M&A dealmakers prepare for 2024 recovery

The M&A market is adapting to a reviving economy in 2024, with dealmakers seeking legal counsel to prepare for regulatory intervention, valuation gaps, and cautious acquirors, say **Nick Cline, Douglas Abernethy,** and **Catherine Campbell**

As the continually evolving M&A market adapts to a (hopefully) reviving economy, dealmakers are reflecting on recent deal processes, preparing to navigate hurdles, and strategising with legal counsel to optimise 2024 transactions. Following reduced deal volume in 2023, early signs of an M&A recovery are emerging, with dealmakers anticipating an improving interest rate environment and increasing deal finance availability. However, dealmaker caution, valuation and deal term gaps, and interventionist regulators remain key challenges, making transaction preparation critical to successful execution.

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Addressing acquiror caution

Record levels of M&A activity, including compressed and highly competitive deal processes, resulted in more seller-friendly deal terms in 2021 and early 2022. Many deals were signed with fewer buyer protections and less information about target businesses than buyers have required at other times in the dealmaking cycle. This included tighter financial liability caps, shortened periods for claims, limited seller recourse, and frequent resistance to other protections, such as escrows and material adverse change clauses.

The aftermath of this M&A surge has seen a rise in post-closing discoveries of target company issues, and increasing M&A disputes, claims, and litigation – all compounded by ongoing macroeconomic and geopolitical challenges – making dealmakers reflect on their transaction playbooks and approach new deals cautiously.

While buyers have made gains in recent deals, a nuanced picture remains, with considerable variation in overall deal terms, based on deal size and target sector. Analysing data from more than 340 European deals signing or closing between July 2021 and June 2023 (inclusive), **Latham & Watkins' 10th edition of its annual European Private M&A Market Study** (the M&A Market Study) provides insights into the trends and developments shaping the overall market.

As dealmakers prepare for new acquisitions, deal teams have worked closely with their advisers (internally and externally) to review previous acquisitions to pre-empt issues, implement improvements, and gain an in-depth understanding of current market dynamics. This collaboration encourages cross-practice information flows, which is critical in deal planning.

In recent deals, for example, this has included considering alternative deal structures and creative use of contractual provisions such as earn-outs. The growing prevalence of this contractual provision – in which additional post-completion consideration is paid based on the performance or meeting of targets by the acquired business – comes as parties seek flexibility to unlock valuation gaps and facilitate M&A deals, with 20% of deals making use of earn-out provisions.

Escrows remain uncommon – only 15% of deals in the M&A Market Study featured an escrow, a notable decrease from earlier editions. This decrease is in part due to warranty and indemnity (W&I) insurance and sellers providing relatively limited covenants in the 2021–22 seller's market. The decrease also suggests that, despite buyers' concerns about sellers' ability to meet post-completion obligations, sellers are successfully resisting requests for a portion of the purchase price to be placed in escrow.

The downward trend for liability caps on commercial warranty claims also continues; however, the prevalence of transactions featuring W&I insurance has increased, after plateauing in previous editions. This increase reflects significant deal volume among private equity sellers, which typically favour W&I insurance, albeit W&I insurance now seems to be a commonly preferred route across the entire spectrum of sellers.

In the public M&A context, bidders have also been getting creative in an attempt to bridge valuation gaps. For example, 2023 saw five firm takeover offers announced that featured unlisted share alternatives, allowing target company shareholders the option to elect to roll into the bidder's structure.

Ongoing creativity is to be expected in the year ahead as parties seek expert legal counsel for solutions to close deals while also managing risks.

Rising regulatory interventions

Dealmakers have a significant amount of regulation to contend with, including, most recently, the Foreign Subsidies Regulation (FSR), which empowers the European Commission to control subsidies that distort the EU internal market and places new filing requirements on dealmakers. As regulators and governments push to enhance and aggressively enforce a wide range of rules impacting investments in multiple sectors, dealmakers should expect to continue to feel the hand of government, even in sectors not traditionally viewed as 'regulated'. Careful planning to manage and mitigate such interventions is essential.

Antitrust regulators remain particularly active. For example, the UK's Competition and Markets Authority (CMA) is playing a more prominent role in reviewing global M&A deals, including a number of high-profile interventions in 2023, with more anticipated in 2024.

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Recent deals have also seen the CMA focus on buy-and-build transactions, as it looks to protect against perceived threats to consumers. It was perhaps this proactivity from the CMA that prompted the UK government to publish a "strategic steer" in November 2023 reminding the CMA that it was expected "to prioritise outcomes that promote competition, investment, innovation and boost economic growth".

Foreign direct investment and national security concerns also remain a priority. As it currently operates, **the UK's National Security and Investment Act 2021** (the NSI Act) undoubtedly results in extra administrative steps for investors whose transactions are caught by the regime; in particular, the mandatory notification requirement. This is the case even when national security concerns are remote; for example, internal reorganisations, debt-to-equity restructurings, de-SPAC transactions in which no single investor acquires control of the target company, and acquisitions of companies whose activities are caught by the NSI Act's wide scope.

It is therefore unsurprising that the prevalence of transactions featuring foreign direct investment approval conditions continues to increase – just 10% of deals included in the 2019 edition of the M&A Market Study featured such conditions, compared with 34% of deals included in the 2023 edition.

In late 2023, the secretary of state issued a call for evidence designed to solicit views on "how the system can be even more business friendly while maintaining and refining the essential protections we need to protect our national security". As part of a wider pattern of the UK government showing a willingness to engage with investors, advisers, and other parties, the call for evidence has sought views on the scope of the mandatory notification obligation, including the definitions of UK economy sectors and the types of transactions covered by the mandatory notification obligation.

That said, the call for evidence is not restricted to reducing the NSI Act's scope. The UK government has indicated that it is considering expanding the reach of some of the definitions of the sectors of the economy covered by the mandatory notification requirement, such as adding "generative AI" to the existing artificial intelligence definition, but potentially narrowing other parts of that definition.

