Global M&A Insights

Innovation thrives amid challenging conditions

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Innovation thrives amid challenging conditions

As we look ahead to the second half of 2023, the outlook for M&A remains complex. In the six months to the end of June, global deal value stood at USD1.2 trillion, around one-third of last year's annual total.

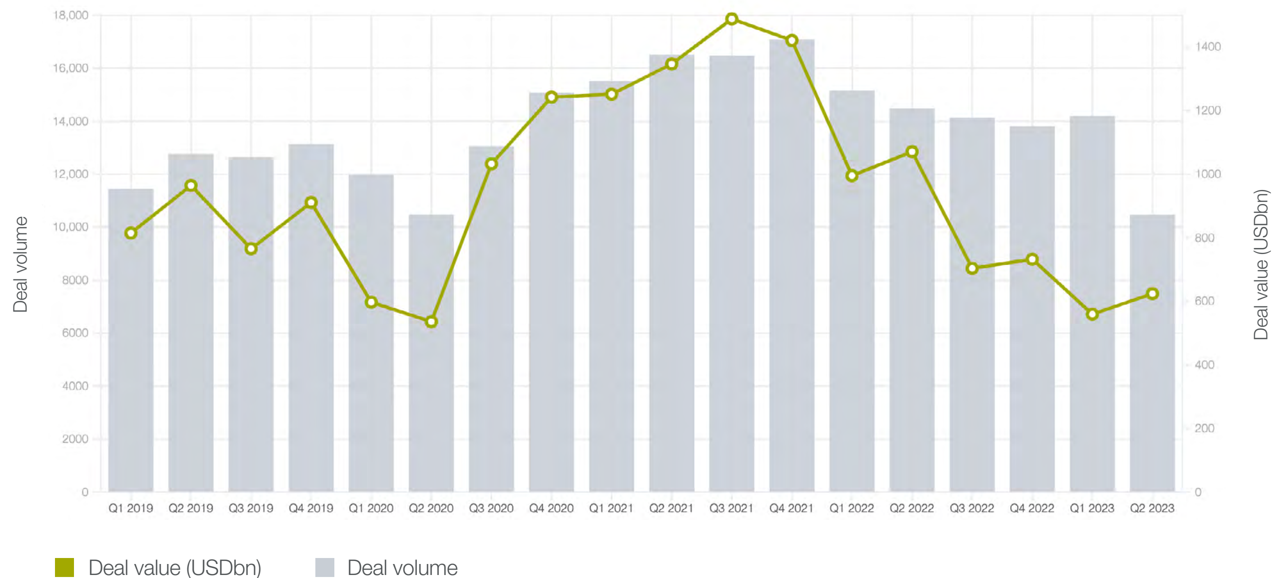
Inflation continues to be uncomfortably high in many advanced economies, with interest rates expected to increase further. On the flip side, deal activity was up in Q2 compared to the previous quarter, the S&P 500 has risen sharply over the past six months, and high-yield bonds are generating healthy returns.

Research shows that confident deal-making in turbulent times can deliver outsize returns, and our observation on the current market is that innovative structuring is helping businesses gain a competitive advantage.

This is the focus of our latest edition of M&A Insights: where are we seeing activity, and what lessons can be drawn from the way those deals are being done?

Global M&A remains volatile

Quarterly deal value and volume. 2019-present



Middle Eastern sovereign wealth funds reshape global deal terms

Our first article looks at the increasing power of Middle Eastern sovereign wealth funds. Higher oil prices following Russia's invasion of Ukraine have boosted revenues among the region's biggest SWFs by more than USD1tn over the past year.

They are now among the most active and sophisticated investors in the world and are pursuing a broader range of M&A opportunities, including full buyouts and co-investments alongside strategic acquirers.

Many are also exploring growth investments in the tech sector, where their presence in a cap table can prove invaluable for founders looking to attract additional investment.

However, the advent of a landmark piece of EU regulation is set to impact their future deal-making on the Continent, as our team explains.

DOJ and FTC propose sweeping changes to U.S. antitrust notification regime

Across the Atlantic, the Department of Justice and Federal Trade Commission have recently unveiled sweeping changes to the U.S. merger control filing process that will significantly increase the information burden on merging parties.

Among other things, the new form will require details on the rationale for the transaction as well as granular financial data, new categories of internal documents and, importantly, the "structure of entities involved, such as private equity investments". The new form, coupled with the imminent publication of updated U.S. merger review guidelines, will revolutionise how the U.S. agencies review transactions in the future.

Complex cross-border challenges change nature of technology transactions

Our next piece examines the state of tech deal-making, and particularly how the complexity of challenges such as climate change is changing the nature of tech transactions.

Today we are seeing more cross-sector, cross-border collaborations as businesses bid to develop new low-carbon energy sources with applications in everything from grid-scale electricity generation to powering container ships.

Collaboration deals enable businesses to develop proofs-of-concept while minimising financial risk – but to get them right there are a number of strategic, legal and cultural questions that need to be considered from the outset.

Public-to-private deals present a target for arbitrage funds

Next, we explore the IMF's latest economic forecasts, and how sluggish growth in advanced nations opens a window of opportunity for arbitrage funds.

As investment banks report take-private deals starting to kick off in one particular EU member state, we explain how the quirks of its regulatory regime make it a prime target for arbitrage investors, who need only one share to intervene in deal processes to bump up stockholder compensation.

Groundbreaking U.S. energy policy generates wave of innovative M&A

Our last piece looks at the impact of the Inflation Reduction Act and Infrastructure Development and Jobs Act on U.S. infrastructure M&A .

We reveal how the Biden Administration's signature green policies have seen USD150 billion of investment in domestic utility-scale clean energy projects announced since August 2022 – more than in the previous five years combined.

