M&A dealmakers should expect enhanced regulatory focus

Increased regulatory intervention is here to stay, and deal teams must remain agile and skilful to meet the evolving challenges as Douglas Abernethy, Nick Cline, Robbie McLaren and Catherine Campbell explain

The recovery of the M&A market since the early days of the pandemic has been impressive. Even allowing for varying treatment of Covid-19 winners and losers, deal processes for resilient assets (and even for less obviously attractive assets) are often extremely competitive, and valuation multiples have continued to rise. Such high deal values and volumes have been accompanied by heightened regulatory interest in deal making, and challenges for deal planning and execution.

The extent to which the war in Ukraine, the imposition of sanctions and export controls on Russia, and related geopolitical, financial and commodity volatility will impact the global M&A outlook is hard to predict – some geographies, sectors and businesses have experienced immediate effects, while for others implications will become clear in time. However, it seems certain that as regulators and governments push to introduce or enhance a wide range of rules impacting investments in multiple sectors, dealmakers should expect that the hand of government will be felt in M&A deals, even for businesses not traditionally viewed as 'regulated'. In our view, such enhanced regulatory focus is here to stay and dealmakers must now address how best to tackle the implications and minimise the impact of regulatory interventions in deals.

Successfully executing an acquisition in 2022 will require skilful navigation of a complex and evolving legal and regulatory landscape – and deal teams must remain agile to clear hurdles and achieve their commercial objectives.

The global regulatory direction of travel

The year 2022 is likely to bring a general step-up in enforcement, as regulators increasingly coordinate efforts, share learnings, and seek to take action on a growing range of issues and concerns.

Amid the tumult of recent years, the risk of short-term corporate decisions having long-term financial and reputational consequences is heightened. Large and well-publicised fines, including for bribery, cyber and data breaches, gun jumping, cartel behaviours, and breaches of regulatory orders, mean that dealmakers must remain alert to the risk of inheriting liabilities for historical regulatory noncompliance.

Rising regulation of tech innovation is also noteworthy. While fast-growing sectors such as fintech thrive, such growth has begun to attract greater regulatory scrutiny, as has the tech industry more broadly. In the UK, for example, the Financial Conduct Authority is pursuing a formal transformation program and intends to be more assertive, and as such stakeholders should expect a stricter regulator prepared to "test [its] powers to the limit". Stakeholders are already witnessing this in practice.

While the level of supervisory oversight is set to increase, posing challenges for industry participants and impacting players operating on the unregulated perimeter, a more robust regulatory environment could also play into the hands of some buyers and create opportunities for those able to navigate change.

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National security drives creation of new FDI screening regime

Growing economic nationalism and national security concerns are actively impacting M&A, with multiple jurisdictions enforcing foreign direct investment (FDI) screening regimes and intervening in the acquisition of strategically important companies.

The UK's National Security and Investment Act (NSIA) is now officially in force, granting powers to the Secretary of State for Business, Energy and Industrial Strategy (BEIS) to screen a broad range of transactions on national security grounds, allowing BEIS to block, impose conditions, or potentially unwind already completed deals that give rise to national security concerns.

The NSIA arrives at a time of heightened scrutiny of foreign direct investments (FDIs) across Europe and beyond. According to the 2021 edition of Latham & Watkins' Private M&A Market Study – which examined more than 320 European deals – the prevalence of FDI approval conditions in deals continues to grow. This reflects the increased number of jurisdictions with FDI approval regimes and the high value, high profile, and strategically significant nature

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of the deals surveyed. With the advent of the NSIA, we anticipate that this trend will continue (and accelerate), bringing new considerations and challenges to deals.

Antitrust regulators take a more prominent role in global deals

Merger control scrutiny is tightening. Agencies are scrutinising the suitability of buyers and merger dynamics more closely and imposing greater evidentiary burdens on merging parties. Amid the changes to UK laws and regulations brought about by Brexit, the end of the transition period means that acquirers face potential parallel EU and UK competition investigations – with the effect that the UK's Competition and Markets Authority (CMA) now plays a more prominent role in reviewing global M&A deals.

Dealmakers must remain alert to the CMA's increasingly interventionist approach, including in transactions with a limited nexus to the UK – and all in the context of a voluntary merger regime. This trend is likely to increase the regulatory burden on acquirers, who must navigate potentially divergent EU and UK processes for deals that would previously have been reviewed by only one of those two regulators.

Big tech and digital mergers remain key areas of focus, with regulators keen to step up traditional enforcement and also seek new ways to intervene, as demonstrated by the 2021 publication of Article 22 Guidance by the European Commission (EC). While the EC has historically discouraged referrals of transactions from EU

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national competition authorities that fall below the national merger control thresholds, the EC changed practice because of a perceived enforcement gap regarding potentially anticompetitive mergers falling below all EU merger thresholds. Digital and pharma/biotech mergers are in the eye of the storm, but the EC's renewed practice is not limited to those specific sectors.

In the US, the Biden Administration has focused on merger enforcement – particularly in technology, healthcare, and banking – along with specific practices that affect workers' mobility and wages, such as non-competes in employment agreements. US regulators have announced enquiries anticipated to expand antitrust scrutiny going forward, consistent with changes practitioners are already seeing.

How should dealmakers respond? Assess the opportunity

The M&A market is likely to place a greater emphasis on deal planning and critical assessment of regulatory risks, including developing a strategic regulatory clearance plan focused on managing the impact of filings, clearances, and other hurdles. Nascent regimes and amended approaches mean that work is required to mitigate unexpected delays or remedies. If a transaction falls within scope of a particular regime, screening processes may well involve extensive disclosure requirements that can impact deal timetables, creating barriers to closing. For example, clients have undertaken a merger control-style analysis of FDI approval issues, including analysing their own shareholder base and that of any other investors involved in the deal. Deal teams should consider opening an early dialogue with regulators to allay potential concerns.

Undertakings – a solution to acquisition but an impediment to exit?

Deal teams should also prepare for the imposition of undertakings in order to close sensitive deals, and consider how this would impact deal value and transaction rationale. Recent deals with a UK nexus have seen BEIS require undertakings designed to protect UK national security, including safeguarding the confidential information of the target, limiting the extent to which information can flow up to the ultimate investor, and imposing UK nationality requirements for board appointees.

The UK government has also shown a desire for investors to give 'voluntary' economic commitments (e.g. relating to UK jobs), even though this falls outside the scope of existing legislation, including the NSIA. Dealmakers should note that undertakings and commitments typically relate to the target rather than the buyer, and may therefore impede the attractiveness of the target on exit.

Differences in process between BEIS, the CMA, and other antitrust or FDI regulators are likely to create challenges in ensuring that remedy offers can successfully straddle relevant regimes effectively. For example, the Committee on Foreign Investment in the United States (CFIUS) may accept undertakings as a condition of clearance, including prohibiting or limiting the transfer of certain intellectual property, trade secrets, or knowhow. There is also an emerging practice of FDI regulators in one jurisdiction raising national security concerns about the likely impact of remedies offered by the investor to a regulator in another jurisdiction. Balancing the requirements of different regulators in different jurisdictions requires agility.

