

THE GLOBAL ANTITRUST ECONOMICS CONFERENCE

Friday, May 31, 2019 - New York University Stern School of Business

PRESS REPORTS

Reports by Global Competition Review©

Phillips touts activist investment against private equity and common ownership concerns by Pallavi Guniganti

Competition to control companies is a useful aspect of private equity investment and can counter worries that shareholders who own stakes across a sector enable companies to compete less vigorously, a member of the Federal Trade Commission has said.

Speaking today in New York, Commissioner Noah Phillips emphasised the potential for investors or companies that do not compete directly with an acquisition target – “be they potential competitors, startups, or private equity, or other buyers specialising in firm management” – to act as alternatives to overtly problematic mergers of horizontal rivals.

The Republican appointee did not call out Democratic commissioner Rohit Chopra by name in his speech. But Phillips’s remarks clearly contrast with concerns that Chopra has repeatedly raised about the role of private equity in the economy.

Last year, Chopra [blamed](#) reduced competition in the financial sector partly on the decline in companies trading in the public markets, as capital has moved into private pools such as private equity and hedge funds. He said private equity funds often take a controlling interest in a company, change its strategy and exit the investment by selling to a competing company.

Chopra claimed many private equity funds manage companies for the fund’s near-term profit, by cutting output that is not sufficiently profitable and adding debt. He also suggested that “the unique incentives structure of private equity funds means we may need to ask additional

questions to determine whether or not they are suitable buyers” for assets divested as a condition of merger approval.

“While private equity funds can theoretically create the conditions for a long-term turnaround of the company, their strategies may not necessarily require that the acquired business actually stay in business,” Chopra warned. He has since criticised private equity involvement in dissenting from the FTC’s clearances of [Staples/Essendant](#) and [Linde/Praxair](#).

FTC chair Joseph Simons has [defended](#) private equity, saying that such buyers “can be very effective in providing both financing and management expertise. There are some really large, well run, well-financed, private equity firms and those, in particular, I would not want to keep out of the process” for mergers and divestitures.

Phillips today also spoke of private equity as a potentially positive force in competition – both the competition for corporate control, and in the effects for consumers.

“Adopting a categorical rule that deems certain kinds of buyers as bad for antitrust purposes would be itself anticompetitive,” he said. “It would undermine this competition to better run firms – competition that, in turn, has real consumer benefits; competition that can, also, cut firms down to size.”

Limiting the pool of potential buyers reduces the likely sale price of a company and decreases company founders’ exit options, Phillips added, which may chill investment in and innovation by start-ups. Removing the threat of buyout by activist investors also “makes management more complacent, reducing their incentive to compete”.

Critics of common ownership – a single investor owning the major companies in a sector, such as airlines – have raised fears that company managers do not compete as vigorously when rival companies have the same owners. Phillips has been sceptical of this theory, but said that if one accepts it as true, this makes the role of activist investors competing for corporate control even more important.

Given the potential benefits of the market for corporate control – pushing companies to deconsolidate and lessen market concentration, increasing companies’ efficiency in ways that boost consumer welfare – “antitrust regulators should seek to foster its operation,” Phillips said. “We should look for opportunities to unleash the market forces that spur competition; and tread carefully with proposals that might inhibit it.”

Phillips made his remarks in the opening keynote address at the Global Antitrust and Economics conference, organised by Concurrences and hosted at New York University. The event ends today.

DG Comp official: invisible hand isn't working in pharma

by Pallavi Guniganti

Pharmaceutical investment incentives are better fueled by longer patent periods than by governments allowing drugmakers to block entry or charge excessive prices, a director at the European Commission's Directorate-General for Competition has said.

Paul Csiszár, head of DG Comp's directorate that oversees pharmaceuticals, said on Friday that the profits from opportunistic price hikes based on a lack of competition are not necessarily funneled into research and development.

He spoke on a panel alongside Bates White partner George Rozanski, who argued that if governments reduce the returns to investment – even after a drug's patent has expired – by attacking excessive prices, companies will invest less in innovation.

Rozanski noted a [study](#) published in 2015 that found the returns to investment for drugs launched from 2005 to 2009 were roughly equivalent to the cost of capital, which the study's authors suggested was insufficient to maintain investment incentives. This indicates an absence of excessive profits for the industry as a whole, Rozanski said.

Csiszár replied that if there is a correlation between opportunistic price hikes and the “funneling back to R&D, there's a much simpler way to deal with this: raise the patent exclusivity period.”

Big pharmaceutical companies should make the case that they are struggling for money to invest in innovation, even as they spend so much on advertising and marketing for prescription drugs, Csiszár said. “How do I know if they make more money on these product-hopping and other situations,” he asked, that more of the money would go to research and development instead of marketing?

“The simplest way is that you grant more patent rights to them,” he said.

Csiszár noted the EU courts in *AstraZeneca* [held](#) that dominant companies have the right to try to fend off competition from generic drugmakers. But the courts also said drugmakers cannot engage in conduct that has no business rationale other than to make generic entry more difficult.

