



Office of Commissioner
Rohit Chopra

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

STATEMENT OF COMMISSIONER ROHIT CHOPRA JOINED BY COMMISSIONER REBECCA KELLY SLAUGHTER

*In the Matter of Pfizer Inc. / Mylan N.V.
Commission File No. 1910182
October 30, 2020*

Summary

- The FTC's record when it comes to reviewing pharmaceutical mergers suggests that the agency will simply never seek to block a merger. Instead, the agency's approach is to strike narrow settlements. This encourages market actors to propose even more unlawful mergers.
- Both Pfizer and Mylan have been accused of collusion in the generic drug business. We must assess whether this merger will enhance their ability to conspire and collude.
- Rajiv Malik, who will be president of the merged entity, is currently a defendant charged with antitrust misconduct. The Commission's silence about his role is deeply problematic.

Drug prices are out of control, and in too many instances, are out of reach for patients who depend on them. Competition from generic drugs pushes down high prices. That's why it's critical to combat abuse of intellectual property that allows branded drug makers to block generic entry. But we should also be deeply concerned that patients can't reap the full benefits from generic competition, given the alleged collusion in the generic drug industry to drive up prices. Any investigation of massive mergers in the generic business must take this into account.

Today, the Federal Trade Commission has voted to settle allegations that Mylan's (NASDAQ: MYL) proposed \$12 billion acquisition of Pfizer's (NYSE: PFE) generic drug business is unlawful.¹ The combined firm would become the largest generic pharmaceutical firm in the world and offer approximately 3,000 drug products that treat a broad range of diseases and conditions.² The FTC's proposed settlement requires divestiture of seven individual products, as well as other provisions.

¹ Pfizer, Press Release, Mylan and Upjohn, a Division of Pfizer, to Combine, Creating a New Champion for Global Health Uniquely Positioned to Fulfill the World's Need for Medicine (July 29, 2019, 2:45AM), https://www.pfizer.com/news/press-release/press-release-detail/mylan_and_upjohn_a_division_of_pfizer_to_combine_creating_a_new_champion_for_global_health_uniquely_positioned_to_fulfill_the_world_s_need_for_medicine.

² See Mylan & Upjohn Investor Presentation, A New Champion for Global Health at 17 (July 29, 2019), <https://www.championforglobalhealth.com/-/media/championforglobalhealth/pdf/mylanupjohninvestorpresentation072919.pdf>; see also Mylan & Upjohn Fact Sheet, A New Champion for Global Health (n.d.a.), <https://www.championforglobalhealth.com/-/media/championforglobalhealth/pdf/MylanUpjohnFactsheet072919.pdf>.

When it comes to pharmaceutical mergers, I am unable to identify a single instance in recent history where the agency has filed a complaint in federal court seeking to halt a prescription drug company merger. This lack of litigation creates the strong impression that the FTC simply looks to strike settlement deals involving individual product divestitures. Virtually every market participant I have spoken to in this industry believes that there is simply no risk of the FTC blocking an unlawful pharmaceutical merger outright.

I respectfully disagree with the status quo approach the Commission applied to this pharmaceutical merger. The use here is especially concerning, since both firms and two of Mylan's top executives have been accused of a wide-ranging price fixing and market allocation conspiracy in the generic drug industry.³ With an expanded empire of generic drug products, these alleged antitrust crimes may be even easier to perpetrate by the new entity.⁴

In this statement, I focus on how mergers involving companies competing across a large number of product lines can exacerbate the risk of collusive conspiracies, particularly in industries where middlemen may not have an incentive to keep prices low.⁵ I also focus on issues we must always confront. For example, the Commission should always look to testimony from top executives at companies proposing to merge in order to fully understand the range of potential effects on competition. The Commission can only make a conclusion about the risk of collusion and any impacts on competition when it has a full range of data and evidence.

Conditions for Collusion

When competitors enter into agreements to fix prices, rig bids, and divvy up markets, they can face civil and criminal charges. Pfizer and Mylan are defendants in several state attorneys general and private plaintiff lawsuits alleging market allocation and price fixing in the generic drug industry.⁶ They are also under investigation for criminal market allocation and price fixing by the Department of Justice.⁷ Over thirty additional generic drug companies are defendants in the same state attorneys general suits, including well-known drug firms Sandoz, Actavis, Teva, and Allergan, among others. Patients have allegedly paid many billions of dollars in overcharges for the generic drugs involved, causing a significant negative impact on our national health and economy.⁸

³ See Compl., *Connecticut v. Teva Pharms. USA, Inc.*, Case No. 3:19-cv-00710 (D. Conn. filed May 10, 2019) ¶ 50; *In re Generic Pharms. Pricing Antitrust Litig.* ¶ 34, Civ. Action No. 17-3768 (E.D. Pa. filed June 15, 2018).

