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 AbbVie/Allergan
Commission File No. 191-0169
May 5, 2020

Today, the Commission proposes a consent agreement with AbbVie and Allergan to settle claims that the parties' pending merger will substantially lessen competition in three relevant markets: (1) drugs for the treatment of exocrine pancreatic insufficiency, a condition that makes it impossible to digest food properly; (2) Interleukin-23 ("IL-23") inhibitors for the treatment of moderate-to-severe Crohn's disease; and (3) IL-23 inhibitors for the treatment of moderate-to-severe ulcerative colitis. AbbVie's $63 billion acquisition of Allergan—a merger of two of the largest pharmaceutical companies in the world, both of which have previously been the subject of allegations of anticompetitive conduct—has rightfully garnered substantial public attention. Commission staff painstakingly reviewed and analyzed large volumes of information, and I commend them for their work on this investigation, especially in light of the challenging and unprecedented circumstances of the past several months. As I have said in the past, however, I remain concerned about the Commission's approach to pharmaceutical mergers. In this case specifically, I do not believe the proposed settlement adequately remedies a range of competitive issues that this acquisition poses. I share the concerns Commissioner Chopra has articulated in detail about the proposed divestitures and the absence of meaningful benefits to consumers, and I write separately only to add a few additional thoughts on the question of innovation harms.

Analysis of the effects of a merger on innovation is a standard practice for the Commission in all merger matters, and I think that it deserves particularly substantial and vigorous investigation when it comes to transactions between pharmaceutical companies. At a time when we are all enduring increasingly difficult news about family members, friends, and neighbors near and far with serious health concerns because of the global coronavirus pandemic, we are keenly aware of the need for companies to innovate by creating and manufacturing products for testing, prevention, and treatment. As pharmaceutical companies frequently cite the need to invest in research and development to justify exorbitant drug prices,[1] innovation consequences of pharmaceutical mergers merit particular scrutiny.

Vigorous enforcement of the antitrust laws helps protect and promote the competitive environment that supports strong incentives for research and development and leads to greater

[1] Yoni Blumberg, *Here's why many prescription drugs in the US cost so much—and it's not innovation or improvement*, CNBC (Jan. 14, 2019), https://www.cnbc.com/2019/01/10/why-prescription-drugs-in-the-us-cost-so-much.html.

innovation.[2] Innovation also helps lead to better outcomes for consumers in the form of lower prices, higher quality, and more choices. Thus, 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.

The explicit inclusion of a section on innovation effects in the 2010 Horizontal Merger Guidelines was a significant step in formalizing the recognition that a merger could harm innovation.[3] Since the 2010 Guidelines, the Commission has brought several cases that include allegations of harm to innovation.[4] To conduct a thorough analysis of innovation competition, it is essential to seek both past evidence of innovation in an industry, but also information about what parties and other stakeholders in the industry predict about future competition. When considering the competitive effects on innovation, we must be particularly mindful of Section 7's instructing us to prevent monopolies and oligopolies in their "incipiency" and the Supreme Court's emphasis that the Clayton Act deals with "probabilities, not certainties."[5]

More importantly, the Commission must seek to gather this kind of evidence at the earliest stage possible in an investigation and from the most relevant sources possible to ensure the most thorough record. In addition, we need to cast a broad net for third parties and other industry participants to consult. In this case, staff deserves credit for its consideration of and investigation into the transaction's effect on the parties' research and development programs and investments, as well as on innovation competition that was more in-depth than what I have seen in previous pharmaceutical mergers.[6]

Nevertheless, I am concerned that the initial scope of the investigation curtailed the Commission's ability to obtain and consider all relevant evidence. For example, crucial pieces of evidence should be made available early in the investigation and pursuant to a Second Request. Because Second Requests are enforceable in court for a party's lack of substantial compliance, information produced under that process provides the Commission with a materially different level of confidence that it has received the relevant information needed to determine whether a transaction is likely to harm competition. Furthermore, in these types of cases, it is incumbent on the Commission to seek and on parties to produce evidence from the individuals best positioned to understand the scientific significance of particular research and development projects, as well

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[2] *See* Giulio Federico, Fiona Scott Morton & Carl Shapiro, *Antitrust and Innovation: Welcoming and Protecting Disruption*, Innovation Pol'y & Econ. 125, 26 (2019), http://faculty.haas.berkeley.edu/shapiro/disruption.pdf.
[3] *See* U.S Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 6.4 (2010).
[4] *See, e.g.*, *In the Matter of Altria Group/JUUL Labs*, Docket No. 9393 (Apr. 1, 2020); *In the Matter of Illumina Inc./Pacific Biosciences of California, Inc.*, Docket No. 9387 (Dec. 12, 2019); *In the Matter of CDK Global and Auto/Mate*, Docket No. 9382 (Mar. 20, 2018); *In the Matter of Verisk/EagleView*, Docket No. 9363 (Dec. 16, 2014); *FTC v. Steris Corporation*, No. 15-cv-1080, (N.D. Ohio Sept. 24, 2015).
[5] *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962).
[6] *See Dissenting Statement of Commissioner Rebecca Kelly Slaughter In the Matter of Bristol-Myers Squibb and Celgene*, Fed. Trade Comm'n (Nov. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1554283/17_-_final_rks_bms-celgene_statement.pdf; *Closing Remarks of Commissioner Rebecca Kelly Slaughter*, FTC Hearing #4: Innovation and Intellectual Property (Oct. 24, 2018), https://www.ftc.gov/system/files/documents/public_statements/1418279/slaughter_-_closing_remarks_at_ip_innovation_hearing_10-24-18.pdf.

as contemporaneous evidence that was generated at the time and not documents created in anticipation of an agency challenge.

Based on my review of the record before the Commission, and in light of AbbVie's public representations about its plans to curtail Allergan's ongoing research programs,[7] I cannot share the majority's confidence that the innovation effects of this merger are competitively benign.

I appreciate that the investigative analysis in this case on the question of innovation harms is movement in the right direction. Going forward, however, I hope our investigations will address these issues more comprehensively at the very start of an investigation.

[7] Eric Sagonowsky, *AbbVie, nearing the end of Humira's historic run, scoops up a struggling Allergan for $63B*, FiercePharma (June 25, 2019), https://www.fiercepharma.com/pharma/no-allergan-split-abbvie-buys-struggling-drugmaker-for-63b.