

Slučajevi: zlouporaba vladajućeg položaja i vertikalna koncentracija poduzetnika

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- Slučaj 1
 - Zlouporaba vladajućeg položaja (*Bronner/Mediaprint*)

- Slučaj 2
 - Zlouporaba vladajućeg položaja (*Google Shopping*)

- Slučaj 3
 - Koncentracija poduzetnika (*Google/Fitbit*)



SLUČAJ 1



Slučaj 1: činjenice



■ Poduzetnik Bronner

- izdavač austrijskog dnevnog lista *Der Standard*
- 1994. na austrijskom tržištu dnevnih novina imao 3,6% tržišta (prema prihodima od prodaje), odnosno 6% (prema prihodima od oglašavanja)

■ Poduzetnik Mediaprint

- izdavač dnevnih novina *Neue Kronen Zeitung* i *Kurier*
- 1994. imao 46,8% austrijskog tržišta dnevnih novina (prema prihodima od prodaje), odnosno 42% (prema prihodima od oglašavanja), dopirući do 53,3% populacije u dobi iznad 14 godina, te do 71% svih čitatelja novina

Slučaj 1: činjenice



- Poduzetnik Mediaprint je organizirao mrežu kućne dostave novina koja je pokrivala cijelu zemlju, a na taj se način dnevne novine dostavljaju pretplatnicima tijekom ranih jutarnjih sati
- Bronner je tražio od Mediaprinta da uključi njegov dnevni list (*Der Standard*) u ponudu novina koje se prodaju putem mreže kućne dostave, a za što bi mu platio razumnu naknadu
- Mediaprint na to ne pristaje

Slučaj 1: pitanja



- Koje opcije ima Bronner na raspolaganju?
- Što biste napravili na njegovom mjestu?

Slučaj 1: što je Bronner napravio?



- U postupku pred austrijskim Kartelnim sudom Bronner je tražio da Mediaprint prestane zloupotrebljavati svoj navodni vladajući položaj na tržištu na način da uključi *Der Standard* u svoju mrežu kućne dostave za što će mu Bronner platiti razumnu naknadu

Slučaj 1: pitanja



- Na temelju čega Bronner to traži?
- Koji su uvjeti da bi se nešto smatralo zlouporabom vladajućeg položaja?

Slučaj 1: Bronnerovi argumenti



- Poštanska dostava, koja se obavlja u kasno jutro, ne predstavlja odgovarajuću alternativu kućnoj dostavi
- S obzirom na mali broj pretplatnika bilo bi mu neprofitabilno organizirati vlastitu uslugu kućne dostave
- Mediaprint ga je diskriminirao jer je uključio drugi dnevni list, *Wirtschaftsblatt*, u svoju mrežu kućne dostave iako ga Mediaprint ne izdaje

Slučaj 1: Mediaprintovi argumenti



- Uspostava mreže kućne dostave zahtijevala je veliku administrativnu i financijsku investiciju
- Ako bi se tražilo da sustav bude dostupan svim austrijskim novinama, to premašilo prirodni kapacitet tog sustava
- Činjenica da ima vladajući položaj ne obvezuje ga da subvencionira konkurenciju na način da pomaže konkrentskim poduzetnicima
- Položaj WB-a nije usporediv s položajem Der Standard-a jer je izdavač WB-a povjerio Mediaprint grupi tiskanje i cijelu distribuciju, uključujući prodaju na kioscima, tako da kućna dostava predstavlja samo dio paketa usluga

Slučaj 1: proceduralna pitanja



- *Kartellgericht* je odlučio prekinuti postupak i uputiti Sudu Europske unije pitanja glede primjene članka 102. UFEU-a na konkretan slučaj
- Prethodno odlučivanje (*preliminary reference procedure*)
- *Kartellgericht* smatra da postoji učinak na prekograničnu trgovinu između država članica
 - odbijanje pristupa mreži kućne dostave može imati učinak potpunog isključenja Bronnera s tržišta dnevnih novena
 - Bronner, kao izdavač austrijskih dnevnih novina koje se prodaju i u inozemstvu, sudjeluje u međunarodnoj trgovini

Slučaj 1: čl. 102. UFEU-a



- Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
- Such abuse may, in particular, consist in:
 - (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
 - (b) limiting production, markets or technical development to the prejudice of consumers;
 - (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Slučaj 1: analiza



- Mjerodavno tržište
- Vladajući položaj
- Zlouporaba
 - Odbijanje poslovanja (refusal to deal)
 - Diskriminacija

Slučaj 1: kako je odlučio Sud EU-a?