⁴ The Department of Justice also charged Teva with criminally conspiring to fix prices, rig bids, and allocate customers for generic drugs. Five previous corporate cases were resolved by deferred prosecution agreements; Teva and its co-conspirator Glenmark are awaiting trial. Four executives have also been charged; three have entered guilty pleas, and one is awaiting trial. See Press Release, Dep't. of Just., *Seventh Generic Drug Manufacturer Is Charged In Ongoing Criminal Antitrust Investigation* (Aug. 25, 2020), <https://www.justice.gov/opa/pr/seventh-generic-drug-manufacturer-charged-ongoing-criminal-antitrust-investigation>.

⁵ Most generic drugs are sold by their manufacturers to group purchasing organizations and large retail purchasers, who negotiate pricing contracts for their members that ultimately purchase the products. These contracts typically have inflation-based provisions that allow for potentially greater compensation when prices are higher. See *In re Generic Pharms. Pricing Antitrust Litig.* ¶ 74.

⁶ See e.g., Pl. States' Consol. Am. Compl., *In re Generic Pharms. Pricing Antitrust Litig.*; Compl., *Connecticut v. Teva Pharms.*; Compl., *Connecticut v. Sandoz, Inc.*, Civ. Action No. 3:20-cv-802 (D. Conn. filed June 10, 2020).

⁷ See Pfizer Inc., Current Report (Form 8-K) (Aug. 6, 2020) at 175; Mylan N.V., Annual Report (Form 10-K) (Dec. 31, 2019) at 153.

⁸ Compl., *Connecticut v. Teva Pharms. USA, Inc.* ¶ 5.

Typically, collusion is easier to pull off when a market has only a few big players, since coordination is more difficult with more actors.⁹ However, there are many generic drug companies that operate in the United States. So why might there be widespread misconduct?

One potential explanation is that these companies compete with each other in multiple different product markets. The enormous profit potential for these firms from collusion likely contributes to their incentives to engage in mutually beneficial coordination. By trading favorable competitive terms in one market for favorable competitive terms in another market, it may be easier for competing firms to reach mutually beneficial terms of trade and punish each other for any deviations.¹⁰

Pfizer and Mylan allegedly did just that.¹¹ In addition to colluding within individual generic drug product markets, Pfizer's Greenstone division, Mylan, and others are charged with trading customers across *different* drug markets.¹² They allegedly allowed price increases on generic drugs without competing, based on a quid pro quo from competitors on different drug products.¹³ Given these allegations, it is important that we closely investigate how this transaction could increase the ability of the merged entity to engage in similar – or even more harmful – collusive conduct.

For example, the merged entity would become the top supplier of generic drugs by global revenues, with an enormous number of products and a broad range of competitors with which to engage in quid pro quo collusive arrangements.¹⁴ With more generic drugs in the hands of one competitor, it may be easier to form a cartel and punish those who don't adhere to its terms. Despite this risk, the Commission's analysis is silent with respect to the alleged price fixing conduct.¹⁵

The FTC often acts without the benefit of the experience of other law enforcement partners.¹⁶ In all matters the Commission should avoid a go-it-alone approach and collaborate with other agencies to help shed light on the mechanisms involved in the allegations. Together, we should closely assess whether the likelihood of harm increases post-merger.

⁹ This concept is reflected in the FTC's Horizontal Merger Guidelines. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 7.2 (Aug. 19, 2010), <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf>.

¹⁰ See Federico Ciliberto & Jonathan W. Williams, *Does multimarket contact facilitate tacit collusion? Inference on conduct parameters in the airline industry*, 45 RAND J. OF ECON. 764 – 791 (2014) (noting that such multimarket contact facilitates tacit collusion in the U.S. airline industry).

¹¹ Compl., *In re Generic Pharms. Pricing Antitrust Litig.* ¶¶ 103 – 105 (describing Defendant Malik's willingness to "play fair" and give up two large customers to Heritage because Heritage had previously allowed Mylan to enter another market without competition); see also Compl., *Connecticut v. Sandoz, Inc.* ¶ 1299.

¹² *Id.*

¹³ Compl., *In re Generic Pharms. Pricing Antitrust Litig.* ¶ 101; see also Compl., *Connecticut v. Teva Pharms* ¶ 12.

¹⁴ Beth Snyder Bulik, *Mylan and Pfizer roll out tricolor branding for their giant generics combo, Viatrix*, FIERCEPHARMA (July 9, 2020, 10:06 AM), <https://www.fiercepharma.com/marketing/mylan-and-pfizer-debuts-new-viatrix-generics-merged-brand-unveils-tri-color-logo-for>.

