A&O SHEARMAN

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Global M&A Insights

LATERAL THINKING IN FAST-MOVING MARKETS

This PDF contains interactive elements.

Contents

Introduction

How are dealmakers responding to an uncertain and volatile macro environment? Our latest M&A Insights report offers a global perspective on the forces shaping M&A activity, from the rising interest in the European defense sector to the creative transactional structures being deployed by life sciences innovators to navigate challenging markets.

Alongside these themes, we take a deep-dive into preferred equity instruments, which are attracting significant interest from investors looking for creative ways to deploy capital.

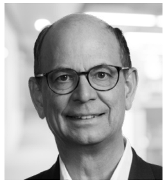
We take stock of the U.S. Outbound Investment Security Program (or "reverse CFIUS") and how it's affecting JV structuring.

We explore a rise in privatizations in Singapore and Hong Kong, and compare the nuances of the two jurisdictions' takeover regimes.

And we look at how the European Commission's evolving thinking on merger reviews is impacting industrial companies embarking on strategic reviews, sales, JVs, and site closures in response to market pressures.

M&A in a period of turbulence

Macroeconomic volatility, shifting trade policies, and regulatory change continue to shape the dealmaking landscape. Here we explore the challenges and opportunities for buyers and sellers navigating uncertain markets.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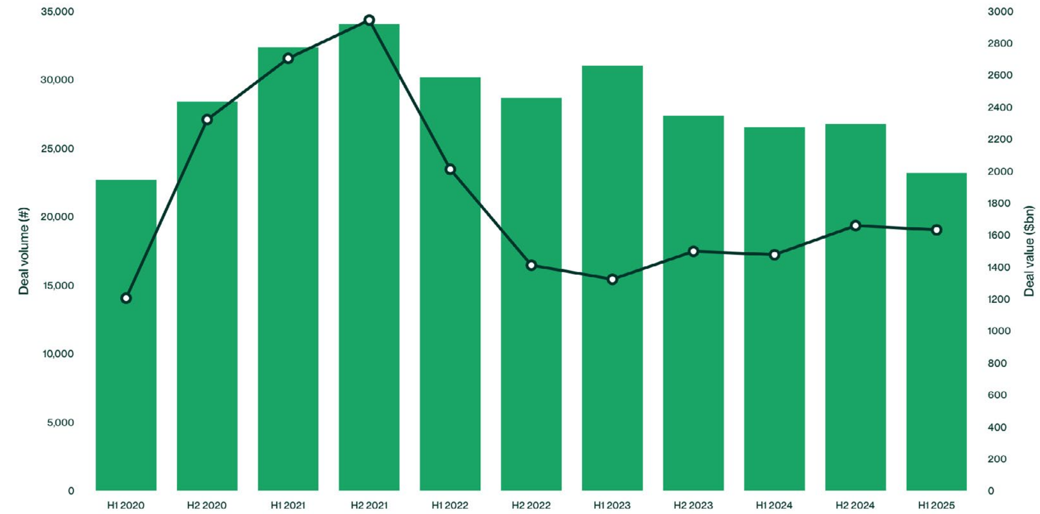
Macro uncertainty drives deal count lower

Global M&A volume in H1 2025 lowest since COVID-19 pandemic



Deal value ($bn) Deal volume (#)

Source: Refinitiv • Data correct to June 30

Global M&A by value for H1 2025 remained relatively robust compared to previous periods, but deal volumes were lower than at any point since H1 2020.

The rapidly changing macro landscape through the first six months of the year has made M&A deals challenging to execute. Global M&A by value stood at USD1.6 trillion during the first half of the year, which although higher than during the same period last year masks a significant drop between Q1 and Q2. The 18% fall in deal value over this period was the biggest quarterly drop for three years, while deal volumes for H1 were the lowest since H1 2020 at the height of the COVID-19 lockdown.

Dealmakers attempting to price assets have been forced to adjust their revenue and cost projections around the impact of significant shifts in trade policy, while in public markets, equity price volatility has acted as a barrier to stock-for-stock deals.

Boards have been reluctant to put businesses up for sale if they are not assured of finding a buyer at an acceptable price. Meanwhile, long periods between signing and closing deals exacerbate the prevailing nervousness as conditions change seemingly by the day.

PRIVATE EQUITY FUNDS PURSUE OPPORTUNITIES

Private equity buyers are affected by these forces but are still looking to do deals. Lower stock prices in some jurisdictions are creating opportunities for take-privates, especially in the mid-market segment (businesses valued at below USD1 billion). We may also see PE firms exploring distressed acquisitions where firms are unable to ride out the uncertainty.

As far as leveraged finance is concerned, private credit providers are stepping in to support acquisitions that banks are unable to fund. In terms of sponsor financing, while issuance of broadly syndicated loans is subdued, there is liquidity available in the unitranche market.

SECTORAL DYNAMICS AND REGULATORY SHIFTS

Unsurprisingly, the shifting trade landscape is weighing heaviest on acquisitions of businesses with complex cross-border supply chains, for example in logistics, shipping and manufacturing. However, interest has remained strong in infrastructure assets, where revenue streams are more predictable, and in industries where there are few substitutes, such as pharma, minerals and ultra high-tech such as AI, nanotechnology and advanced materials. Likewise financial institutions M&A—particularly among banks and insurers—should continue given the strong fundamental drivers for consolidation.

OVERHAUL OF U.S. MERGER NOTIFICATION REGIME

As dealmakers are adapting to this new landscape, they are also having to contend with a major change to the Hart-Scott-Rodino pre-merger notification regime in the U.S., via which parties file details of proposed transactions with the Department of Justice Antitrust Division (DOJ) or the Federal Trade Commission (FTC) when seeking U.S. antitrust approval of their transactions.

The previous regime had remained unchanged for nearly 50 years, but in response to a growing unease among the federal agencies that they were receiving too little information to assess whether certain transactions warranted an investigation, a new filing form has been introduced.

The changes place a significantly higher burden on parties in terms of the data they need to provide and include a requirement for affirmative statements around potential overlaps and the strategic rationale for transactions. The antitrust agencies are also requesting additional information on non-compete agreements and other types of employee practices under their new Antitrust Guidelines for Business Activities Affecting Workers, creating a further challenge for organizations to navigate.

The new regime is more time-consuming and costly to navigate, particularly for multinationals that have complex operations in multiple sectors and markets. As a result, many organizations that are frequent M&A participants have used the period since the changes were introduced to invest in processes that enable them to compile the necessary data in preparation for future deals.

For further information on how the U.S. administration is impacting merger reviews, read our latest analysis.

Preferred and structured equity investments in the spotlight amid uncertain markets

Preferred equity investing is on the rise amid a search for yield and a fall in the number of high-quality assets coming to market. Here we explore the growing appeal of preferred equity instruments, outline the terms that are heavily negotiated in deals—and explain their impact on M&A. To find out more, you can listen to our podcast, which explores preferred equity trends from a U.S. and European perspective.

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Preferred equity instruments (preference shares in the UK; preferred interests or shares in the U.S.) have long been used by private equity firms in buyout structures, including to structure their own returns, as a hurdle for management incentive schemes, to enable profits to be easily distributed or as a simple instrument to provide liquidity for investors.

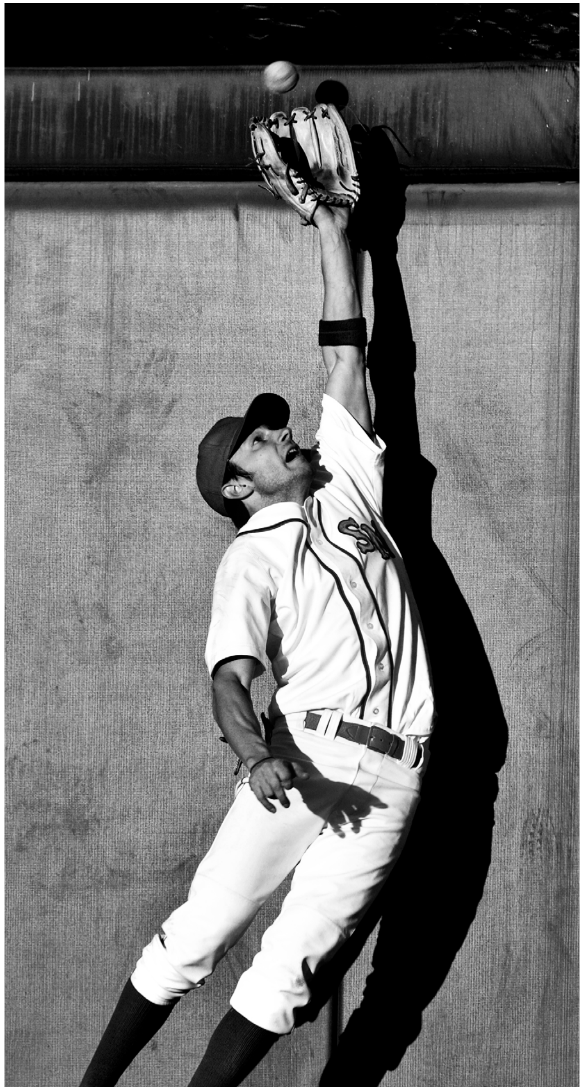
Today however, a market has developed for preferred equity as an asset class in its own right. Investors—including traditional private equity firms, private credit funds or specialized vehicles in these institutions—are attracted by the fact that preferred equity instruments may incorporate debt-like features (e.g., fixed or sometimes floating dividend rates) yet offer higher returns than traditional debt securities to compensate investors for taking on equity risk, as well as governance rights and distribution waterfalls that give holders priority claims on assets and earnings above subordinated investor classes, and therefore a level of downside risk protection. They can be designed in a variety of ways and can offer investors conversion features to common equity or upside participation without conversion, as well as acting as pure fixed-return instruments.