He quoted the European Court of Justice's [ruling](#): “the preparation by an undertaking, even in a dominant position, of a strategy whose object it is to minimise the erosion of its sales and to enable it to deal with competition from generic products is legitimate and is part of the normal competitive process, provided that the conduct envisaged does not depart from practices coming within the scope of competition on the merits, which is such as to benefit consumers.”

In other words, Csiszár said, EU law evaluates conduct by whether it betters the quality of the drug or otherwise brings something to the consumer, or whether it has no purpose other than creating a barrier to competition.

Speaking at GCR Live Brussels in July 2017, Csiszár [emphasised](#) how rarely DG Comp brings excessive pricing cases. But at GCR Live Pharma earlier this year, he [insisted](#) on the agency's legislative mandate to do so, even as he acknowledged the difficulties of proving such cases.

Last Friday, Csiszár said competition authorities hardly ever use the laws against excessive pricing because they do not want to be price regulators. Yet with examples such as Martin Shkreli's company Daraprim still selling an off-patent drug for \$750 per pill, antitrust enforcers face a massive market and regulatory failure on generic drugs, he said, for which “the invisible hand is really stuck in the pocket.”

“This has become ideology, ‘the market will take care of it,’” Csiszár said. “Baloney!”

With regard to merger control, he said any fact pattern in a deal that would make more likely such a lack of entry in a market with inelastic demand would be an issue for DG Comp.

Csiszár and Rozanski spoke on a panel with Skadden Arps Slate Meagher & Flom partner Ingrid Vandendorpe, White & Case partner Jack Pace and Tel Aviv University law professor David Gilo, who [formerly](#) headed Israel's Antitrust Authority.

The discussion, which was moderated by Princeton University emeritus professor Robert Willig, was part of Concurrences' Global Antitrust Economics conference at New York University. The conference ended on Friday.

To read related articles, visit GCR's website.

Reports by MLex©

Rules barring certain types of buyers could harm competition, FTC's Phillips says by Leah Nysten

IN BRIEF

Antitrust agencies should avoid categorical rules that would prevent certain types of buyers from acquiring divestitures, a Republican Federal Trade Commission member said today. In remarks about the benefits of the market for corporate control, FTC Commissioner Noah Phillips appeared to reject calls by one of his fellow commissioners to more heavily scrutinize private equity buyers.

Antitrust agencies should avoid categorical rules that would prevent certain types of buyers from acquiring divestitures, a Republican Federal Trade Commission member said today.

“Competition to manage a firm is a real phenomenon underlying certain M&A strategies,” Commissioner Noah Phillips said at a conference* in New York. “Beneficial buyers might be those who are not current competitors, be they potential competitors, startups, or private equity or other buyers specializing in firm management. ... Adopting a categorical rule that deems certain kinds of buyers as ‘bad’ for antitrust purposes would be anticompetitive. It would undermine this competition to better run firms — competition that, in turn, has real consumer benefits; competition that can, also, cut firms down to size.”

Phillips’s comments, in a speech about the benefits of the market for corporate control, appeared to reject calls by one of his fellow commissioners, Democrat Rohit Chopra, to more heavily scrutinize private equity buyers.

In January, the FTC voted 3-2 to allow Staples’ planned purchase of Essendant. Staples is controlled by private equity fund Sycamore Partners. In a dissent, Chopra criticized the FTC for not investigating Sycamore’s plans post-purchase, noting that the private equity fund previously bought and then quickly resold dollar store assets divested as part of a deal reviewed by the FTC.

In his remarks today, Phillips said that the Staples-Essendant deal came about after Genuine Parts tried to merge its office supply wholesale distribution business, S.P. Richards, with Essendant, in what would have been a merger to monopoly.

“I’m not aware of anyone who believes the S.P. Richards deal — the horizontal version — was less anti-competitive” than the Staples-Essendant deal, he said. “In other words, market forces helped drive the realization of an almost certainly better deal from an antitrust perspective —

avoiding a deal between two primary, direct competitors that almost certainly would have raised far more significant competitive concerns. The market for corporate control was allowed to act, in concert with the antitrust laws, and it yielded greater consumer welfare.”

Phillips also warned that reducing the pool of buyers could have unintended consequences on innovation as startups often seek to be acquired.

“The vast majority of startups fail, and leading explanations include various managerial failings. Acquisition is a critical exit path for many or most that do not, the chilling of which will deter not only innovation but the investment pipeline on which that innovation depends,” Phillips said. “To preserve the innovation that has been critical to our economy’s growth over the last several decades, we need to be cognizant of these kinds of potential tradeoffs, and avoid chilling incentives to innovate unnecessarily or unintentionally.”

In response to a question about his views on private equity buyers, Phillips said he views them as an important aspect of the market.

"My view is that private equity is an important part of the M&A environment," he said**. "When we look at private equity buyers, we should scrutinize them for the same things that we scrutinize other folks. Are you going to stay in the business and be active? That’s an important consideration. We can look at a private equity shop and what their plans are and what they’ve done in the past. These are valid considerations. I think they need to be part of the pool."

* “The Global Antitrust Economics Conference 2019.” Concurrences and NYU Stern School of Business. New York. May 31, 2019.

** Updated on May 31, 2019 at 14:06 GMT: Adds additional comments from Phillips.

To read related articles, visit MLex’s website.