View on web

Share

Dechert LLP

Join Dechert Partners Alec Burnside, Rani A. Habash, Paul T. Denis, and Michael L. Weiner for a January 24 Webinar
DAMITT 2017 Recap - How long does it take for merger investigations in the U.S. and EU?

DAMITT 2017 Year in Review – Number of Significant Antitrust Merger Investigations Declines in the US and Europe But Investigations Take Ever Longer to Complete; Signs of Trump Administration Quickening the Pace

DAMITT debuts European coverage

DAMITT
From Dechert LLP

Fast Facts

- The length of significant U.S. merger investigations climbed to an average of 10.8 months in 2017, a new DAMITT record, despite the number of investigations dropping by more than 20%.
- There are signs of a possible trend reversal under the Trump administration as significant U.S. merger investigations of deals announced after the 2016 Presidential election, but resolved in 2017, were about 1.3 months faster than in the prior year.
- New DAMITT EU data show that investigations of deals cleared with remedies in Phase I and all Phase II proceedings in 2017 lasted an average of 7.0 months and 15.1 months, respectively, counting from announcement, both up from 2016, despite the lowest number of significant EU merger investigations on record since 2014.
- The ever-growing length of pre-filing talks in the EU, coupled with increased use of timetable extensions in Phase II, has resulted in investigation durations that more than double (Phase II) and quadruple (Phase I with remedies) the theoretically fixed schedule under the EU Merger Regulation.

Significant U.S. antitrust merger investigations resolved in 2017 took longer than ever recorded—an average of 10.8 months from announcement to agency action—according to DAMITT, the Dechert Antitrust Merger Investigation Timing Tracker. The duration grew despite the number of significant U.S. merger investigations falling to 27, the lowest level since 2013. Yet there were signs that the Trump administration might be reversing what has been a trend toward longer antitrust merger investigations in the United States. The average duration of the 10 significant merger U.S. investigations related to transactions announced after 2016's Presidential election, but resolved in 2017, was only 7.3 months.

New DAMITT analysis of European Union data found that the duration of significant EU antitrust merger investigations resolved in 2017 also grew, while their number decreased to 21, the lowest level since 2014. EU merger investigations that went to Phase II took an average of 15.1 months from announcement to clearance, also the longest on record in DAMITT's analysis. The average duration of investigations cleared with remedies in Phase I was 7.0 months. These average durations, calculated to include the time taken for pre-filing discussions, tell a radically different story from the theoretically fixed schedule of EU investigations.

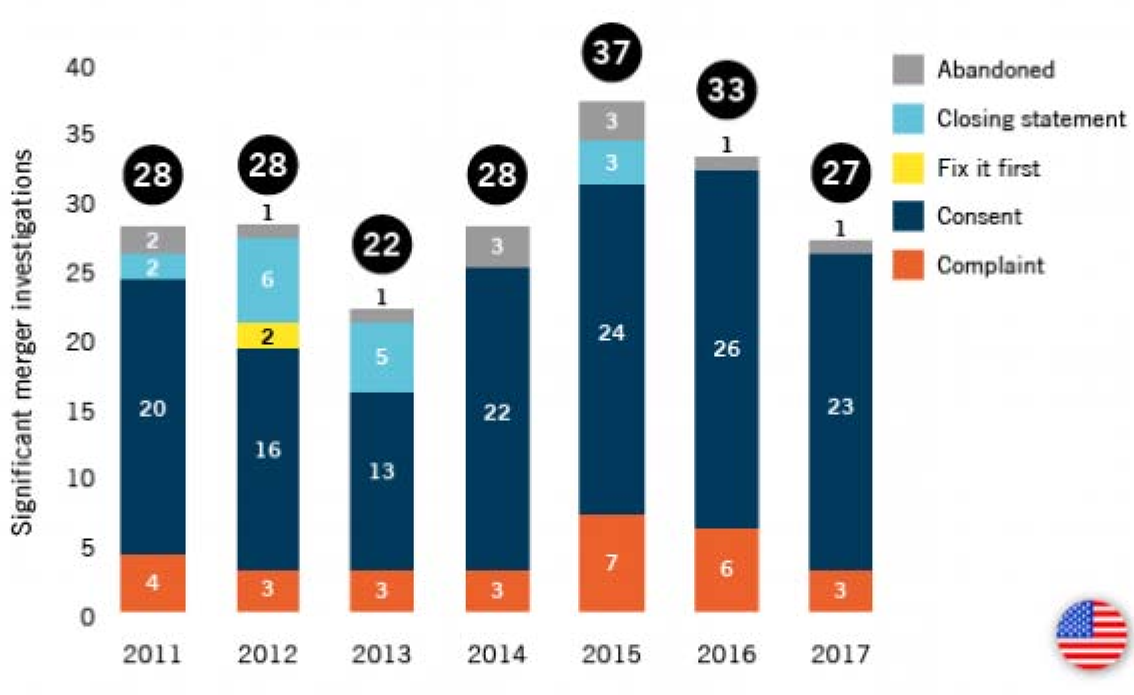
Decline in Significant U.S. Merger Investigations and Complaints Filed