This unprecedented increase is sparking some interesting M&A activity as funds look to enter the market much earlier in the development cycle.

Middle Eastern sovereign wealth funds reshape global M&A terms

Flush with cash and increasingly sophisticated, Middle Eastern SWFs are investing across a broader range of assets and markets than ever before. But a landmark EU regulation presents challenges for future deals

By Khalid Garousha, Ben Ward, William Samengo-Turner and Dr Boerries Ahrens

Three years ago, a study from New York University, the London School of Economics and Bocconi University pronounced the end of the "golden era" for sovereign wealth funds. According to their research, the COVID-19 crisis marked a turning point for SWFs.

"This dramatic, unexpected shock accelerates the pre-existing negative trend of declining oil prices and slowing of global trade, the two main drivers of SWF growth," it read.

Fast-forward three years and reports of sovereign wealth funds' impending demise have proved incorrect – in fact wildly incorrect.

Russia's invasion of Ukraine pushed oil prices to levels not seen since the global financial crisis, and while they have fallen during 2023, figures from the IMF suggest the revenues of Middle Eastern SWFs have grown by more than USD1.3tn since the start of the war.

With currencies in the region pegged to the dollar, GCC economies with lower fiscal expenditure were able to transfer large surpluses into their SWFs at year-end.

Where are Middle Eastern sovereign wealth funds investing?

Middle Eastern SWFs are now among the most active and sophisticated investors in the world. Last year they scaled new heights, more than doubling their investments in Western economies to USD51.6bn.

Of the top 10 most active sovereign investors in 2022, five were from the GCC, while the region's funds were responsible for almost half (43%) of the year's 60 SWF mega deals (USD1.0bn+).

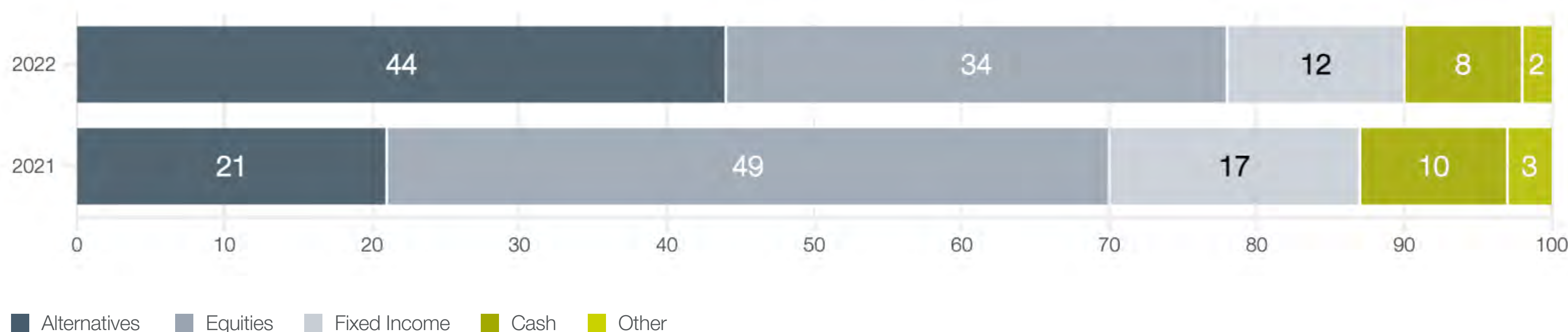
A decade ago sovereign investors were generally cautious and often took passive minority stakes, but in recent years they have developed a higher tolerance for risk and now pursue a more diverse range of opportunities.

Today, Middle Eastern SWFs execute full buyouts, co-invest alongside other financial sponsors and are more active stewards of their portfolio companies, routinely insisting on broader governance rights and board oversight and representation, even where they don't hold a significant position.

However, trying to identify consistent themes in their deployment of capital can be difficult because unlike many private investors, their unique strategies are diverse and focused on more than pure financial returns. Middle Eastern SWFs have domestic and geopolitical objectives and take a long-term view on where they put their money as they strive to diversify their national economies away from natural resources.

Middle Eastern sovereign wealth funds shift focus

AuM by asset allocation (%)



Why has the perception of sovereign money changed in Silicon Valley?

Their expansion into Silicon Valley is a good example of this shift. At the height of the tech boom, when venture capital funds were falling over themselves to back the next unicorn, sovereign funds were not seen by founders as the ideal growth partners due to their conservative reputation. The relatively light-touch approach of the VCs and their speed of execution made them highly competitive when assessing financing term sheets.

