

# 2015 ANTITRUST M&A YEAR IN REVIEW

2015 was a record-breaking year for global merger activity, with the highest recorded volume of announced transactions at over \$5 trillion, approximately half of which involved U.S. targets.\* The year was punctuated by three mega-deals valued at over \$100 billion: Pfizer/Allergan, Dow/DuPont, and Anheuser-Busch InBev/SABMiller.

Many of the major deals of 2015 are strategic plays, combining competitors to gain efficiencies, improve innovation and more effectively compete in changing regional and global markets. That means many of them present challenging competition issues for regulators in the U.S., Europe, and elsewhere.

By any measure, the agencies rose to the challenge and were extremely active in the merger enforcement arena. The Department of Justice (DOJ) Antitrust Division challenged five transactions, four of which were abandoned by the parties and one of which is pending. The Federal Trade Commission (FTC) challenged six transactions, four of which are pending. In addition, between the two U.S. agencies, numerous transactions were cleared only after the agencies imposed substantial divestitures and other remedies. And in Europe, Commissioner Vestager made her mark in her first year on a number of high-profile merger investigations.

Several important themes emerge from the agencies' record on merger enforcement in 2015.

First, the agencies are increasingly willing to block transactions that they consider harmful to nascent competitors and future innovation in dynamic markets. In April, DOJ, along with the FTC, blocked Comcast's \$45 billion attempt to acquire Time Warner Cable, based on concerns that the merger would make Comcast an "unavoidable gatekeeper" for emerging broadband internet services such as "over the top" streaming video services like Netflix. Similarly, DOJ worked closely with agencies in China, Korea and Europe to block the combination of Applied Materials and Tokyo Electron,

## NOTABLE CROWELL & MORING DEALS IN 2015

### AT&T's \$67 Billion Acquisition of DIRECTV

C&M was lead antitrust counsel for AT&T in this transaction which created a more competitive video/broadband provider. DOJ cleared with no conditions.

### Humana's Proposed \$37 Billion Merger with Aetna

C&M is representing Humana in connection with the antitrust review of its proposed merger with Aetna, which will combine two highly complementary health insurance providers in the U.S. DOJ review pending.

### United Technologies' \$9 Billion Sale of Sikorsky Aircraft to Lockheed Martin

C&M was lead antitrust counsel for UTC in connection with its divestiture of a leading helicopter manufacturer to a premier defense contractor. DOJ cleared in initial waiting period.

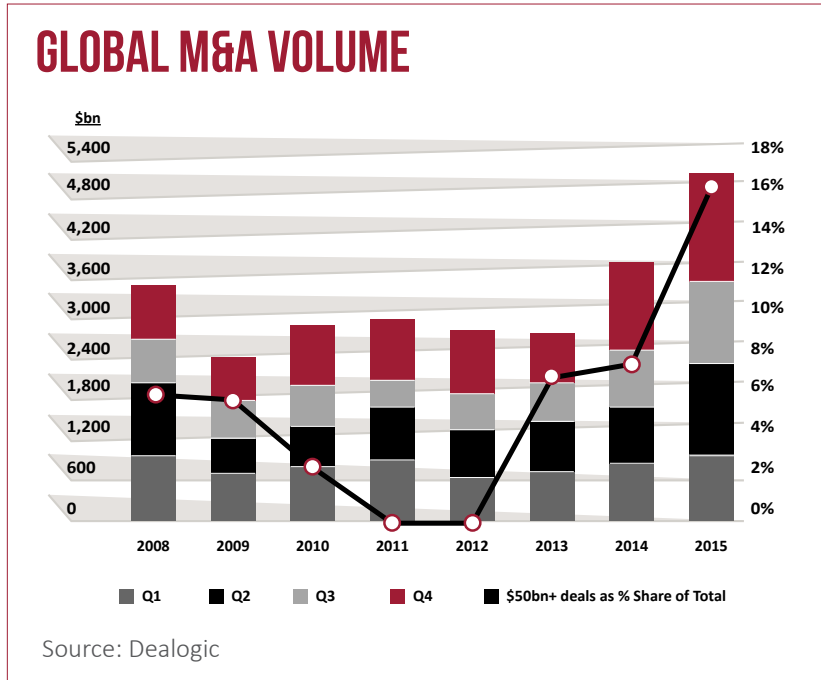
### Liberty Global's Acquisition of De Vijver Media

C&M's Brussels team assisted cable operator Liberty Global in this transaction, one of the first EU cases involving vertical integration between broadcasters and content distribution platforms. European Commission (EC) cleared after a Phase II investigation and commitments guaranteeing access to De Vijver Media's channels.