There were only 27 significant U.S. merger investigations concluded by the Department of Justice (DOJ) and Federal Trade Commission (FTC) during 2017, a more than 20% decline from the average of 35 significant investigations in 2015-16. "Significant" merger investigations in the U.S. include proposed Hart-Scott-Rodino (HSR)-reportable transactions resulting in a closing statement, consent order, complaint challenging a transaction, or transaction abandonment for which the antitrust agency issues a press release during the year in question.

The number of significant U.S. investigations resulting in a complaint was down more than 50%—only three significant merger investigations in 2017 resulted in a litigation challenge as compared to an average of 6.5 per year in 2015-16.

The declines in significant U.S. merger investigations and resulting complaints likely were not caused by a reduced number of merger filings. Although data on CY2017 HSR filings are not yet publicly available, the number of U.S.-targeted transactions announced in 2017 rose by 14% from a year ago according to Thomson Reuters, suggesting overall growth in the U.S. deal market. It is possible that the decline in investigations and complaints represents just a hiccup or disruption associated with the change in administrations. In Q1 2017, only three significant U.S. merger investigations were concluded, but this number grew to nine, six and nine in the subsequent quarters, respectively. Roughly 40% of 2017's significant U.S. merger investigations (10 of 27) related to transactions announced after 2016's Presidential election, approximately the same percentage as over the same period in the prior year.

Significant U.S. Antitrust Merger Investigations (2011 – 2017)



Comparable Decline in Significant EU Merger Investigations, But Two Deals Blocked and One Abandoned

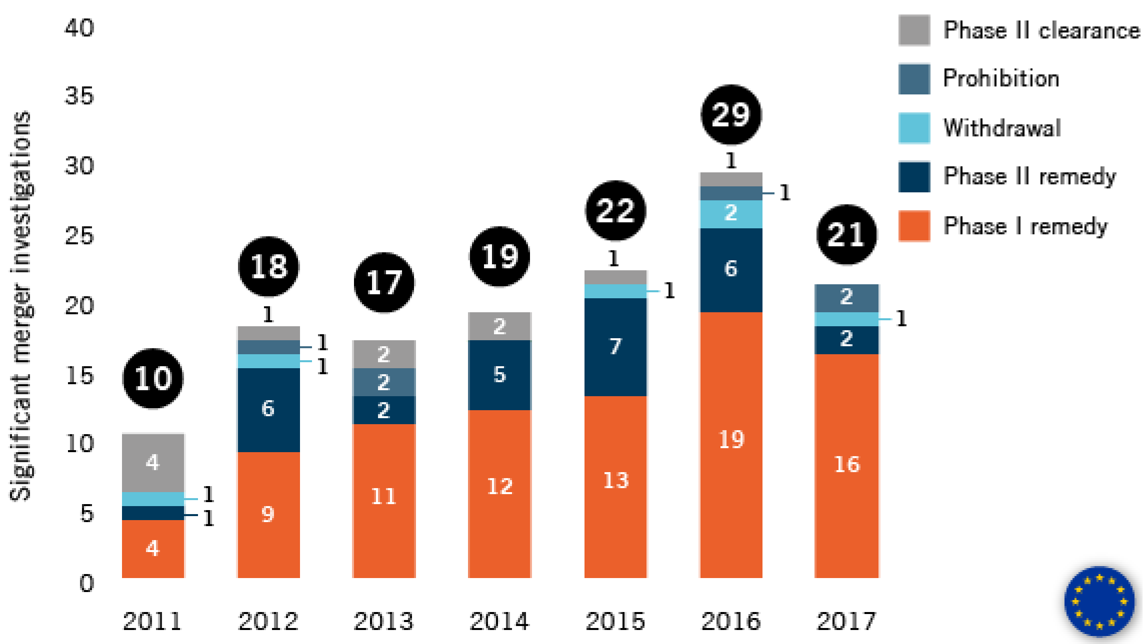
The number of significant EU merger investigations also fell in 2017, an even more marked decline than experienced in the U.S. There were 21 significant EU merger investigations in 2017, down nearly 22% from the average of 25.5 per year over 2015-16 and down nearly one-third from the 29 significant investigations in 2016, the busiest year in the 2011-17 period analyzed by DAMITT. In light of the procedural differences between the EU and the U.S., DAMITT defines “significant” EU merger investigations to include transactions subject to the EU Merger Regulation and resulting in either Phase I remedies or the initiation of a Phase II investigation.