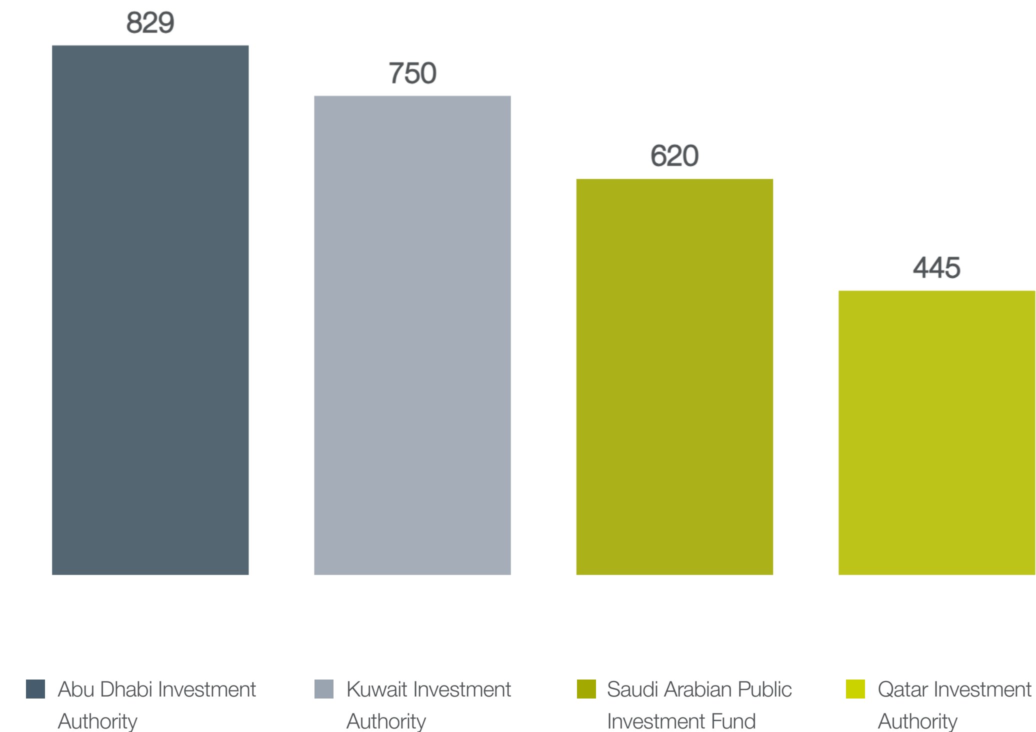
In the wake of recent high-profile tech failures and the retrenchment of traditional VC money, that view has changed. Having a Middle Eastern SWF in your cap table is now increasingly viewed as a hallmark of quality and maturity that can attract further investment, not least because of their preference for robust due diligence.

For tech companies themselves, SWFs' emergence has coincided with a change in the way growth investments are structured – where founders used to dictate terms, we are now seeing more veto rights for investors and enhanced information rights. This is perhaps as much a sign of tech's recent challenges as it is the demands of the SWFs themselves.

As far as the wider sponsor community is concerned, investing alongside an SWF has advantages beyond just their financial firepower.

Middle Eastern SWFs are increasingly able to negotiate preferential terms, and while they operate independently of the states they represent, their profile, reputation and contacts allow them access to opportunities not available to others.

Largest Middle Eastern sovereign wealth funds



How will the EU Foreign Subsidies Regulation affect SWF deals?

Looking ahead there are some recent regulatory developments that will add a degree of complexity to future sovereign wealth fund deals in Europe. The EU Foreign Subsidies Regulation – designed to allow the Commission to investigate government financing of businesses it believes could distort the functioning of the single market – introduces a new notification regime for certain transactions.

The rules apply where one or more of the merging parties, the target or the JV is established in the EU, generates sales of at least EUR500m within the EU, and, together with all other parties to the transaction, has received combined "financial contributions" from a non-EU country of more than EUR50m in the previous three years.

The concept of "financial contribution" is drawn broadly and includes interest-free loans, capital injections, non-ordinary-course tax benefits or the purchase of goods and/or services by public authorities.

By being crafted in this way it captures financial investments by third countries into investment funds, and therefore applies to any acquisition by an SWF.

Private capital firms that have state-affiliated investors will also be in scope, and because the rules cover all parties to a deal, a filing is required where the target has received state benefits, even if the acquirer has not.

Filing a notification will start the clock on a 25 working day review, after which the Commission can launch an in-depth investigation lasting up to 90 working days. If it doesn't like what it sees, it can block a deal or request the parties to submit remedies. Any failure to notify could result in a significant fine.

European regime will impose significant compliance burden on financial sponsors

The regulation will require sponsors to track (at fund level) the financial contributions they or their portfolio companies have received in the three years prior to any deal.

The look-back period applies from deal signing or announcement, meaning firms will need to monitor financial contributions across the relevant fund in real time, or at the very least on an event-driven basis, rather than relying on yearly updates (as is usual for merger control reporting).

The draft notification form reveals the Commission is looking for detailed, confidential data on the sources of finance used to fund transactions, as well as a comprehensive breakdown of how the target has been valued.

> "The concept of 'financial contribution' is drawn broadly and includes interest-free loans and capital injections, among other things – and therefore applies to any acquisition by a sovereign wealth fund"

DOJ and FTC propose sweeping changes to U.S. antitrust notification regime

Financial sponsors will be challenged by a new U.S. filing form which will require details on deal rationale, overlaps in parties' activities, granular financial data and the structure of entities involved in a transaction

By Elaine Johnston, Noah Brumfield and Hugh Hollman

In the biggest shake up of the U.S. merger review process in decades, the Federal Trade Commission (FTC) and Department of Justice (DOJ) have announced proposed changes to the merger control notification form as well as the pre-merger notification rules which implement the Hart-Scott-Rodino Act.

According to the agencies, the revisions will enable transactions to be screened for potential antitrust issues "more effectively and efficiently" within the initial 30-day waiting period. To facilitate this they plan to dramatically expand the scope of information that merging parties will need to submit up front.

"The DOJ and FTC say the changes will enable deals to be screened for potential issues 'more effectively'. To facilitate this they plan to dramatically expand the scope of information required up front"

New U.S. merger filing form requires much more granular information from parties

As an example, the new form will require details on the rationale for the transaction, investment vehicles/corporate relationships and previous acquisitions. Merging parties will need to submit information on horizontal overlaps and non-horizontal relationships, as well as more detailed financial data, new categories of internal documents and, importantly, the "structure of entities involved, such as private equity investments".

In line with the current focus of the FTC and DOJ on the impact of M&A on competition for workers, the revised form will require information that will enable the agencies to screen for labour market issues. It will also collect details of foreign subsidies that might distort the competitive process, mirroring the approach the EU is taking with the Foreign Subsidies Regulation, which we explore in more detail in our article on Middle Eastern sovereign wealth funds.