With other regulators – including those in the US – voicing similar antitrust and foreign investment concerns, dealmakers need to consider the heightened risk and growing threat of enforcement action on multiple fronts. A key challenge has been navigating the nexus between regimes, and across different jurisdictions. As regulators can take divergent approaches to the same deal, proactive and early engagement with expert legal counsel is essential to navigate strategically the tougher and more complex enforcement landscape. Early diligence is required to assess and determine impacted entities based on the factual matrix of each deal.

With regard to the FSR, deal teams can also improve their chances of a successful transaction by planning ahead and assessing their relationships with governments and related entities across jurisdictions and corporate structures. In many cases, acquirors will need to engage upstream with specialists to prepare their notifications, which may be particularly challenging and time consuming for global corporations.

For acquirors seeking to enhance certainty in competition filings, employing risk mitigation by assessing available strategies (e.g., submission of a briefing paper or even a full merger filing to the CMA) may offer solutions. Where national security concerns are foreseeable, acquirors will need to ensure a comprehensive strategy is in place for engaging with government and addressing concerns, including potentially by adding a government affairs expert to the usual slate of advisers. But even when national security concerns appear implausible, severe sanctions for completing a transaction

without first obtaining approval when required mean that notification analysis should form a key part of the deal preparation process.

Prepare for all transaction types

While traditional M&A was subdued in 2023 compared with previous years, joint venture activity, public-to-private deals (in the later part of the year), and carve-out transactions remained more robust. These deals are expected to remain prominent in 2024, and deal teams should remain agile and ready to engage in a range of deals.

Large corporates often operate ongoing reorganisation, carve-out, and divestment programmes to streamline portfolios, realign focus, and extract value from underperforming assets, and current market conditions are resulting in ramped-up preparations. There are plenty of issues for sellers to plan for as they look to maximise value; for example, deeply integrated businesses can make visibility on historical and forecast standalone performance difficult to obtain and measure. Corporates should:

- Identify assets and entities within the deal perimeter (including when flexibility exists to respond to buyers' requests);
- Assemble a deal team covering all areas and jurisdictions;
- Initiate early tax planning;
- Consult legal advisers on regulatory filing requirements and HR issues; and
- Consider corporate structuring.

Early planning and engagement with stakeholders is essential as there may be numerous third-party consents, employee consultations, and operational, technical, financial, legal, and taxation issues (among others) to consider to prevent business continuity and financial strength from being compromised, both in practice and in the eyes of an acquiror.

Such deal readiness is valuable for all companies but is particularly valuable for public companies as the UK continues to prove a fertile hunting ground for shareholder activism, with US-based investors spearheading a significant proportion of public campaigns during 2023. These seasoned investors with a track record of success are increasingly turning their attention to UK plcs, and corporates should expect more of this activity in 2024.

Heightened shareholder activist focus can introduce significant disruption to the day-to-day management and business operations of targeted UK companies. However, proactive preparation, including reviewing and enhancing activism defence strategies, can bolster UK plcs' preparedness and uncover opportunities. In a welcome reduction to a source of friction in large-scale M&A, 2024 is expected to see the requirement for mandatory shareholder approval for significant transactions by UK premium listed companies (i.e., 'Class 1 transactions') removed, as part of the Financial Conduct Authority's wide-ranging capital markets reforms.

Open for business

The next 12 months will likely present significant opportunities for dealmakers, but in a world increasingly difficult to predict, they will need expert legal counsel to help them to prepare for, and optimise, M&A transactions.

Germany

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Market overview

The German M&A market showed remarkable resilience in 2023, maintaining a steady pace of activity despite geopolitical uncertainties, economic headwinds, and growing regulatory scrutiny.

Naturally, these developments led to a more cautious approach from financial investors and a reduced number of private equity deals, including leveraged buyouts, IPOs, and public takeovers. But strategic investors – generally less dependent on external financing and, hence, less affected by increased interest rates – took the opportunity of fewer deal competitors and stayed active in the M&A market of 2023.

While mega-deals were rare, a shift towards divestitures, joint ventures, and strategic partnerships, as well as transatlantic deal activity, has become evident. Combined with numerous transactions in certain sectors, such as technology and energy, and a strong small and midcap market in which financing matters less, the overall M&A situation in Germany in 2023 was robust.

Looking ahead, as interest rates continue to stabilise, a more favourable environment is anticipated for financial investors to access debt capital and, thus, a boost to deal activity. This may be particularly beneficial for capital-intensive industries. Given the ongoing recovery of the capital markets and the broader economy, an uptick is expected in the number of IPOs in 2024, reflecting renewed confidence and a general revitalisation compared to 2023.

Public and private M&A are both key for the transactions market in Germany. Starting during the COVID-19 pandemic, a number of IPOs and public deals received noticeable attention; however, private deals still lead the league tables. While 2023 remained influenced by volatile capital markets and a few pulled IPOs, 2024 has already started strong with the Renk and Douglas IPOs, as well as the announced €3 billion MorphoSys and €2.9 billion ENCAVIS takeovers. More IPOs (in particular, as part of dual-track exits) and public takeovers are in the immediate pipeline.

Despite the rather bleak state of the German economy, a number of high-profile transactions in the past year indicate a recovery of the German M&A market. This included infrastructure deals, which reached strong levels in 2023, a trend that is set to continue in 2024.

With the continued growth of AI and digital operations, investors are showing increasing interest in infrastructure assets such as data centres and fibre-optic networks. These emerging asset classes offer fresh opportunities for investors and debt providers, especially in Europe and Asia. Germany, with its central location and well-developed telecommunications infrastructure, is particularly attractive for such investments. A recent example is NorthC, a leading European provider of regional data centres, which recently entered into the Frankfurt data centre market. After fulfilling the necessary regulatory and planning requirement, including the acquisition of a suitable plot of land, the company will now develop a 5 MW data centre in Frankfurt.

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The rising interest in the purchase of large infrastructure projects was further underlined by RWE forming a joint venture with Masdar to develop two giant offshore wind parks off the coast of the UK.

SAP's acquisition of LeanIX demonstrates how strategic buyers may also bolster their suite of business transformation tools and represented one of the larger German transactions in 2023.