Of the 21 significant EU merger investigations in 2017, only five involved Phase II proceedings, down sharply from 10 the prior year and somewhat below the seven-year average of 7.4 per year. Two of these five Phase II investigations led to the transaction being blocked, only the second time that this many transactions have been blocked in any of the seven years covered by DAMITT. In addition, a filing was withdrawn for a public offer that might have been cleared with remedies, but ran out of time as the Phase II investigation progressed. (DAMITT left out of the statistical reckoning altogether an aberrant case withdrawn in 2017 after having stood in limbo since 2013, which would have severely distorted the analysis.)

In 2017, 16 of the 21 significant EU merger investigations were resolved with Phase I remedies, down from 19 in the prior year but above the seven-year average of 12.

The decline in significant EU merger investigations is somewhat of a surprise in light of the fact that there were 380 EU notifications in 2017, a ten-year high. But it does not seem to reflect any particular shift in enforcement philosophy—indeed the two decisions to block a merger, plus the opposition to a public offer that then timed out, belie any suggestion of reduced enforcement vigor in the EU.

Significant EU Antitrust Merger Investigations (2011 – 2017)



The Average Duration of Significant U.S. Merger Investigations Has Continued to Increase, but Investigations of Transactions Post-Dating the Presidential Election Have Moved More Quickly

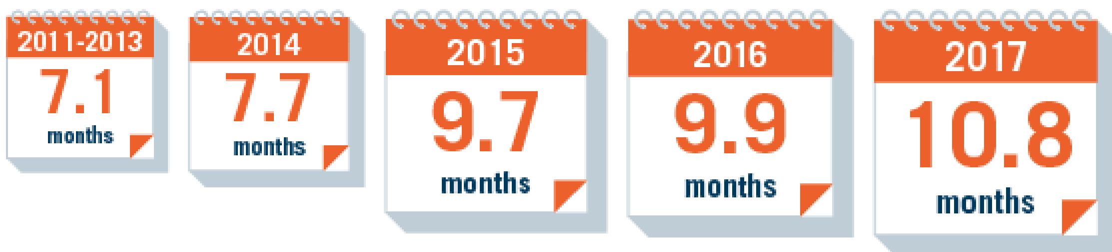
The average duration of significant U.S. merger investigations continued to grow in 2017, hitting 10.8 months, the longest average duration in the seven years covered by DAMITT and up nearly 10% from the 9.9 month average in 2016. The record duration defied the expectation of some that the duration would shorten as the agencies had fewer significant merger investigations drawing on their resources.

Unlike in prior years, a few investigations of significantly longer duration drove up the average in 2017. The median duration of significant U.S. merger investigations was 9.1 months, a figure lower than the 9.7 month median in 2016. Although this was the second consecutive year in which the median duration of significant U.S. merger investigations declined, it still remained well above the 2011-13 level of 7.1 months.

Recent remarks by a senior official in the Department of Justice's Antitrust Division, citing DAMITT's findings, suggest that the current DOJ administration may be taking steps to reverse the trend toward longer U.S. merger investigations. DAMITT analysis indicated some evidence that the Trump administration might be cleaning up the backlog and speeding up the review of more recently announced transactions. Investigations of transactions announced prior to the Presidential election took disproportionately longer than investigations of later transactions. The portion of significant U.S. merger investigations relating to transactions announced after November 8 of the prior year was roughly 40% in 2017, only marginally higher than the 39% in 2016, and those 2017 investigations were reviewed more quickly, an average of 7.3 months as compared to 8.5 months in 2016.