PREFERRED EQUITY ISSUED IN VARIETY OF CONTEXTS

Preferred equity can be issued in a variety of scenarios, including to provide additional capital for M&A or capex; to deliver a liquidity event for existing shareholders; or to inject financing into a new JV or aggregator vehicle for the purpose of an acquisition. These contexts are often dependent on local dynamics and have resulted in different market for the terms of a typical preferred security, reflecting the associated level of risk (i.e., is the security transferable? Does it represent an investment grade obligation? etc.)

We are also seeing preferred equity attached to debt provided by credit funds in large acquisition financings (particularly in the U.S. and Europe); in “fallen angel” investment grade structures; and in the special situations market, where they are used to refinance senior secured debt in circumstances where additional credit or new common equity may be unavailable or unattractive economically.

The latter two scenarios are driving much of the uptick in investor interest across the world.



OPTION FOR INVESTORS LOOKING FOR CREATIVE WAYS TO DEPLOY CAPITAL

Preferred equity instruments are attracting investors looking for creative ways to deploy capital in an environment where fewer quality assets are coming to market as a result of prevailing economic and geopolitical uncertainties. Increased competition among credit funds has also driven sponsors to expand their menu of options as a way of attracting new investment.

For investment grade issuers unable to take on further debt without it impacting their credit rating, preferred or structured equity is a good way to inject capital, with the preferred return acting as an incentive for existing shareholders to participate.

As far as investors are concerned, these instruments operate much like minority holdings, albeit with added features to manage downside risk. However, they need to be carefully structured to ensure they are considered equity by ratings agencies; too many debt-like features (in particular mandatory payment obligations) and they could trigger a downgrade. In this context we are also seeing common/minority equity structures (so called “structured equity”) with no embedded preferred return but with economic features that encourage an early (and preferred) exit or dividend stream and with similar governance and downside protections. These structures may be designed to achieve a certain accounting or ratings treatment for what are otherwise investment grade corporates.

In a distressed or special situation context, preferred and structured equity can act as an “extension” for sponsor-backed issuers facing a debt maturity wall but where valuation issues make a sale unlikely or commercially unattractive, injecting new capital that can be used to reduce leverage, or pursue acquisitions or other strategic alternatives. The proceeds can be deployed to remedy covenant breaches in the event that asset valuations fall, while preferred equity issuance also gives sponsors an alternative to a secondary sale, enabling capital to be returned to investors without transferring the asset to a continuation fund.

As previously mentioned, equity instruments do not carry the same repayment rights as debt, and do not provide holders with the right to force an issuer into insolvency if they are not redeemed at the end of their investment’s life. However, preferred equity investors are often closed-ended funds and therefore need certainty over an exit, making redemption rights and forced sale provisions a key focus in deal negotiations. With that said, they typically contain equally heavily negotiated investor protections and covenants, with the most important often being leverage restrictions, priming restrictions and limitations on transactions with affiliates, among other things.

FOCUS ON EXIT MECHANICS IN NEGOTIATIONS

Exit mechanics may include "drag" rights that allow the investor to initiate a sale process (or even force the closing of a sale) if the issuer has not redeemed its stake by an agreed date. Such clauses are invariably bespoke, and may, for example, require the issuer to hire an investment banker within a set period (possibly with the investor approving their choice) who would then be obliged to run an auction. One area of caution for issuers is that where the investor is a fund with different pockets of capital, any sale could be to themselves. Here, even the placement of the rights will be bespoke, and it is important to consider the treatment of the proposed rights in a bankruptcy/insolvency context.

SPRINGING GOVERNANCE RIGHTS PROVIDE DOWNSIDE PROTECTIONS

Critically, the most effective remedy that investors may look to include are provisions stating that, in the event of a breach, they are automatically able to take over the company's board or assume another governance position. This will give the investor a seat at the table and could in turn lead to a sale, but where the investor has greater influence over the process.

Board takeovers in this context are typically executed by increasing the size of the board to the point where the investor has a majority. Should the business then continue towards insolvency, the investor would sit at the heart of the process, giving them more information rights and greater leverage to steer the process in a way that maximizes their returns.

It is critical for investors considering preferred and structured equity opportunities to think carefully about their remedy options, particularly if they are more used to operating in the credit markets. Here, those negotiations need to be informed by a sophisticated understanding of how restructuring and insolvency processes play out in different jurisdictions. Investors with large portfolios would also need to consider the antitrust implications of assuming ownership of the asset.

PREFERRED EQUITY IN FOCUS: ASIA PACIFIC

In Asia, prevailing macroeconomic headwinds and persistent challenges in securing exits are prompting private equity sponsors and sovereign wealth funds to pivot away from traditional growth equity investments and towards buyouts or preferred equity instruments that closely resemble loan-style financings. These instruments are increasingly favored by investors and funds with the appetite and flexibility to move through the capital stack, and are frequently issued by operators of data centers, logistics or other real estate assets, as well as in connection with special situations opportunities.

In these transactions, redeemable preference shares are generally non-convertible but are paired with warrants designed to allow investors to capture the potential equity upside. The two instruments are typically detachable, such that even following redemption of the preference shares, investors may elect to retain the warrants, which are ordinarily cash settled upon the occurrence of a liquidity event such as an IPO or a trade sale.

These opportunities are commonly structured through a credit investment lens. Investors will typically look to negotiate debt-like protections, including:

- make-whole payments in the event of early redemption of the preference shares
- step-up in preferred dividend rate if the issuer opts for PIK interest for any given period
- enhanced governance rights if PIK interest accrues beyond a specified percentage of the total investment.

Given the prevalence of sponsor involvement, investors often negotiate put rights, permitting them to transfer the instruments to the sponsor shareholder at the agreed consideration if redemption is impracticable, or alternatively, a parent guarantee conferring equivalent protection. Other common investor safeguards include leverage restrictions that not only restrain the issuer's ability to incur additional indebtedness, but also extend to its subsidiaries, thereby mitigating the risk of structural subordination.

Unlike in the U.S. and Europe, where preferred equity is sometimes deployed in connection with continuation vehicles, such transactions are relatively uncommon in Asia. Further, as many issuers in the region are not investment graded, the impact of preferred equity instruments on credit ratings is generally not a material consideration.

Rising geopolitical tensions ignite European defense M&A

As Europe scrambles to build its military-industrial capabilities, sector dealmaking is on the rise. Here we explore how foreign investors are shaping their strategies to navigate sweeping reforms of regulatory frameworks that are happening in parallel.

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The defense sector has been one of the brightest spots for European dealmaking in the face of recent market headwinds. The war in Ukraine, escalating geopolitical tensions and the fraying of the U.S. security support that has protected Europe since the Second World War has exposed the fragility of EU military capabilities and galvanized political will to address capacity gaps.

With defense spending by member states rising, the order books of Europe's prime contractors (Airbus, BAE Systems, Leonardo, Thales, Rheinmetall, Dassault Aviation, Saab and KNDS) grew by 15% in 2024. Their combined backlogs hit a record high of EUR291bn over the same period, with the surge in demand generating strong cash flows and momentum for strategic investments.