In addition, investors are increasingly acting as leading providers of capital solutions to large global corporations in a variety of industry sectors. Apollo, for example, invested about €1 billion in a portfolio of high-quality real estate assets controlled by Vonovia in Southwest Germany in the first quarter of 2023. Six months later, Apollo broadened its partnership with Vonovia by another €1 billion long-term investment in real estate assets in Northern Germany controlled by Vonovia.

Economic recovery plans

Following the outbreak of the COVID-19 pandemic there was a rapid incline in dealmaking, marked by very low interest rates and large amounts of money available for investments. This came to an abrupt stop with the Russian invasion of Ukraine and the ensuing global economic turmoil in 2022, accompanied by high inflation levels and a corresponding rise in interest rates. High interest levels and continued value misalignment between buyers and sellers remained key features of the M&A market in 2023, with subdued deal activity from financial sponsors. In line with the global trend, deal values trended downwards, although the number of transactions did not decline significantly. In fact, M&A activity in Germany remained stable and was stronger than in any other continental European jurisdiction.

Based on the current pipeline, a robust development of the German M&A market is expected in 2024, with respect to private equity and corporate deals. With the 2023 volume of sponsor-led transactions in Europe being at the lowest level in a decade, a large backlog has built up, with many investors sitting on record levels of dry powder that need to be deployed, while invested funds need to return equity to their investors sooner rather than later.

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Strategic investors that may have been busy with increasing raw material prices and supply chain issues, may now look at opportunities to sell or acquire businesses while they still have a competitive advantage over private equity investors. At the same time, buyers and sellers are beginning to narrow the valuation gap, signalling a move towards a more balanced understanding of key deal parameters. However, existing investment models and acquisition playbooks may need to be revisited as the era of extremely cheap money and ever-increasing valuations seems over. Players with creative investment strategies will see ample opportunities in the upcoming months. The collapse of corporate groups and real estate conglomerates will offer attractive investments for buyers that do not shy away from distressed situations.

Compared with previous years, international investors are still less enthusiastic about assets in Europe, where energy costs are high and growth is expected to remain low in 2024. However, European companies are showing resilience and adaptability. They are actively seeking and capitalising on growth opportunities in select markets, such as the US, showing their commitment to expansion and diversification.

In 2023, deal structures were affected by recently introduced regulatory hurdles and constrained access to debt financing at attractive costs. Financial investors that heavily depend on debt financing, in particular, encountered difficulties. Further reference is made to regulatory hurdles in the "Legislation and policy changes" section below.

Banks and debt funds were more selective with regard to providing debt financing and scrutinised targets to a greater level than in previous years. Generally, except in rare cases in which assets had extremely positive outlooks, debt at attractive costs was difficult to obtain. Consequently, some private equity and venture capital firms have paused their investment activities altogether. On the other hand, strategic bidders with available but untapped capital have been able to utilise their resources more flexibly, resulting in increased activity within the market.

The challenging financing markets, resulting in lower valuations and fewer exit routes, had an impact on the options for assets held by financial sponsors and real estate investment funds. Thus, more deals of the following types can be expected:

- Asset disposals by issuers/borrowers with insufficient liquidity to wait for lower rates in order to manage their repayment schedule;
- Debt-to-equity swaps and pre-insolvency restructurings;
- Carve-outs and business divestitures from corporates, also driven by shareholder activists voicing their expectations on value creation;
- Distressed sales – in particular, in the real estate development market – creating value buy opportunities;
- Secondaries fundraising, with a small but growing portion of "direct secondaries" (transfer of portfolio, rather than limited partner interests);
- More sponsors to focus on existing assets utilising fund-to-fund transfers to retain prized portfolio investments; and
- Support of an acquirer's acquisition financing (e.g., through secured asset-level financing without triggering customary change of control provisions), with these types of arrangements providing more flexibility to partners that wish to guarantee partnership debt and enter into joint venture transactions.

Legislation and policy changes

Private M&A transactions are primarily structured as share or asset deals and not subject to any particular statutory processes (other than regulatory clearances, certain registrations, and/or reissuance of permits).

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In contrast, public M&A transactions have to comply with:
- The German Securities Acquisition and Takeover Act;
- The EU Market Abuse Regulation (*Marktmissbrauchsverordnung*); and
- The German Stock Corporation Act.

They are subject to the supervision of the German Federal Financial Supervisory Authority (BaFin).

Private and public M&A transactions may be subject to German merger control. Furthermore, the Federal Ministry of Economic Affairs and Climate Action (BMWK) has the power to review direct or indirect acquisitions of German-based companies by foreign investors. The BMWK may prohibit any acquisition of 25% or more of the voting rights by a non-EU/European Free Trade Area investor or request commitments if the acquisition is likely to affect public order or security. In addition, acquisitions of 10% or more of the voting rights in a company active in certain sensitive areas, such as critical infrastructure (e.g., IT-related real estate or telecommunications infrastructure) or in military and defence must be notified to, and cleared by, the BMWK before the acquisition can be closed. Recently, several new sectors under foreign direct investment (FDI) scrutiny were added so that the scope of mandatory filings increased notably. In addition, the BMWK can review acquisitions if the foreign investor acquires other means of influence; more specifically, board seats, veto rights, and/or certain information rights. The acquisition of such “atypical control” is not subject to a mandatory filing requirement but still carries the risk of an ex officio review by the German government, so a voluntary filing should be considered.

Changes in corporate and related laws – such as those introduced by the Draft Future Financing Act, the Supply Chain Law, changes to the Foreign Trade Ordinance and Act, and the Foreign Subsidies Regulation (FSR) – are impacting M&A structures and timelines. These changes may include:
- Provisions for multiple-vote shares (dual-class shares);
- Simplification of capital increases;
- More flexibility on employee stock options; and
- Expanded FDI screening.

The FSR grants the European Commission the authority to examine and address distortive subsidies, including M&A deals (subject to certain concentration benchmarks) that involve any firm benefiting from subsidies provided by non-EU nations.

The Modernisation of the Civil Law Partnership Act came into effect on January 1 2024, introducing revisions to various aspects, including the fundamental framework of investment entities, requiring, foremost, changes to the articles of association of the investment entities.