- For the existence of an abuse within the meaning of that provision (Art 102) to be capable of being established in such circumstances, it would be necessary not only for that the refusal of the service comprised in home delivery to be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and for such refusal to be incapable of being objectively justified, but also for the service in itself to be **indispensable** to carrying on that person's business, for lack of any actual or potential substitute for that home-delivery scheme.
- That is not the case where, **first**, other methods of distributing daily newspapers, such as by post and through sale in shops and at kiosks, even though they may be less advantageous for the distribution of certain newspapers, exist and are used by the publishers of those daily newspapers and,
- **secondly**, there are no technical, legal or even economic obstacles capable of making it impossible, or even unreasonably difficult, for any other publisher of daily newspapers to establish, alone or in cooperation with other publishers, its own nationwide home-delivery scheme and use it to distribute its own daily newspapers.

Slučaj 1



- „the primary purpose of Article 82 is to prevent distortion of competition - and in particular to safeguard the interests of consumers - rather than to protect the position of particular competitors” (AG Jacobs)

Za one koji žele znati više



- Po čemu se razlikuje postupak povodom zlouporabe vladajućeg položaja nekog poduzetnika u Austriji od onog u Hrvatskoj?



SLUČAJ 2



Google Shopping

Comparison shopping sites



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Slučaj 2: Google Shopping



Google abuses dominance as search engine to give illegal advantage to “Google Shopping”



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Slučaj 2: Google Shopping



European Commission

Concern: **Google** might be favouring “**Google Shopping**” when displaying general search results

Consumers might not see more relevant results

Other comparison shopping services might not be displayed as prominently and so can't compete on merit

Competition



Slučaj 2: Google Shopping



- Odluka Europske komisije
 - AT.39740, 27.6.2017.
 - Google zloupotrebio svoj vladajući položaj
 - Kazna: 2,4 **mld** EUR
 - http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf



Slučaj 2: Google Shopping



Slučaj 2: argumenti



- EK
 - potrošači nemaju izbora

- Google
 - mogu otići na Amazon, eBay
 - EK ih nije računala u mjerodavno proizvodno tržište



Slučaj 2: analiza



Za one koji žele znati više...



- U koja je druga dva predmeta Europska komisija također kaznila Google radi zlouporabe vladajućeg položaja?
- Kolike su ukupne kazne radi zlouporabe vladajućeg položaja koje je Komisija izrekla Google-u u ta tri slučaja?



SLUČAJ 3

Google



Slučaj 3

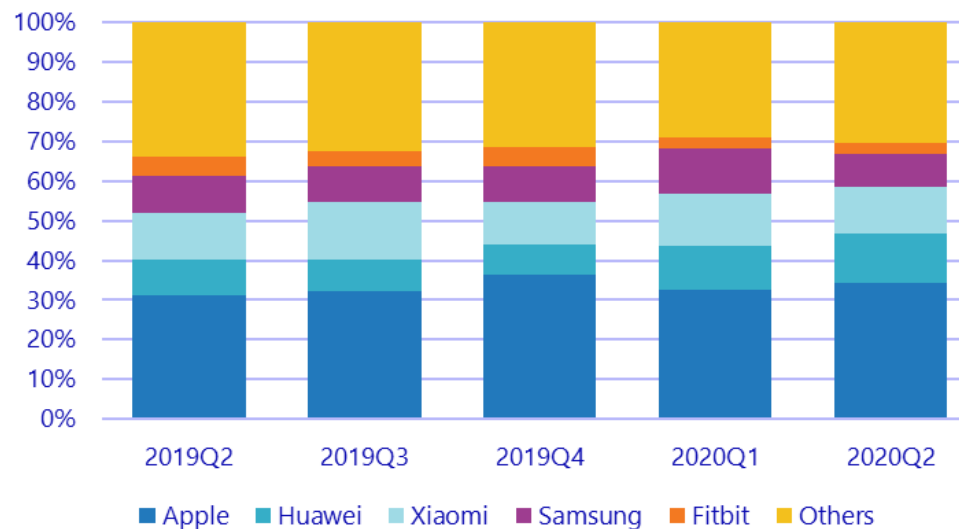


- *Google/Fitbit*, M.9660, odluka Komisije od 17. prosinca 2020.
- https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484
- 2. faza (dubinska analiza koncentracije poduzetnika)
- Uvjetno odobrena (*commitments*)