> *"The M&A market is likely to place a greater emphasis on deal planning and critical assessment of regulatory risks"*

Allocate risk and uncertainty

Deal documents will need to respond to the regulatory framework to which the transaction and the target company are subject. However, transferring risk into deal term protections in the current highly competitive M&A market is challenging, requiring dealmakers to triage and prioritise what can be back-ended to the gap period, and what is essential for signing.

Latham's 2021 Private M&A Market Study found that the prevalence of FDI approval conditions (included in 15% of deals analysed) remains significantly lower than that of merger control conditions (included in 52% of deals analysed). This appears likely to change, given the expansive scope of the NSIA and similar regimes applicable in other jurisdictions. Dealmakers should consider the terms and scope of such conditions and the efforts that parties are compelled to take to satisfy them, in addition to the implications on deal timetable and, in some cases, deal certainty.

Further, compressed deal timetables and a sellers' market in recent years have contributed to a downward trend for liability caps on warranty claims – 63% of sellers in Latham's 2021 Private M&A Market Study limited their commercial warranty liability to less than 20% of equity value, compared to 41% in the 2014 edition.

While buyers may have sought additional warranties, indemnities, and post-closing price adjustments to mitigate the uncertainties of recent years (including fines and other regulatory risks), the competitive M&A market has frequently forced acquirers to accept less-than-perfect deal protections. This development emphasises the importance of a detailed diligence exercise and the potential need, in some cases, for a risk-based post-closing audit and remedial processes.

Mind the gap

Gap covenants governing the conduct of the target business between signing and closing came under heightened scrutiny in 2020 (as dealmakers debated what type of business conduct counted as 'ordinary course' in extraordinary times) and further scrutiny in 2021 (as dealmakers considered the implications of EC fines for gun jumping infringements).

In an increasingly regulated M&A environment, deal teams should expect a greater focus on gap covenants, particularly given lengthening timelines between signing and closing. Buyers need sufficient confidence in the operation of the business by the seller up until deal closing, but without having control through equity ownership, or board voting rights where it may be able to exercise control over the target or determine its strategic commercial behaviour (until relevant merger clearances are received) – always being cognisant of gun jumping rules.

New deals, new challenges

Special purpose acquisition companies (SPACs) emerged as the hottest market trend in 2020 and 2021, allowing SPAC sponsors to launch shell companies with the goal of taking private companies public via merger. The launch of European-style SPACs, the growing number of triple-track deal processes (i.e. with an auction sale, an IPO, and a SPAC sale as possible outcomes), and increasing instances of stressed or distressed M&A present novel, complex deal structures and new challenges – all of which require agile legal advisers who are able to navigate regulatory interventions and give dealmakers the competitive edge.

Germany

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After a busy finish to 2020, 2021 became one of the biggest ever years for M&A in Germany, with records across almost all categories. Most market participants had agreed that 2022 would also be a strong year for M&A, however, that was prior to accounting for the impact of Russia's invasion of Ukraine.

One significant driver of M&A has been corporates disposing non-core units in order to refocus their business activities and to fuel their desire to access new markets and business lines. At the same time, financial investors continue to leverage favourable market conditions for sales to implement and often expedite exits. These sell-side factors are met by a largely appreciative buy-side, in which funding opportunities and cash resources ('dry powder') are combined with a relatively high investment pressure.

While it is widely expected that Covid-related restrictions will soon ebb away, the ongoing disruption of vital supply chains continues to have a significant impact on economic activity in Germany. At this point in time, any reliable prediction about economic development and the M&A market in 2022 might be premature, not least due to the war in Ukraine and associated uncertainties.

Public and private M&A both play an important role in Germany. While some recent IPOs and public takeover attempts garnered noticeable media attention, private deals are still dominating the league tables due to their sheer numbers. This focus is not new and can be attributed to a number of factors, including additional legal requirements that render quite complex the full integration of a listed company following a takeover. However, the situation may yet change, particularly given the remarkable number of planned IPOs and the recent drop in stock market prices that have the potential to offer attractive investment opportunities.

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Economic recovery plans

Aside from an initial slowdown in market activity as well as certain Covid-related issues – such as the stability of supply chains and legal risks resulting from government support – that have now been included in standard due diligence assessments, the pandemic did not have a lasting impact on the M&A market in Germany.

In theory, the fundamentals look promising for a dynamic M&A market in 2022. Strategic players are expected to remain relevant and the shift to remote/digital working as well as the growing importance of digital business models have accelerated the need to address structural and business case-related weaknesses, which is expected to trigger comprehensive portfolio changes in many industries. While corporates are divesting their non-core (or 'old economy') assets leading to a high number of carve-out deals, they are buying into promising new ventures, often with a technology and digital focus. There is also an increased focus on suppliers and thus on vertical integration in order to secure supply chains. While attractive assets continue to hit the market, an ever-growing group of potential buyers with relatively easy access to financing are looking for investment opportunities. In particular, private equity funds have collected unprecedented amounts of funding, not least because of the low returns on alternative forms of investment.

Hamburg-based Körber Group e.g. plans to expand its software division for supply chain and warehouse management, which will be funded through a joint venture with US investor KKR, indicating that PE houses aim to further enhance technical solutions.

The short, mid and long term impact of the war in Ukraine is hard to predict, and it is too early to say how economies and, consequently, M&A markets will react to changes to the global energy supplies market and the exclusion of Russian investors and banks from Western markets.

Public M&A is back on the radar in Germany. The high liquidity and valuations led to an uptick in IPOs in 2021, and, at the same time, Germany's leading stock index DAX expanded and changed its rules to better reflect the quality of its member companies, with a corresponding knock-on effect on the further indices. Furthermore, not only have we seen an increase in taking companies public, but also in taking public companies private.

Successful transactions have shown that, despite rather formalistic rules under German law, such endeavours may very well work. Moreover, given the recent development of stock market prices, interested parties may now have access to an increasing number of attractive investment opportunities.

This can include trends related to:

- Industry consolidation, M&A-driven growth, financing considerations or other factors;
- Distressed M&A, reorganisations; and
- The impact of Covid-19 on M&A-related disputes, use of indemnity provisions.

Financial investors continue to be relevant players in the M&A market as buyers and sellers. Their focus on enhancing performance and modernising structures bears fruit: not only do they impact the portfolio companies they hold, but they also establish best practices in certain industries and thereby influence corporates. Further, carve-outs continue to be strong, feeding off conglomerates trying to align their portfolios with their strategies.

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Acquisitions of private companies are primarily structured as share deals and are not governed by any statutory process (other than regulatory clearances). They are a matter of negotiation between the respective bidder and seller as most relevant statutory provisions are not mandatory.