Some agency officials have suggested that the growing duration of significant U.S. merger investigations is attributable to the merging parties delaying their HSR filings or making greater use of the "pull and refile" option that gives the agency staff a second 30-day clock before having to decide whether to issue a second request. Based on publicly available data for about 63% of the significant merger investigations comprising the DAMITT database, it appears that merging parties are making significant use of one or both of these tactics—but that doing so is resulting in slightly *shorter* rather than longer investigations. The average time between deal announcement and the issuance of second requests for these significant investigations was 72.5 days, with a median of 76.0 days. For transactions with a shorter than average interval between announcement and second request, the average length of the investigation was 11.4 months. For transactions with a longer than average interval between announcement and second request, the average length of the investigation was 11.3 months. Some delay early in the investigation may enable the merging parties to work with the agency staff to resolve or narrow the issues, thereby shortening the investigation. But DAMITT had not revealed this pattern in prior years' data and it remains to be seen whether it will hold going forward.

Average Duration of Significant U.S. Antitrust Merger Investigations (2011 – 2017)



The Average Duration of EU Merger Investigations Going to Phase II Increases Markedly; Phase I with Remedies Nearly Half as Long

EU proceedings in 2017 that went to Phase II lasted a DAMITT record average of 15.1 months from announcement, comfortably double the theoretical duration of the fixed timetable under EU Merger Regulation. Phase I remedy cases took an average of 7.0 months, typical of average tendencies recorded by DAMITT but four times the theoretical period under EU Merger Regulation. These striking discrepancies reflect the ever-growing length of pre-filing talks, and the growing use of timetable extensions in Phase II.

Phase II Proceedings

The 15.1 month average duration for 2017 EU proceedings that went to Phase II represented a more than 10% increase from the average of 13.4 months in 2016. The average duration of such investigations has been climbing steadily since 2011 when it was 9.4 months. This compares to a theoretical formal timetable of six to seven months counting from the moment of notification. DAMITT data thus confirm that the average EU Phase II review has taken longer than the average significant U.S. merger investigation by a factor of a third or more.

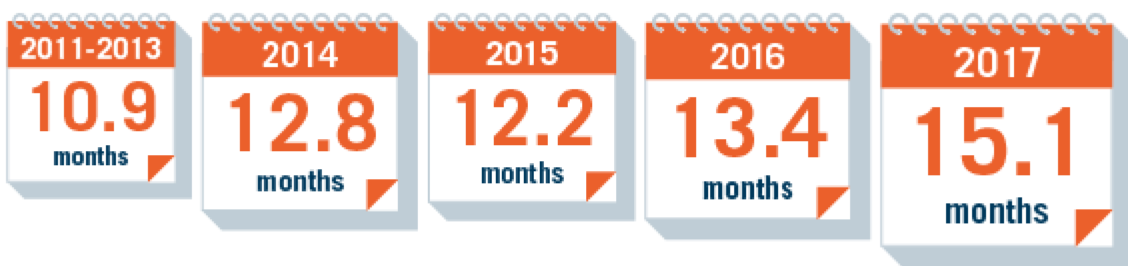
The time between announcement and notification of transactions that went to Phase II proceedings exploded in 2017, reaching 8.3 months, up from 5.5 months in 2016 and well above the 2011-16 average of 4.9 months. Merging parties invariably institute pre-filing talks with Directorate-General for Competition (DG Competition) staff very shortly after transaction announcement, if not before, and the growth of the period between announcement and notification is mostly explained by the intensity of staff demands for the inclusion of materials in the filing, before the formal timetable is triggered.

All five 2017 Phase II investigations entailed the use of "voluntary" extensions of time under Article 10(3) of the EU Merger Regulation. These Article 10(3) extensions are common practice in Phase II investigations, occurring in 88% of all Phase II investigations during the 2011-17 period analyzed by DAMITT and typically consuming the entire three weeks permitted. These extensions may be at the behest of the parties (for example to create space for a remedy discussion), but are often conceded at the instigation of staff.