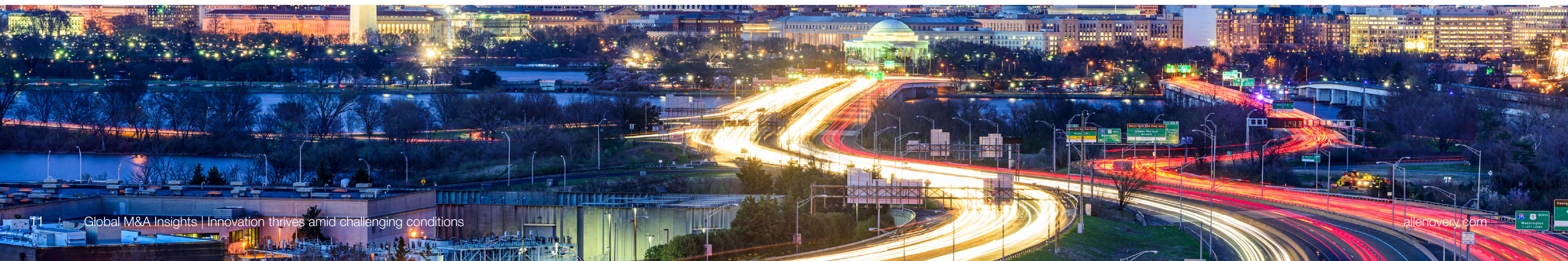
European Commission updates its merger control notification regime

The European Commission is itself bringing in changes to its merger control filing forms, which will take effect on 1 September. Its stated aim is to streamline the notification process and reduce the burden on notifying parties, although whether this will ultimately be the case remains to be seen.

The new EC forms remove the need to provide some information and introduce "tick-the-box"-style requirements for others, but additional information requirements have been added elsewhere.

The changes to the U.S. merger control notification forms have not yet been implemented. Once published in the Federal Register there will be a 60-day period for stakeholders to submit comments, following which the final forms and rules may change. In the meantime, we await the imminent publication of the much-anticipated updated U.S. merger review guidelines, which – together with the revised filing forms – will revolutionise how the U.S. agencies review transactions in the future.

Read our detailed briefing on the proposed U.S. merger filing form changes.



Complex cross-border challenges change nature of technology transactions

A combination of regulatory barriers, market uncertainty and the sheer scale of the challenges businesses face is driving a wave of tech transactions that look very different to the norms of recent years

By Filip van Elsen and Keren Livneh

Technology has been one of the main drivers of M&A for more than a decade. Through the early years of the 21st century tech companies snapped up other innovative businesses to fuel their expansion into telecoms, navigation, streaming and healthcare.

But as their influence has grown, governments and regulators around the world have looked to limit their power, using antitrust and consumer protection laws to intervene in megadeals and investigate bids for smaller companies that they suspect may be stifling competition.

Many countries have in recent years also implemented tighter national security controls to restrict foreign investments in sensitive technologies such as AI which, have dual commercial and military applications.

More recently the tech sector has been buffeted by high-profile failures and the collapse of specialist lenders. At the same time, macro headwinds have reduced startup valuations, while rising interest rates have driven institutional capital into safer asset classes, stemmed the flow of syndicated loans for leveraged buyouts, and contributed to an overall slowdown in venture capital investing.

Tech M&A drops from pandemic-era peak

Quarterly deal value and volume, 2019-present

How issues such as climate change are driving cross-sector collaboration deals

These factors – coupled with the sheer scale and complexity of challenges such as climate change – are combining to change the shape of technology deal-making.

In the past, industries such as energy, mining, shipping and manufacturing typically focused on organic innovation, but the emergence of transformational technologies such as robotics, data analytics – and more recently AI and quantum computing – necessitated a shift in focus.

For years, tech acquisitions were traditional companies' preferred approach, but today many are pursuing strategies more akin to VC investing, placing multiple bets via minority stakes in areas where the path to success is unclear, such as cutting-edge energy solutions.

Perhaps the more significant trend however is the rise of cross-sector, cross-border collaboration deals through which businesses pool expertise to develop systems that have applications in a range of settings.

This dynamic is influenced by macro conditions; in stronger markets companies may be more willing (and able) to pursue buyouts, but in less certain times they often prefer to stay closer to their core competencies. Joint development deals can help participants prove concepts with less financial risk, and then scale up their activities once they know the technology works.

In some parts of the world – including the Middle East, Africa and to a lesser degree Europe – we are also seeing governments and/or state-owned enterprises launch strategic collaborations with tech companies, for example as they try to boost cloud adoption by creating new ecosystems at country level.

> "Joint development deals can help participants prove concepts with less financial risk, and then scale up their operations once they know the technology works"

What are the main considerations for parties considering collaboration deals?

While every collaboration deal is unique, there are a range of strategic, legal and cultural considerations that parties should consider from the outset.

Strategic

- On the strategic side, the most successful tech collaborations start with a thorough analysis of the "why", which then governs how the relationship should operate. Here there are a multitude of potential structures available, from single-purpose contracts such as licence agreements, to alliances (where no equity interests are involved) and joint ventures (which do involve equity contributions).
- It's also vital to understand your potential counterparty, their motivations for the deal and their likely stance in negotiations. Bigger tech companies will have significant resources and leverage, while a founder-led company will be leaner and potentially make faster decisions. With startups you're likely to be engaging with senior who have a bigger emotional stake in the business, which will influence the dynamics of any discussions.

