WHITE & CASE

Ahead of the pack: US M&A 2019

While global M&A fell in 2019, the US forged ahead, maintaining its year-on-year value and taking a greater share of the global deal market


5237

Foreword

Despite a fall in overall global dealmaking, M&A in the US has proved resilient, as megadeals and domestic activity boost the market

It has been a busy year for M&A involving US companies. While global deal value dropped compared to 2018, the US maintained its year-on-year total and took a greater share of the overall deal market.

Confidence in the US economy and the opportunities it offers companies for growth and investment led to a market driven by megadeals (valued at US$5 billion or more), with the life sciences and TMT sectors leading the way. Indeed, a full 58 percent of the US$1.5 trillion worth of deals involving US companies qualified as megadeals, up from 47 percent in 2018. And nine of the top ten deals for 2019 were domestic, suggesting that US corporate executives see plenty of opportunity in their home market.

Last year was also characterized by a growing breadth of M&A market participants. Private equity (PE) remained active, buoyed by strong fundraising and high liquidity in the debt markets. Family offices continued their expansion into direct deals. And sovereign wealth funds, many of which had pulled back from direct investing, returned to M&A markets, with the US as a target.

Rising stock markets and competition for deals led to further increases in company valuations in both public and, in particular, private markets. Many corporates opted for deals involving stock consideration to mitigate high pricing, while PE players sought smaller platforms through which to execute buy-and-build strategies as well as hunting opportunity in taking public companies private. These trends suggest that dealmakers are proceeding with confidence but also caution when it comes to pricing.

Talk of a downturn has been muted somewhat as we head into 2020—at least regarding the first half of the year. Economic growth will settle at 2.1 percent, according to the Conference Board. Unemployment is predicted to remain low, and financing for deals will continue to be widely available and low cost. However, with a presidential election in November, as well as ongoing headwinds such as trade wars and unrest in the Middle East, there is no room for complacency.

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US dealmakers steer a steady path through global headwinds

As the rest of the world backed away from the deal table, confident US corporates continued buying businesses—especially in the life sciences and TMT sectors, and particularly in the domestic market

By John Reiss, Gregory Pryor

US dealmakers had a strong 2019, with 5,757 deals targeting US companies, valued at a total of US$1.53 trillion. This represents a 10 percent decline in volume, but value is practically the same as the previous year's tally, making it the third highest total on record. Meanwhile, global M&A value fell by 8 percent.

In addition, this value figure gave the US a global market share of 47 percent—the second highest percentage on record. Buoyed by confidence in the domestic economy, deals continued to get over the line in the US, while numerous other regions took a slight pause for breath.

Economic stability

In late 2018, fears of a trade war and concerns that a downturn may emerge during 2019 led to volatile public markets. But the Dow Jones Industrial Average was up by 23 percent in 2019.

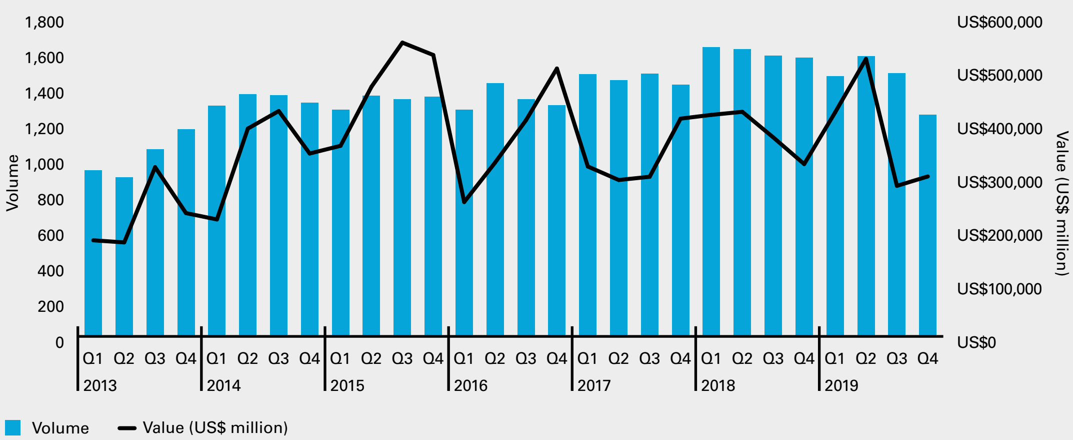
The US economy is forecast to grow by 2.3 percent over the whole of 2019, up from just over 1 percent in 2018, according to The Conference Board, with 2020 set for continued moderate growth. When combined with labor market statistics, which show the unemployment rate stabilized at approximately 3.5 percent, the outlook is bright.