EUROPEAN DEFENSE M&A UP 35% YEAR-ON-YEAR

In the first six months of 2025 European defense M&A by value hit USD2.3bn, 35% up on the same period last year and indeed higher than 2024's annual total. Globally, the combined value of aerospace and defense transactions in H1 2025 stood at USD21.7bn, more than double that of H1 2024 and the highest figure since the same period in 2021.

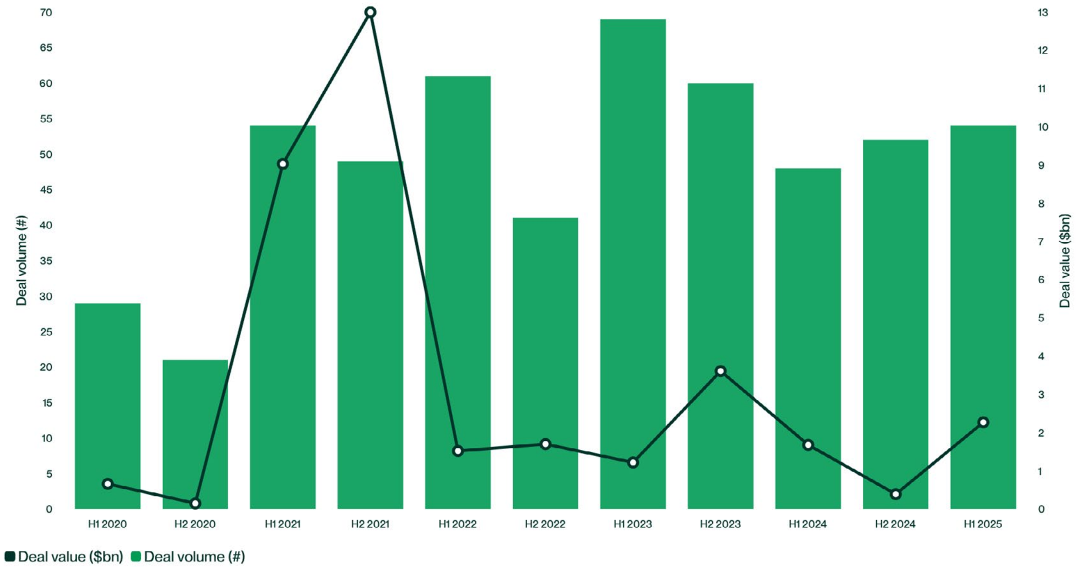
As governments search for ways to boost the volume of private capital flowing in the sector, so interest in defense assets among private equity funds is growing. PE dealmaking in the defense sector globally more than doubled last year to USD13.8bn, with M&A volume up 30% year-on-year. Figures from S&P show that the U.S. and Canada have attracted 83% of global PE and venture capital investment in aerospace and defense since 2020.

LPS PUSH PRIVATE EQUITY FUNDS FOR EXPOSURE

In the past, the PE universe has been split on defense investment. While some funds have excluded the sector altogether others have been involved for many years, albeit not investing directly in front-line munitions manufacturers but preferring instead to back suppliers and developers of dual-use technologies. However, under pressure from their LPs to gain exposure to fast-growing industry, both stances are changing. As they consider their strategies to capitalize on current tailwinds, a number of the biggest players are looking at consolidation deals with investment horizons much shorter than the typical five-year hold period.

Geopolitical shifts ignite European defense M&A

Deal value for H1 2025 up 35% year-on-year; near fivefold increase on H2 2024



Source: Refinitiv • Data correct to June 30

FOCUS ON ADVANCED MANUFACTURING TARGETS AND TECH PROVIDERS

The biggest defense deals in Europe last year—Rheinmetall's USD950 million deal for Loc Performance Products, a U.S.-based manufacturer of machined components for military vehicles, and U.S. defense components manufacturer Loar Holdings' acquisition of France-based LMB, which develops customized high-performance fans and motors, for USD382m—involved conventional weaponry and advanced manufacturing. More recently, Tikehau Capital entered into an agreement to acquire a majority stake in Belgian defense company ScioTeq BV—which develops visualization and computing solutions—from OpenGate Capital, LLC.

But a closer analysis of recent M&A transactions reveals how battlefield dynamics are reshaping the sector. A growing number of investors are targeting technology startups rather than industrial companies, reflecting that 21st century warfare is fought as much with drones and artificial intelligence as it is with warplanes and tanks. Here, Europe's technology deficit in comparison to China and the U.S. is likely to require collaboration with foreign innovators.

Since October 2024 there have been six acquisitions of European drone and counter-drone start-ups, with buyers including Rheinmetall and German defense tech player Quantum Systems. In September last year Safran acquired French defense AI developer Preligens for USD243m, while in June, Rheinmetall announced a partnership with U.S. defense tech business Anduril to develop drones for Europe and explore opportunities to build solid motors for missiles and rockets. Acknowledging the sensitivity of cross-border collaborations, the companies said their alliance was built on "mutual respect for sovereignty" and would "prioritize local control, transparency and adaptability".

VENTURE FUNDING ON THE RISE

VC funding of European defense tech developers reached USD5.2bn in 2024, up 24% year-on-year. The sector is also attracting interest from some of the Continent's most prominent investors; in June, Spotify founder Daniel Ek's fund Prima Materia led a EUR600m investment round in German drone maker Helsing that valued the company at EUR12bn.

Looking ahead, a key focus of transaction strategies—particularly among investors from outside the EU—will be how to structure deals to benefit from the huge volumes of public money flowing into the sector.

FOREIGN INVESTORS FOCUS ON DEAL STRUCTURING TO ACCESS OPPORTUNITIES IN EUROPE

The ReArm Europe Plan, launched in March 2025, is designed to facilitate and incentivize investment and collaboration in the European defense sector. It includes a EUR150bn EU loan facility (the Security Action for Europe (SAFE) financial instrument) to support the joint procurement of military systems.

ReArm Europe also activates the Stability and Growth Pact's escape clause, which would allow member states to exceed current treaty-imposed debt and deficit limits by up to EUR650bn over the next four years. In response Germany has lifted its constitutional "debt brake" and will increase defense spending to 3.5% of GDP by 2029, with Nato members pushing to invest 5% of GDP on military capacity, resilience and security over the longer term.

For overseas dealmakers looking to benefit from this flood of investment, substance is critical. Not only do they have to navigate EU and member state FDI screening rules, which closely scrutinize inbound investments in military and dual-use technologies, but they also need to consider the intent of SAFE.

Its funds are intended for distribution to member states as well as countries in the European Economic Area (EEA), European Free Trade Area (EFTA), prospective EU member states, Ukraine, and nations that have signed security and defense partnerships with the EU. The funding is designed to facilitate joint procurement involving at least two countries from these areas.

For relatively basic products such as small drones or ammunition, 65% of the costs have to originate from companies that are established and managed in those territories (as long as those companies are not controlled by another country). Where the product is more complex, it must also be possible to substitute components that could be restricted by other nations.

Against this backdrop, foreign investors must carefully consider their deal strategies, corporate structuring and governance processes to navigate potential hurdles.

SPONSORS CONSIDER BESPOKE FUND STRUCTURES AND GOVERNANCE PROCESSES

For financial sponsors this could involve establishing EU-domiciled fund structures and management teams, as well as developing separate strategies for dual-use technologies and pure defense assets. In the case of foreign defense suppliers, it may mean participating in defense projects as a secondary, rather than a prime, contractor.

The impetus for European defense acquisitions grew stronger in June when the European Commission finalized its Defense Readiness Omnibus package.

SAFE, introduced as an early initiative under this broader program, has already begun shaping procurement dynamics. The Defense Omnibus operationalizes and expands upon its financial and policy framework, ensuring that regulatory and administrative processes do not impede access to funding or the scaling of Europe's defense capabilities.

It also clarifies the application of sustainability and ESG requirements to ensure legal certainty for investors and operators, and simplifies the regulatory environment for defense-specific and dual-use technologies.

REGULATORY REFORMS PROVIDE PATHWAY TO FASTER PROFITABILITY

The Omnibus package proposes implementing a directive that would raise the value threshold at which EU procurement rules are triggered, taking many smaller contracts out of scope. It also introduces the possibility of accelerating joint procurement contracts concluded by at least three Member States under certain conditions. These include that contractors must be established and have their executive management structures in the EU or an associated territory, and that they cannot be controlled by countries or entities from outside these areas.

The Omnibus proposals would streamline access to EU-level investment, fast-track permits for defense readiness projects and smooth the transfer of defense products across borders.

It also clarifies that the defense industry is more likely than other sectors to make use of provisions permitting the omission of sensitive or classified information from ESG disclosures in recognition of its importance to the resilience and security of the Union, and thereby to peace and social sustainability.

