



Antitrust and Competition: Enforcement scrutiny of M&A and licensing deals in the U.S. and EU focus on “excessive pricing” expected

ANTITRUST AND COMPETITION TRENDS:



Enforcement actions and investigations are likely to accelerate in relation to M&A and pricing and distribution.



More “excessive pricing” cases are expected to be brought in the life sciences sector.



International cooperation on life sciences deals between national antitrust agencies will likely increase.



We have recently seen heightened enforcement against life sciences companies. Far from dying down, this enforcement activity is likely to accelerate over the coming year. National antitrust regulators such as the U.S. Federal Trade Commission (FTC) and the UK Competition and Markets Authority (CMA) will likely increase their activity, particularly in relation to M&A transactions and pricing and distribution practices.

Life sciences companies should therefore expect to see more conduct investigations and lengthier, more intrusive M&A reviews. In multi-company situations, such as M&A and IP licensing, these are likely to put stress on the allocation of regulatory risk and complicate the ability of the parties to reach agreement.

In Europe, more life sciences M&A deals involving high-value but low-(or pre-) revenue targets may be referred to the European Commission. The Commission may also pursue additional “excessive pricing” cases in the life sciences sector. At a transatlantic level, cooperation and exchanges of information between national antitrust agencies on life sciences deals are likely to increase throughout 2022. This follows the move in March 2021 by the Competition Bureau Canada, the FTC, the U.S. Department of Justice, the CMA, and the European Commission to create a multilateral working group that analyzes the effects of mergers in the pharmaceutical sector.

These developments will create particular opportunities for investors in the M&A area. First, antitrust considerations may give financial investors an advantage if they have a limited existing footprint in a particular product. Second, the risk associated with antitrust considerations has value. In any given transaction, whichever party is able to more accurately assess the risk will be able to pocket a disproportionate share of the value. Third, M&A deals in the life sciences sector are perhaps more likely to be approved only conditionally (or subject to consent decrees). Therefore, forced divestments of products or pipeline products will create opportunities for potential buyers of the assets to be divested.

ANTITRUST AND COMPETITION TIPS:

- Life sciences companies should identify any corporate practice that could be vulnerable to antitrust laws, determine whether the exposure for this specific practice has the potential to be severe, and look for resources to mitigate the risk.
- For example, in the M&A area, life sciences companies should determine early in the process whether a transaction presents any material risk of extended investigation or possible intervention. Then, unless the counterparty is prepared to assume all risk, the company may want to consider a detailed antitrust review.
- Life sciences companies should ensure that compliance, training, and document management policies and procedures are up to date and reflect the increased enforcement focus on pricing and distribution issues. These good practices should continue in the M&A evaluation phase.

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