Megadeal movement

This positive sentiment is reflected in the pattern of M&A activity for the year. Confident corporates did big deals to extend their geographic and market reach: Megadeals (those valued at US$5 billion or more) increased by 23 percent, from US$723.9 billion in 2018 to US$888 billion in 2019. They accounted for 58 percent of the total deal value for 2019, a significant increase on the 47 percent seen in 2018.

Megadeal activity was driven mainly by two sectors: life sciences and TMT. The former had the highest megadeal total,

US M&A 2013 – 2019



with US$180.8 billion across eight transactions, as Big Pharma companies increasingly seek defensive biotechnology products and capability. Meanwhile, TMT saw 11 deals valued at US$134.5 billion, reflecting the ongoing convergence of industries as digital disruption continues apace.

Middle market muted

Activity involving large (US$1 billion to US$4.99 billion) and middle-market (US$5 million to US$999 million) deals was down by value and volume compared to 2018. High valuations may have played a role in this dynamic. The megadeals of 2019 often used stock consideration to mitigate the high cost of acquisitions. The largest deal of the year, Bristol-Myers Squibb's US$89.5 billion purchase of Celgene, is one example, as is the US$88.9 billion merger of United Technologies Corporation and Raytheon.

In the mid-market and below, buyers need to fund deals largely through cash and, despite continued liquidity in the debt markets and retained cash on balance sheets, buyers may be more circumspect when faced with high valuations. Companies that don't play in the megadeal space typically have fewer resources dedicated to M&A deals, and they may be more prone to caution in light of a possible downturn, particularly in a sellers' market dominated by auction activity. After several years of benign economic conditions, a survey carried out in the summer of 2019 by the National Association for Business Economics found that 72 percent of economists were predicting a downturn in 2020 or 2021.

Domestic deals dominate at the larger end

With a strengthening of the Committee on Foreign Investment in the United States (CFIUS) regulations (see page 5) and ongoing uncertainty around the effect of US-China trade tariffs through

Top ten US M&A deals 2019

Announced date	Target company	Consolidated sectors	Target-dominant country	Bidder company	Bidder-dominant country	Deal value US$(m)
1/3/2019	Celgene Corporation	Biotechnology	USA	Bristol-Myers Squibb Company	USA	89,489
6/9/2019	Raytheon Company	Defense	USA	United Technologies Corporation	USA	88,905
5/9/2019	Anadarko Petroleum Corporation	Oil & gas	USA	Occidental Petroleum Corporation	USA	54,388
3/18/2019	Worldpay, Inc.	Services (other)	USA	Fidelity National Information Services, Inc.	USA	42,584
1/16/2019	First Data Corporation	Computer services	USA	Fiserv, Inc.	USA	38,448
11/25/2019	TD Ameritrade Holding Corp.	Securities and commodities brokers	USA	The Charles Schwab Corporation	USA	28,978
2/7/2019	SunTrust Banks, Inc.	Retail banking	USA	BB&T Corporation	USA	28,085
8/1/2019	Refinitiv	Services (other)	USA	London Stock Exchange Group Plc	United Kingdom	27,000
12/15/2019	DuPont Nutrition & Biosciences	Chemicals and materials	USA	International Flavors & Fragrances Inc.	USA	26,200
5/28/2019	Total System Services Inc.	Internet/e-commerce	USA	Global Payments Inc.	USA	25,719

FIRRMA gets firmer from February

By Farhad Jalinous, Karalyn Mildorf

In February 2020, new regulations implementing the Foreign Investment Risk Review Modernization Act (FIRRMA) will come into force. This is a major step in the overhaul of the foreign direct investment review process conducted by the Committee on Foreign Investment in the United States (CFIUS).

