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R&D Impact May Be Key In Scrutiny Of Pfizer Oncology Deal

By **Chelsea Naso**

Law360, New York (August 23, 2016, 6:13 PM ET) -- U.S. pharmaceutical giant Pfizer's planned $14 billion acquisition of oncology biotech Medivation could sail through an antitrust review given their minimal product overlaps, unless regulators opt to heighten their focus on the deal's potential impact on research and development within the cancer treatment space, experts say.

The $81.50-per-share deal, announced Monday, stands to give Pfizer Inc. access to California-based Medivation Inc.'s prostate cancer drug Xtandi as well as its "promising" pipeline of late-stage oncology treatments, according to a statement.

The typical antitrust analysis — which goes market by market or, in the case of pharmaceutical companies, drug by drug — will likely yield few, if any, significant challenges for New York-headquartered Pfizer that can't be fixed with a minor divestiture.

However, the acquisition may spur hesitations amid regulators at the U.S. Department of Justice or Federal Trade Commission over the impact the deal could have on research and development and therefore innovation, especially given the increasingly strict and somewhat broad stance being taken in competition matters, noted George Hay, a Cornell Law School professor.

"They're both companies with an established track record of doing research on cancer. It seems conceivable that the agencies will say this is a place maybe to ... expand the aggressiveness of their approach toward mergers and not just look at single overlapping products, but look more broadly," Hay said.

There have been recent calls for antitrust regulators to keep innovation in mind when examining announced mergers, including a recent letter from a U.S. senator urging the DOJ and FTC to work together in their currently separate evaluations of two agrochemical megamergers.

Sen. Chuck Grassley, R-Iowa, who also serves as the chairman of the Senate Judiciary Committee, implored the agencies to compare notes and consider the bigger picture, especially as a third agrochemical megamerger is believed to be in the works. The brunt of his argument centers on the impact the deals would have on farmers and consumers, but also drums up questions about the impact on the development of new technology in the industry.

"I am concerned that further consolidation will diminish critical research and development initiatives, which drive innovation and technological advances in the industry," his letter reads.

That thinking can easily be applied to the pharmaceutical industry, where innovation is key to ensuring healthy competition and fair prices, Hay added. Pfizer itself touted Medivation's oncology pipeline as one of the benefits of the transaction, particularly two development stage standouts — talazoparib, an enzyme inhibitor for the treatment for BRCA-mutated breast cancer and potentially other tumors, and pidilizumab, an immuno-oncology drug for the treatment of large B-cell lymphoma and other blood cancers.

"Are we worried about shrinking the number of ... companies very actively trying to do research on cancer drugs? It seems to be conceivable that this will be the case where they say, 'We ought to take a look at this,'" Hay said.

A closer look at the potential impact on innovation that Pfizer's acquisition of Medivation could have is not necessarily a new idea, explained David H. Evans, a Kelley Drye & Warren LLP antitrust partner.

During the administration of former President Bill Clinton, the idea that innovation needed to be protected was featured in a handful of cases, Evans said. However, while they might play a role in the overall analysis, it's unlikely that such a concern would likely not account for the brunt of the investigation, he noted.

"They've not been the driver of a contested deal, and I doubt you would see the DOJ [or] FTC bringing a lawsuit based exclusively on innovation markets. You might see as part of a larger divestiture package the divestiture of some 'innovation-oriented' properties, whatever those are," Evans said.

"It's not enough that Medivation is a small, scrappy innovator who might get lost in the folds of Pfizer," he added. "They have to compete on some level with an identifiable product or functionality. 'Medivation could invent the cure for cancer if they are left independent' won't work."

Part of the reason challenges to the impact on innovation are secondary to the price impact is because it can be difficult to quantify.

"The reason is that it's easier to trace price, it's easier to figure out what's going on, but innovation in the long run is more important. The difficulty is that we don't know exactly how to determine innovation or what the effect of a merger on innovation would be," said Michael A. Carrier, an antitrust expert at Rutgers University School of Law. "My sense is that if innovation does play a role in mergers, it's more of a secondary role."

Pfizer said Monday it expects the deal to close during the second half of 2016.

Pfizer is being advised by Ropes & Gray LLP, while Guggenheim Securities and Centerview Partners are serving as financial advisers.

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--Editing by Katherine Rautenberg and Philip Shea.