The German government is in the process of significantly revising its FDI framework, which might even include introducing a new investment screening act. This could expand the reach of Germany’s FDI regulations, encompassing a wider array of mandatory submission requirements. This expansion may affect areas such as critical infrastructure, essential technologies, agreements related to intellectual property licensing, and some new investments in high-technology fields.

Practice insight/market norms

Foreign investors continue to wonder about the notarisation requirements in Germany particularly in connection with German limited liability companies. Share purchase agreements, including all annexes, must be read out by a notary to the parties. However, the notarisation process is generally no obstacle to any deal but serves as a disciplinary tool to complete negotiations and ensure the documentation is in final shape. Costs can be considerable and need to be factored into the buyer’s transaction budget.

Depending on the deal structure, seeking employment and tax advice early on is highly advisable in Germany (as in most jurisdictions).

Technology improvements are still facilitating M&A processes; e.g., through expedited and effective document and data handling. This trend will continue with the rise of powerful, yet secure, AI tools.

Public M&A

The scope of legal documentation required for the acquisition of shares in a public company depends on the type of business combination chosen, as well as on the type of shares being acquired and whether these shares are to be acquired over the stock exchange, via a capital increase, or from other shareholders.

Holding 30% of the voting rights in a listed company amounts to “control” under German takeover law. Whoever is about to reach or exceed this threshold, directly or indirectly, will need to consider a public takeover offer. Such an offer requires an offer document. Unsolicited takeover attempts are rare in Germany; in particular, since cooperation with the management is key for a successful integration of the acquired company into the bidder structure.

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 (no poison pills). But 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, even if this limits the success probability of the offer.

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 of, any takeover offer.

BaFin takes a rather restrictive position on the possibility of imposing offer conditions.

Voluntary public takeover offers (offers by buyers that do not already own shares in the target company or whose shareholding is below 30%) are usually only subject to regulatory approvals, fairly standardised market and company material adverse change clauses, and no defensive measures (such as capital increases during the offer period) being taken. There is often a minimum acceptance threshold for offers, as the acquisition of only some of the shares may not be attractive.

Mandatory offers, which are triggered once a shareholder reaches 30%, can only be made subject to regulatory conditions. Minimum acceptance thresholds are not available.

In public M&A transactions in Germany, parties can employ several deal protection measures to safeguard the interests of the acquirer and ensure the successful completion of the transaction. These include the prohibition to search for alternative bidders (white knight), implement structural measures (capital increases, mergers, etc.), or buy back its own shares. These measures are subject to legal and regulatory constraints, particularly under the German Securities Trading Act, the German Stock Corporation Act, and the Takeover Act.

Notably, deal protection measures in Germany must be carefully structured to comply with legal requirements and to respect the principle of equal treatment of all shareholders as stipulated by the Takeover Act. Additionally, the management and supervisory boards of the target company have fiduciary duties to act in the best interests of the company and its shareholders, which may limit the extent to which certain deal protection measures can be implemented.

Private M&A

The 10th edition of the Latham & Watkins Private M&A Market Study shows that locked-box mechanisms for purchase price provisions remain popular in Europe, while in the US, the vast majority of private deals feature completion accounts with post-closing purchase price adjustments. Earn-outs are increasingly used in European deals – in particular, to bridge valuation gaps – but they remain uncommon overall. The use of earn-outs varies between sectors and seem to feature most prominently in technology deals.

Escrows remain uncommon across all jurisdictions. Only 15% of deals in 2022–23 featured an escrow, a slight decrease compared with earlier editions of the study. This decrease is in part due to warranty and indemnity insurance, and sellers providing relatively limited covenants in the 2021–22 seller's market. The decrease also suggests that, despite buyers' concerns about sellers' ability to meet post-closing obligations, sellers are successfully resisting requests for a portion of the purchase price to be placed in escrow.

Share purchase agreements relating to German targets are usually governed by German law under the jurisdiction of German courts or arbitral tribunals.

A relatively weak economy and rising financing costs, with increasing pricing expectation gaps, led to cautious investor behaviour in 2023, resulting in a decline of exit valuations. This, combined with a significant degree of volatility in the capital markets, saw trade sales emerge as the preferred exit strategy.

In 2023, IPO proceeds were at the second-lowest level in the past decade. A significant backlog of unsold (exit-ready) assets has accumulated in private equity portfolios. Looking ahead, there are promising signs of a resurgence in the IPO and private equity exit markets in 2024. As the financial landscape stabilises and valuation expectations between buyers and sellers align, the exit environment will likely improve, offering a more favourable climate for private equity managers and companies looking to go public. The first few months of the year have shown positive signs for a moving market, reinforcing confidence in the resilience and adaptability of the financial markets.

Looking ahead

The global political landscape remains complex. The conflicts in Ukraine and the Middle East, and several significant elections in 2024 can impact M&A activity, making it difficult to predict what 2024 will look like overall. While these circumstances may introduce a degree of uncertainty, they also provide a platform for strategic foresight and opportunity.

Deal activity is already kicking off in 2024, which has seen a busier start than 2023. Deal activity is expected to accelerate further during the rest of the year, as financial investors continue to hold record levels of cash and corporations still need to transform. The stabilisation of inflation and interest rates will further increase deal activity.

Although the German M&A market may not revert to the distinct seller's market of previous years, market players will proceed more cautiously and, in particular, take in the increased burdens of regulatory necessities. Deal-making processes are expected to continue to be longer, as risks and benefits will be considered more carefully, leading to enhanced due diligence processes and deal structures. Transaction documents and deal terms will have to be considered in more detail and adjusted in light of the increased risks.

United Kingdom

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Market overview

The M&A environment continued to face headwinds in 2023, with subdued deal activity compared with the record levels seen in 2021. Steadily rising interest rates, inflationary pressures, geopolitical uncertainty, and regulatory actions have continued to shape the M&A market. This is underscored in deal value and volume data from Dealogic, with 2023 inbound UK M&A deal value (based on target nationality) dropping from £191 billion in 2022 to £109 billion in 2023. Despite market pressures, the 2023 volume figures demonstrated a greater overall market resilience, with inbound UK M&A deal volume (based on target nationality) at a similar level of 2,634 in 2023 compared to 2,739 in 2022.