In addition to the extensive use of voluntary extensions of time, the Commission utilized its powers under Article 10(4) of the EU Merger Regulation to "stop the clock" in 40% of these 2017 Phase II investigations, adding an average 0.8 months to each affected investigation. Only 30% of 2016 Phase II investigations were hit with "stop the clock" orders, but those orders lasted an average of 0.9 months. For the 2011-16 period the rate of stop the clock orders was also 30% but the time off the clock averaged 0.8 months.

DAMITT experience with the EU processes suggests that the overall length of proceedings reflects an intensity of examination illustrated, for example, in the staggering length of Statements of Objections and Decisions: one recently published Decision runs to 915 pages (and that in a heavily redacted version). This may be defensive lawyering on the Commission's part. But it also reflects an increased intensity of focus on internal documents, with EU proceedings in that sense aligning with familiar U.S. second request practice. The pros and cons of this tendency may be debated, but on any basis it suggests that the EU timetabling system, as originally conceived, may be at a breaking point. An average period of 15.1 months from announcement to clearance is a very far cry from the EU's original intent.

Average Period from Announcement to End of EU Phase II Cases (2011 – 2017)

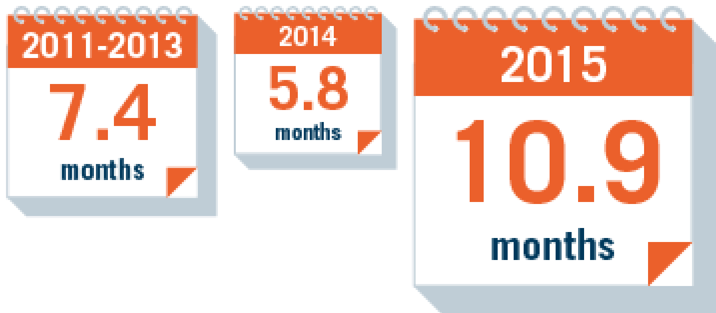


Phase I Proceedings

The 7.0 month average duration for investigations resolved in Phase I with remedies was slightly longer than the 6.6 month average in 2016 and slightly shorter than the 7.5 month average for the 2011-17 period tracked by DAMITT. But as compared to the formal timetable of seven weeks, the reality of clearing an investigation in Phase I with remedies is hardly a speedy proposition.

The length of investigations resulting in Phase I remedies reflects extensive pre-filing talks between DG Competition staff and the merging parties over the scope and detail of the parties' filing. The time between announcement and notification of transactions that resulted in Phase I clearance with remedies rose to 5.2 months in 2017, up from 4.9 months in 2016.

Average Period from Announcement to End of EU Phase I Remedy Cases (2011 – 2017)