In contrast, public M&A transactions have to comply with the German Securities Acquisition and Takeover Act (*WpÜG*), the EU Market Abuse Regulation (*Marktmissbrauchsverordnung*) and the German Stock Corporation Act (*AktG*), and are subject to the supervision of the German Federal Financial Supervisory Authority (*BaFin*).

Private and public transactions may be subject to German merger control. Further, the Federal Ministry of Economic Affairs and Climate Action (*BMWi*) has the power to review direct or indirect acquisitions of German-based companies by foreign investors.

The BMWi may prohibit any acquisition of 25% or more of the voting rights by a non-EU/EFTA investor or may request commitments if it poses a threat to German public order or security or violates essential national security interests. In addition, acquisitions of 10% or more of the voting rights in a company active in certain areas of critical infrastructure or in the area of military and defence may be subject to a mandatory filing requirement.

Compliance with sustainability regulation, digital transformation and disruptive technology will continue to be a due diligence focus of German target companies.

ESG has become an investor focus and is now driven not only by consumer demand, but also by legislative developments across multiple jurisdictions. The M&A market is therefore showing a greater demand for ESG due diligence products, particularly in relation to value chains and corporate responsibility. Further, new reporting obligations due to regulatory developments and forthcoming changes will need to be observed.

Regulatory tightening and political uncertainty could prove an increased hurdle to in-bound and out-bound M&A transactions throughout 2022, as FDI control regimes continue to grow and merger review proceedings remain active. Furthermore, the recent sanctions imposed on Russia will effectively exclude investments by Russian investors in Germany and impose restrictions on investments in companies with affiliates in or ties to Russia.

Market norms

Foreign investors continue to wonder about notarisation requirements in Germany, particularly in connection with German limited liability companies (GmbH). A notary must read aloud to the parties all share purchase agreements, including annexes, which may prove to be a time-consuming exercise.

Depending on the deal structure, parties are advised to seek employment and tax advice early as German law contains some unique features in these areas.

The importance of technology has become increasingly clear during the past years. The M&A market would not have been nearly as successful during the pandemic were it not for the seamless transition to remote working, including virtual meetings, digital collaboration and transaction management platforms. Moreover, inevitably, tech companies have become extremely attractive M&A targets and have pushed valuation to previously unseen levels.

Public M&A

The scope of legal documentation required for the acquisition of shares in a public company depends on the type of business

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combination chosen as well as the type of shares being acquired and whether these shares are to be acquired over the stock exchange, via capital increase or from other shareholders.

Holding 30% of the voting rights in a listed company is considered to provide 'control' under German takeover law. Whoever is about to achieve or exceed this threshold directly or indirectly will need to consider a public takeover offer, which requires an offer document. Unsolicited takeover attempts are still rare in Germany, however, the general attitude towards hostile transactions is less negative than in the past.

After the decision to launch an offer has been published, the management board is prohibited from taking any action that could prevent the success of the takeover offer. However, the management board may search for a 'white knight'; take any action within the scope of the management board's powers if approved by the supervisory board and if no further legal requirements exist; and take actions that would have reasonably been taken if no offer had been launched. Furthermore, the shareholders may, under certain restrictions, authorise the management board to take action within the scope of the powers of the shareholders' meeting before and independent from any takeover offer.

BaFin takes a rather restrictive position regarding the possibility to impose offer conditions. Voluntary public takeover offers, i.e. offers made by buyers that do not own shares in the target company or whose shareholding is below 30%, are usually only subject to regulatory approvals, fairly standardised market and company MACs and no defensive measures (such as capital increases during the offer period).

There is often a minimum acceptance threshold for offers as the acquisition of only a portion of shares may not be attractive. Mandatory offers, i.e. offers that are triggered once a shareholding of 30% is reached by one shareholder, can only be made subject to regulatory conditions.

Break fees in public M&A deals (when the target pays the prospective buyer) have traditionally been unpopular in Germany and few target companies or bidders are willing to accept them.

Private M&A

Deal processes for attractive assets are competitive, allowing sellers to choose locked box structures. Strategic acquirers, which traditionally favour completion accounts, are increasingly accustomed to locked boxes, particularly because pushing for completion accounts can weaken their position in a competitive process.

An increasingly common feature in competitive situations is that certain bidders try to pre-empt entire sales processes. This can be attractive for sellers as it enables them to maximise their leverage, but it can also carry reputational risks for the parties involved.

Recent deals saw an increase in earn-outs, most commonly in emerging technology and life sciences deals in which the knowledge of key individuals is important for long-term success and a fair valuation of target companies based on current KPIs is difficult. On the other hand, escrows remain uncommon, but they do occasionally provide recourse for buyers in the event of a downward price adjustment or as security for liabilities or warranties.

W&I insurance has remained prevalent in transactions involving PE sellers, and more frequently in cases of strategic investors' involvement.

Deal certainty is one of the most crucial factors for sellers besides the purchase price and limitation of liability. Hence, transactions are typically only subject to merger control clearance by the relevant authorities and foreign investment control clearances. Any further deal conditions would depend on the transaction specifics.

Share purchase agreements relating to German targets are usually governed by German law under the jurisdiction of German courts or arbitral tribunals. Depending on specific preferences of the parties, agreements may also be made subject to non-German laws.

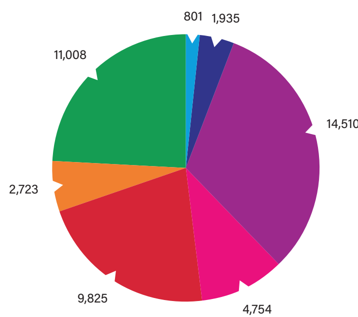
2021 has seen a striking number of private equity exits, relating to valuations rising after a dip at the beginning of the Covid-19 pandemic and the amount of dry powder available in the market. Due to low interest rates on external financing and the tight cash management during the pandemic, corporate buyers also have high liquidity reserves.

Many financial investors and strategic buyers have taken advantage of continuously favourable financing opportunities and numerous sellers have shown good timing in the sale of their investments to PE funds or strategic buyers or the floating of their participation on the stock exchange.

