U.S., EU, U.K., and Other Antitrust Enforcers Enter Collaboration on Antitrust Analysis of Pharma Deals

March 17, 2021

On March 16, 2021, a coalition of international and U.S. antitrust authorities announced their formation of a joint working group to reevaluate their approach to reviewing mergers in the pharmaceutical industry (which today relies largely on an indication-by-indication review of the competitive overlaps between the merging parties). The issues the working group plans to address are broad and cover theories of harm, analytical methodologies, and remedies. The formation of this group highlights that pharmaceutical deals will remain a key priority for antitrust agencies—and indicates the potential emergence of more aggressive enforcement that has implications for deal timing, the scope of agency engagement, and increased multilateral collaboration among reviewing agencies.

The working group will include the Canadian Competition Bureau, the European Commission Directorate General for Competition, the U.K.'s Competition and Markets Authority ("CMA") and, in the U.S., the Federal Trade Commission ("FTC"), the U.S. Department of Justice Antitrust Division, and State Attorneys General. Therefore, any changes that emerge from this joint review process will likely have effects on both sides of the Atlantic, as well as in other jurisdictions across the globe that look to these jurisdictions as leaders in antitrust enforcement.

The announced review is consistent with some recent statements and enforcement actions from the FTC. In 2020, then-Commissioner Slaughter filed a dissent from the consent agreement that the FTC reached with AbbVie and Allergan. Slaughter was concerned that the proposed settlement did not adequately remedy a range of competitive issues that the acquisition posed, including effects on innovation.[1] In addition, in December 2019, the FTC unanimously voted to block Illumina's acquisition of Pacific Biosciences—a deal which the FTC alleged was an attempt by Illumina to maintain a current monopoly in next-generation DNA sequencing by neutralizing a nascent competitive threat from PacBio.

The questions the working group will consider include:

- How can current theories of harm be expanded and refreshed?
- What is the full range of a pharmaceutical merger's effects on innovation?
- In merger review, how should we consider pharmaceutical conduct such as price fixing, reverse payments, and other regulatory abuses?
- What evidence would be needed to challenge a transaction based on any new or expanded theories of harm (e.g., the recent focus on potential or nascent competition from next-generation therapies)?
- What types of remedies would work in the cases to which those theories are applied?
- What have we learned about the scope of assets and characteristics of firms that make successful divestiture buyers?

These questions reflect the wide scope of the review. It is possible that the review could result in new approaches to analyzing the competitive effects of pharmaceutical mergers, as well as a reevaluation of merger remedies in the sector. It is also possible that the participating agencies will pursue novel

[1] **Dissenting Statement of Commissioner Rebecca Kelly Slaughter Regarding the Proposed Acquisition of Allergan plc by AbbVie Inc. - May 5, 2020 (ftc.gov)**

theories of harm in complex pharmaceutical transactions, with potential implications for the length of such merger reviews. Of particular note is the working group's question about how non-merger conduct constituting competitive "abuses" should factor into merger review. Merging companies will need to take these considerations into account when negotiating deal timelines and risk provisions, in developing an effective advocacy strategy with agencies, and in reviewing their overall antitrust compliance programs.

The various press releases announcing the working group emphasize that antitrust review of pharmaceutical deals will remain a key priority for the participating jurisdictions. FTC Acting Chair Rebecca Kelly Slaughter stated that "amid skyrocketing drug prices and ongoing concerns about anticompetitive conduct in the industry, it is imperative that we rethink our approach toward pharmaceutical merger review."[2] European Competition Commissioner Margrethe Vestager welcomed the review as an opportunity to "take stock of the lessons learned in recent years."[3] Similarly, CMA CEO Andrea Coscelli said "when large pharmaceutical companies decide to merge or acquire innovative rivals, it is essential that competition authorities work together to protect consumers from any anti-competitive deals."[4]

While there is no announced timeline for the completion of the review, we will be watching developments closely over the coming months. In the interim, please do not hesitate to contact us if you would like to arrange a discussion.

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[2] **FTC Announces Multilateral Working Group to Build a New Approach to Pharmaceutical Mergers | Federal Trade Commission**

[3] **https://ec.europa.eu/commission/presscorner/detail/en/IP_21_1203**

[4] **https://www.gov.uk/government/news/cma-joins-global-partners-to-consider-approach-on-pharma-mergers**

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