

Axinn Antitrust Insight: FTC Launches Multinational Group to Tackle Pharmaceutical Deals

A photograph of a modern building's curved glass facade, showing multiple floors and windows, set against a light blue sky.

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Axinn Update

On March 16, the U.S. Federal Trade Commission announced a multinational working group aimed at taking “an aggressive approach to tackling anticompetitive pharmaceutical mergers,” which also could have side effects for mergers in other industries as well. The working group’s participants include the antitrust authorities of Canada, EU, UK, and various state attorneys general. According to FTC Acting Chair Slaughter, the initiative was spurred by the “high volume of pharmaceutical mergers in recent years, amid skyrocketing drug prices and ongoing concerns about anticompetitive conduct in the industry.”

The questions set out for the working group to address likely foreshadow what is to come: increased scrutiny of mergers based on potential harm to innovation, as well as demands for broader product and pipeline divestitures. Whereas traditionally the FTC would focus on overlaps in a particular indication or method of action, merging pharmaceutical companies should anticipate investigation of broader overlaps where their products or R&D projects overlap within a larger therapeutic area.

A more aggressive posture against pharmaceutical mergers also would be consistent with several dissenting statements by now-Acting Chair Slaughter and Commissioner Chopra during the Trump administration. For example, both Commissioners dissented in Pfizer/Mylan, Allergan/Abbvie, and Bristol-Myers Squibb/Celgene, where the remedies focused on individual product overlaps.

A more aggressive and searching approach to pharmaceutical mergers could mean more burdensome and prolonged Second Request investigations, expanded remedy demands, narrower sets of potential divestiture buyers, and more court challenges. That said, for merging firms willing and able to take the time and money to litigate, the FTC will not have the final word, as the agency will need to convince the courts to adopt its more aggressive approach as well.

Firms in other industries are not immune from the more aggressive merger-enforcement agenda this working group is poised to advance. While this initiative is focused on mergers in the pharmaceutical industry, Acting Chair Slaughter is reported to have said that if this working group project is deemed successful it could be applied to other industries, and in any event, lessons learned from this project could apply to a wide array of industries.

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