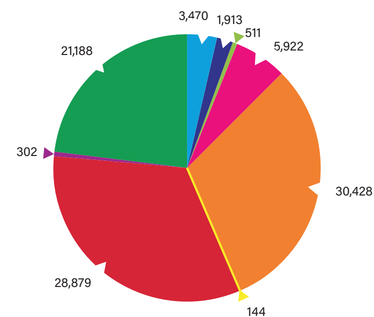
"The high liquidity and valuations led to an uptick in IPOs in 2021"

dealogic

OUTBOUND



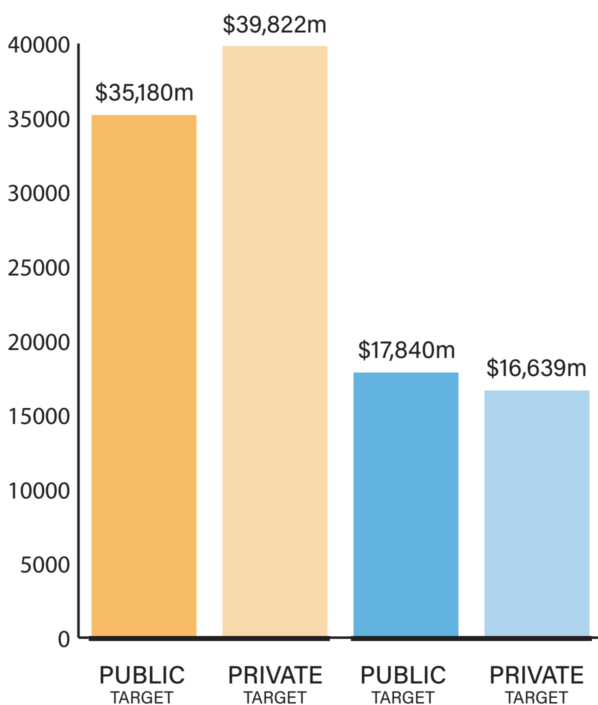
INBOUND



NB only deals with publicly disclosed values are represented in the charts and infographics

- Consumer products
- Energy and natural resources
- Financial services and investment management
- Healthcare
- Industrial goods
- Infrastructure and public services
- Leisure and hospitality
- Professional services
- Telecoms, media and technology

INBOUND OUTBOUND



NB: Values may exclude certain transactions, for example asset acquisitions/sales

Looking ahead

Notwithstanding the significant impact the war in Ukraine will have on the M&A market, the following can be observed:

Cross-border deal flow is set to continue rising in 2022. Moreover, the pandemic recovery differential between the US and Europe and US corporates' high cash pile is likely to further feed transatlantic deal flow.

Technology investments will continue to play a key role in M&A transactions. Consequently, corporates' tech spend and the funding at the tech back-end will have implications for future deal flows. In addition, carve-out transactions will continue to fuel deal activities.

On the regulatory side, merger control issues and protectionist policies should be closely monitored as they will continue to influence deal transactions in Germany and globally. Finally, business models that are ESG-compliant will continue to shape the M&A market.

Further momentum will be created around take-privates, acquisition of minority stakes in listed companies (including by way of PIPEs), and – given the impact of the pandemic and associated lockdowns on a number of business models as well as liquidity squeezes due to Ukraine war related supply chain issues – distressed M&A.

However, the full impact on the M&A market of the fallout from the war in Ukraine will not be fully understood for many months.

United Kingdom

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The 2021 UK M&A market witnessed a resurgence of deal value and volume to pre-pandemic levels and beyond, with a strong seller's market and extremely competitive deal processes for resilient assets (and even for less obviously attractive assets).

The elevated levels of M&A were driven by renewed optimism underpinned by the success of the vaccine rollout, the low-interest environment, private equity sponsors seeking to deploy significant funds, and strategic divestment and consolidation across the wider market (particularly within the high-tech industrial and infrastructure sectors).

According to Dealogic, deal value rose to $322 billion in 2021 from $281 billion in 2020.

The use of listed special purpose acquisition companies (SPACs) as an exit method and route to the public markets continued in the UK, although investor concerns over sponsor voting and the need to produce 'fair and reasonable' statements around conflicts of interest caused dealmakers to reflect on the regulatory and fiscal framework for SPACs in Europe, and the complexities of each deal.

Both public and private M&A transactions play an important part in the UK market, with private M&A deals making up a far higher number of UK target M&A deals. Public takeovers have a prescribed process under the City Code on Takeovers and Mergers (the Takeover Code), as administered by the Panel on Takeovers and Mergers, whereas the structure and process of private acquisitions are a matter of negotiation between the buyer and seller.

Among other notable deals, Latham & Watkins advised on Viasat's $7.3 billion combination with Inmarsat, a deal that highlights how transformative transactions in critical industries are increasingly recognised as a key mechanism for corporates to achieve innovation and drive customer choice. Latham also advised 888 Holdings plc on its £2.2 billion (approximately $2.96 billion) agreement to acquire the international (non-US) business of William Hill International.

Both these transactions highlight how large-scale M&A deals, particularly for experienced acquirers, remain strategically important as a means to achieve both scale and scope to extend product portfolios but also consolidate market position in an uncertain market.

Economic recovery plans

M&A activity witnessed a strong recovery and unprecedented rise in 2021. The inbound UK M&A deal value in 2021 was nearly double the inbound UK M&A deal value in 2019 before the pandemic (although outbound M&A deal value in 2021 did experience a dip). The real estate, leisure and hospitality sectors all saw a decrease in M&A activity, whereas the technology, retail and healthcare sectors witnessed increasing activity and a more robust performance.

The extent to which the war in Ukraine, the imposition of sanctions and export controls on Russia, and related geopolitical, financial, and commodity volatility will impact the global M&A outlook is hard to predict. Some geographies, sectors, and businesses have seen immediate effects, while for others the implications will become clear in time.

Environmental, social and governance (ESG)-related factors are also increasingly significant drivers for change in M&A, driven initially by investor and consumer demand, and now by legislative developments across multiple jurisdictions. Following the COP26 summit in November 2021, a growing trend towards political action and regulation to combat climate change will, in turn, drive demand for companies that align with key sustainability metrics.

In terms of the impact of Covid-19 on M&A disputes, pandemic-related challenges in certain sectors have led to an increase in insurance and insolvency litigation. Furthermore, the uptick in M&A has led to an increase in shareholder disputes, failed M&A disputes and other transactional litigation.

When comparing deals that signed during the 12 months prior to February 2020 (pre-Covid-19) and deals that signed during the 18 months after February 2020 (post-Covid-19), there has been little change in the prevalence of the majority of key deal terms surveyed in the 2021 Latham & Watkins Private M&A Market Study (the Study).

Notably, suggestions that Covid-19-related uncertainty would encourage increased consideration and inclusion of material adverse change clauses and other buyer-friendly accommodations were not borne out.

Private equity (PE) firms have been very active in the UK M&A market in 2021. The Study found that private equity buyers accounted for 57% of all transactions surveyed. This level of appetite and influence is driven by record levels of cash and buoyed by the relative weakness of the pound sterling.

Increased competition for a limited number of high-quality private sale mandates has led PE funds to look for better value in the public M&A markets. The UK M&A market has also witnessed a significant increase in shareholder activism seeking to secure higher offers for a target company prior to backing a bid. Despite a decline in activity by activist shareholders during the pandemic, activism is

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expected to play a key participative role, and challenge, to M&A transactions in the next few years.

Legislation and policy changes

The Companies Act 2006 applies to public and private companies registered in the UK. While the Companies Act does not govern M&A activity as such, its requirements dictate how deals by UK companies are implemented.