¹⁵ See, e.g., Analysis Of Agreement Containing Consent Orders To Aid Public Comment, *In the Matter of Pfizer Inc./Mylan N.V.*, File No. 1910182 (Oct. 29, 2020).

¹⁶ See Statement of Commissioner Rohit Chopra In the Matter of AbbVie, Inc./Allergan plc, Comm'n File No. 1910169, 2, 19 (May 5, 2020), https://www.ftc.gov/system/files/documents/public_statements/1574583/191-0169_dissenting_statement_of_commissioner_rohit_chopra_in_the_matter_of_abbvie-allergan_redacted.pdf; see also Statement of Commissioner Rohit Chopra In the Matter of Social Finance, Inc., Comm'n File No. 1623917 (Oct. 29, 2018), https://www.ftc.gov/system/files/documents/public_statements/1418711/162_3197_statement_of_commissioner_chopra_on_sofi_10-29-18.pdf.

Investigating Executives

In any matter where a company has a history of potential wrongdoing, a key method to determine the motivations for a merger and to predict how it will affect competition is to seek sworn testimony from key executives. This is especially critical to understand how sales, pricing, and market forces are working. This evidence is also helpful if the agency must prepare a lawsuit.

While filings submitted by merging parties shed light on many aspects of a transaction, they do not always provide a complete picture of the deal rationale, pricing models, and boardroom behavior. The state allegations of price fixing and market allocation make clear that individual executives play a key role in sales and price setting, so it is critical that we fully understand this element of the competitive process.

For example, what is their involvement in developing a pricing model? Do they approve deviations from this pricing model? How do they decide which new markets to enter? In what contexts do they interact with their competitors? There are a long list of questions that are absolutely essential in an inquiry like this.

In this transaction, one of the alleged masterminds of the ongoing price fixing and market allocation schemes is Rajiv Malik, Mylan's current president, who is a named defendant in one of the state lawsuits.¹⁷ A second Mylan executive, Vice President of Sales James Nesta, is also a named defendant in one of the cases.¹⁸ The merging parties have publicly announced that Mr. Malik will retain the top executive role in the expanded generic drug empire, if the transaction closes.¹⁹ As president, he will be in charge of the merged entity's sales and marketing operations.²⁰ He will also serve on the merged company's board.²¹

Mr. Malik's role in the alleged price fixing scheme is significant. He allegedly conceived and directed many of the schemes.²² In one example, he is alleged to have agreed to cede market share in one market to a specific competitor in exchange for an agreement from that competitor to allow Mylan to enter a different market without competition.²³

Despite the obvious alarm bells raised by Mr. Malik's planned role in the merged firm, the Commission's analysis does not discuss his involvement in the ongoing price fixing and market allocation allegations in the industry or his future plans for the company. In my view, the Commission owes the public a clear explanation about Mr. Malik's role.

¹⁷ Compl., *In re Generic Pharms. Pricing Antitrust Litig.* ¶ 34.

¹⁸ See Compl., *Connecticut v. Teva Pharms. USA, Inc.* ¶ 50.

¹⁹ See Pfizer Press Release, *supra* note 1.

²⁰ Compl., *In re Generic Pharms. Pricing Antitrust Litig.* ¶ 34.

²¹ See Pfizer Press Release, *supra* note 1.

²² Compl., *In re Generic Pharms. Pricing Antitrust Litig.* ¶ 10.

²³ *Id.* ¶ 188.

In matters like this, it is critical that the Commission rely on a wide range of data and evidence, including testimony from key executives.²⁴

Conclusion

I am concerned that executives in the pharmaceutical industry routinely propose anticompetitive mergers without any fear that their transactions will ever be blocked. In my view, the status quo approach of seeking settlements through divestitures of individual products is myopic and misses some of the fundamental elements of how firms compete in this industry. I am also not aware of any instance where the Commission publicly relied on the testimony under oath of a pharmaceutical executive in approving a pharmaceutical divestiture settlement.

Unless we change our approach, anticompetitive mergers in the pharmaceutical industry will continue unabated, and we will all suffer for it. I appreciate the diligence of our staff, who work at the direction of the Commission. Unfortunately, the directives of the Commission are deeply flawed, favoring routine over rigor. For all these reasons, I respectfully dissent.

²⁴ This is particularly important in industries where the Commission cannot rely on evidence and testimony from customers who act as middlemen. We know from the allegations in the state attorneys general lawsuits that drug wholesalers and large retailers allegedly benefit when generic drug prices are higher. These firms have contractual provisions allowing for potentially greater compensation when prices are higher. *Id.* ¶¶ 71 – 75.