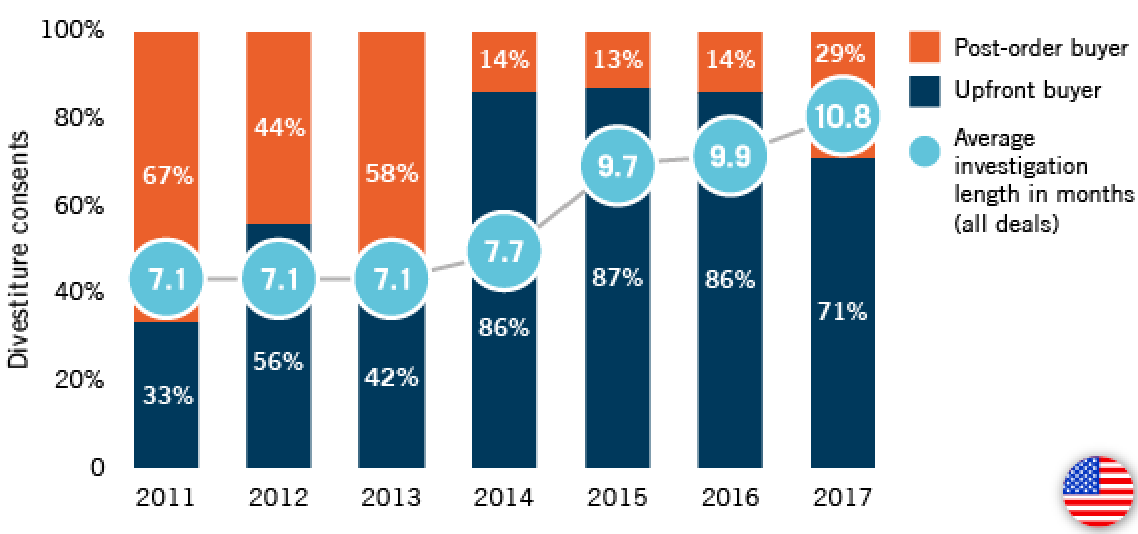


Percentage of U.S. Divestiture Consents Requiring Upfront Buyers Remains Steady

The U.S. agencies' consent orders continued to reflect a high frequency of upfront buyer requirements. The percentage of divestiture consent orders requiring upfront buyers was down to 71% in 2017 compared to 86% in 2016, which may reflect a greater willingness by the agencies to accept post-order divestiture buyers. However, the 71% figure is still well above the 43% average during the 2011-13 period when post-order buyer consents were more common.

When an upfront buyer is required, before the merging parties can consummate their transaction, they must find a willing and able buyer, negotiate a purchase agreement with that buyer for the divested assets, and present that purchase agreement, the buyer's business plan, and other information to the agency as part of the approval process. This process can add significant time to the investigation. Between 2011 and 2017, DAMITT has observed that investigations ending with consents requiring upfront buyers lasted about two months longer than those with consents permitting the merging parties to find and negotiate with divestiture buyers after consummating their transaction. In 2017, however, the difference in duration decreased to about 1.3 months.

U.S. Upfront vs. Post-Order Buyer Trend (2011 – 2017)



U.S. Antitrust Merger Litigation Duration Data Available for Only One Complaint Filed in 2017 Shows a Quicker Pace

In addition to investigations taking longer, prior DAMITT analyses found that U.S. antitrust merger litigation was trending longer, too, lasting about seven months during 2016 from the filing of the complaint to the judge's decision. Although three significant U.S. investigations ended in 2017 with the agencies filing a complaint, only one of these litigations—*AT&T/Time Warner*—has a scheduling order available and is proceeding to trial.

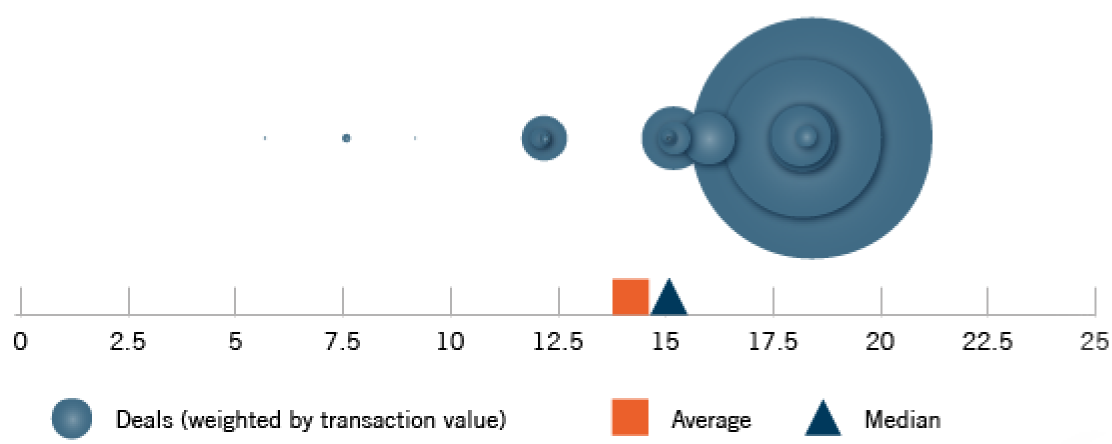
DAMITT has compared this *AT&T/Time Warner* scheduling order against the merger litigation durations in prior years. Compared to 2016 litigations, the *AT&T/Time Warner* trial is scheduled to proceed at a quicker-than-average pace. The trial is currently scheduled to start only 119 days after the agency filed its complaint, about three weeks faster than the average of 140 days in 2016. In addition, the trial is expected to cover 19 calendar days, which is below the 24-day average recorded in 2016. The time between the end of the *AT&T/Time Warner* trial and the issuance of the judge's decision is to be determined. In 2016, judges issued their merger decisions 43 days after the end of trial on average. DAMITT will continue to track this trial and provide updates in upcoming reports.