Slučaj 3



Worldwide Top 5 Wearable Device Companies, 2020Q2 Unit Market Share



Source: IDC 2020



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Slučaj 3

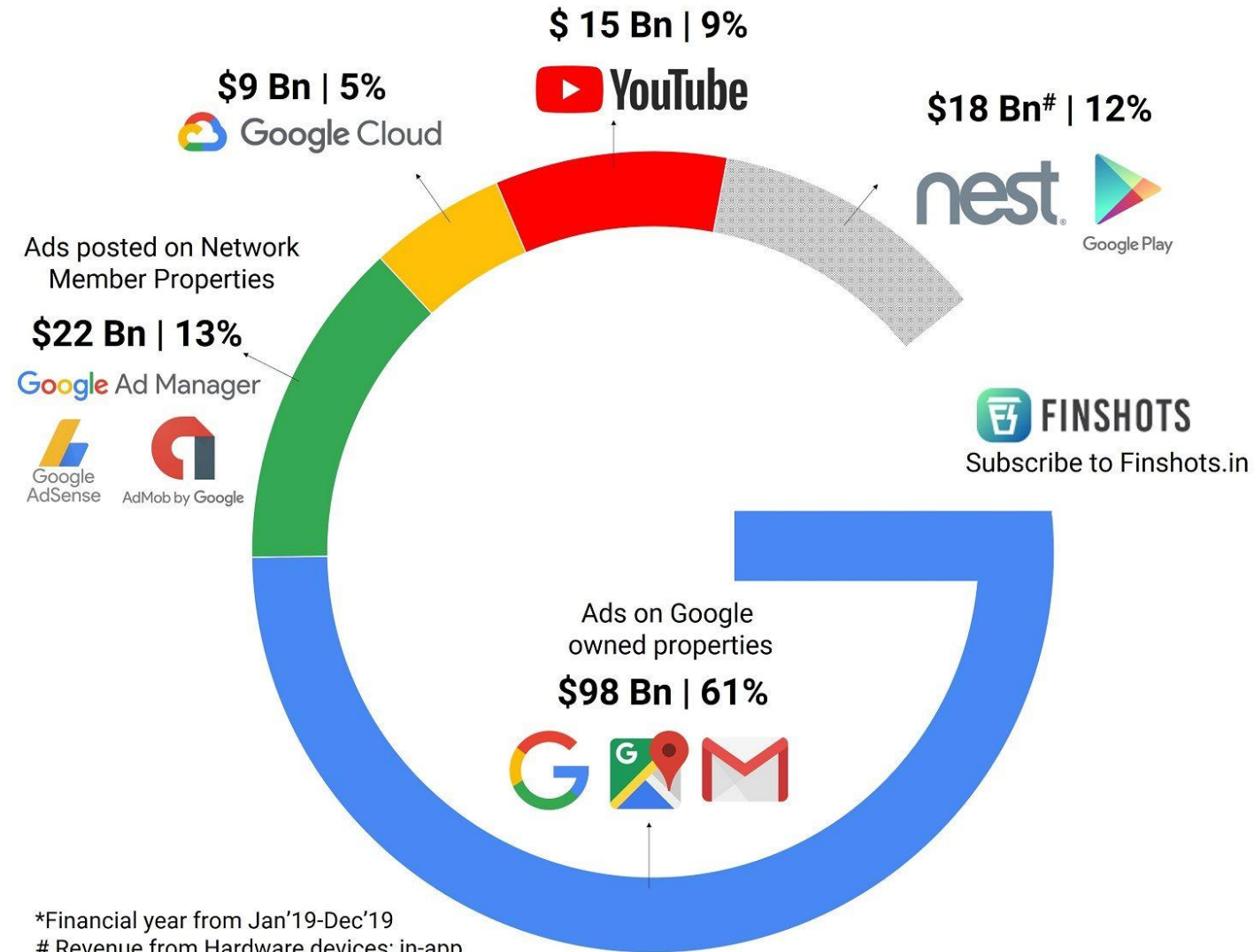


- **Google** is an American multinational technology company active in a wide range of product areas including online advertising technology, internet search, cloud computing, software, and hardware. Amongst other products and services, Google develops licensable operating systems for smartphones and smartwatches, as well as applications, such as a health and fitness application. The company also offers IT and information/research services for the healthcare industry.
- **Fitbit** is an American company active in the development, manufacturing and distribution of wearable devices (both smartwatches and fitness trackers) and connected scales in the health and wellness sector. Fitbit is also active in the supply of related software and services.

