Articles + Publications | March 16, 2021

It Could Be a Very Bitter Pill: US, Foreign, and State Antitrust Enforcement Agencies Launch Group to Change Traditional Analysis Applied to Pharmaceutical Mergers

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Over the past several years, the Democratic commissioners of the U.S. Federal Trade Commission (FTC) have made clear their dissatisfaction with the agency's historic treatment of pharmaceutical mergers. Now, it appears that the FTC has launched a process aimed at changing the way in which such transactions are analyzed and ultimately resolved.

Past dissenting statements issued by now-Acting FTC Chair Rebecca Kelly Slaughter and Commissioner Rohit Chopra have criticized the traditional antitrust analysis applied to pharmaceutical transactions and urged the FTC to file litigation challenging such mergers rather than resolving competition-related concerns through divestitures of overlapping drugs either on the market or in the development pipeline of the merging parties. [1] In fact, in a late 2020 joint statement, they wrote that "[t]he FTC's record when it comes to reviewing pharmaceutical mergers suggests that the agency will simply never seek to block a merger."[2]

In its March 16 press release, the FTC announced that it has initiated a working group with several other competition enforcement agencies "to update their approach to analyzing the effects of pharmaceutical mergers."[3] For this project, the FTC is joining forces with the Canadian Competition Bureau, the European Commission Directorate General for Competition, the U.K.'s Competition and Markets Authority, the U.S. Department of Justice, and the offices of a number of state attorneys general.[4]

According to FTC Acting Chair Rebecca Kelly Slaughter, "[g]iven the high volume of pharmaceutical mergers in recent years, 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."

The acting chair further announced that, "[w]orking hand in hand with international and domestic enforcement partners, we intend to take an aggressive approach to tackling anticompetitive pharmaceutical mergers." A cross-border effort makes particularly good sense in an industry like pharmaceuticals, where the larger established companies are global or, at least, international in scale.

The FTC's press release highlights the following key questions for the working group to consider:

- 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?
- 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?

None of the involved agencies has provided a timetable, nor have they explained what the final work product will look like. Further, given the views of the two current Republican commissioners who have supported the current analysis applied in pharmaceutical mergers, the two open FTC commissioner seats, pending and suggested proposed federal legislative fixes to the treatment of all mergers, and uncertainty as to the position that the new administration might take, this joint working group will be worth following.

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[1] *See, e.g.,* Statement of Commissioner Rohit Chopra Joined By Commissioner Rebecca Kelly Slaughter*, In the Matter of Pfizer Inc. / Mylan N.V.,* Commission File No. 1910182 (Oct. 30, 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1582382/191_0182_pfizer-mylan_-_dissenting_statement_of_commrs_chopra_and_slaughter_1.pdf; Dissenting Statement of Commissioner Rebecca Kelly Slaughter*, In the Matter of AbbVie/Allergan,* Commission File No. 191-0169 (May 5, 2020), available at *https://www.ftc.gov/system/files/documents/public_statements/1574577/191_0169_dissenting_statement_of_commissioner_rebecca_kelly_slaughter_in_the_matter_of_abbvie_and_0.pdf;* Dissenting Statement of Commissioner Rohit Chopra, *In the Matter of AbbVie, Inc. / Allergan plc*, Commission File No. 1910169 (May 5, 2020), available at https://www.ftc.gov/system/files/documents/public_statements/1574583/191-0169_dissenting_statement_of_commissioner_rohit_chopra_in_the_matter_of_abbvie-allergan_redacted.pdf; Dissenting Statement of Commissioner Rebecca Kelly Slaughter, *In the Matter of Bristol-Myers Squibb and Celgene,* Commission File No. 191-0061 (Nov. 15, 2019), available at https://www.ftc.gov/system/files/documents/public_statements/1554283/17_-_final_rks_bms-celgene_statement.pdf; Dissenting Statement of Commissioner Rohit Chopra, *In the Matter of Bristol-Myers Squibb/Celgene*, Commission File No. 1910061 (Nov. 15, 2019).

[2] Statement of Commissioner Rohit Chopra Joined By Commissioner Rebecca Kelly Slaughter, *In the Matter of Pfizer Inc. / Mylan N.V.*

[3] *See* https://www.ftc.gov/news-events/press-releases/2021/03/ftc-announces-multilateral-working-group-build-new-approach.

[4] State attorneys general who so far have indicated they are joining the working group include Pennsylvania, Wisconsin, California, and Virginia. *See, e.g.*, WisPolitics.com, “Dept. of Justice: Wisconsin DOJ named to International Task Force on pharmaceutical mergers” (March 16, 2021), available at https://www.wispolitics.com/2021/dept-of-justice-wisconsin-doj-named-to-international-task-force-on-pharmaceutical-mergers/; Augusta Free Press, “Herring Joining Task Force to Examine Pharmaceutical Mergers (March 16, 2021), available at https://augustafreepress.com/news/herring-joining-task-force-to-examine-pharmaceutical-mergers/.

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