\*Source: Dealogic

based on concern not about current products but about potential harm to competition for future development of equipment for next-generation semiconductors.

By contrast, DOJ did not challenge or require remedies in AT&T's \$67 billion acquisition of DIRECTV, concluding that the combination of the parties' complementary internet and video businesses "will provide significant benefits to millions of subscribers." DOJ also did not challenge Expedia's acquisition of Orbitz after an extensive investigation, in part because "the online travel business is rapidly evolving."



A second theme is the agencies will closely scrutinize deals even where there is a track record of prior consolidation in those markets that has not been challenged. In other words, there is a tipping point at which the agencies view additional concentration as likely to harm competition, even if prior consolidation has not produced that effect. One notable example is the proposed acquisition of GE's home appliance business by Electrolux, which followed the Whirlpool/Maytag merger in 2006. Notwithstanding their argument that the prior merger proved that consolidation in the industry did not result in higher prices, Electrolux and GE abandoned their transaction in the middle of the preliminary injunction hearing. Similar issues may arise in four deals to watch in 2016: Staples/Office Depot (complaint filed by FTC

on Dec. 7); Anheuser-Busch InBev/SABMiller (DOJ review pending); and Aetna/Humana and Anthem/Cigna (DOJ reviews pending).

Third, the agencies have demanded increasingly broader remedies and strong divestiture buyers. For example, the FTC challenged the Staples/Office Depot merger after months of remedy negotiations with the parties. Similarly, DOJ reportedly has rejected several remedy proposals in its review of the Baker Hughes/Halliburton transaction. Notably, the agencies are far more likely to reject product-line carve outs or other narrow divestitures, and demand the sale of entire business entities to maintain the competitive status quo.

Regulators also appear to be increasing their scrutiny of divestiture buyers. Following several unsuccessful merger remedies, including the Hertz/Dollar Thrifty and Albertson's/Safeway transactions where divestiture buyers went bankrupt, the agencies are sharpening their focus to ensure that divestiture buyers will be robust and positioned to quickly replicate lost competition.

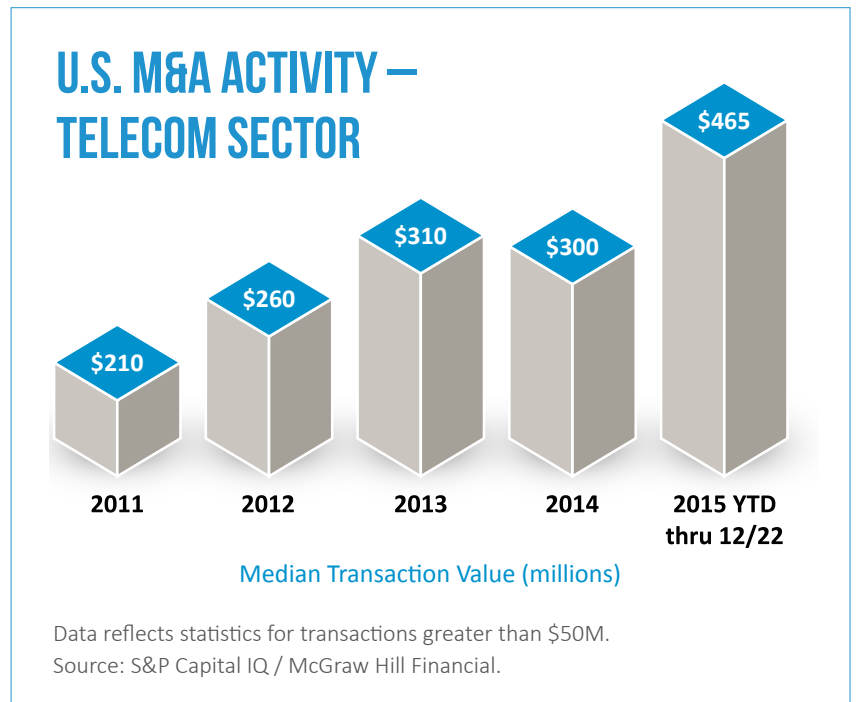
Finally, the agencies have demonstrated not only that they are willing to go to court to block deals viewed as harmful to competition, but have shown they can win those cases. In 2015, the FTC obtained a preliminary injunction blocking the merger of Sysco and US Foods, and the DOJ was mid-hearing in challenging the Electrolux/GE merger when the parties abandoned the transaction. The only defeat in the past year was an adverse decision against the FTC in its effort to block the Steris/Synergy Health transaction based on a potential competition theory, which failed as a matter of evidentiary proof (not theory).