ANTITRUST ENFORCEMENT AND STATE AID IN THE SPOTLIGHT

At the same time, the Commission is likely to take a more flexible approach to merger reviews, antitrust enforcement and state aid analysis in relation to defense activities.

Importantly, the Omnibus package also addresses the challenge around whether defense-related investments can be considered sustainable under the EU Sustainable Finance Framework. While the EU Taxonomy Regulation currently excludes weapons outlawed by international arms conventions, further guidance is expected under Paris-Aligned and climate transition benchmarks later in 2025.

Why are take-private deals accelerating in Singapore and Hong Kong?

A growing number of companies are delisting from public markets globally. Here we examine what's driving activity in Singapore and Hong Kong, and explore how shifting regulatory regimes are influencing transaction flows.

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Recent years have been marked by a steady flow of delistings from public stock indexes. During the period from 1996 to 2020 the number of U.S. public companies halved from more than 7,000 to less than 4,000, with other major markets experiencing even bigger declines.

These deals have a variety of drivers, including the cost and potential risk of public company reporting requirements, the impact of macro uncertainties on equity prices, and the availability of deep pools of financing on the private markets. With stock valuations squeezed, listed companies have made attractive targets for cash-rich corporates and private equity firms looking to deploy dry powder.

The London Stock Exchange has been particularly affected, with recent research revealing that one in four businesses listed since 2021 have now left the exchange. Meanwhile, Singapore and Hong Kong, whose public M&A regimes are based on the UK Takeover Code, have experienced similar pressures.

So far this year, 18 companies have left the Singapore Stock Exchange (SGX), the highest number since H1 2021. Hong Kong has seen 87 public to private deals, again the highest number for four years.

This dynamic, coupled with important legal and regulatory changes proposed to the Singapore Takeover Code, means we can expect more delistings in the period ahead.

HOW DELISTINGS ARE EXECUTED IN SINGAPORE

In Singapore there are a number of mechanisms via which a public company can be delisted. The usual approaches are a voluntary general offer followed by a compulsory acquisition, or by way of a scheme of arrangement. In the former scenario, an offeror can make a general offer to other shareholders with a view to obtaining overall voting control, which would then be followed by a compulsory share purchase.

Such an offer can be declared unconditional when the offeror receives acceptances relating to 90% of the shares it does not own. Where debt finance is required, lenders will typically prohibit the bidder from declaring the offer unconditional below 90% acceptance without their consent.

Importantly, this route does not require the target company to cooperate.

SCHEMES OF ARRANGEMENT MOST POPULAR ROUTE

A second option is a scheme of arrangement. Schemes require two-limbed shareholder approval (a majority in number of the shareholders present and voting, and 75% by value). The offeror and its concert parties are not eligible to participate, but crucially the court-approved process results in the bidder acquiring 100% of the shares. As a result this is increasingly the most popular route to a privatization.

As mentioned above, important changes have been proposed to Singapore's Takeover Code which we anticipate will provide a more favorable regulatory environment for delistings.

While Singapore's public M&A regime is based on the UK Takeover Code, Singapore's Securities Industry Council (SIC—the equivalent to the UK Takeover Panel) has issued its own set of practice statements, bulletins and other releases.

However in May 2025, the SIC launched a consultation on proposed amendments designed to bring the Singaporean code closer to prevailing international standards.

One of the key proposals would prohibit break fees except in limited circumstances (at present they are permitted, with fees capped at 1% of the target company's value). The SIC is proposing to restrict their use as it believes they harm the interests of shareholders. In its view, if a target accepts a higher offer, the payment of the break fee would represent lost value to the buyer. Were the reforms to be successful, it would move Singapore's takeover regime back into line with that of the UK.

In addition, as part of its reform proposals, the SIC is consulting on changes to the scheme process to improve certainty and increase timeliness, transparency, fairness, and investor protection—key considerations for both local and international investors. As noted above, schemes have become the preferred way to execute a delisting, and we expect these reforms, if successful, will further boost their usage.

HONG KONG TAKEOVER CODE HAS SUBTLE DIFFERENCES

From a comparative perspective, Hong Kong's public M&A regime is also founded on the UK Takeover Code, although unlike Singapore, its regulator, the Securities and Futures Commission (SFC), develops practice notes similar to those issued in London. The SFC also publishes quarterly takeover bulletins that explain its position on selected issues. Like the UK Takover Panel, the SFC issues panel decisions in cases involving particularly novel, important, or difficult points at issue. As a result the application of the Hong Kong code is shaped by a combination of these decisions, informal consultations with the SFC, as well as practitioners' understanding of market practice.

HKEX HOPING TO ATTRACT SECONDARY LISTINGS FROM OVERSEAS

In terms of market landscape, the Hong Kong Stock Exchange has also seen its fair share of delistings in recent years, with the total number of public to private deals in H1 2025 the highest since 2021.

However, the picture here is more nuanced. The HKEX is a deeper capital market than the SGX, and has recently indicated that it is hoping to attract more secondary listings of companies traded in the Middle East and across Southeast Asia that are looking to access Chinese investment. Recent reports reveal that alongside an uptick in privatizations, the number of companies applying to list on the HKEX hit a new high in the first half of this year, beating the existing record which was again set in H1 2021.

The HKEX could see further primary listings if the U.S. follows through with its pledge to delist Chinese companies from U.S. markets. There are currently more than 200 Chinese corporates traded on the NYSE, Nasdaq, and NYSE American, with a combined market capitalization of over USD1.1 trillion.

However there is pressure on the HKEX to loosen its rules around dual class shares in order to facilitate any repatriation. The exchange adapted its rules in 2018 to begin accepting stocks with different voting rights after Alibaba opted to take its USD25bn flotation to New York. Dual class structures are now permitted for businesses with a market capitalization above HKD10bn, although the number of votes is capped at ten per share. According to analysis from Bloomberg, 22 of the 27 largest Chinese businesses listed in the U.S. would not comply with the rule—with some shares carrying up to 100 votes.

SINGAPORE VS. HONG KONG: HOW DO THEIR TAKEOVER REGIMES DIFFER?

Issue	Singapore position	Hong Kong position
Deal protections	Broad prohibition on all deal protection measures such as break fees, exclusivity arrangements, and implementation agreements between the offeree company and any person acting in concert, with two exceptions: • where there is a friendly competing bidder (a "white knight") • following a formal sale process. Any offer-related arrangement requires the consent of the Securities Industry Council (SIC), which would generally not be forthcoming save in limited circumstances, including in relation to confidentiality obligations and non-solicitation agreements.	No general prohibition on such arrangements, subject to the following requirements. • Break fees: an inducement fee or break fee must be de minimis (normally no more than 1% of the offer value). Any inducement or break fee arrangement must be fully disclosed, and the SFC should be consulted at the earliest opportunity in all cases where an inducement fee, break fee, or any similar arrangement is proposed. • Standstill agreements: these must be fully disclosed on a timely basis by the board of the offeree company.
Information parity	The amendments strengthen the principle of information parity among all bona fide offerors. These are the changes. • Any offeror may request, in general terms, all information that has been supplied to other offerors on a weekly basis, rather than having to specify individual questions. • The offeree board must provide all information previously given to other offerors at the time of the request, as well as any further information provided to other offerors in the seven days following the request. • This requirement applies to both written and non-written disclosures. Equivalent access (e.g., site visits or meetings) must be granted to subsequent offerors. • The offeree company may set up a common data room to facilitate compliance. • Recipients of such information may be subject to confidentiality conditions to safeguard sensitive information.	• Any information, including particulars of shareholders, given to one offeror or potential offeror must, on request, be provided equally and promptly to another offeror or bona fide potential offeror. • The other offeror or potential offeror must specify the questions to which it requires answers. It is not entitled, by asking in general terms, to receive all the information supplied to its competitor. • This requirement will normally apply only when there has been a public announcement of the existence of the offeror or potential offeror to which information has been given or, if there has been no public announcement, when the offeror or bona fide potential offeror requesting information has been informed authoritatively of the existence of another potential offeror. • The passing of information should not be made subject to any conditions other than confidentiality; reasonable restrictions forbidding the use of the information passed to solicit customers or employees; and the use of the information solely in connection with an offer or potential offer.