Merging Companies Do Not Appear to Be Adjusting to Increased Durations by Using Longer Termination Periods in Transaction Agreements

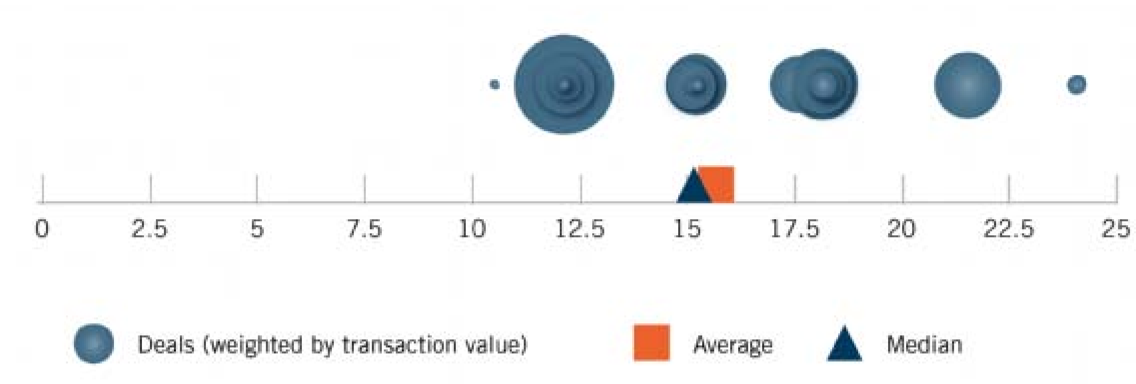
Despite the increasing length of significant merger investigations and litigations, DAMITT's analysis of publicly available transaction agreements for deals involved in significant U.S. merger investigations suggests that merging parties may not be responding by agreeing to longer termination periods. The average time period from deal announcement to the final termination date in transaction agreements among parties involved in significant merger investigations that concluded in 2017 was 14.2 months, down from 15.7 months in 2016 but similar to the 14.3 month average in 2015. As shown in the 2017 chart below, companies involved in deals with a higher transaction value tended to allot more time in their transaction agreements than companies involved in smaller transactions.

Despite the shortened termination periods in the 2017 data, only two U.S. significant investigations —*Walgreens/Rite Aid* and *Abbott/Alere*—went beyond their original termination deadlines. The court decision in the *AT&T/Time Warner* merger trial is expected to come in after the companies' original termination deadline of April 2018, which would bring the total to three.

Time from Announcement to Final Termination Date (Months)
Significant U.S. Antitrust Merger Investigations in 2017



Time from Announcement to Final Termination Date (Months)
Significant U.S. Antitrust Merger Investigations in 2016



Conclusion

Although the number of significant investigations declined in 2017 in both the U.S. and the EU, the duration of significant merger investigations continues to trend upward to record levels. While the circumstances of future antitrust-sensitive transactions may lead to results above or below DAMITT averages, the latest trends suggest that parties to the hypothetical average “significant” deal subject to review only in the United States would have to plan on approximately 11 months for the agencies to investigate a transaction and another seven months if they want to preserve their right to litigate an adverse agency decision. Deal timetables for cases likely to go to a European Phase II need to allow for an average lapse of 16 months from announcement to clearance.

Want to Learn More?

Wednesday, January 24, 2018
12:00 p.m. EST / 5:00 p.m. GMT / 6:00 p.m. CET

Register here »

For a more in-depth discussion, join Dechert Partners Alec Burnside, Rani A. Habash, Paul T. Denis, and Michael L. Weiner for the 30-minute webinar: DAMITT 2017 Recap - How long does it take for merger investigations in the U.S. and EU?

This update was authored by:

Alec Burnside
Partner
Brussels
T: +32 2 535 54 33
Send email

Paul T. Denis
Partner
Washington, D.C.
T: +1 202 261 3430
Send email

Rani A. Habash
Partner
Washington, D.C.
T: +1 202 261 3481
Send email

Michael L. Weiner
Partner
New York
T: +1 212 698 3608
Send email

Dechert LLP ranked as one of the 20 leading Antitrust/Competition practices in the world as part of the Global Elite (2018).