If the announcements of additional mega-deals in late 2015 foreshadow what is to come, 2016, the last year of the Obama Administration with legacies in the making, may be yet another big year for antitrust merger enforcement. The agencies have proven that they are taking a very close look, will consider non-traditional theories of harm, are focusing more intensely on the adequacy of proposed remedies, and will challenge transactions that they view as potentially harmful.

# TELECOM

In 2015, the DOJ and Federal Communication Commission (FCC) reviewed two of the largest telecom deals in U.S. history: Comcast's \$45.2 billion proposed acquisition of Time Warner Cable, and AT&T's \$67 billion acquisition of DIRECTV. The regulatory paths of these deals went in starkly opposite directions.

The proposed Comcast/TWC transaction involved the combination of the two largest U.S. cable operators, but significantly they do not compete for customers in any overlapping geographic area. Regulators nevertheless were concerned about the fact that the combination would have created a company with the most broadband and video subscribers in the nation alongside the ownership of significant programming interests. As such, the agencies feared that Comcast/TWC would be able to harm emerging competition from new "over the top" video services, like Netflix, that are dependent on broadband distribution. DOJ concluded that the transaction would have made Comcast "an unavoidable gatekeeper" for such internet based services.



In contrast, the DOJ and FCC agreed that AT&T's proposed acquisition of DIRECTV would create "a more effective MVPD competitor, offering consumers greater choices at lower prices." Although there was some overlap in the areas in which both companies provided video service, the parties explained why neither had the assets necessary to effectively compete against the larger providers of broadband/video bundles. DIRECTV, as a direct-broadcast satellite provider, lacked broadband capabilities. And AT&T's video product was limited, and cost-disadvantaged, by its relatively small footprint and subscriber base.

The integration of cable and content providers was front and center in the EC's review of Belgian cable operator Telenet's proposed acquisition of TV broadcaster and production company De Vijver Media (DVM). This was one of the first times the EC analyzed the vertical integration of a cable operator with a distribution platform and a content provider. After a Phase II investigation to assess the risk of foreclosure at both the content and distribution levels, the Commission eventually approved the transaction subject to limited commitments regarding the licensing of DVM's channels to third parties on non-discriminatory terms.

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# HEALTH CARE

2015 marks five years since the passage of the Patient Protection and Affordable Care Act (ACA). With its goal of controlling health care costs while improving quality, ACA is prompting a shift toward value-and risk-based payment models, technology-based health care, and increased focus on primary and coordinated care.

These changes have spurred consolidation by both payors and providers, and corresponding scrutiny by the antitrust agencies. The head enforcers at both DOJ and FTC have reiterated that the goals of health care reform do not supplant competition policy, and the agencies will scrutinize transactions that threaten to harm competition. The review process will examine payor and provider claims that consolidation will lead to higher quality health care at more affordable prices for more consumers, as the agencies question whether transactions will raise prices or adversely affect quality.

- **Provider consolidation:** In early 2015, the Ninth Circuit upheld the FTC's and State of Idaho's challenge to St. Luke's Health System's consummated 2012 acquisition of Saltzer Medical Group, rejecting the parties' efficiencies arguments as not merger specific. As hospital and physician group transactions continued throughout the year, the FTC has remained vigilant, with recent challenges to hospital mergers in Pennsylvania, West Virginia, and Illinois, and settlements requiring remedies in other transactions.
- **Payor combinations:** The biggest headlines in 2015 were Aetna's proposed acquisition of Humana and Anthem's proposed acquisition of Cigna. The transactions, which are pending review by DOJ, have attracted attention due to their size, but the parties have emphasized that the mergers bring together companies with significant complementarity and potential to improve health care.
- **Health care services consolidation:** Companies providing critical services to the health care industry have consolidated as they have faced increasing marketplace challenges. The FTC has required remedies to clear several mergers in medical device industries involving overlapping products. By contrast, Cerner successfully acquired Siemens Health Services, based on the parties' evidence that the transaction would accelerate the introduction of next-generation health IT solutions.

