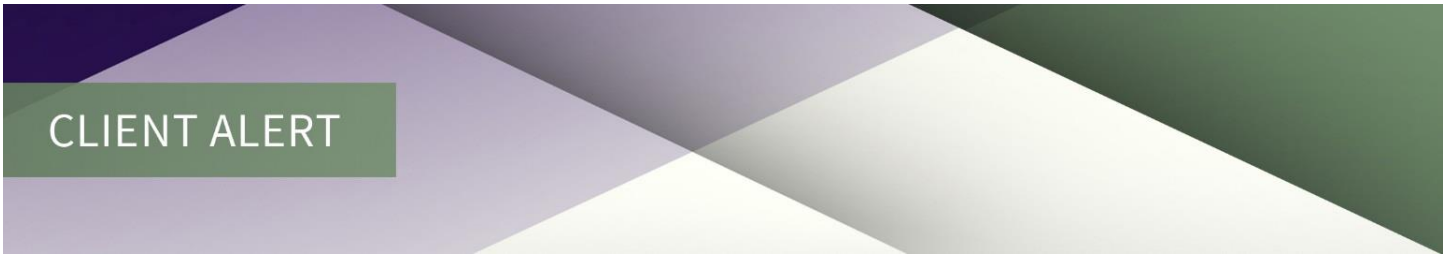


# Pharma as the Test Case for a New Antitrust: Multinational Pharma Merger Task Force Requests Public Comments on New Theories of Antitrust Harm

May 18, 2021

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In our March Client Alert, we reported the launch of a new cross-border, multiagency working group to review and update the approach employed by antitrust and competition agencies when analyzing pharmaceutical mergers.[1] Now officially called the "Multilateral Pharmaceutical Merger Task Force" ("Task Force"), the group consists of major antitrust agencies in North America and Europe, and its stated purpose is to identify new or refreshed theories of competitive harm for pharma mergers.[2]

Some, however, see the Task Force as a paradigm for the development of the new antitrust policy that has been so frequently debated in the United States and Europe, particularly in the context of high tech, networks, and platforms.

1 Client Alert, Willkie Farr & Gallagher LLC, Increased Antitrust Scrutiny of Pharma Deal (Mar. 19, 2021), here.

2 The group consists of the U.S. Federal Trade Commission, the U.S. Department of Justice, the European Commission's Directorate General for Competition, the Canadian Competition Bureau, the UK's Competition and Markets Authority, and Offices of State Attorneys General.

The Task Force has requested comments from the public on all issues concerning pharmaceutical mergers, including theories of harm, the role of innovation, market definition, and remedies. The public comment period is open only through June 25, 2021, and seeks input on the following seven issues:[3]

1. What theories of harm should enforcement agencies consider when evaluating pharmaceutical mergers, including theories of harm beyond those currently considered?

2. What is the full range of a pharmaceutical merger's effects on innovation? What challenges arise when mergers involve proprietary drug discovery and manufacturing platforms?

3. In pharmaceutical merger review, how should we consider the risks or effects of conduct such as price setting practices, reverse payments, and other ways in which pharmaceutical companies respond to or rely on regulatory processes?

4. How should we approach market definition in pharmaceutical mergers, and how is that implicated by new or evolving theories of harm?

5. What evidence may be relevant or necessary to assess, and if applicable, challenge a pharmaceutical merger based on any new or expanded theories of harm?

6. What types of remedies would work in the cases to which those theories are applied?

7. What factors, such as the scope of assets and characteristics of divestiture buyers, influence the likelihood and success of pharmaceutical divestitures to resolve competitive concerns?

The importance of this public consultation cannot be overstated. Its outcome will provide the basis for the Task Force's likely stricter scrutiny of pharma mergers and perhaps allegedly anticompetitive practices in the pharma industry as well. And, as noted, the theories of harm developed by the Task Force could be translated to other industries, particularly in innovation-driven markets, accomplishing an expansion of antitrust enforcement across North America and Europe.

Our global antitrust team is ready to assist you in preparing comments on any of the issues noted above, either with attribution to your company or anonymously. Comments need not be extensive or cover all questions posed. Clients may wish to prepare comments internally or with the assistance of counsel.

In either case, industry input is crucial to inform the agencies of pharmaceutical business realities and to remain a part of the regulatory dialogue that will underlie the next generation of antitrust enforcement.

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[3] The official notice of the public consultation is available on the website of the U.S. Federal Trade Commission.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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