Issue	Singapore position	Hong Kong position
Schemes of arrangement	The proposed changes would introduce more structured requirements for takeovers conducted via schemes of arrangement. • The scheme meeting (where shareholders vote) must be held within six months of the public announcement of the scheme. • Once all relevant conditions to the scheme have been satisfied or waived, the offeror is required to take all necessary procedural steps to make the scheme effective. • This is intended to prevent offerors from relying on long-stop dates or immaterial outstanding conditions to lapse their offers and avoid completion. • These requirements are designed to improve certainty and timeliness in the execution of schemes of arrangement, ensuring that shareholders are not disadvantaged by unnecessary delays or tactical lapses.	In addition to the local law requirements in the offeree company's place of incorporation, Hong Kong's takeovers code imposes the following requirements for privatizations via schemes of arrangement. • The scheme is approved by at least 75% of the votes attaching to the disinterested shares (i.e., shares other than those held by the offeror and the persons acting in concert with it) at a duly convened meeting of shareholders. • The number of votes cast against the resolution to approve the scheme is not more than 10% of the votes attaching to all disinterested shares. The Hong Kong code has no equivalent provision on the timeliness of the implementation of the scheme.

Deal structuring in focus as U.S. outbound investment regime takes effect

Navigating the Committee on Foreign Investment in the United States has long been a key consideration for inbound investors to the U.S. But at the start of 2025, a new U.S. regulatory framework was introduced to regulate and limit outbound investments and transactions by domestic entities. With the new rules having been in effect for six months, we explore their impact on deal structuring.



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In August 2023, the Biden administration laid the foundations for the Outbound Investment Security Program (OISP) via an executive order (EO). After a long rulemaking process, the Treasury Department issued a final rule implementing the program in late 2024, with the OISP taking effect in January 2025.

The program targets transactions involving counterparties connected to "countries of concern" —currently China, Hong Kong and Macau—and that are active in developing technologies with national security implications (specifically semiconductors and microelectronics, quantum information technologies, and artificial intelligence). The regulation is designed to prevent U.S. companies' IP, know-how, capital or professional connections from being transferred to entities based in, or owned or controlled by persons based in, these territories.

From an operational perspective, the OISP requires U.S. persons to conduct due diligence and either notify the U.S. Department of the Treasury of the transaction if they determine the investment is a "notifiable transaction" under the OISP, or refrain from proceeding if it is a "prohibited transaction".

Unlike the Committee on Foreign Investment in the United States (CFIUS) process, the OISP does not provide for a pre-closing government review or approval of proposed investments; instead, parties are responsible for determining whether their activities are notifiable or prohibited. In its current form, the OISP does not contemplate any pre-clearance or case-by-case approval mechanism.

The OISP imposes a broad "knowledge" standard on parties, meaning that a U.S. person is deemed to have knowledge that a notification or prohibition is necessary not only if they have actual knowledge of relevant facts or circumstances, but also if they are aware of a high probability that such facts exist or have "reason to know" (i.e., if they could have acquired the information through a reasonable and diligent inquiry).

This standard requires parties to undertake meaningful due diligence, including seeking information from transaction counterparties, reviewing public and non-public sources, and obtaining representations or warranties as appropriate, to determine whether a transaction is in scope.

OUTBOUND INVESTMENT PROGRAM SURVIVES REPEAL OF BIDEN-ERA POLICIES

The OISP has been implemented unaltered by the Trump administration and indeed the president has reinforced some of the OISP's provisions via his "America First Investment Policy" EO, under which the U.S. administration may seek to expand the list of covered sectors to include biotechnology, hypersonics, aerospace and advanced manufacturing, among others. The policy also proposes using sanctions to "further deter United States persons from investing in the PRCs military-industrial sector."

With U.S. dealmakers continuing to pursue outbound investments and joint ventures (JVs) across the current and potential list of covered sectors, OISP considerations have become an important factor in diligence and deal structuring.

PARTIES STRUCTURING JVS TO AVOID FALLING IN SCOPE OF OISP

The OISP does not limit JVs involving U.S. entities (or foreign businesses with U.S. owners) and China-linked counterparties engaged in the development of technologies that are close to those subject to the regulations. However, great consideration must be taken with respect to the activities of these JVs—or frankly any partnership involving investment from the U.S. short of a full buyout—in order to ensure compliance with the program.

Specifically, by focusing on governance and ownership structure, investments and transactions can be structured to provide that the JV is not classified as a "person of a country of concern", and as such would not be subject to the OISP.

This is the case even if one of the parties to the JV was a Chinese entity or otherwise would be a "person of a country of concern". Accordingly, structuring a transaction and investment where (i) any such counterparty holds less than 50% of the JVs voting interest, voting power of the board or common stock, and otherwise has limited governance or operational rights, and (ii) the JVs management HQ and place of incorporation are in the U.S. or a neutral third country, could allow a JV with a person of a country of concern to be outside of the OISP.

As such, even if the JVs activities fall into the OISP's current list of covered activities, or if that list were to expand in future to capture the JVs activities, then it would still fall outside the OISP. Parties contemplating the formation of a JV should therefore consider the effects of the JVs governance and ownership structure on whether it is currently or could in future become subject to the OISP.

OISP: HOW WOULD A JV BE CONSIDERED A "PERSON OF A COUNTRY OF CONCERN"?

- The JV has a "principal place of business" (i.e., the primary location where the JVs management directs, controls, or coordinates the JVs activities) in China, Hong Kong or Macau.
- The JV is headquartered or incorporated in one of the countries of concern, or is otherwise organized under their laws.
- At least 50% of the JVs outstanding voting interest, voting power of the board, or equity interest is held, individually or in aggregate, directly or indirectly, by any of the following:
  - citizens or permanent residents of China, Hong Kong, or Macau that are not U.S. citizens or permanent residents
  - entities with a "principal place of business" in one of the three territories
  - entities headquartered in China, Hong Kong, or Macau
  - entities incorporated in or otherwise organized under the laws of China, Hong Kong, or Macau
  - the government of China, Hong Kong, or Macau (or any political subdivision, political party, agency, or other instrument), or persons acting for or on their behalf
  - entities in which the government of China, Hong Kong, or Macau holds individually or in aggregate, directly or indirectly, 50% or more of the entity's outstanding voting interest, voting power of the board, or equity interest
  - entities in which the government of China, Hong Kong, or Macau possesses the power to direct or cause the direction of its management and policies
  - entities in which one or more of the foregoing persons, individually or in the aggregate, directly or indirectly, holds at least 50% of the entity's outstanding voting interest, voting power of the board, or equity interest

Creative deal structures help life sciences innovators ride out the macro storm

Pharma innovators have long pursued a variety of deal structures to navigate the risks associated with the drug development process. Here we explore the legal and regulatory dynamics of these creative transactions, which are helping industry players navigate current market volatility.

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Globally, market volatility has eroded confidence and subdued M&A activity. A “wait and see” approach is the prevailing sentiment for many market participants; it is difficult to convince boards to advance deals while valuations are unpredictable while the uncertainty surrounding tariffs is adding complexity to negotiations and long-term planning.

In the life sciences sector in particular, deal value has fallen sharply in recent years. In 2024, the total value of global life sciences and healthcare M&A with contingents fell 36% year-on-year to USD137.3bn, with no therapeutic biopharma acquisitions exceeding USD5bn.

At the same time, there are factors specific to the industry that continue to drive transactional activity, including that the sector is willing to deploy its accumulated cash in return for access to promising assets. In Q1 2025, the sector saw 132 deals worth USD52bn with contingents, the strongest quarter since Q4 2023 and 11.5% higher than Q4 2024.

PATENT CLIFF CREATES MOMENTUM TO PURSUE INNOVATIVE ASSETS

In the U.S., large-cap pharmaceutical companies are confronting a patent cliff that is expected to wipe out more than USD250bn in global revenues by the close of the decade. This dynamic is compelling acquirors to pursue innovative assets—particularly in oncology, immunology, gene therapy, and rare diseases—within start-ups and mid-cap biotech targets.

At the same time, the shift toward precision medicine and platform-based R&D has amplified demand for data analytics systems, AI-enabled drug-discovery technologies, and integrated diagnostic capabilities, and in doing so broadened the definition of a "life-sciences" target to include digital health companies, genomic-sequencing firms, and specialty contract research organizations.

On the sell-side, capital markets dislocation—exacerbated by elevated interest rates, a tepid IPO window, and venture investors' prioritization of portfolio triage—has compelled many early-stage biotechs to contemplate strategic alternatives at valuations that are lower than during the market's 2021 zenith and are therefore attractive to cash-rich strategic buyers.