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## U.S. M&A ACTIVITY — HEALTH CARE SECTOR

2011



2012



2013



2014



2015 YTD thru 12/22



### Median Transaction Value

Data reflects statistics for all announced U.S. healthcare transactions with disclosed value. Source: S&P Capital IQ / McGraw Hill Financial

# ENERGY

**[D]eal activity in the midstream segment dominates the statistics .... Analysts predict that 2016 may prove to be an even stronger year for midstream megadeals.**

Against a prolonged era of low commodity prices, energy companies are seeing a need for strategic alternatives to survive and thrive in a challenging market environment. Some deals in the producer segments, including upstream coal, natural gas, and oil companies, have moved forward but heavy exposure to commodity pricing has created headwinds for upstream deals in the capital markets. By contrast, deal activity in the midstream segment dominates the statistics. According to PwC, during the third quarter of 2015, 14 midstream deals accounted for over 70% of deal value in the oil and gas sector. Analysts predict that 2016 may prove to be an even stronger year for midstream megadeals.

Midstream deals are driven not only by the need for scale and synergies, but the desire for growth in returns to investors as U.S. production levels have declined. Some of the most high profile deals involve master limited partnerships that distribute most income to investors. More than 100 MLPs exist in the

energy infrastructure space, and serve as key growth vehicles for companies able to acquire strategic assets. Antitrust review of acquisitions of and by MLPs has become increasingly complex, as more transactions involve fractional ownership arrangements in which operating control is divorced from ownership interests and governance. Companies that aggressively pursue MLP strategies will benefit from stepped up due diligence on such issues to minimize the risk of investigations or delayed deal execution associated with merger reviews.

## INTELLECTUAL PROPERTY AND INNOVATION

The most recent Horizontal Merger Guidelines put innovation squarely at issue in merger analysis, and firms that compete in sectors where innovation and intellectual property drive the competitive dynamics must be prepared to respond to novel theories of harm to get the deal done. In 2015 Applied Materials and Tokyo Electron abandoned plans to merge their semiconductor manufacturing equipment businesses, which would have combined the two largest competitors with the necessary know-how, resources, and ability to develop such equipment.

Although the parties offered to divest overlapping products, DOJ rejected the proposed remedy because it would not restore competition with respect to R&D scale and resources required to continue the rapid advance of innovation in the industry. According to DOJ, “the proposed remedy would not have replaced the competition eliminated by the merger, particularly with respect to the development of equipment for next-generation semiconductors.”

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# EXPANDING INVOLVEMENT OF THIRD PARTIES

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Third parties – including competitors, customers, and participants in adjacent markets – have become increasingly active in the merger review process. Once viewed with great skepticism that third parties are driven by incentives to disrupt efficient consolidation or gain leverage for commercial reasons, the agencies now welcome third party involvement as a means to gain insight into market dynamics, learn the nuances of competition in complex, dynamic industries, and get access to documents and information to improve their analysis. However, third parties have to consider whether their goal

is to block the deal, influence the remedies imposed, or shape the agency’s view of market dynamics for the analysis of future deals, as well as whether their advocacy could have collateral legal or commercial risks.

Examples of 2015 deals in which third parties played pivotal roles:

- **Sysco/US Foods (FTC):** Large national food service management companies helped convince the court that they were uniquely dependent on the two top (merging) distributors, and would be competitively harmed by the merger notwithstanding the multitude of smaller distributors the parties claimed to compete with.
- **Expedia/Orbitz (DOJ):** Extensive evidence from the travel industry helped DOJ conclude that, notwithstanding the presence of smaller online travel agencies, multiple metasearch companies, and recent entry by Google and Trip Advisor, the merger would reduce from 3 to 2 the number of online search and booking companies. While DOJ cleared the transaction based on evidence suggesting the merger would not result in a price increase, the intervenors were able to shape DOJ’s understanding of the unique market presence of large, global OTAs.

