vastly more self-reinforcing and all-engulfing than in offline marketplaces.

By amassing, analyzing, and exploiting vast and constantly growing troves of information on consumers and their online activities, a dominant platform like Google can increase and solidify its power in ways we are still coming to fully understand. For example, it could use this information to target discriminatory favoritism among sellers, advertisers, or information providers who use the platform to reach consumers. Or it could tailor new product and service offerings of its own to preempt promising business opportunities it identifies from being offered by competitors, or even to target another seller’s customers. And these powers are further augmented by the platform’s unprecedented and pervasive insight into our everyday lives, which enables it to individually target us to monitor, manipulate, and monetize our personal interactions as consumers, and as citizens.

Dominant online platforms can exercise inordinate influence over market access, diminishing the quantity and quality of consumer choices, and restricting the pathways for all who seek to reach consumers. Any exercise of these restrictive business practices would betray the promise of the internet as a vehicle for *increasing* the power of consumers in the marketplace and

¹ <https://techcrunch.com/2019/11/01/google-is-acquiring-fitbit/>.

society.

Google's acquisition of Fitbit, an independent competitor in the wearable health devices market, could potentially result in the following harms:

- degrading or eliminating the ability of Fitbit devices to interface with other platforms, or other operating systems, by reengineering the interface to make the experience using Google android superior to using competing alternatives, or even integrating Google functionality into Fitbit to make alternative interfaces inoperable, even though that may not work as well for the user.
- degrading the quality of the consumer experience with Fitbit, or with other Google wearables, by declining to innovate, or discontinuing the product entirely, as Google did with smart-home provider Revolv, rendering the equipment consumers had purchased useless.
- further adding to Google's existing vast troves of consumer information, broadening the reach of Google's market dominance, giving Google greater leverage over consumers, and erecting a higher hurdle to new entry by new competitors.
- foreclosing the potential for Fitbit – through growth, diversification, and partnering – to become a building block for a viable competing alternative to Google and Alphabet in other market sectors, including sectors where they are now dominant.
- foreclosing the potential for Fitbit to become an independent platform for new entry and innovation into other market sectors, including providing and monitoring health services using digital technologies.
- reducing the incentive to respond to consumer privacy preferences, by decreasing consumer marketplace choices.

In retrospect, it is clear that in the online platform marketplace, antitrust enforcers have failed to make effective use of their authority to “arres[t] mergers at a time when the trend to lessening of competition ... is still in its incipency ... to brake this force at its outset and before it gather(s) momentum.”²

Instead, as antitrust enforcers hewed to the approach of examining mergers in piecemeal isolation, Google has quietly and steadily executed roughly 150 strategic acquisitions of smaller companies in just the past decade.³ Any number of these smaller companies could potentially have

² Brown Shoe Co. v. United States, 370 U.S. 294, 317-18 (1962).

³ https://www.crunchbase.com/organization/google/acquisitions/acquisitions_list.

become a cornerstone or building block for a competing business, giving consumers more options in a more vibrant online marketplace. A new viable competitor might also have disciplined Google and strengthened its incentives to offer consumers more robust protections itself.

Each of these acquisitions was legally subject to review under Section 7 of the Clayton Act. But very few were actually *subjected* to serious review. These and similar multiple strategic acquisitions by other online platforms have resulted in a heavily concentrated marketplace, with a few entrenched dominant leaders.⁴ As a result, too often a start-up's main path to long-term success has become the prospect of selling itself to a giant platform, as opposed to the prospect of selling its products and services to consumers in an open marketplace.

These developments are concerning enough from a traditional competition standpoint. But the competition concerns arising from the business practices of Google and other large online platforms, in their amassing and use of ever-larger amounts of personal data regarding online commercial transactions, information exchanges, searches, and other disclosures, have taken on even higher stakes as our society moves inexorably closer to the long-foretold Database of Intentions: the omniscient predictor, and potential manipulator, of everyone's decision-making processes and most likely choices.

As John Batelle envisioned when he coined the term in 2003:

The Database of Intentions is simply this: The aggregate results of every search ever entered, every result list ever tendered, and every path taken as a result. ... This information represents, in aggregate form, a place holder for the intentions of humankind – a massive database of desires, needs, wants, and likes that can be discovered, subpoenaed, archived, tracked, and exploited to all sorts of ends. Such a beast has never before existed in the history of culture, but is almost guaranteed to grow exponentially from this day forward. This artifact can tell us extraordinary things about who we are and what we want as a culture. And it has the potential to be abused in equally extraordinary fashion.⁵

FTC Commissioner Pamela Harbour highlighted Batelle's warning in her dissent from the 2007 decision not to challenge Google's acquisition of DoubleClick.⁶

⁴ *E.g.*, Amazon (about 60 such acquisitions during this decade), https://www.crunchbase.com/organization/amazon/acquisitions/acquisitions_list; . Microsoft, about 85, https://www.crunchbase.com/organization/microsoft/acquisitions/acquisitions_list; Apple, about 70, https://www.crunchbase.com/organization/apple/acquisitions/acquisitions_list; and Facebook, about 60, https://www.crunchbase.com/search/acquisitions/field/organizations/num_acquisitions/facebook.

⁵ https://battellemedia.com/archives/2003/11/the_database_of_intentions

⁶ https://www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf. Notably, an earlier FTC investigation into DoubleClick's privacy practices, in

John Batelle and Commissioner Harbour have proven all too prescient, and their concerns fall squarely within the four corners of the acquisition now under investigation. Consumers' increasing lack of control over their privacy is undermining their control over the decisions available to them in the marketplace, as ads and information are tailored and targeted to them based on their assembled profile. Some of these ramifications may go beyond what a merger enforcement remedy can reach. But they are all pertinent to a thorough investigation that fully employs your authority under the incipency standard and a proper application of the consumer welfare standard.

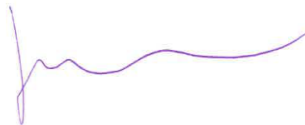
If the Department were to hew to an overly narrow approach to its enforcement responsibilities – such as by limiting this investigation and any enforcement action to immediate price effects on advertisers – that would woefully shortchange the mission with which the Department has been entrusted.

For all these reasons, we urge you to investigate this acquisition with commensurate thoroughness and breadth, taking full account of all ways it has the potential to reduce competition, harming consumers and those who seek to reach them. Your focus should not be confined to obvious adverse price effects in the immediate term; it should encompass all adverse effects on consumer sovereignty and a vibrant marketplace in the longer but still foreseeable horizon. In our view, this acquisition has hallmarks of likely harm to competition that would warrant enforcement action to oppose it.

Sincerely,



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connection with its proposed acquisition of consumer-purchasing-data seller Abacus Direct, was closed in 2001 without further action, based on DoubleClick's representation that the two companies were not sharing personal identifiable information with each other, and had committed to clarifying its stated privacy policy consistent with that representation.

https://www.ftc.gov/sites/default/files/documents/closing_letters/doubleclick-inc./doubleclick.pdf. After Google acquired DoubleClick, it continued to keep DoubleClick's massive database of web-browsing records segregated from other personally identifiable information it was amassing. But it quietly abandoned this data segregation in the summer of 2016. See <https://www.propublica.org/article/google-has-quietly-dropped-ban-on-personally-identifiable-web-tracking>.