Legal

- Legal due diligence also plays a critical role in deal structuring. Here, the key issues are likely to involve IP rights, regulatory risk, employment considerations and liability management. Different IP rights will apply depending on the assets in question; patents for example safeguard novel, inventive and non-obvious inventions made by humans and typically attach to hardware. Copyrights require the demonstration of creativity, originality and the presence of a human author, and are used to protect software (including algorithms provided they have been converted into source code).
- What is each party bringing to the relationship, and on what terms will any background (ie pre-existing) IP be shared? This will have a big impact on transaction structure – a JV for example enables parties to license background IP to the new entity and control its onward use through their role as shareholders.
- Sophisticated regulatory analysis must be overlaid on to IP considerations. Data is often at the heart of innovative collaborations and JVs, with issues such as data ownership and the allocation of exploitation rights among the parties critical to the success of the partnership.

What happens to foreground IP (ie innovations developed through the collaboration)? Will this belong to one party and made available under license? How will any future upside in jointly developed IP be shared (ie through milestone payments or royalties)?

What are the rights of the parties in relation to improvements to background IP developed through the relationship, particularly if those improvements were made independently? If generative AI is involved in developing any outputs, what IP protections might be available here? What arrangements will apply to any data generated through the relationship? Where will any IP and data rights reside when the collaboration comes to an end?

Here, the regulatory focus must be forward-looking – are there any developments on the horizon that might impact future use cases? Again, a JV can help mitigate parent company risk by ringfencing responsibility for regulatory compliance.

- Depending on the counterparty, restrictive covenants may also be a factor. If a product or service is developed through the collaboration, can the service provider sell or license anything similar to its partner's competitors? Can the service provider set up a separate business line based on the customer's data? Non-competes are a hot topic of debate in the tech industry – does the service provider insist on a no-poaching clause in an attempt to protect its workforce, and if so is this enforceable?

Cultural

- Cultural considerations also need to be taken into account. Bigger tech companies will have significant resources and as well as sophisticated IP strategies and controls. However they may lack experience in certain regulated sectors, and like any large business may operate in silos.
- Startups typically have leaner teams (particularly in legal) less robust compliance frameworks and less well-developed IP protections. They will almost certainly be more nimble but look out for "key person" risk – are there individuals without whom the partnership would be worthless? If so, what can be done in terms of compensation (eg equity plans), lock-ups or governance structures to keep them incentivised and on board? Will the cultures of the two businesses integrate effectively? If one partner is used to quick decisions and limited bureaucracy, what can be done manage any dissonance?

As a general rule, any business looking to enter into a collaboration with a tech company must consider each potential partner separately. There is no "one size fits all" approach and each will present different risks and challenges.

It's important to think carefully about each party's contribution to the partnership, as they may have a different view on the value of particular IP or data assets.

Deals should be structured with a view on the full collaboration life-cycle – what's the rationale, where does the value lie, how can the deal be designed to achieve the desired outcome and what happens when it ends? Parties should also consider how they might exit the relationship early if necessary.

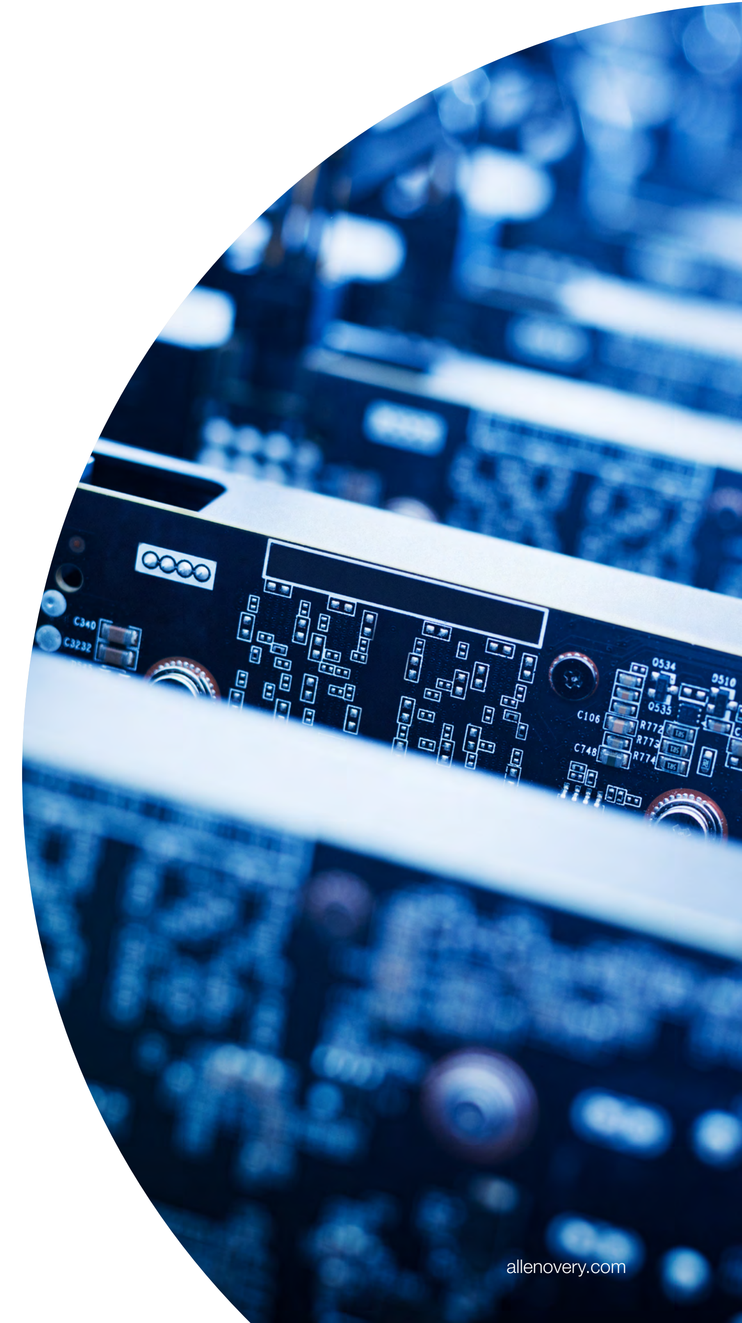
What are the keys to negotiating a successful collaboration deal?

