

# Antitrust and Competition: Trends in US and EU Merger Enforcement

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## Contributing Partner

**Maria Raptis**  
New York

## European Counsel

**Thorsten C. Goetz**  
Frankfurt

## Associates

**Athanasia Gavala**  
Brussels

**Joseph M. Rancour**  
Washington, D.C.

**Amaury S. Sibon**  
Brussels

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Four Times Square  
New York, NY 10036  
212.735.3000

[skadden.com](http://skadden.com)

Merger activity in 2015 was at its highest level in years, and competition authorities in the U.S. and European Union continued to be very aggressive, challenging a number of high-profile deals in court and causing some parties to abandon their transactions rather than litigate. The authorities are poised to remain active in 2016, and the agencies' recent string of successes ensures that merging companies can expect an aggressive approach to deals with competition issues. Merger parties also should be aware of anti-trust enforcers' preference for an "upfront buyer" in any proposed merger remedy. U.S. agencies, particularly the Federal Trade Commission (FTC), regularly require upfront buyers, and in recent years, the European Commission (Commission) has increasingly sought upfront buyer commitments.

## Aggressive Enforcement and Litigation Success in M&A

### United States

In the U.S., the FTC and the Department of Justice Antitrust Division (DOJ) successfully opposed several transactions in 2015 and continue to pursue enforcement actions against mergers in concentrated markets.

Over the past several years, the U.S. agencies have required upfront buyers in nearly two-thirds of divestitures, and an increasing number of conditional approvals in the EU have contained an upfront buyer commitment.

**Comcast/Time Warner Cable.** Comcast and Time Warner Cable (TWC) abandoned their proposed \$45 billion merger in April 2015 after facing opposition from the Federal Communications Commission (FCC) and DOJ based in part on concerns that the merger would make the combined company a "gatekeeper" for Internet-based services. The FCC staff recommended the FCC designate the merger for an administrative hearing, indicating apprehension over the transaction under the FCC's public interest standard, and the DOJ informed the two companies of its competition concerns, leading Comcast and TWC to abandon the deal. In the wake of the abandoned Comcast/TWC transaction and AT&T's failed attempt to acquire T-Mobile in 2011, merging

parties in industries requiring both antitrust and FCC approval need to give careful thought to the agencies' concurrent jurisdiction and how their parallel review can impact deal timing and outcome.

**Sysco Corp./US Foods.** The FTC secured a significant litigation victory in challenging Sysco Corp.'s proposed acquisition of US Foods. The FTC issued an administrative complaint and, along with a number of state attorneys general, sought a preliminary injunction in federal district court claiming that the merger would have combined the only two broadline food-service distributors equipped to serve large national customers. According to the FTC, the companies accounted for a combined market share of 75 percent in that market. Sysco and US Foods attempted to resolve competition concerns by entering into an agreement to divest 11 distribution centers to Performance Food Group, but the court found that the proposed remedy was insufficient to restore the potential loss to competition. The court issued a preliminary injunction, and the parties abandoned the transaction shortly thereafter.

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**General Electric/Electrolux.** The DOJ filed a complaint in federal court challenging General Electric's proposed acquisition by AB Electrolux. The DOJ alleged the transaction would combine the two leading suppliers of wall ovens, ranges and cooktops in the U.S. to so-called contract-channel purchasers. According to the complaint, contract-channel purchasers are homebuilders, property managers of apartments and condominiums, hotels and governmental entities that individually negotiate contracts for major cooking appliances with suppliers such as GE and Electrolux. The DOJ rejected settlement offers from Electrolux to sell assets to a third party, demonstrating the U.S. agencies' willingness to litigate when they believe a divestiture proposal would not fully address competition concerns. Four weeks after the trial began, GE terminated the transaction.

**Staples/Office Depot.** The FTC filed an administrative complaint challenging Staples' proposed \$6.3 billion acquisition of Office Depot. The complaint came 18 years after the FTC successfully sued to block the same parties' original merger attempt and alleges that the current Staples/Office Depot deal would violate antitrust laws by significantly reducing competition in the market for "the sale and distribution of consumable office supplies to large business-to-business customers in the United States." According to the FTC, these customers constitute a separate, relevant market distinct from the more competitive retail markets for office supplies sold to consumers.

## European Union

The EU Commission was similarly active in 2015.

**GE/Alstom.** Following a long and intensive investigation, the Commission approved GE's \$9.5 billion acquisition of Alstom's power and grid business, with remedies. The Commission was concerned that the transaction would have eliminated one of GE's main global competitors in the heavy-duty gas turbines market. The parties committed to divest Alstom's heavy-duty gas turbine business to Italy-based Ansaldo, including key personnel, upgrades, pipeline technology, and research and development.

**TeliaSonera/Telenor/JV.** Scandinavian telecom operators TeliaSonera and Telenor announced in September 2015 that they would abandon plans to combine mobile telecom operations in Denmark after the EU Commission raised competition concerns. The Commission said the transaction would have created the largest mobile network operator in Denmark, and the company would face insufficient competition from the remaining operators in the Danish markets. According to Commissioner for Competition Margrethe Vestager, the Commission would have prohibited the merger because the proposed remedies were deemed insufficient to address competition concerns. The abandonment of the transaction marks another successful intervention by the Commission in a series of telecom mergers in the past two years.

In a number of these mergers (Hutchison 3G UK/Telefonica Ireland, Telefonica Deutschland/E-Plus, Orange/Jazztel), the Commission obtained substantial remedies from the parties that eliminated competitive overlaps, strengthened the position of competitors and facilitated entry into national telecom markets.

## Convergence of US and EU Approach to Merger Remedies

Notwithstanding the number of cases litigated in 2015, most in-depth merger reviews ultimately are being resolved through settlement, usually by means of a divestiture. In the U.S., when the agencies have any concerns about the viability of a divestiture package, they are likely to require merging parties to identify an "upfront buyer" — a buyer with whom the merging parties have entered into a binding agreement for sale of the divestiture assets, and whom the authorities have approved. Over the past several years, the U.S. agencies have required upfront buyers in nearly two-thirds of divestitures.

There are indications that the EU approach to remedies is converging with U.S. methods. Over the past few years, an increasing number of conditional approvals in the EU have contained an upfront buyer commitment, despite statements from EU Commission officials that they remain the exception. Upfront solutions are particularly prevalent in Phase II investigations, which are more in-depth and only required if clearance isn't possible after an initial Phase I investigation. As of November 30, 2015, the Commission had used upfront buyer commitments in seven out of 12 Phase II conditional approvals made in 2014 and 2015, a substantial increase over prior years. A similar trend can be observed in relation to Phase I conditional approvals. Examples where upfront buyer remedies were used in 2015 include GE's acquisition of Alstom's energy business, which was approved in a Phase II decision subject to the divestiture of Alstom's heavy-duty gas turbines business, and NXP's proposed acquisition of Freescale, where the Commission conditioned Phase I approval of the transaction on NXP's divestiture of its leading radio frequency power transistors business.

Upfront buyer remedies are designed to incentivize the parties to implement the remedy within a short time frame after approval, lessening the risk that the assets being divested will deteriorate in the interim period. However, upfront buyer remedies create significant additional pressure on the parties, as they can extend the merger timeline while the authorities vet the divestiture buyer and test the buyer's ability and incentives to restore the competitive status quo. Greater remedy demands across jurisdictions mean that merging parties must consider the possibility of a divestiture that includes an upfront buyer as they negotiate transactions that may generate significant antitrust scrutiny.