Some of the key changes involve an expansion of transactions that are included in the scope of CFIUS's jurisdiction, including certain non-controlling but non-passive investments in US businesses involving critical technology, critical infrastructure or sensitive data (referred to as "TID US businesses"). In addition, the new regulations expand CFIUS's jurisdiction to include certain real estate purchases, leases and concessions.

Prior to FIRRMA, CFIUS's jurisdiction was limited to foreign control of US businesses, and the CFIUS review was for the most part a voluntary process. Under FIRRMA, certain qualifying investments in US businesses involved with critical technology and investments by entities with substantial foreign government ownership in TID US businesses can be subject to mandatory filing requirements. And there are potentially harsh penalties for non-compliance!

Foreign investors take note

Companies will need to give greater consideration in the early stages of a transaction to both jurisdictional and substantive CFIUS issues. This means buyers (including investors purchasing minority stakes in TID US businesses) will need to conduct CFIUS-focused due diligence, which under the new rules can be a complex and fact-specific assessment, to determine whether the transaction triggers a mandatory filing. If not, they should then consider whether it is advisable to make a voluntary filing and what impact that may have on their bid. Finally, consideration must be given to whether a "fast track" declaration or a full filing is the best course.

Parties also need to be sensitive to these issues when allocating CFIUS risk in their purchase agreements. And if an overseas investor opts not to file, it needs to understand the risks of CFIUS requesting a filing. Notably, under FIRRMA, CFIUS has increased resources to pursue non-notified transactions and has been ramping up such efforts. Additionally, in 2018, CFIUS announced the issuance of its first-ever monetary penalty—a US$1 million fine—for violation of a mitigation agreement.