PRIVATE CAPITAL INVESTORS INCREASE EXPOSURE TO SECTOR

Concurrently, private equity sponsors and sovereign wealth funds have increased their exposure to the sector, often via consortium structures that pair their capital with R&D-oriented operating partners. These hybrid arrangements typically accommodate the extended investment horizons inherent in clinical development while addressing acquirors' desire for downside risk-sharing, milestone-based earnouts, and royalty streams.

While significant acquisitions have been less frequent in the life sciences industry in recent years, the sector has a long-standing reliance on traditional M&A as an engine for growth, portfolio realignment, and pipeline replenishment. With that said, unorthodox structures such as the hybrid arrangements noted above are another key driver for expansion and innovation.

STRATEGIC ALLIANCES FEATURE AS LOWER-RISK PRECURSORS TO OUTRIGHT ACQUISITIONS

Looking ahead, we remain optimistic about a gradual reopening of the U.S. biotech IPO market in the latter half of the year. Nevertheless, the patent-expiry super-cycle and the urgency of therapeutic differentiation are expected to preserve M&A as the sector's dominant strategic lever. Transaction structures are likely to retain contingent components, while strategic alliances—licensing partnerships, co-development and joint research agreements, joint ventures, and option-to-acquire deals—will continue to feature prominently as lower-risk precursors to outright acquisitions.

Creative deal structures and transactions have always been a staple of the life sciences industry. The frenetic pace of scientific discovery, the huge cost of clinical trials, and the inherent uncertainty of the regulatory approval process have driven companies to adopt an array of collaborative and innovative approaches that differ markedly from the conventional, full-company "sign-and-close" acquisition model more common in other industries. The global nature of the sector also drives diversity in dealmaking.

For example, Merck & Co's partnership with Daiichi Sankyo in 2023 exemplified a multi-asset collaboration with the companies co-promoting and sharing profits and expenses. Such structures are designed to allocate risk, optimize capital deployment, preserve optionality, facilitate access to specialized capabilities, and accelerate time to market without incurring the balance-sheet and integration burdens that accompany outright acquisitions.

FLEXIBLE STRATEGIES PROVE RESILIENT IN CHALLENGING M&A MARKETS

These flexible strategies have proven especially resilient in challenging M&A markets, as they allow parties to tailor deal terms to evolving macro conditions, defer major capital commitments, and pursue incremental value creation even when traditional dealmaking slows due to macroeconomic uncertainty or constrained financing environments.

While each transaction is highly bespoke, they frequently share certain legal features: complex intellectual property allocation mechanisms, tiered economic waterfalls, unilateral or mutual termination and control-transfer triggers, and governance frameworks that resemble miniature joint venture constitutions.

At the earliest stages of research, parties often enter discovery collaborations or target-identification alliances via which a large pharmaceutical company will fund basic research in exchange for an exclusive option—exercisable upon the achievement of preclinical or early clinical milestones—to license or acquire the resulting intellectual property.

A good example is the 2024 collaboration between GSK and Flagship Pioneering, which aims to discover and develop ten transformational medicines and vaccines in a deal worth up to USD870m. The transaction gave GSK an exclusive option to licence the candidates for further clinical development. Meanwhile, Novartis announced at the end of last year a multi-year, multi-target alliance with Schrödinger to apply the latter's computational predictive modelling technology and enterprise informatics platform to identify and advance therapeutics.

OPTION STRUCTURE PROVIDES ORIGINATOR WITH NONDILUTIVE CAPITAL AND VALIDATION

The option structure provides the originator with nondilutive capital and a validation halo, while permitting the larger party to defer major consideration until meaningful de-risking has occurred. Option considerations are invariably tiered: an upfront technology fee, periodic research funding tranches, an exercise price calibrated to the stage of development at exercise, and downstream milestone and royalty payments. The accompanying legal architecture must address ownership of background IP, the extent of the license during the option term publication restrictions, exclusivity commitments, and termination rights keyed around safety signals or any failure to reach agreed research goals.

As the asset matures, co-development and co-commercialization arrangements emerge, typically involving a sharing of global clinical development costs and a geographic or field-based allocation of commercialization rights. Merck and Bayer agreed to exactly this sort of arrangement in 2014 for the cancer drug Adempas, which included joint steering committees and profit-sharing arrangements.

Economic participation is usually expressed through either cost-sharing and profit-split formulas or royalties. Here, the governance terms resemble those found in joint ventures: joint steering committees, escalation paths, deadlock-resolution provisions, tie-breaker voting rights for the party bearing greater financial risk, alliance managers, and dispute-escalation ladders.

STAGED BUYOUTS INCREASE IN POPULARITY

An increasingly popular variant is the staged buyout: the commercial lead receives an option to purchase the partner's retained co-commercialization stake after regulatory approval, with a pre-agreed multiplier on net sales or fair-market-value floor to compensate the minority partner for early-stage risk-sharing.

Regional or territory-specific license transactions continue to proliferate as companies seek rapid entry into markets such as China, Japan, and Latin America, where legacy incumbents possess established regulatory, manufacturing, and distribution infrastructure. For example, Amgen's 2019 agreement with BeiGene granted BeiGene rights to commercialize Amgen's oncology portfolio in China, leveraging BeiGene's local expertise. More recently, Bayer acquired the rights to Cytokinetics' heart drug in Japan to strengthen its cardiovascular business.

These deals address antitrust and national security concerns by channeling rights through local subsidiaries and incorporating CFIUS—(or analogous regime) compliant information-sharing protocols. Increasingly, parties negotiate step-in provisions that enable the global licensor to re-assume rights upon the occurrence of predefined performance shortfalls, thereby providing a synthetic "call option" to re-aggregate global rights without the complexity of a traditional acquisition.

PLATFORM COLLABORATIONS WHERE DISCOVERY-STAGE COMPANY POSSESSES ENABLING TECHNOLOGY

Then there are platform collaborations, which are serviceable when a discovery-stage company possesses an enabling technology—such as mRNA, CRISPR-based gene editing, or antibody-drug conjugate linkers—that can spawn multiple product candidates across disparate therapeutic areas.

A prominent example is the 2018 collaboration between Moderna and Merck to develop personalized cancer vaccines using Moderna's mRNA platform. The largest collaborative R&D alliance in 2024 saw Bristol Myers Squibb pay USD55m to collaborate with Prime Medicine to develop reagents for ex-vivo T-cell therapies. Under the terms of the agreement, Prime will design optimized editor reagents for a select number of targets, including reagents that leverage its Prime Assisted Site-Specific Integrase Gene Editing (PASSIGE) technology.

Here, rather than buying the platform outright, a larger counterparty will license access to a limited number of "collaboration targets" while typically receiving an equity stake to align incentives. Each target is governed by its own development plan and set of milestones. Because the platform owner is concurrently developing its own pipeline assets, the definitive agreements must define "fields," background and foreground IP, and improvements with exceptional granularity to mitigate freedom-to-operate conflicts. Oversight of publication rights and competitive programs, especially when the platform may be foundational across multiple alliances, is a perennial negotiation flashpoint.

Manufacturing and supply partnerships often function as quasi-joint ventures, particularly for biologics that require specialized cell-culture or gene-therapy vector capacity. For instance, the 2020 partnership between Lonza and Moderna to manufacture mRNA-1273, Moderna's COVID-19 vaccine, involved long-term capacity commitments and technology transfers. More recently, Regeneron has agreed a ten-year manufacturing and supply agreement worth USD3bn with Fujifilm Diosynth Biotechnologies, which will make large bulk drug products for the biotech at a new site in North Carolina. This deal nearly doubles Regeneron's U.S. manufacturing capacity amid ongoing tariff concerns in the U.S.

CHANGE-OF-CONTROL PROVISIONS UNDER SPOTLIGHT IN MANUFACTURING PARTNERSHIPS

Under these deals, the innovator retains product ownership but commits to long-term minimum purchase obligations, frequently backed by capacity reservation fees and take-or-pay terms. Change-of-control provisions receive heightened scrutiny because any acquirer of either party could find itself contractually bound to an unwanted long-term supply arrangement or forced to share proprietary manufacturing know-how with a competitor.

Asset purchases coupled with contingent milestone or royalty consideration have replaced whole-company acquisitions where the seller is a single-asset entity. For instance, in 2024 AstraZeneca acquired Amolyt Pharma for USD800m with a potential contingent payment of USD250m and BioNTech's acquisition of Biotheus with potential USD150m contingent payment.