Continued market pressures from the Ukraine–Russia war, tightening debt markets, and persistent inflation weighed heavily on financial markets for the majority of the year. However, a modest rise in activity was seen in the fourth quarter and driven by deals across the healthcare, technology, and financial services sectors, as cautious optimism led to companies seeking out new growth opportunities.

UK take-private transactions featured heavily in 2023 (i.e., when a publicly traded company returns to private company status as a result of a sale), accounting for approximately 53% in value of all UK transactions in 2023 (compared with approximately 46% in 2022, according to Dealogic). This activity was supported by UK-listed companies continuing to trade at a significant discount to their US peers.

In terms of M&A market drivers, public and private M&A transactions play an important part in the UK market, but private M&A deals make up a significant majority 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 (the Takeover Panel), whereas the structure and process of private acquisitions are a matter of negotiation between the buyer and seller.

Latham & Watkins advised on a number of significant M&A transactions in 2023, including acting for Abcam, a global leader in the supply of life science research tools, on its acquisition by Danaher Corporation for approximately $5.7 billion (and having previously advised Abcam on its listing on NASDAQ).

Latham also advised Norsk Hydro on its agreement with Glencore, regarding the acquisition of Brazilian alumina refinery Hydro Alunorte, the world's largest alumina refinery, and additional assets.

Furthermore, Latham advised on the multi-faceted cross-border strategic alliance between Lithia Motors and Pendragon, consisting of Lithia's acquisition of the UK motor and leasing business of Pendragon to create the UK's second-largest car dealer group by revenue (with revenues of $5 billion), a subscription for shares by

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Lithia into Pendragon (to be renamed Pinewood) to result in Lithia becoming one of Pinewood's largest shareholders, and the formation of a joint venture between Pinewood and Lithia to market and deploy Pinewood's proprietary dealer management software in North America.

Economic recovery plans

The M&A environment in 2023 remained subdued, with interest rates and recessionary fears compounding market uncertainty and making it harder for parties to agree on deal price. However, the market also demonstrated resilience in deal flow relative to pre-pandemic levels as UK M&A deal volumes remained comparable.

Looking forward to the next 12 months, the macroeconomic headwinds that hampered UK M&A in 2023 may recede with a normalisation of large-scale M&A volumes amid an increasingly supportive institutional leveraged loan market. The private markets have demonstrated a resilience, with many investors sitting on record levels of capital that needs to be deployed. It is anticipated that the M&A environment in 2024 will show improved sentiment, but the M&A playbook will also require buyers to readjust their valuation processes and prioritise greater investor protections through creative structures.

The most significant factors influencing deal structures in 2023 were the introduction of new regulatory red tape and the low availability and high cost of traditional debt financing. The new regulations that are having an impact on M&A activity are discussed in detail below.

In terms of debt financing, the challenges faced by firms in sourcing debt at reasonable rates have meant that private equity and venture capital bidders have struggled to put in place long-term financing arrangements in the post-completion phase, impacting bidder returns and capital availability. As a result, certain private equity and venture capital firms that could not fully fund transactions pressed the 'pause' button on investments. Strategic bidders with committed but undrawn capital, however, could afford to be more flexible in how they deployed capital and were therefore more active in this space.

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Deal structures in 2023 were also influenced by a continued rise in shareholder activism. Activist investors are strategically using the inflationary headwinds to compel companies into action (including by way of strategic M&A), with US-based investors spearheading a significant proportion of public campaigns in 2023. In response, UK plcs are proactively enhancing activism defence strategies and focusing on ESG objectives in response to greater scrutiny.

Private equity acquirers continued to be active in the UK M&A market, albeit at lesser levels than in recent years. More challenging financing markets in 2023 led financial sponsors to look to non-traditional lenders and equity co-investors to finance deals.

The general partner-led secondaries market continued to experience growth as the range of accessible exit routes for funds narrowed across the IPO and M&A markets, compounded by the need of limited partners to realise liquidity.

Further opportunities to acquire high-quality assets at lower multiples are expected to continue to drive deal volume (particularly as interest rates begin to stabilise) and the related recovery of acquisition financing markets should further drive M&A activity in 2024.

Legislation and policy changes

In terms of legislation and the regulatory bodies that govern M&A activity in the UK, **the UK Companies Act 2006** applies to public and private companies registered in the UK. While the Companies Act 2006 does not govern M&A activity as such, its requirements dictate the way that deals by UK companies are effected.

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, and 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, a principles-based set of rules issued and administrated by the Takeover Panel.

The end of the Brexit transition period on December 31 2020 marked the end of the European Commission's (EC's) status as a 'one-stop shop' for the review of mergers relating to the UK meeting 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 EC may conduct parallel assessments of the same merger in their respective jurisdictions.

A number of recent regulatory changes have impacted M&A transactions – the introduction of **the National Security and Investment Act 2021** (the NSI Act) in 2022 and **the Foreign Subsidies Regulation** (FSR) in 2023 continue to affect the structure and timelines of deals.

The NSI Act empowers the secretary of state to screen a broad range of transactions on national security grounds and allows them to block or impose conditions on deals. Under the NSI Act, 93% of notified transactions were approved within the initial 30-working-day review period (according to the UK government's most recent annual report), but dealmakers must now routinely factor in potential NSI Act processes at the early stage (particularly if national security concerns are foreseeable).

Additionally, the FSR allows the EC to investigate and remedy distortive subsidies. Under the FSR, the EC has the power to review a wide range of M&A transactions (at specific concentration thresholds) involving any company that has received a subsidy from a non-EU country. This new regulatory layer

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applies in addition to existing merger control and FDI scrutiny, and effectively imposes an obligation on all companies operating in the EU to keep detailed records of all foreign financial contributions received by any entity of the group, taken as a whole.

In terms of upcoming policy framework changes that may impact M&A in the UK, merger control scrutiny is tightening. In particular, agencies are scrutinising the suitability of buyers and market dynamics more closely and imposing greater evidentiary burdens on merging parties; for example, buy-and-build transactions were a focus in 2023, a trend that the authors anticipate will continue in 2024. Strategic management of merger control from the outset is key to ensuring successful deal execution.