The acquisition of private companies is a matter of negotiation between the buyer and seller, and no regulated offer process is required. In non-regulated industries (i.e. other than financial services, telecoms, media, pharmaceuticals), deals are not typically subject to input from regulatory bodies, save for competition and foreign direct investment (FDI) matters.

Public acquisitions are governed by the Takeover Code.

The end of the Brexit transition period on December 31 2020 marked the end of the European Commission's status as the one-stop shop for the review of mergers relating to the UK meeting certain monetary thresholds. This means that if a merger satisfies the jurisdictional thresholds of the EU Merger Regulation and the UK's Enterprise Act 2002, the Competition and Markets Authority and the European Commission may now conduct parallel assessments of the same merger in their respective jurisdictions.

The UK's National Security and Investment Act (NSI Act) came into force on January 4 2022, granting powers to the Secretary of State for Business, Energy and Industrial Strategy (BEIS) to screen a broad range of transactions on national security grounds, allowing BEIS to block or impose conditions on deals. Due to its retroactive application, the NSI Act is already impacting deals. Early consideration of NSI Act-related timing implications will likely impact M&A timelines going forward.

The Pensions Regulator gained enhanced powers in 2021. Unlike the NSI Act, the Pension Schemes Act 2021 will not have retrospective effect. However, it expands the circumstances in which the Pensions Regulator can exercise existing moral hazard powers.

The Pension Schemes Act also creates new moral hazard powers that can be exercised against any 'person' and includes penalties that encompass criminal sanctions. Given the increasing political and public pressure on the Pensions Regulator, dealmakers should anticipate increased scrutiny of deals that involve a defined benefit pension plan going forward.

The impact of Covid-19 has caused challenges for companies, but overall the lasting impact of Covid-19 on deal terms appears limited. This short-term impact largely mirrors what was seen at the time of the financial crisis in 2007/2008.

ESG issues have become increasingly important for corporates in recent years. A wider range of deal provisions are being considered in light of their potential to enhance the ESG outlook of acquisitions.

While ESG-linked M&A deal terms such as ESG warranties and indemnities have largely remained off the table for auction processes (often due to the compressed timetables imposed on bidders), on suitable deals we have seen early interest in the PE space for ESG-linked terms, such as ratchets to help foster stakeholder alignment on the importance of post-completion ESG enhancements to an acquired business.

Merger control scrutiny is tightening — agencies are scrutinising the suitability of buyers and market dynamics more closely and

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imposing greater evidentiary burdens on merging parties. Strategic management of merger control from the outset is key to ensure successful deal execution.

Rising regulation of tech innovation is also noteworthy. In the UK, for example, the Financial Conduct Authority (FCA) is pursuing a formal transformation programme and intends to be more assertive. Stakeholders should therefore expect a more interventionist-approach from the regulator prepared to 'test [its] powers to the limit'.

Market norms

UK companies can be acquired by way of a share purchase (i.e. purchasing all the shares of the target company) or an asset purchase (i.e. purchasing all the assets of the target company) but, as a matter of UK domestic law, M&A transactions between private UK companies cannot be consummated by way of a merger by absorption.

The Companies Act does provide for mergers for UK public companies, but these provisions are generally not used and a scheme of arrangement is more commonly seen. This is in contrast to other jurisdictions where mergers are frequently encountered.

One area that is often overlooked by parties involved in M&A transactions: buyers do not usually attend to consolidation of group companies immediately after closing, resulting in continued administrative and financial burdens (e.g. filing annual accounts) to maintain dormant or inactive subsidiaries.

Dealmakers are increasingly using artificial intelligence technology to conduct more efficient due diligence in M&A transactions.

During the pandemic, dealmakers have made extensive use of virtual meeting technology and electronic signature platforms to negotiate and close transactions, and this trend looks set to continue.

Public M&A

A bidder may choose to stake-build in order to obtain control of a public company. However, depending on the time of such acquisition and form of consideration, stake-building may set a floor price and fix the form of consideration for any future offer. Furthermore, acquiring 30% of the voting rights in a public company will require a bidder to launch a mandatory cash offer for the remainder of the shares it does not own.

In addition, any dealing giving rise to speculation, rumour or an untoward movement in the public company's share price may mean an announcement is required (if the acquirer is considering making an offer for the whole company), while disclosures will also be necessary once certain thresholds of ownership are crossed.

A takeover offer will usually be subject to an extensive set of conditions, including: securing acceptances carrying more than 50% of the voting rights in the target (or, in the case of a court-sanctioned scheme of arrangement, the requisite 75% target shareholder approval), antitrust and regulatory approvals, the bidder's shareholder approvals, listing of consideration shares (when applicable), and conditions dealing with the state of the target's business.

A bid cannot be subject to conditions that depend on the subjective judgement of the bidder. Additionally, seeking to rely on a material adverse effect or similar bidder protective condition to not proceed with an offer requires the consent of the Takeover Panel,

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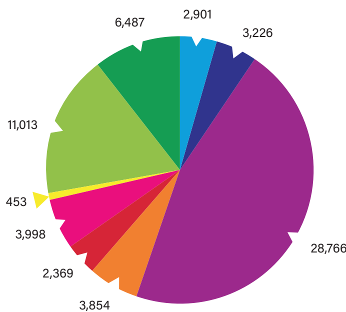

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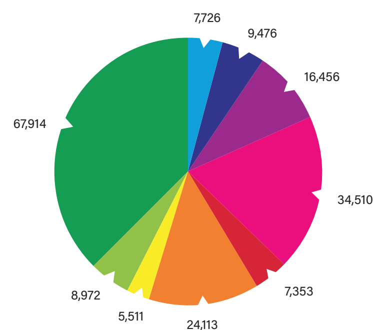

NB only deals with publicly disclosed values are represented in the charts and infographics

- Consumer products
- Energy and natural resources
- Financial services and investment management
- Healthcare
- Industrial goods
- Infrastructure and public services
- Leisure and hospitality
- Professional services
- Telecoms, media and technology

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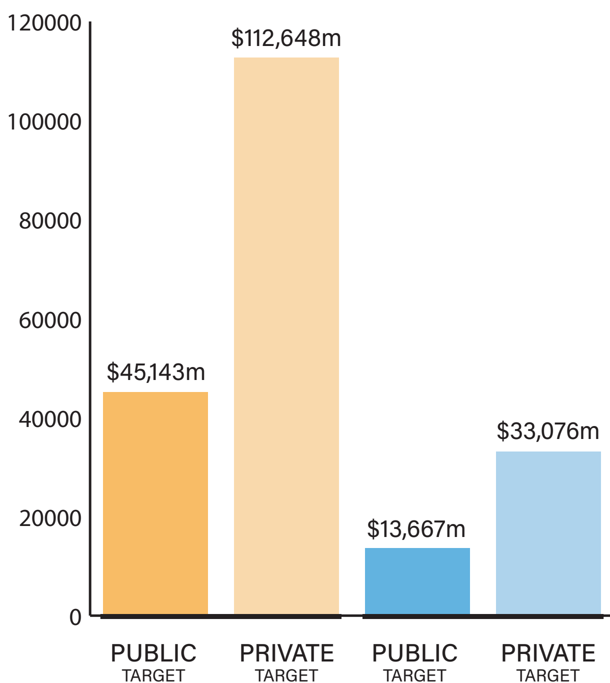

NB: Values may exclude certain transactions, for example asset acquisitions/sales

which applies a materiality test with a high bar (requiring the circumstances to be of considerable significance and aiming to strike at the heart of the purpose of the transaction) before it will permit an offer to be lapsed.