These assignments may be structured through the sale of patents, investigational new drug applications (INDs), and/or manufacturing know-how, sometimes consolidated in an IP-holding subsidiary that is spun off to the buyer. In these arrangements the earn-out component is of outsized importance and often extends across commercial sales, label expansions, and even patent-term-extension events. Deal agreements must address audit rights, information-sharing, change-of-control acceleration, and buyer obligation to use "diligent" or "commercially reasonable" efforts, with each calibrated to bind the buyer to sustain development. In the U.S., the Delaware court has traditionally been reluctant to enforce vague best-efforts covenants.

SYNTHETIC SECURITIZATIONS ALLOW MATURE REVENUE STREAMS TO BE MONETIZED

Royalty-interest divestitures, sometimes styled as synthetic securitizations, enable innovators to monetize mature revenue streams while retaining product ownership. A recent example is Royalty Pharma's 2024 purchase of royalties and milestones on autoimmune disease drug frexalimab from ImmuNext for USD525m.

Structured spin-outs—where an originator contributes a non-core therapeutic program into a newly capitalized subsidiary funded by venture investors and retains an option or right of first refusal to reacquire the program post-proof-of-concept—allow large pharma companies to offload near-term R&D expense while preserving future strategic control. For example, in 2018, GlaxoSmithKline spun out its oncology assets into a new company, Tesaro, which was later reacquired after clinical validation. The parent's option is usually exercisable at predetermined multiples of invested capital or fair value, often combined with an automatic conversion of the venture investors' preferred shares into a royalty or milestone entitlement to align economics upon re-acquisition.

ASSET SWAPS GAIN TRACTION AS COMPANIES REFOCUS

Finally, asset swaps and therapeutic-area carve-outs have gained traction as companies refocus their pipelines. A notable example is the 2014 asset swap between Novartis and GlaxoSmithKline, in which Novartis acquired GSK's oncology portfolio while GSK took over Novartis's vaccines business, allowing both companies to sharpen their strategic focus.

In these transactions two parties exchange late-stage or commercial portfolios in disparate therapeutic areas, obviating cash consideration, accelerating strategic fit, and sidestepping antitrust concerns that might arise from concentration within a single modality. Because valuation mismatches are inevitable, balancing payments or contingent-value rights are integrated to equalize post-closing economics, and transitional-services agreements govern supply chain, pharmacovigilance, and quality-assurance obligations until full operational separation is achieved.

DEAL CONSIDERATIONS

When structured carefully, these alliances and novel transactional forms provide life science companies with the flexibility to access capital, capabilities, and markets while minimizing the binary risk profile that has historically typified blockbuster drug development.

Across all of these collaborative and non-traditional M&A structures, practitioners confront recurring commercial and contractual considerations:

- scrupulous delineation of background versus foreground intellectual property and improvements
- sophisticated milestone-based economics that align risk and reward while safeguarding accounting treatment under frameworks such as U.S. Accounting Standards Codification 606
- governance provisions that provide for joint oversight while sidestepping antitrust or fiduciary duty constraints
- rigorous change-of-control and assignment clauses calibrated to the high acquisition churn in the sector
- data-privacy, pharmacovigilance, and regulatory-compliance frameworks to manage the global exchange of clinical data
- dispute-resolution mechanisms that often combine expedited arbitration for scientific disagreements with traditional court procedures for monetary claims.

Hybrid arrangements also often present novel tax considerations compared to more vanilla M&A structures. Parties will need to consider tax consequences early in negotiations and seek alignment on structure, intended tax treatment, and risk allocation.

For example, structures that incorporate research funding payments and back-end options to acquire target assets or equity may raise questions about the tax treatment of the payments vis-à-vis the funder, the target and the target's equity holders.

The deductibility or capitalization of the funder's payments versus the current or deferred taxation of those payments at the target or equity-holder level depends on the terms of the deal and the tax laws of the relevant jurisdiction(s). Here, beneficial tax regimes in the target's jurisdiction (e.g., R&D tax credits or full expensing of certain R&D costs, the latter of which is currently included in U.S. tax legislative proposals) may play a role.

Similarly, deals that include contingent or optional asset or equity sales—with or without earnout payments—may raise notable tax differences, including the potential for two levels of tax in an asset sale versus a possible tax exemption in an equity sale.

Moreover, hybrid arrangements that anticipate royalty streams or other current returns on investment may give rise to withholding taxes that would materially alter economics absent local or double tax treaty relief, requiring early consideration of withholding taxes and risk allocation. If an actual or quasi joint venture is planned, key considerations will include whether the JV constitutes a separate entity for local tax purposes and/or whether any flows are subject to "arm's length" pricing requirements.

These examples are just a few of the tax considerations that may arise in a hybrid arrangement. Given the panoply of options parties may consider to achieve their commercial and strategic objectives, a particular structure could give rise to any number of tax considerations, making tax a key component across the full life cycle of the deal.

European merger enforcement in chemical, steel and other basic industries

Industrial companies with operations in Europe are under pressure from persistently high energy costs, resurgent tariff barriers, and longstanding social and environmental liabilities. These pressures are leading to strategic reviews, sales, JVs, and site closures. Merger control plays a prominent role in how companies think about these strategic options. Here we summarize the current state of play and offer practical thoughts on how to approach transaction feasibility.

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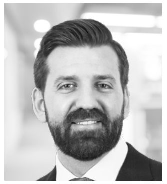

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An excellent starting point for understanding the Commission's current thinking is an article published in autumn 2024 by Daniele Calisti (then head of unit for Mergers in Basic Industries, Agriculture and Manufacturing).[1] In the article, Calisti and colleagues examine the European Commission's application of physical structural metrics to the assessment of industrial and manufacturing mergers.[2]

CAPACITY IS KEY

Calisti explains how the Commission's approach to merger enforcement has "significantly evolved" by tightening of enforcement of horizontal transactions.

In Calisti's analysis, the Commission's assessment of deals concerning steel, metal processing, production of chemicals and cement, and the manufacturing of industrial inputs of all kinds, now focuses on capacity shares, as well as a concept he describes as "pivotality."[3]

Deals between merging parties that are "pivotal" are more likely to be problematic. To avoid being pivotal, there needs to be so much spare capacity outside the merging firms that total demand can be met without the merging parties supplying any of it.

Assuming that the merging parties have significant market share in some dimension, this implies that large amounts of spare capacity need to be available in the market post-merger for it to act as a sufficient constraint on the merging parties' competitive position.

HOW TO MEASURE MARKET POWER

Market power (i.e., the ability to affect price or output in a market) describes the impact a company has on customers, direct competitors, and downstream rivals. In most industrial settings, market power is closely linked with the size of the relevant entity. Calisti explains that the Commission now favors two primary metrics of market share in industrial contexts that can be used as an initial indicator of market power:

- Merchant sales: Merchant sales are sales to third parties (i.e., excluding captive production/consumption). Market shares based on this metric have the advantage of capturing the significance of players established outside the reference market (such as imports for geographic markets narrower than global) and provide a measure at the same level on which price competition occurs.
- Capacity shares: Capacity shares refer to production capacity at the relevant level of the value chain and provide a measure of manufacturing capabilities available within the reference market.

Capacity shares are useful in assessing competition in manufacturing industries as they reflect structural patterns of supply regardless of whether the output is used captively or sold to third parties. Investment in plant and machinery is a major cost that is often largely sunk. Its operation involves incurring fixed costs that are slow to adjust to cyclical movements in demand; steel, cement, or oil-refining equipment cannot easily be turned off and on, and skilled labor cannot typically be scaled up and down easily (other than through temporary shift pattern changes). Capacity therefore reflects underlying trend levels of supply.

The Commission's decisional practice, in Calisti's analysis, has put structural capacity firmly in the spotlight as the most appropriate and informative starting point for assessing long-term market power in industrial contexts, particularly those characterized by homogeneous products and vertically integrated players (e.g., steel, copper, aluminum, and chemical manufacturing).[4]

The major weakness in capacity shares as a measure of competitive pressure in a market is that they are highly sensitive to geographic market definition. In other words, capacity measures exclude imports from outside the geographic market. This makes geographic market definition very important to predicting case outcomes.

HOW TO MEASURE GEOGRAPHIC MARKETS

The geographic reach of industrial players is limited by the distance over which they can or do typically sell their products, which in turn may be determined by the physical characteristics of the products in question. Long-distance shipping is progressively more unlikely to be economic or logistically practical for heavy, bulky or lower-value goods, goods with specific technical or preservation requirements, or goods that require frequent or recurring supply rotations.