Collaborations can be heavily negotiated so a focused, rigorous process helps. Parties should consider working in sprints and meeting in person – but only if the numbers are manageable.

Any internal due diligence should be conducted before negotiations start, and during talks, parties should consider separate discussions on the IP agreement and overall collaboration contract while keeping core teams on both sides.

Collaboration deals can be complex and a perfect outcome may not be possible, so it's important to stay focused on finding pragmatic solutions. At the same time parties must accept a degree of uncertainty – there will inevitably be grey areas, but also structures that limit potential liabilities.

Finally, cultivating a collaboration requires a different mindset to a pure M&A deal – JVs and partnerships are long-term arrangements, so maintaining a productive relationship is critical.



Public-to-private deals present a target for arbitrage funds

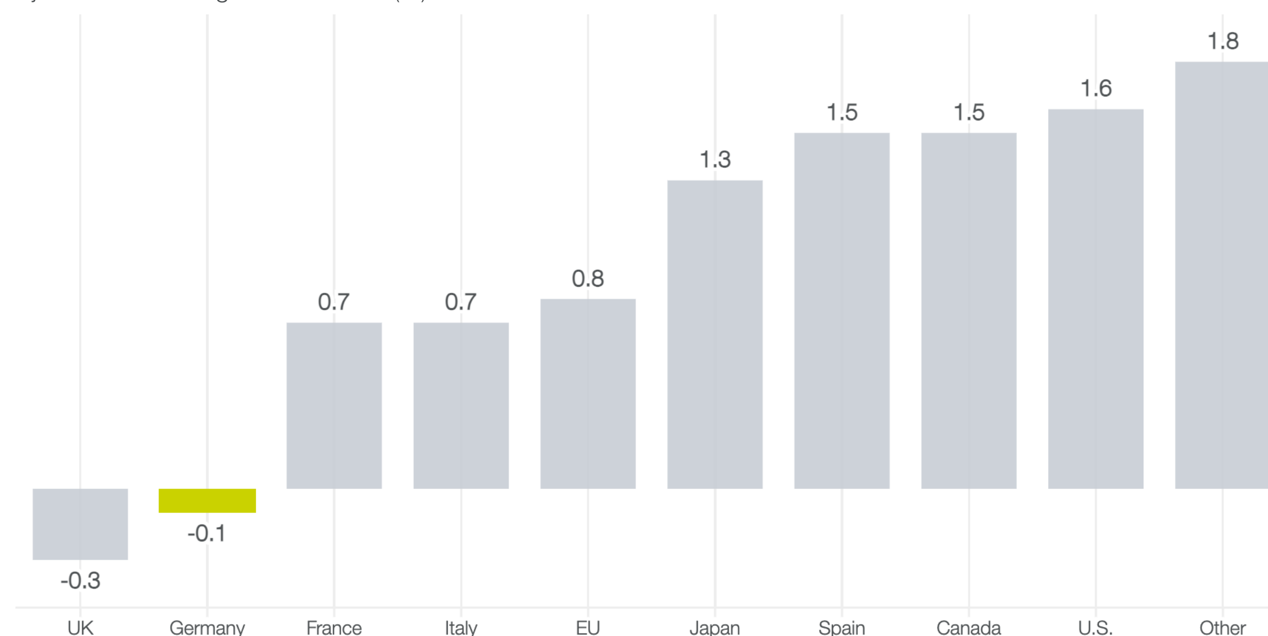
Investment bankers report more take-private deals as macro conditions supress equity prices. This is set to spark activity among arbitrage funds – particularly in markets with favourable regulatory regimes

By Dr Jonas Wittgens

The latest economic forecast from the International Monetary Fund paints a bleak picture for the G7. UK output is expected to shrink by 0.3% this year, the worst outlook in the group. Italy and France are set to grow – just – by 0.7%. Even the U.S. is on course for just 1.6% expansion.

While not the poorest performer, Germany is also predicted to go into recession. This follows three relatively lean years by international standards; in 2021, most G7 nations benefited from a post-pandemic rebound of more than 4%, and in some cases close to 7%. Germany's economy grew by less than 3%.

How will advanced economies perform?



Source: IMF

The reasons for Germany's struggles are manifold. Its economy is founded on industrial manufacturing and particularly conventional vehicles, where its national champions have been overtaken in the shift to electrification.

German companies rely heavily on exports to China at a time when East/West tensions are strained. It also has some of the highest electricity costs in the world, the legacy of years of poorly designed energy policy, an overreliance on Russian gas and a deficit of sites capable of supporting large-scale renewable power generation.

The German government is implementing a strategy to decarbonise its economy by becoming a hydrogen importer, but the benefits will not be felt for years. In the meantime, its energy costs are set to remain high with the transition funded through taxation.

As more take-private deals kick off, expect a rise in activist investment

Despite these challenges, German corporates invest heavily in R&D and are renowned for their good governance. Against this backdrop, investment bankers are starting to see more take-private processes kicking off as financial investors and corporates explore opportunities to buy fundamentally sound companies at a discount.

History suggests this will spark more activist activity, with funds building stakes in the wake of rumoured bids or announced offers in order to:

- intervene either during the acceptance period to force up the offer price; or
- take action post-closing to block the integration of the target and initiate proceedings aimed at forcing the bidder to acquire the remaining outstanding shares for a higher price than the initial offer price.

"In recent years we have seen a rise in event-driven activism, with some features of the German regulatory framework making it a prime market for arbitrage funds"

This type of activism has been on the rise, including in 2021/22 when Petrus, Teleios Capital and others intervened to block a sponsor-led takeover of Aareal Bank, with the bidders eventually returning with a higher offer that was accepted.

