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Competition Agencies Launch Cross-Border Pharmaceutical Merger Working Group

- Competition authorities in the U.S., Canada, U.K. and European Union have formed a pharmaceutical merger working group aimed at updating merger analysis in this industry.
- This initiative, with its focus on a particular industry, appears to be unique and serves a reminder that issues involving pharmaceuticals are at the forefront of many enforcers' agendas.

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On March 16, the U.S. Federal Trade Commission (FTC), the Antitrust Division of the U.S. Department of Justice, certain state attorneys general, the Canadian Competition Bureau, the U.K. Competition and Markets Authority (CMA), and the European Commission Directorate General for Competition announced the launch of a multilateral working group to examine mergers in the pharmaceutical industry. According to the agencies, the goal of the working group is "to identify concrete and actionable steps to review and update the analysis of pharmaceutical mergers."

The European Commission Directorate General for Competition said that the initiative "will bring enhanced scrutiny and more detailed analysis of these kinds of mergers in the future, for the benefit of consumers." The head of the CMA said that "it is essential that competition authorities work together to protect consumers from any anti-competitive deals." The FTC, which is an impetus for the working group, said that the "project will ensure that FTC investigations include fresh approaches that fully analyze and address the varied competitive concerns that these mergers and acquisitions raise."

The FTC listed several "questions to be considered":

- 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?

Acting FTC Chairwoman Rebecca Kelly Slaughter in particular has been critical of certain pharmaceutical mergers in the past. For example, in May 2020 she dissented from a Commission action accepting a consent order relating to AbbVie's acquisition of Allergan. That order allowed the acquisition to proceed subject to divestiture of Allergan's assets and rights for certain drugs. In her dissent, then-Commissioner Slaughter expressed general concern about the potential effects of pharmaceutical mergers on innovation. She wrote that "it is essential to scrutinize closely whether a merger is likely to diminish innovation competition by incentivizing the merged firm to curtail its innovative efforts, including investment in research and development, below the level that would prevail in the absence of the merger." To conduct such an analysis, she argued that the FTC should collect "past evidence of innovation in an industry" as well as "information about what parties and other stakeholders in the industry predict about future competition." She also expressed "concerns . . . about the proposed divestitures and the absence of meaningful benefits to consumers." She also made innovation-related arguments in her dissent in the Bristol-Myers Squibb and Celgene matter. Acting Chairwoman Slaughter has also previously argued that the FTC "should carefully examine and aggressively employ new ways to utilize our enforcement tools that restore competition and eliminate unfair or deceptive acts or practices in the pharmaceutical industry."

Significance

Many competition agencies around the world have investigated mergers and other matters in the pharmaceutical industry in recent years. And many of the agencies involved in the pharmaceutical merger working group often work together – bilaterally or multilaterally – on specific mergers and other competition investigations and on policy matters, including through organizations such as the International Competition Network or the Organisation for Economic Cooperation and Development (OECD). However, this initiative, with its focus on a particular industry, appears to be unique. While each jurisdiction will have its individual competition laws and outcomes, the formation of the working group is a reminder that issues involving pharmaceuticals are at the forefront of many enforcers' agendas.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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