



UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Rebecca Kelly Slaughter

DISSENTING STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER

In the Matter of Bristol-Myers Squibb and Celgene
Commission File No. 191-0061
November 15, 2019

The Federal Trade Commission has a long history of reviewing mergers between pharmaceutical manufacturers using an analytical framework that identifies specific product overlaps between the merging parties, including of drugs in development, and requiring divestitures of one of those products. This approach addresses significant competitive concerns in these mergers,¹ but I am concerned that it does not fully capture all of the competitive consequences of these transactions.²

The consent decree in this case follows the Commission's standard approach. It remedies a serious concern about a drug-level overlap between BMS's development-stage BMS 986165 (or "TYK2") and Celgene's on-market Otezla for the treatment of moderate-to-severe psoriasis. This is important, and I support the Commission's effort to remedy this drug-level overlap. However, I remain concerned that this analytical approach is too narrow. In particular, I believe the Commission should more broadly consider whether any pharmaceutical merger is likely to exacerbate anticompetitive conduct by the merged firm or to hinder innovation.

Several recent developments enhance my concerns. Branded drug prices have increased substantially in recent years,³ and pharmaceutical merger activity persists at a high pace.⁴ The

¹ Within the standard analytical framework for pharmaceutical mergers, the Commission has done a good job of studying the effects of previous divestitures, and has taken seriously the lesson that divestitures of on-market, rather than pipeline products, are often more likely to succeed in preserving competition among the overlapping products. See Bruce Hoffman, *It Only Takes Two to Tango: Reflections on Six Months at the FTC*, at 6 (Feb. 2, 2018).

² The Commission has been very successful in negotiating settlements with merging parties to address drug overlaps. The Commission has not recently litigated pharmaceutical merger cases, and, although merger litigation in other industries and merger guidelines provide useful guidance, we simply do not have a contemporary body of pharmaceutical merger caselaw to clarify the boundaries for our analytical approach.

³ See IQVIA Institute for Human Data Science, *The Global Use of Medicine in 2019 and Outlook to 2023*, at 11 (Jan. 29, 2019); IQVIA Institute for Human Data Science, *Medicine Use and Spending in the U.S.*, at 8 (Apr. 19, 2018); Laura Entis, *Why Does Medicine Cost So Much? Here's How Drug Prices Are Set*, TIME (Apr. 9, 2019), <https://time.com/5564547/drug-prices-medicine/>; see also Joanna Shepherd, *The Prescription for Rising Drug Prices: Competition or Price Controls?*, 27 HEALTH MATRIX 315, 315-16 (2017); Aimee Picchi, *Drug Prices in 2019 are Surging, With Hikes at 5 Times Inflation*, CBS NEWS (July 1, 2019), <https://www.cbsnews.com/news/drug-prices-in-2019-are-surging-with-hikes-at-5-times-inflation/>.

⁴ See Barak Richman, et al., *Pharmaceutical M&A Activity: Effects on Prices, Innovation, and Competition*, 48 LOY. U. CHI. L. J. 787, 790-91 (2017); Meagan Parrish, *What's Behind all the M&A Deals in Pharma*, PHARMA MANUFACTURING (July 31, 2019).

high rate of drug company consolidation has coincided with a sea change in the structure of pharmaceutical research and development; recent studies suggest mergers may inhibit research, development, or approval in this changing environment.⁵ In addition, the pharmaceutical industry has long been the focus of anticompetitive conduct enforcement by both the Commission and private litigants, including for practices such as pay-for-delay settlements,⁶ sham litigation,⁷ and anticompetitive product hopping.⁸ We must carefully consider the facts in each specific merger to understand whether or how it may facilitate anticompetitive conduct, and therefore be more likely to result in a substantial lessening of competition.

Going forward, I hope the Commission will take a more expansive approach to analyzing the full range of competitive consequences of pharmaceutical mergers. I urge not only the Commission, but also researchers and industry experts to think carefully and creatively about these cases, and in particular to study the effects of recent consummated mergers on drug research, development, and approval. Outside of merger enforcement, we should also continue to police aggressively business practices that suppress competition. Indeed, as Commissioner Chopra and I have explained elsewhere, we should unleash the full scope of our authority under Section 5 to combat high drug prices.⁹

The problem of high drug prices is too important to leave any potential solutions unexhausted. As a society, we should also consider all other policy interventions that would help combat high drug prices.¹⁰

⁵ See Justus Haucap & Joel Stiebale, *Research: Innovation Suffers When Drug Companies Merge*, HARVARD BUSINESS REVIEW (Aug. 3, 2016); Justus Haucap & Joel Stiebale, *How Mergers Affect Innovation: Theory and Evidence From the Pharmaceutical Industry* (2016) (finding a negative effect on research and development activity of the merged firm and rival firms); *but see* Richman, et al., *supra* note 4 at 799-801, 817-18 (finding a positive correlation between increased pharmaceutical merger and drug development activity, but noting competitive concerns about a “bottleneck” in FDA approval).

⁶ See Press Release, Fed. Trade Comm’n, *Last Remaining Defendant Settles FTC Suit that Led to Landmark Supreme Court Ruling on Drug Company “Reverse Payments”* (Feb. 28, 2019), <https://www.ftc.gov/news-events/press-releases/2019/02/last-remaining-defendant-settles-ftc-suit-led-landmark-supreme>.

⁷ See Press Release, Fed. Trade Comm’n, *Statement of FTC Chairman Joe Simons Regarding Federal Court Ruling in FTC v. AbbVie* (June 29, 2018), <https://www.ftc.gov/news-events/press-releases/2018/06/statement-ftc-chairman-joe-simons-regarding-federal-court-ruling>.

⁸ See Press Release, Fed. Trade Comm’n, *Reckitt Benckiser Group plc to Pay \$50 Million to Consumers, Settling FTC Charges that the Company Illegally Maintained a Monopoly over the Opioid Addiction Treatment Suboxone* (July 11, 2019), <https://www.ftc.gov/news-events/press-releases/2019/07/reckitt-benckiser-group-plc-pay-50-million-consumers-settling-ftc>.

⁹ See Statement of Commissioners Rohit Chopra and Rebecca Kelly Slaughter Regarding the Federal Trade Commission Report on the Use of Section 5 to Address Off-Patent Pharmaceutical Price Spikes, (June 27, 2019).

¹⁰ The problem of high drug prices has prompted a number of proposed policy solutions in addition to antitrust enforcement, including (1) reference pricing, (2) reforming import restrictions, (3) innovation prizes, and (4) Medicare Part D price negotiation. See So-Yeon Kang, et al., *Using External Reference Pricing in Medicare Part D to Reduce Drug Price Differentials With Other Countries*, 5 HEALTH AFF. 38 (2019); Tim Wu, *How to Stop Drug Price Gouging*, N.Y. TIMES (Apr. 20, 2017), <https://www.nytimes.com/2017/04/20/opinion/how-to-stop-drug-price-gouging.html>; Charles Silver & David A. Hyman, *Here’s a Plan to Fight High Drug Prices That Could Unite Libertarians and Socialists*, VOX (Jun. 21, 2018), <https://www.vox.com/the-big-idea/2018/6/21/17486128/prescription-drug-prices-monopolies-epipen-shkreli-sanders-patents-prizes>; Juliette Cubanski & Tricia Neuman, *Searching for Savings in Medicare Drug Price Negotiations*, Henry J. Kaiser Family Foundation (Apr. 26, 2018).