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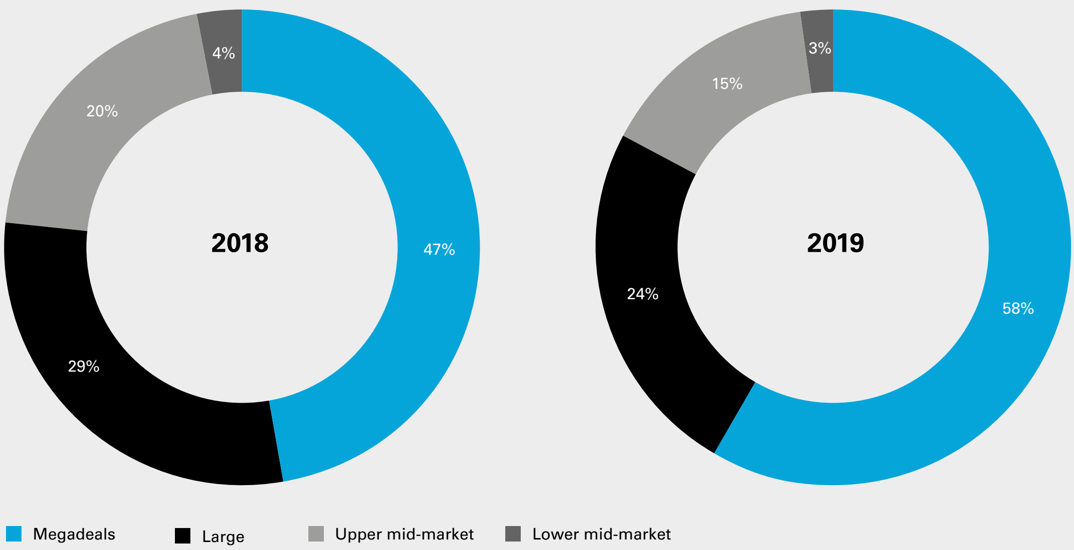
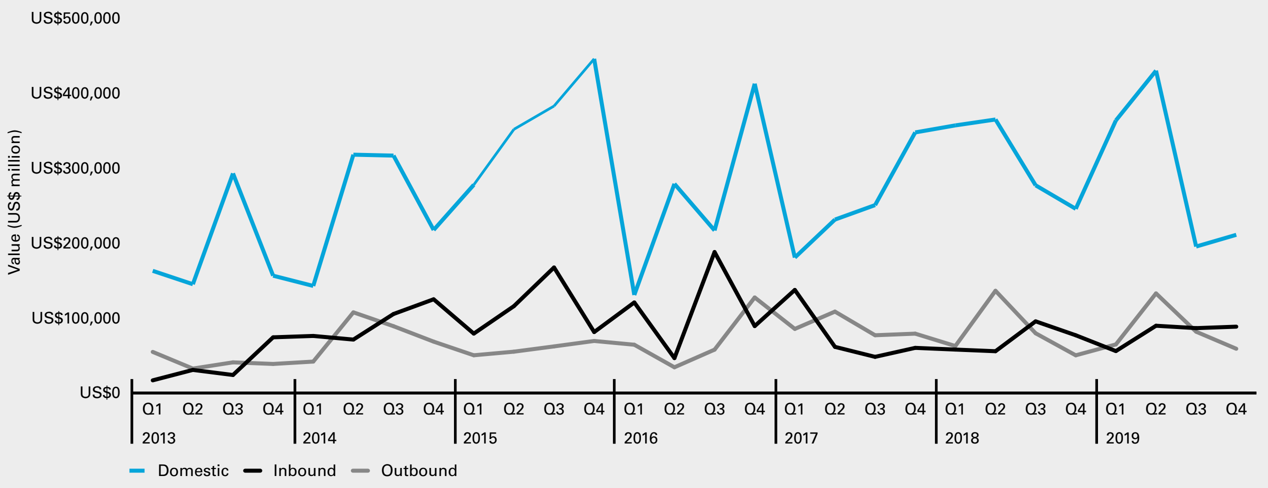
Megadeals (those valued at US$5 billion or more) went up 23 percent, from US$723.9 billion in 2018 to US$888 billion in 2019. They accounted for 58 percent of the total deal value for 2019, a significant increase on the 47 percent seen in 2018

US M&A value by deal size 2018 and 2019



US M&A: Domestic, inbound and outbound value



2019, it is perhaps unsurprising that domestic transactions dominated the megadeal space.

Nine of the top ten deals of 2019 were domestic, with only the UK-based London Stock Exchange's US$27 billion acquisition of financial markets data and infrastructure provider Refinitiv bucking the trend. However, the focus on large domestic deals also reflects greater appetite among US buyers for US assets, given the strength of the economy relative to some other markets (the European Union is forecast to grow by just 1.4 percent in 2019, for example).

While the focus at the top end was on domestic deals, figures across home-grown, inbound and outbound M&A mirrored the market's overall pattern. 2019 has seen 4,785 domestic deals worth US$1.2 trillion—a fall of 9 percent by volume and 4 percent by value year-on-year, which is similar to the overall market. The volume of inbound deals also fell by 13 percent to 972, while the value increased from US$286.5 billion in 2018 to US$325.8 billion in 2019, with outbound deal numbers dropping by 5 percent to 1,337 transactions and a consistent value of US$338.7 billion.

This is despite an increased focus on foreign acquirers by authorities in many markets, including the US, as well as greater coordination

Family offices make their presence felt

By Kerry O'Rourke Perri

Over the past few years, family offices have become an increasing force in the investment and deal markets. A recent study by Campden Research estimates that the total assets under management among the projected 7,300 family offices worldwide currently stands at US$5.9 trillion.