## ANTITRUST MERGER INVESTIGATIONS: E-DISCOVERY, TIMING AND COST

Merger investigations are becoming longer and more costly, which may be in part a result of the cost and burden of collecting, reviewing and producing large volumes of electronic information. The ABA recently conducted a “Second Request Cost Survey,” which reported that the median length of a merger investigation involving a Second Request among those surveyed was approximately 7 to 8 months, with a range from 2.25 to 12 months. The survey also found that the average cost of compliance with a Second Request was \$4.3 million, with a range of \$2-9 million. Practitioners observe that both cost and timelines in U.S. merger investigations have steadily increased over the past decade.

In August 2015, the FTC issued a revised model Second Request, which imposes new obligations on merging parties with respect to the use of predictive coding or technology-assisted review, identification and production of databases, and creation of ‘data maps.’



One cause of this trend is the vast amount of electronic documents and data requested by the DOJ and FTC in Second Requests, and the challenges companies have in quickly negotiating and complying with those requests. In August 2015, the FTC issued a revised model Second Request, which imposes new obligations on merging parties with respect to the use of predictive coding or technology assisted review, identification and production of databases, and creation of “data maps.” The DOJ has long imposed similar requirements with respect to predictive coding and databases. These requirements, though process-oriented, give the agencies additional leverage in the overall merger review by making compliance virtually impossible on any timetable other than that to which the government agrees.

## EUROPE: COMMISSIONER VESTAGER’S FIRST YEAR

Since taking her post in November 2014, Commissioner Margrethe Vestager has established herself as an economically sophisticated head of the European Commission’s Competition Directorate whose decision-making is tempered with both pragmatism and the protection of consumer welfare.

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2015 saw the highest number of Phase II merger investigations (11) initiated by the Commission since 2007 and the highest number of Phase II clearances subject to commitments (7) since 2001. This may reflect a higher level of M&A activity generally, or signal that the new Commissioner has a more cautious attitude toward mergers.

In particular, Commissioner Vestager has expressed skepticism as to the efficiencies generated by telecoms mergers, particularly four-to-three mobile mergers in national telecom markets, several of which were cleared by her predecessor, Joachim Almunia. At the same time, Vestager seems to have retained much of Almunia’s ability to find creative solutions and clear difficult cases. GE/Alstom – a merger of two of the three main producers of heavy duty gas turbines in Europe, with combined market shares in excess of 50% – was seen as Vestager’s first major test in a difficult merger, and resulted in clearance subject to a major divestment to a fringe player. The Commissioner’s statement following the case was perhaps telling: “I am glad that we can approve this transaction, which shows that Europe is open for business.”

# OVERVIEW OF OUR ANTITRUST M&A PRACTICE



Crowell & Moring has successfully handled the antitrust clearance of some of the largest and most complex mergers and acquisitions in recent history. We pride ourselves on guiding our clients through the review of their most important strategic transactions. Our track record of favorable outcomes speaks for itself.

We have one of the largest and most active antitrust mergers and acquisitions practices around. It is not uncommon for our firm to handle several second requests and Phase II investigations each year, while working closely with the antitrust agencies in many cases to resolve matters in the initial waiting period.

Our M&A practice takes clients from antitrust planning in the initial stages of a transaction through the premerger notification process (often in multiple jurisdictions globally), responding to second requests from the Federal Trade Commission or Department of Justice, or investigative demands by other national or state agencies, negotiating or litigating final resolution of antitrust issues, and representing clients in court proceedings to secure final approval of merger remedies. We also counsel clients in a broad range of joint ventures, collaborations, and marketing and distribution alliances.

Our strategy is to form long-standing client relationships and to invest in developing deep understanding of our clients' businesses. We use that knowledge to identify transactions that are likely to attract significant scrutiny and to prepare our clients to manage the merger review process, rather than be managed by it. Where appropriate, we begin the advocacy process in advance, positioning the company to respond quickly to any demands for documents and information and to avoid delays to the transaction's consummation. We have deep experience working with the antitrust and competition agencies and, when necessary, are prepared to litigate a government challenge.

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