And recently, following a takeover bid for leading real estate company Deutsche Wohnen SE by its competitor Vonovia, we saw Elliott Management (through its investment vehicle Cornwall) claiming for a special audit of the actions of the target's management over accusations they breached their duties. The respective shareholder resolution proposal was voted down, but it remains to be seen whether a court will order the audit to go ahead.

Some features of the German regulatory framework making it a prime market for arbitrage funds. For any bidder considering an investment in Germany, there are some nuances to consider.

– Hostile takeovers are not common in Germany but they do happen. However, any German public company facing a hostile bid only has a limited array of takeover defences to work with.

– After a bidder has published its decision to launch an offer, the target's management board cannot intervene to prevent it except in limited circumstances. These include actions that a prudent and conscientious manager would have taken absent a bid; the search for a "white knight"; actions approved by the supervisory board; or actions authorised by shareholder resolution.

– If these conditions are satisfied, the management board can implement a handful of defensive measures, all of which are tightly controlled under German takeover law. They are, in particular: issuing new shares from authorised capital; executing a buyback of treasury shares to increase the voting power of friendly shareholders and reduce the free float available for purchase; disposing of treasury shares to an anchor shareholder; or disposing of material assets.

– The fact these defences are relatively weak means target boards more often focus on whether they can create more value on their own than with the bidder, with synergies a hot topic in many takeover negotiations.

– That said, hostile bidders also face obstacles, including that they are limited to basing their bid on publicly available information (eg annual accounts, articles of association, register of major shareholders), even where they are competing with a recommended offer. There is no provision in German law that grants a hostile bidder access to the same information as a recommended rival, but the target's management board will need to decide whether the denial of due diligence would constitute a breach of its duties.

– As far as M&A activism is concerned, under German law, investors holding a single share have the power to initiate judicial proceedings following a bid to increase the compensation due under common post-closing integration measures, such as domination and profit and loss transfer agreements and squeeze outs (whereby a majority shareholder seeks to force those with minority stakes to sell up).

– These proceedings may last for years, and data shows that as a consequence of specific German valuation regimes applied by the courts, the compensation offered it often raised significantly. In this scenario *all* minorities have to be paid the additional amount, even those who didn't initiate the proceedings.

– Holding 1% of the nominal share capital (or shares with a nominal value of EUR100,000 or more) enables a shareholder to apply to bring a derivative lawsuit against members of the management board and supervisory board to seek compensation for perceived losses in a deal, and to apply for the appointment of a special auditor to test whether assets have been undervalued.

– Shareholders with 5% of the nominal share capital plus one share can block a squeeze out unless the majority shareholder pursuing the merger holds 90% or more of the shares. Investors with 10% of the nominal share capital plus one share can therefore block any attempt to force a squeeze out.

Not every public offer attracts event-driven activists. But where they are present in the target's stock, the bidder will need to execute a carefully crafted legal and comms strategy to get the deal over the line.

Groundbreaking U.S. energy policy generates wave of innovative M&A

Research shows the Biden Administration's Inflation Reduction Act has already channelled hundreds of billions of dollars into new projects – and kick-started some surprising deal activity

By Jillian Ashley

Infrastructure continues to be one of the few asset classes where M&A activity remains strong. With strategic and financial buyers typically able to fund all-equity deals, infra deal-making has been insulated from the recent collapse in the syndicated leveraged lending.

At the same time, operational infrastructure assets often have portable debt already in place, with many acquisitions structured in such a way that they don't trigger a change in control that requires the package to be reset in a market where financing costs are rising steadily.

As well as these favorable factors, infrastructure investment has been boosted by some radical policy developments, including the U.S. Inflation Reduction Act, and the Infrastructure Investment and Jobs Act.

Our research shows that the IRA – which was signed into law in August 2022 and will channel more than USD360bn into green infrastructure via a series of tax incentives, grants and other subsidies – has already provided a massive boost to U.S. infrastructure development.

What's different about the Inflation Reduction Act?

The IRA provides tax credits for a wider range of projects than previous federal support schemes, which primarily supported solar and wind. Now, everything from electric vehicle infrastructure to nuclear power plants and green hydrogen facilities are in scope for financial support, subject to project developers meeting local content requirements, among other things.

The Act is more flexible in that it allows for certain tax credits to be paid directly to tax exempt parties such as publicly owned utilities. Historic schemes favoured tax equity structuring, which requires financing from a party with a large tax exposure, typically an investment bank or major corporate.

It's also now possible for project owners and developers to sell their tax credits to other taxpayers, making the financing of green energy projects simpler and more efficient.

The Infrastructure Investment and Jobs Act meanwhile allocates an additional USD1.2tn in spending, including USD110bn for roads and bridges, USD73bn for power infrastructure and USD66bn for passenger and freight rail.

While some initially questioned whether it would replace private dollars rather than being additive, the consensus among infrastructure investors is that it has bolstered opportunities for private investment by increasing activity in the sector. This is desperately needed given the sums required are far beyond the federal funding available through the Act itself.