The proportion of family office capital flowing towards private companies is also on the rise, both through traditional private equity funds and direct private investments. And investors are achieving strong returns with these strategies. A Family Office Exchange report from June 2019 found that private equity fund investments by family offices averaged 11.1 percent in 2018, with direct investments averaging 16.8 percent.

According to a 2019 UBS study, 39 percent of family offices expect to increase their allocations to direct investments in 2020. While a number of these investors may have cut their teeth on co-investments alongside private equity funds, it seems that many are now starting to seek out deals for themselves. This affords them the opportunity to do away with the fee structures associated with fund investments as well as offering them far greater control over investments.

Family values

In addition, family offices are taking different approaches to direct investment than those taken by private equity. Family offices often have longer investment horizons than traditional funds and so can appeal to other family business sellers who wish to retain a stake over the long term and can tolerate longer market cycles.

They also tend to favor local investments (85 percent of North American family offices are more likely to invest in North American companies, according to a FINTRX Buy-Side study) and investments with a direct link to their experience and background.

Family offices are also more focused on the social and environmental impact of the investments than many buyout firms—a third of family offices engage in sustainable investing, according to the UBS survey.

As the firepower of family offices increases and their appetite for direct deals grows, they could become a significant competitor to private equity. However, it also seems likely that family offices will target somewhat different investments, thus adding to the private company financing ecosystem at a time when more companies are opting for a private as opposed to public ownership structure.

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Canada was the most active acquirer of US businesses, accounting for 203 deals worth a total of US$55.1 billion

Inbound US M&A (top 10)

Country	Volume
Canada	203
United Kingdom	164
Japan	82
France	58
Germany	58
Sweden	44
Switzerland	36
Australia	34
Netherlands	32
Ireland (Republic)	29

Country	Value US$(m)
Canada	55,102
United Kingdom	49,851
Japan	44,840
France	39,399
Germany	25,163
Switzerland	21,407
Sweden	15,754
Australia	13,941
Netherlands	13,083
South Korea	7,987

Antitrust—a view on vertical deals

By Rebecca Farrington

Over the last decade, the number of transactions reported to antitrust authorities in the US has risen significantly. In 2009, there were 716 reported deals; by the fiscal year 2018, this had risen nearly threefold to 2,111 deals.

Interest from US antitrust authorities has generally been steady but is rising in certain areas. While there is a trend toward greater scrutiny of certain M&A activity in the US, what is less clear at this stage is the extent to which we will see an overhaul of antitrust.

One area of increased and demonstrated interest is in examining the effect of vertical mergers. Though the DOJ’s attempt to prevent the AT&T–Time Warner tie-up failed, the FTC and DOJ in January jointly issued draft Vertical Merger Guidelines for public comment. This much-anticipated update to the 1984 guidelines gives a framework for evaluating vertical mergers under the antitrust laws. While reflecting “new economic understandings”, the draft guidelines largely follow and attempt to define and frame what is essentially an existing consensus view on analyzing the competitive effects of vertical mergers. The fact that the guidelines have been issued shows that vertical mergers will continue to be an area of interest for the FTC and DOJ.

Don’t wait—act on antitrust

Companies engaging in M&A on both buy- and sell-sides will need to continue to consider early on whether a transaction is likely to raise antitrust questions, and what remedies may be required. These are considerations not just in a US context. The increase in mandatory pre-merger clearances globally means parties need to organize their global clearance strategies carefully to ensure consistency in advocacy and timing.

between countries on antitrust legislation (see page 7). For sellers, CFIUS has become a bigger issue when preparing for a deal and, while there may be additional scrutiny on the execution prowess of overseas buyers, the totals for inbound M&A suggest that increased scrutiny is not proving to be a deal-breaker.