Furthermore, the Financial Conduct Authority (FCA) has published **a consultation paper setting out detailed draft rules for a new UK listing regime**. The publication represents the final stage of the journey to reshape **the UK Listing Rules**, which started with the launch of **Lord Hill's UK Listing Review** in 2020. Key measures include the following:

- Single segment – the existing premium and standard listing segments will be merged into a new, single segment for equity shares in commercial companies.
- IPO eligibility – certain key barriers to listing (including the current premium segment requirements for a three-year financial and revenue-earning track record and a 'clean' working capital statement) will be removed.
- Significant transactions – Class 1 transactions will trigger only a requirement on the company to release a transaction announcement (but with no requirement to include a working capital statement or restated historical financial information), rather than a compulsory shareholder vote or FCA-approved shareholder circular.
- Related-party transactions – larger related-party transactions will no longer require compulsory shareholder votes or FCA-approved shareholder circulars. Instead, such transactions would require a transaction announcement and a fair and reasonable opinion from a sponsor.

M&A dealmakers should remain alert to these changes as the implementation process progresses.

Practice insight/market norms

A common misconception about the UK M&A market is that public transactions cannot be consummated by way of merger. The Companies Act 2006 does, in fact, provide for merger by absorption for UK public companies, but these provisions are generally not used and a scheme of arrangement is more commonly seen. This approach is in contrast to other jurisdictions; in particular, the US, where mergers are frequently encountered.

An area that is often overlooked by parties involved in M&A transactions is that buyers do not appropriately attend to the consolidation of group companies immediately after closing, resulting in continued administrative and financial burdens (for example, filing annual accounts) to correctly maintain newly acquired dormant or inactive subsidiaries.

Dealmakers are increasingly using artificial intelligence technology to conduct more efficient due diligence in M&A transactions. It is now routine for dealmakers to use virtual meeting technology and electronic signature platforms to negotiate and close transactions, and this looks set to continue. On the other hand, cybersecurity preparedness has become a paramount technological concern for companies, as sophisticated and costly attacks are on the rise.

Public M&A

The acquisition of control of a public company is regulated by the Takeover Code and the Takeover Panel. A bidder may choose to stake-build to obtain a toehold in a public company. However, depending on the timing of such acquisition and the 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 at the highest price it has paid.

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 judgement of the bidder. Additionally, bidders seeking to rely on a material adverse effect or similar bidder protective condition to not proceed with an offer require the consent of the Takeover Panel, 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 being declared, wholly unconditional).

Private M&A

According to **the tenth edition of the Latham & Watkins European Private M&A Market Study** (the M&A Market Study), 55% of deals included a locked-box mechanism, 28% of deals included a completion accounts mechanism, and 17% of deals did not provide for price adjustment – broadly consistent with the 2022 findings.

The proportion of deals that included an earn-out increased in 2023 (and more significantly among private sellers) given the uncertain economic environment. The M&A Market Study noted that earn-outs featured in 20% of deals analysed, up from 14% in 2019. With a growing range of innovative earn-out metrics – and market dynamics in favour of cash-rich buyers – earn-outs are expected to facilitate M&A deals across sectors in the year ahead.

Escrows remain uncommon – only 15% of deals in the M&A Market Study featured an escrow, a notable decrease from earlier editions. This decrease is in part due to warranty and indemnity (W&I) insurance and sellers providing relatively limited covenants in the 2021–22 seller's market. The decrease also suggests that despite buyers' concerns about sellers' ability to meet post-completion obligations, sellers are successfully resisting requests for a portion of the purchase price to be placed in escrow.

The prevalence of transactions featuring W&I insurance increased to 48%, after plateauing at around 32% in previous editions.

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

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 deals included in the M&A Market Study – 33% of 2023 deals analysed included FDI approvals as a condition (compared with 24% in 2022).

In the UK, it is not common practice to provide for a foreign governing law and/or jurisdiction in private M&A share purchase agreements. Such agreements relating to UK companies and assets are typically governed by English and Welsh law and are subject to the jurisdiction of the English and Welsh courts. In fact, for global transactions, depending on the location of the parties and their advisers, purchase agreements are also often governed by English and Welsh law, because it is viewed as stable, impartial, and commercial, with a developed litigation infrastructure.

The exit environment in the UK throughout 2023 remained subdued. The overarching effect of economic uncertainty, rising interest rates, and stock market volatility created hesitancy among many acquirers. These macroeconomic conditions played a major role in muting UK and global IPOs, among other strategies. The UK is specifically looking to promote its listing regime to maintain market share, and the introduction of new listing rules in 2024 should translate into greater exit opportunities.

Looking ahead

Although it is difficult to predict how the current macroeconomic trends will play out in 2024, there are reasons to expect that some of the headwinds that impacted UK M&A activity in 2023 may give way. While UK M&A activity levels will likely continue to lag in the first two quarters of 2024, deal activity is likely to accelerate at the end of the year as investors continue to hold record levels of cash, and inflation and interest rates stabilise.

Nevertheless, factors that suppressed M&A activity in 2023 remain, and it is unlikely that the 2024 market will be as seller friendly as it has been in previous years. While investors will likely return to the market to attempt to take advantage of a reset in valuations and generally depressed competition for deals, they will likely proceed with caution and be particularly focused on the greater regulatory burdens when they target UK companies. Latham & Watkins expects that this will result in longer deal processes overall as the risks and benefits of potential transactions are more carefully considered, enhanced diligence is requested, and deal structures and terms are adjusted in response to perceived risks.

United States

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Market overview

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The deal environment in 2023 was subdued relative to prior years; however, the M&A market, much like the US economy, was more robust than many had anticipated. Many usual players in the M&A markets were active, providing transaction volume to top-tier advisers. The outlook for the US M&A market in 2024 is cautiously optimistic.

While 2023 incurred headwinds that muted the pace, breadth, and depth of the M&A market – including ongoing heightened scrutiny from regulators globally, a rising interest rate environment, global tensions, and challenging equity markets — there are a number of factors that may lead to a more robust outlook for 2024. These factors include well-capitalised corporate balance sheets, the equity markets trading near record highs, and the resulting improved C-suite confidence, declining inflationary pressures, the end of interest rate hikes, financial sponsors with 'dry powder' at the ready and renewed access to bank debt, and a normalisation of valuation expectations between buyers and sellers.