BREAKING DOWN REVENUE STREAMS OF GOOGLE (ALPHABET)



Total Revenues: \$162 Bn



*Financial year from Jan'19-Dec'19
Revenue from Hardware devices; in-app purchases & digital content on Play Store; Misc revenues.

Advertising:



- By acquiring Fitbit, Google would acquire
 - the database maintained by Fitbit about its users' health and fitness; and
 - the technology to develop a database similar to that of Fitbit.
- By increasing the already vast amount of data that Google could use for the personalisation of ads, it would be more difficult for rivals to match Google's services in the markets for online search advertising, online display advertising, and the entire “ad tech” ecosystem.
- The transaction would therefore raise barriers to entry and expansion for Google's competitors for these services to the detriment of advertisers, who would ultimately face higher prices and have less choice.

Ads Commitment:



- Google will not use for Google Ads the health and wellness data collected from wrist-worn wearable devices and other Fitbit devices of users in the EEA, including search advertising, display advertising, and advertising intermediation products.
- Google will maintain a technical separation of the relevant Fitbit's user data. The data will be stored in a “data silo” which will be separate from any other Google data that is used for advertising.
- Google will ensure that European Economic Area ('EEA') users will have an effective choice to grant or deny the use of health and wellness data stored in their Google Account or Fitbit Account by other Google services (such as Google Search, Google Maps, Google Assistant, and YouTube).

Access to Web Application Programming Interface ('API') in the market for digital healthcare:



- A number of players in this market currently access health and fitness data provided by Fitbit through a Web API, in order to provide services to Fitbit users and obtain their data in return.
- The Commission found that following the transaction, Google might restrict competitors' access to the Fitbit Web API.
- Such a strategy would come especially at the detriment of start-ups in the nascent European digital healthcare space.

Web API Access Commitment:



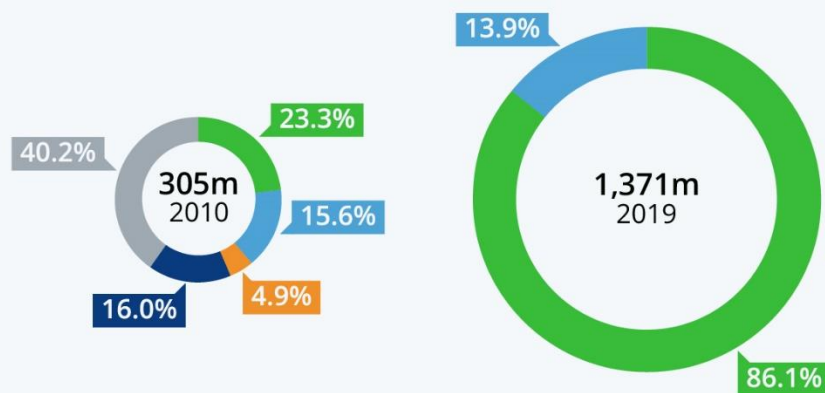
- Google will maintain access to users' health and fitness data to software applications through the Fitbit Web API, without charging for access and subject to user consent.



The Smartphone Duopoly

Worldwide smartphone market share by operating system (based on unit shipments)