Good neighbors

Canada was the most active acquirer of US businesses, accounting for 203 deals worth a total of US$55.1 billion, even as the US-Mexico-Canada Agreement (USMCA) trade agreement remained unratified at the end of 2019. The largest inbound deal with a Canadian bidder was Brookfield Asset Management's US$9.6 billion purchase of Oaktree Capital. The UK was in second place for value and volume, with 164 deals worth US$49.8 billion led by LSE's acquisition of Refinitiv for US$27 billion. China hasn't been a top ten bidder for inbound US deals since 2017, when it ranked sixth by volume and seventh by value.

4,785

The number of US domestic deals in 2019

US $325.8 billion

The value of US inbound deals in 2019—an increase from the US$287 billion seen in 2018

Looking ahead

As we move into 2020, it seems likely that M&A activity will continue to be robust as long as the economy continues to grow and confidence remains high.

There are some concerns about an eventual downturn, but that inevitability provides opportunities for buyers that are experienced with distressed assets. The upcoming Presidential elections may also have an effect on M&A activity, particularly depending on which Democratic candidate wins the nomination. But we'd expect activity to be brisk in the early part of the year, as companies seek to complete deals well ahead of any potential change in administration.

> "For sellers, CFIUS has become a bigger issue when preparing for a deal and, while there may be some reticence about dealing with overseas acquirors, given the potential for delays and completion risk, the totals for inbound M&A suggest that increased scrutiny is not proving to be a deal-breaker

Top ten US M&A deals 2019 inbound

Announced date	Target company	Consolidated sectors	Target-dominant country	Bidder company	Bidder-dominant country	Deal value US$(m)
01/08/2019	Refinitiv	Services (other)	USA	London Stock Exchange Group Plc	United Kingdom	27,000
25/11/2019	Tiffany & Co.	Consumer: Other	USA	LVMH Moet Hennessy Louis-Vuitton SE	France	16,640
08/05/2019	Zayo Group Holdings, Inc.	Telecommunications: Carriers	USA	Zayo Group Consortium	Sweden	14,116
10/05/2019	Buckeye Partners, L.P.	Oil & gas	USA	IFM Investors	Australia	10,188
09/09/2019	Aviation Capital Group LLC (75.5 percent stake)	Rental and leasing	USA	Tokyo Century Corporation	Japan	9,896
13/03/2019	Oaktree Capital Group LLC (61.16 percent stake)	Fund management	USA	Brookfield Asset Management Inc.	Canada	9,635
03/06/2019	Cypress Semiconductor Corporation	Computer: Semiconductors	USA	Infineon Technologies AG	Germany	9,302
12/02/2019	Coty, Inc. (19.97 percent stake)	Consumer: Other	USA	JAB Holdings B.V.	Netherlands	9,119
01/07/2019	Genesee & Wyoming, Inc.	Transportation	USA	Genesee & Wyoming Consortium	Canada	8,608
06/11/2019	Aircastle Limited (71.73 percent stake)	Rental and leasing	USA	Consortium consisting of Marubeni Corp and Mizuho Leasing Company	Japan	8,369

Private equity stands its ground in 2019

In line with the wider US M&A markets, PE deals held firm through 2019 with 1,329 buyouts, worth US$208 billion, representing a decline of 9 percent by volume, but just a 4 percent fall by value relative to 2018

By Oliver Brahmst, Gary Silverman

PE remained resilient in 2019, despite a drop-off in the second half of the year. The first six months were particularly impressive, with buyout volume keeping pace with H1 2018. Funds kept moving on deals, particularly as interest rates remained low and credit availability is high, with private credit funds increasingly providing flexible—and larger—financing packages for PE-backed deals. This has driven ever-larger fundraisings: Average sizes of US private debt funds have risen to more than US$1 billion since 2016, when they were just under US$700 million, according to Preqin statistics.