A factor that may also impact 2024 activity is the availability of the IPO market. In the event that the appetite for new equity offerings is muted, the M&A market could benefit. Finally, event-driven/activist investors catalysing M&A opportunities may also prompt market participants to act not only in response to such investors, but in advance of unsolicited overtures.

Dealmakers both domestically and outside the US will continue to heavily consider regulatory enforcement. Transactions totalling in excess of $360 billion have been challenged since 2022. While most of these transactions were ultimately consummated – often with structural remedies – the environment seems no less rigorous. The policies of the US Department of Justice (DOJ) and Federal Trade Commission (FTC) are in line with the more aggressive approach of non-US competition authorities such as the UK Competition and Markets Authority, which have also stepped up enforcement actions.

In 2024, a new and expanded Hart–Scott–Rodino (HSR) form and recently finalised revised merger guidelines will take effect. The revised HSR form will require filings with greater disclosures regarding proposed transactions. Market participants should appreciate that the heightened disclosure will require more time to prepare the forms and provide more regulators with more information to probe.

National security concerns also remain a significant consideration, particularly in certain market sectors such as technology and energy. Similar to antitrust/competition enforcement, 'foreign investment review' in the US (including the Committee on Foreign Investment in the United States, or the CFIUS) and around the globe (including the EU foreign direct investment review) will require increased attention and analysis by market participants.

Importantly, M&A market participants must also consider geographies in which they are transacting. For example, China is a more charged political environment particularly as it relates to national security issues. Dealmakers and corporate boards must take these considerations into account when evaluating transactions.

The US 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. The cost of capital and the availability of debt financing is a driving factor, particularly for private company and private equity (PE) dealmaking where acquirer stock is not available as transaction currency. For public companies, well-capitalised balance sheets together with an ability to use stock as an acquisition currency remain key drivers for potentially stronger deal volume in 2024.

Increased scrutiny and evolving models of antitrust enforcement and review continue to be topics of conversation among M&A participants within the US and around globe. Particular industry verticals including technology, energy, and healthcare are receiving heightened scrutiny from regulators. In the US, governmental agencies challenged and sought to block a number of high-profile transactions within those industries, including Microsoft/Activision and Illumina/Grail. Regardless of the agencies' win/loss record, regulators are undeterred, as the potential for new legislation within the US with respect to 'horizontal' and 'vertical' mergers may alter long-held views on antitrust review and enforcement.

M&A practitioners continue to discuss approaches opposite regulators to maximise outcomes. Such changes would include preparing to divest assets in advance of approaching regulators ('fix it first' approaches) such that settlement packages are part of the proposed transaction rather than provided by regulators.

Economic recovery plans

Deal flow in 2023 was similar in many regards to what occurred in 2022. Overall, in 2023 the total M&A market by value dropped approximately 20%, with the number of transactions falling by approximately 15%. These levels were below the decade-long trend in M&A from 2011 through 2021. Generally speaking, the M&A market in the Americas was similar to that which was seen in 2023. The markets in Europe and Asia were slightly more subdued.

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Themes that were apparent in 2022 continued in 2023. Specifically, monetary tightening by the US Federal Reserve Bank in the form of significant interest rate hikes and fears of a recession in the US, along with geopolitical tensions, and general economic uncertainty weighed on the M&A markets. In particular, the first half of 2023 was subdued. That said, the second half of 2023 saw an uptick in transaction volume. In the fourth quarter of 2023, five of the year's 10 largest transactions were announced, including several large transactions in life sciences. That industry vertical is expected to remain active in 2024.

Market participants are growing more optimistic that deal flow will improve through 2024. PE buyout funds continue to maintain high levels of uncommitted capital for M&A transactions and, importantly for PE participants, bank lending appears to be rebounding. The revival of bank lending, together with continued access to 'private credit', is viewed as a harbinger of increased PE transaction activity. Strategic acquirors continue to remain focused on growth both with a focus on M&A and organically. Moreover, corporations continue to focus on their organisations and where they may be streamlined through divestitures and spin-offs.

Significantly, there is a US presidential election in November 2024. Historically, election issues have not had material impacts on transaction volume; the election can serve as justification for participants to temper their M&A activities. In addition, market participants may evaluate whether a change in the White House may impact the regulatory agenda as a whole. Those considerations could impact when M&A market participants choose to pursue certain 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 particular transactions based upon the presumed anti-competitive effects. This increased regulatory scrutiny has impacted, 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.

Participants in the US M&A market have also sought to work through valuation disconnects between buyers and sellers. In an effort to bridge the difference between the bid/ask spread in M&A transactions, the use of contractual provisions to mitigate pricing risks has become more common. Specifically, the use of earn-outs and 'contingent value rights' were a greater topic of discussion and influenced deal structures.

PE firms remain a driving force of dealmaking. With a halt to the rise in US interest rates and a decrease in economic uncertainties, PE participants are expected to be more active in 2024, with uncommitted capital at PE firms remaining at record levels.

Shareholder activism was more buoyant in 2023, with many campaigns focused on the common themes of asset allocation, sub-par returns on investment, board governance, and, importantly, M&A. Activists are expected to wage similar campaigns in 2024. With more robust equity market valuations, activists, as value investors, may be seen pushing for campaigns at those companies that have not participated in the market's uptick and are struggling with operating performance.

Legislation and policy changes

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

The federal government primarily regulates the issuance and sales of securities through the Securities and Exchange Commission (SEC), antitrust matters through the FTC and the Antitrust Division of the DOJ, and foreign investment that may have national security implications through the 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, the legislative branch of the US government, and government enforcement and regulatory agencies have publicly spoken about antitrust priorities designed to address perceived shortcomings in antitrust enforcement. These evolving antitrust priorities will expand antitrust scrutiny and 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 and accounted for.

