M&A FIT/GOOGL: Advocacy Group Planning to Send Report to EC Before Companies' Notifications

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Takeaways

- According to Agustin Reyna, the European Consumer Organisation's head of legal and economic affairs, his group now plans in mid-January to send a report to the European Commission laying out its antitrust concerns with Google's Fitbit acquisition.
- Reyna says the report will detail facts, figures and theories of harm that the merger presents in three specific market sectors: online advertising, wearable devices and wearable operating systems. Working with several other consumer, privacy and industry groups, Reyna aims to submit the report ahead of the merging parties' formal notifications to the EC.
- European antitrust practitioners noted the strategic rationale for the timing of the coalition's submission. One antitrust attorney, who aided a previous investigation into Google, noted that the report will likely seek to influence the initial perspectives of the EC's case team as it investigates the transaction.

Europe's leading consumer advocacy group now plans in mid-January to send a report to the European Commission laying out its antitrust concerns with the Fitbit-Google transaction, the report's co-lead told Reorg M&A.

According to Agustin Reyna, who is leading the report's development, the European Consumer Organisation, or BEUC, plans to submit the report ahead of the companies' formal notifications with the EC. This contrasts with the group's usual practice of sending its reports to the EC after merging parties have filed their notifications with the commission.

The nature of Google's bid for Fitbit is "unique," however, and so the coalition is "hoping to provide some input" before the launch of the commission's investigation at the time of the companies' notifications, said Reyna, who serves as head of legal and economic affairs for the group.

Under its policies and procedures, the European Commission's case work does not officially begin until the merging parties file their merger notifications with the commission. As a result, commission staff may not interact with third parties until the companies' notifications. Despite this, European antitrust practitioners noted the strategic rationale of the BEUC's timing.

"The entire pre-notification process is about shaping the views of the commission's case team, and this will have an influence on the case team's thinking," said Pablo Figueroa, an antitrust attorney with the Spanish law firm Garrido Abogados. "It shows a sophistication that doesn't surprise me, given that BEUC is familiar with these procedures as a former complainant in the EC's search case against Google and has retained well-respected competition law academics in the past, like Professor Ariel Ezrachi from the University of Oxford." Figueroa previously worked on the private legal team that helped shed light on Google's anticompetitive practices via its comparison shopping search engine.

Practitioners noted that commission staff has likely received input from other groups during the merger's pre-notification phase, including the merging parties. Fitbit disclosed on Nov. 15 that the companies' counsel have "begun pre-notification consultations with the European Commission" and aim to file their notifications with the commission "as soon as is reasonably possible."

Figueroa told Reorg M&A that the commission will take all perspectives into account when forming its initial thoughts about the merger. In developing its report, the BEUC has worked closely with industry participants, which the EC prioritizes when investigating mergers. "The European

Commission asks questions of a wider variety of stakeholders, including competitors, while still attaching more importance to the views of clients and consumers," he said.

Shortly after Google and Fitbit's Nov. 1 deal announcement, the BEUC began work with other consumer, privacy and industry groups on its report. Reyna previously told Reorg M&A that the report will specifically outline which markets the merger would negatively impact, as well as figures and graphs for EC staff to use in its investigation. Since the start of its work in November, the coalition has narrowed its report's focus to three specific sectors: online advertising, wearable devices and wearable operating systems.

Reorg M&A previously analyzed and reported the thoughts of antitrust practitioners regarding the aggregation of Google and Fitbit's personal health data, which would further the companies' dominant positions in online advertising and wearables. The union of Google's WearOS with Fitbit's smartwatch portfolio may also present vertical antitrust concerns.

The BEUC initially aimed to send its report to the EC by the end of 2019. More recently, the group has updated its goal to mid-January. "It's taking a bit longer than expected, since we had to shift resources internally," Reyna said. "But as far as we know, there is no formal notification to the European Commission yet [by the merging parties], so we expect [the investigation's launch] to take longer than expected."

In contrast with the parties' delayed filing with the EC, Google and Fitbit filed their initial antitrust paperwork with U.S. antitrust authorities in November. Additionally, Fitbit shareholders will vote on the transaction this Friday, Jan. 3.

Following reports that the DOJ gained clearance to investigate the merger, Reyna noted his expectation for close cooperation between the EC and DOJ. "EU-U.S. coordination will be essential," he said.

Reorg M&A's previous coverage of this transaction can be found **HERE**.

--Matt Tracy