● Android ● iOS ● Windows Phone ● BlackBerry ● Others



Source: IDC



statista



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Slučaj 3

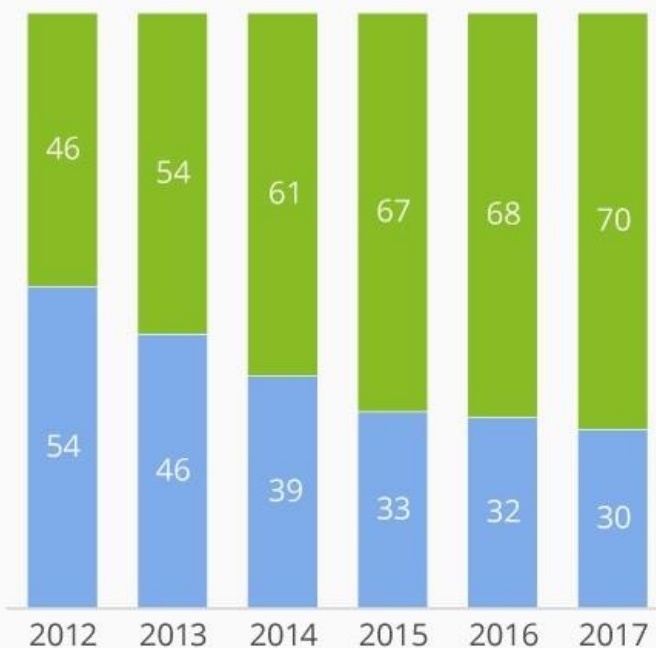


Apple Users More Willing to Pay for Apps

Share of worldwide app downloads and consumer spend by app store (in %)*

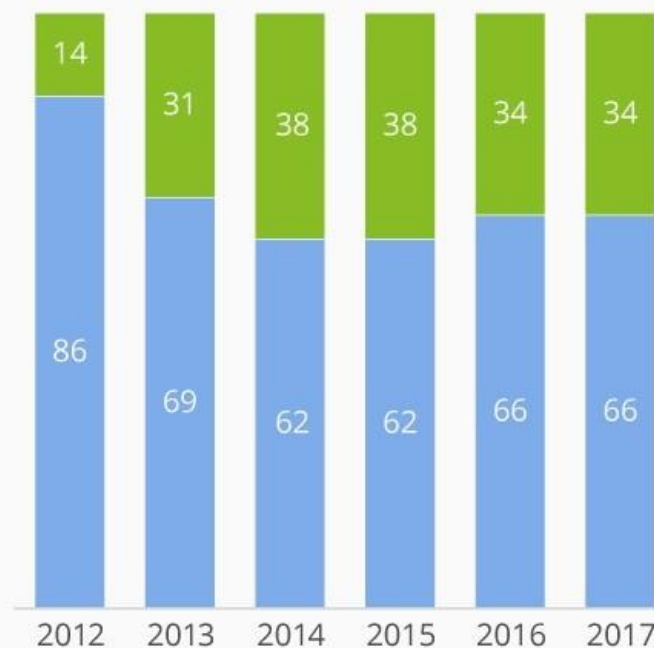
Share of app downloads

Apple App Store Google Play



Share of app consumer spend

Apple App Store Google Play



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Wrist-worn wearable devices:



- The Commission is concerned that following the transaction, Google could put competing manufacturers of wrist-worn wearable devices at a disadvantage by degrading their interoperability with Android smartphones.

Android APIs Commitment:



- Google will continue to license for free to Android original equipment manufacturers (OEMs) those public APIs covering all current core functionalities that wrist-worn devices need to interoperate with an Android smartphone. Such core functionalities include but are not limited to, connecting via Bluetooth to an Android smartphone, accessing the smartphone's camera or its GPS. To ensure that this commitment is future-proof, any improvements of those functionalities and relevant updates are also covered.
- It is not possible for Google to circumvent the Android API commitment by duplicating the core interoperability APIs outside the Android Open Source Project (AOSP). This is because, according to the commitments, Google has to keep the functionalities afforded by the core interoperability APIs, including any improvements related to the functionalities, in open-source code in the future. Any improvements to the functionalities of these core interoperability APIs (including if ever they were made available to Fitbit via a private API) also need to be developed in AOSP and offered in open-source code to Fitbit's competitors.
- To ensure that wearable device OEMs have also access to future functionalities, Google will grant these OEMs access to all Android APIs that it will make available to Android smartphone app developers including those APIs that are part of Google Mobile Services (GMS), a collection of proprietary Google apps that is not a part of the Android Open Source Project.
- Google also will not circumvent the Android API commitment by degrading users experience with third party wrist-worn devices through the display of warnings, error messages or permission requests in a discriminatory way or by imposing on wrist-worn devices OEMs discriminatory conditions on the access of their companion app to the Google Play Store.

Slučaj 3



- The duration of the commitments is ten years. Because of Google's entrenched position in the market for online advertisement, the Commission may decide to extend the duration of the Ads Commitment by up to an additional ten years, having justified the necessity for such an extension.
- A trustee, who has to be appointed before the transaction can close, will monitor the implementation of the commitments. To fulfil its duties, the trustee will have far-reaching competences, including access to Google's records, personnel, facilities or technical information. The monitoring trustee will also be entitled to share the reports it provides for and provided to the Commission with the Irish Data Protection Commission. The commitments also include a fast track dispute resolution mechanism that can be invoked by third parties.

Slučaj 3



- Executive Vice-President Margrethe **Vestager**, in charge of competition policy, said: *“We can approve the proposed acquisition of Fitbit by Google because the commitments will ensure that the market for wearables and the nascent digital health space will remain open and competitive. The commitments will determine how Google can use the data collected for ad purposes, how interoperability between competing wearables and Android will be safeguarded and how users can continue to share health and fitness data, if they choose to.”*