In public takeover offers, break fees (when the target pays the prospective buyer) are now largely prohibited, whereas reverse break fees (when the prospective buyer pays the target) are not prohibited. Only in limited circumstances can a break fee be offered: for example, a break fee may be offered to a 'white knight' making a bid in competition with a hostile offer that has already been announced (subject to such fee being de minimis and payable only upon the first offer becoming or declared wholly unconditional).

If the bidder is a UK public company and subject to the UK Listing Rules, and the total value of the reverse break fee exceeds 1% of the market capitalisation of the bidder, the bidder's directors will need to treat the reverse break fee as a material transaction (which, among other things, requires shareholder approval). If the bidder controls more than 10% of the target, a reverse break fee may also constitute a related party transaction for the purposes of the UK Listing Rules.

Private M&A

According to the Study, which examined more than 320 deals signed between July 2019 and June 2021, 49% of deals included a locked-box mechanism, 26% of deals included a completion accounts mechanism

"The inbound UK M&A deal value in 2021 was nearly double the inbound UK M&A deal value in 2019 before the pandemic"

and 25% of deals did not provide for price adjustment. This trend is consistent with results from the previous four editions and reflects the continuing seller-friendly nature of the UK M&A market.

The proportion of deals analysed that include an earnout has continued to rise in recent years. In the UK, earnouts featured in 13% of deals, compared to 7% in the 2020 edition. This change reflects a growing number of 'acquihire' transactions and strong deal volume in sectors that traditionally favour earnouts (including technology and biotech deals).

In private M&A, the conditions to closing that are included in a purchase agreement will vary based on the circumstances of each transaction. Historically, conditionality beyond regulatory and antitrust clearances is uncommon, but the increasing role of regulation in deal making is having an impact.

The prevalence of FDI approval conditions continues to increase, corresponding with the increased number of jurisdictions with FDI regimes, and the high-value, high-profile and strategically significant nature of a number of deals included in the Study: 15% of deals analysed included FDI approval as a condition, up from 11% in the 2020 edition and 10% in the 2019 edition.

Purchase agreements relating to UK companies and assets are typically governed by English law and are subject to the jurisdiction of the English courts. For global transactions, depending on the location of the parties and their advisers, purchase agreements are frequently governed by English law (since it is viewed as stable, impartial and commercial, with a developed litigation infrastructure) but may alternatively be subject to the laws and courts of another jurisdiction, such as New York.

The 2021 exit environment was strong – 2021 witnessed the busiest IPO market since 2014. The market encountered innovative deal structures such as the emergence of SPACs in the UK and direct listings. In some instances, sellers employed dual-track or triple-track exits.

The FCA rule changes that came into effect in 2021 (including the removal of certain barriers that apply to listing through SPACs, permitting a limited form of dual class share structure on the premium segment, and reducing the free float level from 25% to 10%) are expected to further encourage exits.

Looking ahead

From a confident M&A outlook at the start of 2022, to a more uncertain outlook towards the end of Q1 2022 – the war in Ukraine is having a dampening effect on dealmaking. Deals with direct exposure to Russia or Ukraine have largely halted, while elsewhere much depends on the individual circumstances of each deal — some deals remain unaffected, while others are influenced by cautious parties. Transactions are proceeding, albeit with lessened debt financing availability and tightened terms in some cases, but the long term impact of geopolitical, financial, and commodity volatility on the global M&A outlook remains unclear. Notwithstanding recent events, we expect that the market will likely remain 'seller-friendly' as sellers continue to seek greater certainty as to a buyer's financial ability and covenant strength. Further, following the recent changes to UK regulations post-Brexit, acquirers now face greater regulatory burdens when they target UK companies, particularly in sensitive industries. However, with the right level of planning and timely engagement with regulators, dealmakers can continue to successfully execute transactions.

United States

Robert Katz and Charles Ruck, Latham & Watkins

The US M&A market remains strong following a record setting year in 2021. The market experienced unprecedented transaction volumes and values in 2021 and many of the underlying market dynamics remain in place for 2022. There are, however, factors that could moderate the pace, breadth and depth of the M&A market in 2022, including increased scrutiny from regulators, rising interest rates, global tensions and stock market volatility.

The extent to which the war in Ukraine, the imposition of sanctions and export controls on Russia, and related geopolitical, financial, and commodity volatility will impact the global M&A outlook is hard to predict. Some geographies, sectors, and businesses have seen immediate effects, while for others the implications will become clear in time.

The global regulatory environment received increased attention from dealmakers in 2021 and will continue to do so in 2022. Regulators in the US and around the world have signalled through both actions and public statements that a transaction's impact on the competitive landscape will receive increased scrutiny and oversight.

Sustainability and organisations' and institutions' commitments to, and ability to improve, their environmental, social and governance (ESG) positions remains a key priority. Dealmakers and C-suite executives will likely demand increased attention as to how a transaction may be viewed and positioned from an ESG perspective.

The market continues to be driven by both private and public M&A transactions, although private M&A is more prevalent because there are many more private than public companies. Ready availability of financing (despite recent upticks in interest rates) is a driving factor, particularly for private company and private equity deal-making where acquirer stock is not available as transaction consideration.

For public companies, increased levels of cash on their balance sheets, together with an ability to use stock as an acquisition currency, remain key drivers for strong deal volume in 2022.

Transactions involving special purpose acquisition companies (SPACs) accounted for more than $600 billion in transaction value in 2021 and were a key component in fuelling increased deal activity. The outlook for 2022 is less certain based upon, among other factors, increased scrutiny from US regulators, investors taking a more cautious approach both in terms of private investment in public equity (PIPE) investments and shareholder redemptions.

So-called de-SPAC transactions and their evolution through 2022 and beyond continues to be discussed by dealmakers within the US.

Rising levels of scrutiny and evolving models of antitrust enforcement and review continue to be a topic of conversation amongst M&A participants within the US and throughout the globe. The potential for new legislation within the US with respect to both horizontal and vertical mergers that could alter long-held views on antitrust review and enforcement will continue to be top of mind for dealmakers.

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The pace of regulatory review together with an increased appetite to enjoin or otherwise re-shape transactions was seen in 2021 and has and will impact transactions in 2022.

Economic recovery plans

Covid-19 caused a sharp decline in deal volume and deal value in the first half of 2020. Even with a strong rebound in the second half of 2020, M&A activity still ended down 21% by value compared to 2019, according to Mergermarket.