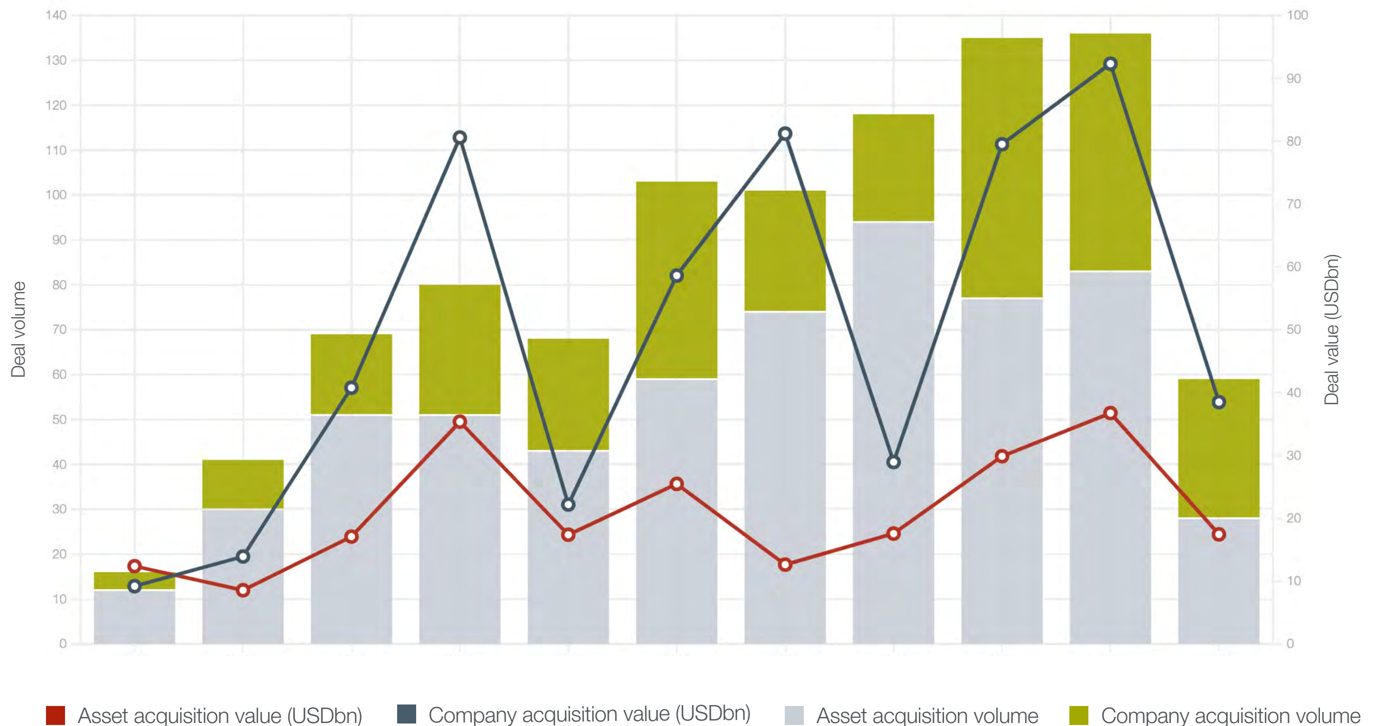
At the same time, the Department of Energy's Title 17 and Advanced Technology Vehicles Manufacturing (AVTM) loan programs have made billions of dollars available (at a low cost of capital) for innovative clean energy projects and the electric vehicle supply chain respectively, with the Loan Programs Office extremely active in deploying this funding.

All this investment activity is having an impact on M&A, where private funds have significant dry powder to deploy into infrastructure to meet investors' demands for exposure to energy transition and ESG-friendly opportunities.

Closed-ended funds have a deadline by which they need to exit their investments, which in turn is driving transactional activity. In addition to pure secondary trades on infra assets where activity remains robust, we are seeing financial sponsors teaming up with developers to access pipelines of greenfield projects, entering the market much earlier than in the past to take advantage of the significant uptick in value these incentives have put into play.

U.S. infra M&A hits new high in 2022

Annual deal value and volume. 2013-present



In many cases, investors and developers are entering into joint development agreements that see the investor funding development activity in exchange for preferential access to new projects. Once they break ground for construction or alternatively become operational, the assets are then transferred to the investor.

Fund managers are also acquiring project developers with strong long-term pipelines, bringing the development platform into their portfolio.

For any non-U.S. investors looking to enter the U.S. market, it should be noted that they will need to consider whether a review by the Committee of Foreign Investment in the United States is required or is advisable – a decision that turns on a number of factors, including the nature of the assets, whether they constitute "critical infrastructure", the foreign investor's proposed ownership levels and governance rights, and the nationality of the investor itself.

Non-U.S. investors should consult their legal counsel for guidance on navigating these considerations and their impact on auction dynamics and overall deal timing.

What impact has the IRA had on infrastructure investment in the U.S.?

In its first year, the IRA has kick-started an astonishing array of infrastructure development. According to figures from the American Clean Power Association:

- USD150bn of investment in domestic utility-scale clean energy projects has been announced since August 2022, exceeding the total investment in similar projects in the U.S. between 2017 and 2021. Together these projects will deliver 96,000MW of new clean energy capacity.
- 46 new or expanded utility-scale clean energy manufacturing facilities have also been announced, including 10 focused on wind power, 26 on solar and 10 on battery storage.

Bloomberg also reports that:

- the North American battery supply chain received USD17bn of investment in 2022. 45GWh of battery manufacturing capacity was added through the year, twice as much as in 2021. By the end of 2023, the U.S. is expected to reach 178GWh of battery manufacturing capacity;
- record-breaking offshore wind auctions were concluded in states such as New York, the Carolinas and California; and
- 92MW of hydrogen producing projects were commissioned last year, including the Angeles Link project, a green hydrogen production pipeline serving the LA region that is expected to be the nation's largest.

Overall we remain bullish on the U.S. infrastructure market, both in terms of investment and M&A activity.

The measures introduced by the Biden Administration are likely to survive whatever the outcome of next year's presidential election, with the need for infrastructure development acknowledged across the House and incentives that are already in play difficult to remove once they've been granted.

However taking full advantage of the opportunities on offer will require well-crafted strategies to mitigate risk.

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