In addition, the SEC has also made changes to beneficial ownership filings in an effort to modernise such reports. Beginning in 2024, statements of beneficial ownership filed on Schedule 13D must be filed within five business days, rather than 10 business days, after a holder acquires more than 5% beneficial ownership. In addition, statements of beneficial ownership filed on Schedule 13G by "qualified institutional investors" (e.g., passive institutional investors) must be filed within 45 days after quarter end, as opposed to 45 days after year end. More accelerated filing date requirements can serve as an early warning signal to accumulations of an issuer's equity securities.

In general, the US framework of protecting 'consumers', rather than 'competitors', is being revisited writ large. In addition, global developments regarding enforcement have been in lockstep with those in the US. Agencies outside the US are very focused on merger enforcement. For example, the UK's Competition and Markets Authority has undertaken lengthy, time-consuming reviews of M&A transactions through the course of 2023. This potential revised regulatory framework, together with the 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.

Also in the US, reviews of M&A transactions related to national security issues continue to increase. The CFIUS has been subjecting more transactions to review. Similar to antitrust/competition enforcement, foreign investment regimes globally have been more active, with perceived increased protectionism on the rise.

Practice insight/market norms

The litigation profile as it relates to the US M&A market may sometimes be overstated. While it is true that 'public' M&A transactions have significant probabilities of being litigated, the large majority of all such cases are neither material nor time consuming. A well-run, deliberative, and thoughtful transaction process guided by informed and independent boards of directors will substantially reduce, if not entirely obviate, the risks of litigation. Market participants should not avoid transactions for fear of litigation.

In 'public' transactions it is often asked whether the buyer may pursue indemnity claims or escrow funds, or provide for representation and warranty insurance (RWI) to satisfy any post-closing claims for a breach of a representation or warranty. It is important to note that public M&A transactions are without recourse to the target company or the target company shareholders once the transaction has closed. In public company transactions, buyers should assume that once definitive transaction documents have been executed, the parties will be obligated to close, subject only to the receipt of required regulatory approvals or material adverse event (MAE) having occurred with respect to the target company.

An intuitive follow-on question and one that is often asked by non-US market participants is how an MAE is determined. Specifically, whether there are quantitative guidelines or whether it is entirely qualitative. In determining whether an MAE has occurred, there are no definitive guidelines. The question is whether the company in question has suffered a durationally significant, material diminution of its earnings potential not necessarily tied to macro market conditions but, rather, specific to the company in question.

As a result of the pandemic, dealmakers have had to adjust to a 'virtual' environment where every aspect of an M&A transaction relies on technology, necessitating a keener focus on cybersecurity issues in the deal execution process. Also, data privacy and cybersecurity have 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 'public' M&A, issues relating to obtaining control of a company are guided by the laws of the state in which a company is incorporated and the company's organisational documents. Most states require shareholder approval (usually by a majority of outstanding shares) for mergers. Similarly, in the tender offer context, acquisition of a majority of a company's outstanding shares is required to obtain 'control'. This would be the case where the target company has recommended the tender offer and in the unsolicited/'hostile' context, where an acquiror has launched a tender offer without requiring (or, in some cases, seeking) the target company's recommendation. 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 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 required regulatory approvals.

In a transaction structured as a tender offer, the buyer will typically also require a 'minimum tender' condition to ensure that it may take control of the target company upon the closing of the tender offer.

Parties to public company merger agreements may employ various deal protection measures to deter third parties from interfering with the closing of an agreed-upon transaction. Parties may employ the following:

- A no-shop provision – a contractual provision that prohibits the target company (and its representatives) from soliciting competing proposals after the execution of a merger agreement.
- Termination fees ('break-up fees') – termination fees are payable by the target company to the buyer to reimburse the buyer for its costs and expenses in the event the target company terminates its merger agreement to accept a superior proposal from a third party. In practice, termination fees are in excess of the costs and expenses incurred by the buyer, but the quantum of the fee must not be so large such that courts find the termination fees coercive and in violation of the target board's fiduciary duties. In the US, such fees typically range from 3–4% of the transaction value.
- Matching rights – merger agreements typically include contractual provisions that grant the buyer the right to match, within a number of days, any superior proposal that is received by the target company.
- Voting lock-ups – buyers may secure firm commitments from shareholders of the target company to vote their shares in favour of the proposed transaction.
- 'Force the vote" provisions – merger agreements may include provisions, subject to compliance with applicable state laws, that require target companies to put the proposed transaction to a vote of its holders, regardless of whether a superior proposal exists.

The suite of deal protection provisions agreed to in a transaction are, typically, the most heavily negotiated terms.

Private M&A

2023 saw the continued use of earn-outs and other similar provisions under which the seller will receive one or more additional payments, contingent on the target's future performance, in part to account for differences in valuation.

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

A trend that continues is the use of RWI insurance in private transactions. The private market has reached a point where RWI is the norm rather than a negotiated point. Market participants, both PE and strategics, have become comfortable with the product and how it is employed.

All the conditions listed above generally also apply in private M&A transactions. However, in private company transactions, there is a greater ability for the acquiror to seek more bespoke conditions should the dynamics of the transaction allow.

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

The exit environment in 2023 was, similar to the M&A environment writ large, muted. The IPO market was challenged as the appetite for equities was, generally, limited. The M&A markets were also challenging as buyers and sellers had gaps in their valuation expectations and overall confidence levels were low. Financial sponsors faced difficulties in exiting their own investments ('private for longer' was a common refrain) and in providing an exit opportunity for sellers. PE sponsors faced challenges related to valuations and the cost and availability of debt financing.

Market participants expect a more robust exit environment in 2024. The equity markets have been buoyant through the fourth quarter of 2023 and in the early days of 2024, which bodes well for the IPO market. There is an expectation that interest rates will be lower through the year, which, together with a greater availability of credit, bodes well for PE sponsors and the availability of credit.

Looking ahead

There is growing confidence among market participants that M&A activity will be robust in 2004. Equity markets have entered the year trading at near-record highs. Corporate/strategic M&A players have strong balance sheets and there is confidence more generally regarding profitability through 2024. Financial sponsors are similarly well situated. With the US Federal Reserve having signalled that interest rates have likely peaked and that interest rate cuts could begin as early as the second half of 2024, together with more readily accessible credit markets, PE sponsors should see activity revert to pre-2023 levels.