Global deal volume enjoyed unprecedented activity in 2021 topping $5 trillion for the first time ever, up approximately 64% from the prior year. The US was a key driver of this record setting pace, accounting for nearly half of transaction volume and value.

Generally, market participants expect strong deal flow to continue in 2022. Private equity (PE) buyout funds continue to maintain high levels of uncommitted capital for M&A transactions. In addition, strategic acquirers continue to remain focused on growth, both with a focus on M&A and organically.

There are moderating factors that could present a drag on the market, including less accommodative monetary policy from the US Federal Reserve Bank, challenges posed by antitrust regulators and the Covid-19 pandemic. However the US M&A market is expected to remain strong overall.

Transaction participants have been more keenly focused on the scrutiny regulators will apply to M&A transactions and how such risks are allocated among the parties to transactions. Regulators in the US have explicitly signalled a heightened sensitivity to the competitive effects of certain transactions and have taken more aggressive actions, including prohibiting the consummation of certain transactions based upon the presumed anti-competitive effects.

This increased regulatory scrutiny has and will continue to impact transaction strategies in the global markets. In particular, certain industries – including technology, industrials and healthcare – will remain under heightened oversight.

2021 also saw a dramatic surge in the volume and size of SPAC deals, an alternative path to taking a private company public whereby

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a SPAC is formed to raise cash in an initial public offering (IPO), and the proceeds are subsequently used to complete a business combination with a private target, typically within two years of the SPAC's IPO.

SPAC transactions accounted for approximately 10% of the global deal volumes in 2021. Through the latter half of 2021 and early 2022 the SPAC alternative became less prevalent, as the performance of many companies taken public through SPAC structures came under pressure in the public markets.

PE firms remain a driving force of deal-making. Despite rising interest rates and increased market volatility, PE participants are expected to remain quite active in 2022, with uncommitted capital at PE firms remaining at record levels.

Shareholder activists are also expected to have a greater profile in 2022. While the pace of activist campaigns was relatively unchanged in 2021 compared to 2020 and 2019, market participants are anticipating a renewed level of activity.

Activists are expected to wage campaigns based not only on usual and customary grounds (such as asset allocation and sub-par returns on investment), but also on ESG platforms and 'say on pay'. These activist campaigns are often M&A-related, with an underlying thesis that shareholders are better off with companies being sold or re-configured to drive maximum shareholder value.

Legislation and policy changes

US M&A transactions are subject to regulation by both the federal government and the target company's state of incorporation.

The federal government primarily regulates the issuance and sale of securities through the Securities and Exchange Commission (SEC), antitrust matters through the Federal Trade Commission and the Antitrust Division of the US Department of Justice and foreign investment that may have national security implications through the Committee on Foreign Investment in the United States (CFIUS).

The laws, rules and regulations administered by the SEC are particularly relevant in the purchase or sale of a US public company. The laws of the target's state of incorporation govern that company's internal affairs and impose requirements for shareholder approval of mergers and the procedures for effecting mergers.

The Biden administration announced antitrust priorities in 2021 designed to address perceived shortcomings in antitrust enforcement. These evolving antitrust priorities will expand antitrust scrutiny going forward, consistent with changes practitioners are already seeing at the antitrust agencies within the US. The potential for new legislation within the US with respect to both horizontal and vertical mergers that could alter long-held views on antitrust review and enforcement will continue to be top of mind for dealmakers.

In negotiating transaction agreements, practitioners will need to be aware of these risks and how they are allocated, together with the time required to navigate the antitrust review process.

More deal parties have adjusted their transaction structures and used Covid-specific terms and conditions to allocate pandemic-related risks, including through the use of contingent pricing structures and carve-outs in material adverse effect (MAE) definitions and interim operating covenants to permit targets to take

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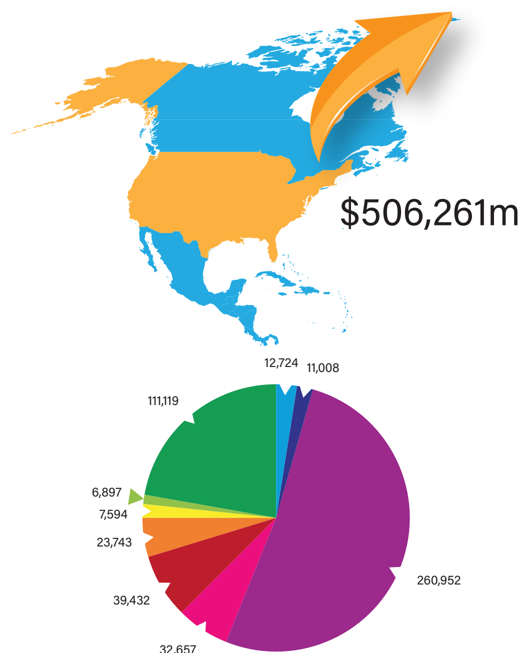

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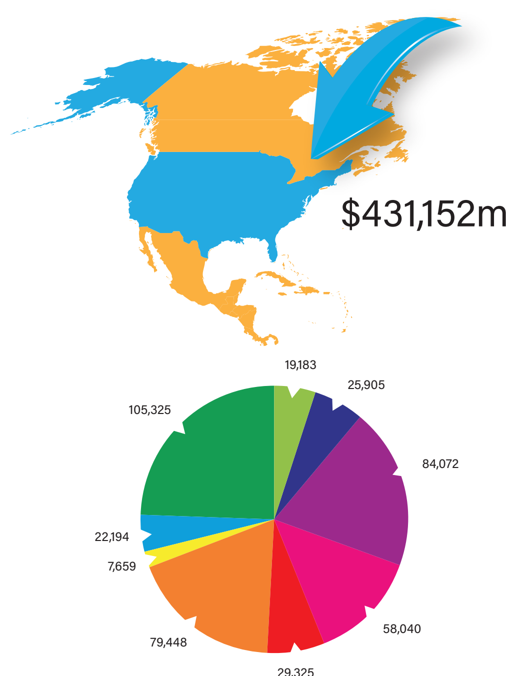

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- Consumer products
- Energy and natural resources
- Financial services and investment management
- Healthcare
- Industrial goods
- Infrastructure and public services
- Leisure and hospitality
- Professional services
- Telecoms, media and technology