As Calisti notes, the Commission has more recently approached these features of industrial manufacturing with greater sophistication. First, the Commission has adopted geographic market definitions that use a catchment area determined by a measurable distance (radius) or time (isochrone) centered around supplier locations, or possibly, in markets with customer-specific prices, customer locations. This approach is also reflected in the updated Market Definition notice[5] and marks a change from the historic practice of defining geographic markets as either national, EEA-wide or global. Second, the Commission has recognized that conditions of competition are not uniform within a given catchment area (a concept referred to as “geographic differentiation”) and, for goods with a high transportation-cost-to-product-value ratio, such as cement, competition may be stronger between suppliers that are located in proximity to each other.

In practice, this represents a trend toward narrower geographic frames of reference. Together with the preference for capacity shares, this leaves competition from imports at risk of underrepresentation in the analysis. Calisti acknowledges this issue: “The competitive assessment in basic industries ... starts in a sense from the observation of physical bodies in an industry, through the observation of their mass. This obviously does not account for potential imports of the relevant products, which will also have to be assessed.” While the acknowledgement is helpful, relying on import constraints from outside the market in practice is difficult, especially at phase 1 where there is limited time for detailed substantive argument.

This is unfortunate. In many industrial markets, imports perform a balancing role and effectively act (after transport costs) as the marginal cost producer, thereby having a significant impact on pricing. This is especially so if the current U.S. tariff policy is sustained, as this will generate import diversion from U.S. to Europe. Export producers with excess supply could easily divert products to Europe to maintain economies of scale or cover fixed costs. This will generate intense competition, driving down prices in Europe. Indeed, it is what the EU’s trade defense instruments are designed to tackle. Yet this is also the competitive pressure that is most at risk of being underrepresented in the merger assessment framework Calisti describes.

PIVOTALITY

In addition to a preference for capacity shares, the Commission has more recently relied on the concept of "pivotality." A firm post merger may be considered pivotal when all other competitors are capacity-constrained to the extent that they are unable, together, to cover the entire demand in the market; in such situations, the pivotal firm's capacity is necessary to cover some part of total demand.

The underlying argument is that while smaller amounts of spare capacity may generate an ability for rivals to expand output in response to a price rise from the merging parties, they may well not have the incentive to do so; since, if the merged parties are "pivotal," some customers will need to transact with the merged parties at the higher price. This pulls up the market price generally, which is likely to benefit rivals. The critical evidence to support this often comes from the internal documents of both merging parties and their rivals. In its decision prohibiting the Tata Steel-ThyssenKrupp merger, for example, the Commission found that "the Parties' synergy planning documents confirm a strong likelihood that the Transaction would result (i) in production capacity reductions [...] in a context of already tight supply, (ii) in the elimination of competing R&D efforts and (iii) at the very least in significant price increases in the EEA steel markets."[6]

While there remain other considerations for the Commission to fully capture the reality of competitive dynamics (e.g., customer preferences, innovation, sustainability), the clear message Calisti has for industrial companies is that physical structural metrics provide the best lens through which to assess the competitive effects of a transaction. This has important implications for deal planning.

In particular, pivotality implies that significant spare capacity outside the merging party is needed to constitute a sufficient competitive constraint.

This is in direct tension with the deal rationale for many industrial transactions in Europe currently. Persistently high energy costs, resurgent tariff barriers and longstanding social and environmental liabilities are reducing capacity utilization and capex incentives in Europe. Taking out underused capacity is a major deal rationale and key to finding a sustainable level for European production—but reliance on capacity shares and pivotality by the European Commission will make these transactions more difficult. See the practical thoughts below on how to plan for and manage this issue.

POLITICAL CONSIDERATIONS

The geopolitical environment has changed significantly in the months since Calisti's article was published. The Trump administration's erratic approach to tariffs has upended global trade flows to a far greater degree than expected; the EU in general and Germany in particular have recognized the need for significant increases in defense spending—which has a direct impact on preserving European industrial capacity and resilience.

We also have a new European Commission, with Teresa Ribera as the commissioner responsible for competition. She comes to the portfolio with a background in environmental and social policy rather than antitrust. These factors create some potential for unexpected outcomes. For instance, reducing capacity may create competition concerns, but it also improves capacity utilization and lowers average costs, making industrial production in Europe more economically sustainable. How this weighs against "pivotality" and the considerations discussed in this note will be key for many transactions now being considered.

Getting a transaction cleared by reference to political considerations alone in Europe is difficult and high risk. Most deals will be best served by working through the analysis in the normal way, with wider considerations playing at the margins, perhaps in weighing evidence relating to entry or incentives of existing players to use spare capacity or when negotiating the perimeter of a remedy.

KEY TAKEAWAYS FOR INDUSTRIAL COMPANIES WHEN ASSESSING DEAL FEASIBILITY

Look primarily to capacity shares rather than sales

- This will be the fastest way to filter the likely difficulty of the transaction, but ought to be done against a range of plausible geographic market definition approaches (see below).

Invest time to consider appropriate catchment areas (rather than EEA or national shares)

- This may involve reviewing internal assessments of catchments and delivery mileage. Consider working with an economist to test different merger outcomes under different catchment definitions and centering on both sources of supply and demand.

Be mindful of the "consolidation race"

- Many transactions in European chemicals and industrial contexts are motivated by capacity rationalization—taking out inefficient and underutilized spare capacity.
- The first transaction to seek approval will benefit from the capacity remaining in the rest of the industry—an especially significant advantage if "pivotality" is going to feature prominently in the antitrust assessment.

Remember that spare capacity is not a "silver bullet"

- Historically and intuitively, the existence of spare capacity outside the merging firms was often considered sufficient to defeat unilateral price effects.
- More recently, the Commission has recognized the importance of considering whether firms have not only the ability to expand output but also the incentive to counter price increases by utilizing their spare capacity (or whether, if a merged entity were to increase prices, other players would benefit more from simply increasing their own prices).[7]

Build evidence of the impact of imports

- Imports do not sit well with the Commission's framework for the assessment of basic industries mergers, even if they may play a key role in competitive dynamics.
- We are also now in a period of significant import disruption. It will be important to collect evidence of import volumes and reflect that these have been and are expected to be structural rather than cyclical features. Referring to internal documents, such as modelling of capital investment, may help evidence this.

Structural remedies solve structural concerns

- Where remedies are required to alleviate potential competition concerns, the Commission, like most antitrust agencies, has a stated preference for structural remedies (i.e., divestments) rather than behavioral remedies (e.g., access to manufacturing facilities)—a preference that is increasingly honored in the breach[8] but does still tend to operate in industrial transactions. Appropriate remedies should take into account the particularities of relevant value chains, including considering the viability of any divestiture package in industries where vertical integration provides a competitive advantage. A divestment proposal that does not include upstream capabilities or essential inputs is unlikely to constitute a comprehensive and effective remedy. Merging parties may have to include primary production assets even if the competition concern relates to downstream markets.
- Remember that in industrial contexts, the Commission is likely to often require an upfront buyer (i.e., a buyer to be identified and approved, and a divestment sale signed before the reviewed deal can close).
- Plus, the viability of the remedy will likely turn on customer perception of quality, expertise, R&D, logistics and market reputation.

FOOTNOTES

1. Daniele Calisti has since moved to a new role as head of unit for Merger Case Support and Policy where he leads development and oversight of EU merger policy, including current review of the Commission's merger guidelines.

2. Daniele Calisti, Pilar Córdoba Fernández, Amine Mansour, "Mass, space, and gravity-merger enforcement in basic industries," *Journal of European Competition Law & Practice, Volume 15, Issue 6, September 2024, pp. 386–399*.

3. Calisti cites a paper by Thomas Bueetter, Andrea Cilea and Massimiliano Kadar (2016) "Horizontal Mergers in Homogeneous Goods Industries: When is Spare Capacity Sufficient to Offset Unilateral Effects?" *World Competition, Volume 39(1) pp57–65.*

4. Cases M.8444, ArcelorMittal/Ilva (2018); M.8674, BASF/Solvay's Polyamide Business (2019); M.8713, Tata Steel/ThyssenKrupp/JV (2019); M.8900, Wieland/Aurubis Rolled Products/Schwermetall (2019); M.9076, Novelis/Aleris (2019); M.9409, Aurubis/Metallo Group Holding (2020); M.10658, Norsk Hydro/Alumetal (2023).

5. See paragraph 73 231107 Market Definition Notice (rev) (PresCab).docx.

6. Case M.8713, Tata Steel/ThyssenKrupp/JV (2019), para 1227.

7. Cases M.6471, Outokumpu/Inoxum (2012); M.6905, INEOS/Solvay/JV (2014).

8. See Chapter 2 of the A&O Shearman Global Trends in Merger Control 2025, where we identify over half of remedy cases globally having a behavioral component.

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