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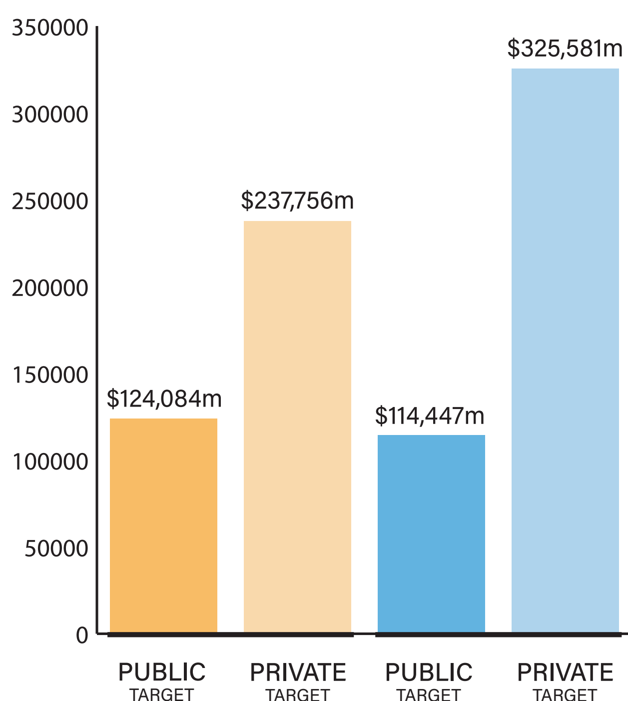

NB: Values may exclude certain transactions, for example asset acquisitions/sale

actions in response to Covid-19. Dealmakers and C-suite executives will likely demand increased attention as to how a transaction may be viewed and positioned from an ESG perspective.

The Biden administration has brought a renewed focus to antitrust enforcement. There are more than a dozen federal agencies within the US reviewing, analysing, and providing input on a renewed approach to competition/antitrust governance. The general US framework of protecting consumers, rather than competitors, is being re-visited writ large. Regulators are now more keenly focused on other constituencies, including labour, the environment and other ESG-related concerns.

This potential revised regulatory framework, together with time required to navigate regulatory review and the remedies that regulators may ultimately require, is something that all parties should consider thoughtfully when contemplating a potential M&A transaction.

Market norms

Unlike the locked box approach that is more common in many non-US jurisdictions, in most US private acquisitions the purchase price agreed to at signing is usually subject to closing or post-closing adjustment based on the amounts of certain financial accounts of the target (e.g., cash, indebtedness, and net working capital) on the closing date. Under this approach, the parties generally must spend more time negotiating the adjustment mechanics and related accounting methodologies.

Under the laws of most states, public target boards must generally retain the right (commonly referred to as a fiduciary out) to terminate the transaction agreement after signing but before the target's shareholders approve the transaction to accept a higher offer. Shareholder litigation is common in such transactions, and the buyer is generally liable for related costs.

Representations and warranties insurance (RWI) and transaction structures that provide for no post-closing recourse by the buyer against the seller except for fraud are increasingly common in private company transactions.

As a result of the pandemic, dealmakers have had to adjust to a virtual environment where almost every aspect of an M&A transaction relies on technology, necessitating a keener focus on cybersecurity issues in the deal execution process.

Data privacy and cybersecurity have also become critical elements of the business and operations of most companies and thus should be a key focus of due diligence in any M&A transaction.

Public M&A

In light of the fiduciary duties of public company directors that generally require them to maximise shareholder value in a sale, target boards often conduct some form of a pre-signing market check. However, in some deals, the target board will forego a pre-signing market check in exchange for a go-shop right to solicit competing offers for a limited period of time (usually 30-60 days) after signing the transaction agreement.

While state law generally requires target boards to preserve a fiduciary out to accept a higher offer under certain circumstances, buyers usually negotiate for a prohibition on the target's right to affirmatively solicit competing offers (except in the case of a go-shop right), and the right to receive a break-up fee if the target's board terminates the transaction agreement to accept a higher offer.

Most states require shareholder approval (usually by a majority of outstanding shares) of most mergers. Certain regulatory approvals, including clearance under the Hart-Scott-Rodino antitrust statute, and for non-US acquirers, from the CFIUS, must be obtained before an acquirer can take control of a US company. Acquiring a US company in regulated industries such as financial services and energy may be subject to additional regulatory scrutiny at the federal and/or state level.

Public company acquisitions can be structured as (1) a one-step merger between the acquirer (or more commonly a subsidiary of the acquirer) and the target (typically requiring majority shareholder approval), or (2) a two-step transaction involving a tender or exchange offer by the acquirer for all the target's outstanding shares (which is generally subject to a minimum tender condition requiring the tender of at least a majority of the outstanding shares) followed by a back-end merger. Both types of transactions are typically subject to the following conditions (among others):

- Accuracy of representations and warranties;
- Material compliance with covenants;
- No MAE on the target; and
- Receipt of regulatory approvals.

Nearly all public target M&A deals in 2021 included an MAE exception for changes, effects or conditions arising out of the Covid-19 pandemic and governmental responses thereto, according to Deal Point Data. Many agreements also provide for greater flexibility under the interim operating covenants to permit the target to take action in response to Covid-19.

Public company merger agreements generally require the target to pay a termination fee if the target terminates the agreement to accept a superior offer, or if the buyer terminates because the target changes its recommendation in favour of the deal. These fees are usually between 2% and 4% of the transaction's equity or enterprise value, but may fall outside this range based on deal size and other factors.

In some transactions the buyer is required to pay the seller or the target a reverse termination fee under certain circumstances (e.g., the failure to obtain required regulatory approvals or if all the buyer's closing conditions are satisfied and it nevertheless fails to close the transaction). These fees are highly variable but often range between 5% and 7% of the transaction's equity or enterprise value.

Private M&A

2021 saw the continued use of earn-outs, under which the seller will receive one or more additional payments, contingent on the target's future performance, in part to account for increased earnings uncertainty due to Covid-19.

Completion accounts (known as working capital or balance sheet adjustments) are common in private company acquisitions. Locked box transaction structures are much less prevalent in private company acquisitions in the US than in many other jurisdictions.

At the beginning of the pandemic, RWI carriers started including broad Covid-19-related exclusions in their policies. Over the last several months, these exclusions have narrowed to focus on the target's Covid-19-related risks.

All the conditions listed for public M&A above (except the minimum tender condition) generally also apply in private M&A transactions. However, in the absence of RWI, representations and warranties usually survive the closing in private M&A transactions and may give rise to post-closing indemnity claims.

Agreements are typically governed by the law of the target company's state of incorporation. If that state has sparsely developed corporate law, the parties sometimes provide that Delaware law will govern certain issues.

The current exit environment remains robust, and was substantially boosted throughout 2021 by de-SPAC transactions, i.e., mergers between SPACs and private companies. The market for IPOs and de-SPAC transactions remains strong, albeit with a renewed focus on quality and the underlying economics of the transaction. Trade sales and sales to financial sponsors are expected to remain strong and will likely increase as a result of stock market volatility.

Looking ahead

There is continued confidence in the market that M&A activity will remain robust in 2022.

Among the factors likely to drive and sustain M&A activity in the near-term are the release of Covid-19 vaccines and the easing of pandemic driven constraints, continuing low interest rates, the general availability of credit, the amount of capital to be invested by private equity firms, the Biden administration's likely support for infrastructure and renewables investment, a recovery in oil prices and the continuing popularity of de-SPAC transactions.