Funds and gains

At the same time, PE funds have also been raising significantly larger funds than in the past. Blackstone, for example, broke a record by raising US$26 billion—the largest PE fund ever—as investor capital increasingly concentrates at the larger end of the fund spectrum. Preqin figures for 2018 show that 62 percent of the US$426 billion was directed toward funds of US$1billion or more and that the ten largest funds accounted for almost a quarter of this. PE dry powder has reached US$1.54 trillion at the end of June 2019, a record high.

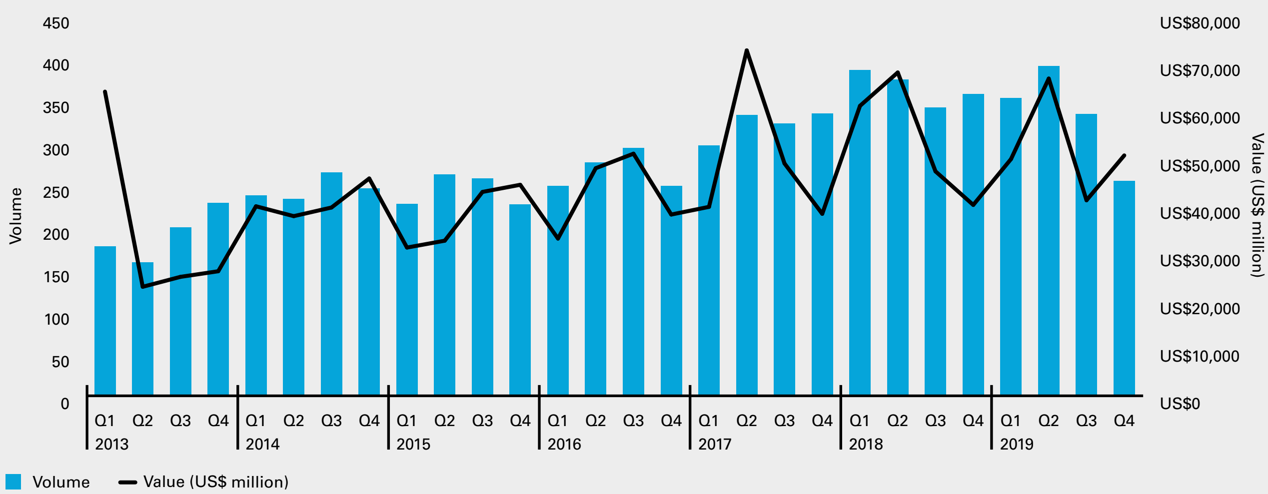
Competition heats up

Dry powder and available credit are underpinning continued deal activity by PE houses, but they do not have the market to themselves. Strategies remain active and increasing numbers of family offices are seeking to complete direct deals (see page 6). Sovereign wealth funds are also returning to the US, among other markets. Investors such as Singapore's GIC have recently led or co-led deals and the Qatar

US $208 billion

The total value of 1,329 PE buyouts in 2019

US private equity buyouts 2013 – 2019



Investment Authority was, early in 2019, reported to be increasing its US exposure to approximately US$45 billion over the next two years.

However, PE remains an attractive option for sellers wishing to roll over some of their equity to benefit from upside, as well as those not wishing to divulge commercially sensitive information to competitors.

Increased competition for deals has had an inevitable impact on valuations. EBITDA multiples in the US reached an average of 12.9x in September 2019, compared with 11.5x in December 2018, according to PwC figures. Many larger sponsors have tried to mitigate high entry prices by fishing for deals in the mid-market and pursuing buy and build strategies. This strategy should endure, as it enables PE-backed companies to benefit from synergies and therefore potentially pay more for assets. Yet competition has become fierce in this part of the market too and multiples are also rising. Valuations of US M&A deals in the US$100 million to US$250 million range have increased markedly: from an average of 9.0x for 2017 to 10.7x in the year to September 2019, according to Capital IQ.

> **TMT has become an increasingly popular target for PE, as the technology subsector has matured and as firms seek to capitalize on the digitalization and technological transformation occurring across sectors**

Public-to-private on the rise

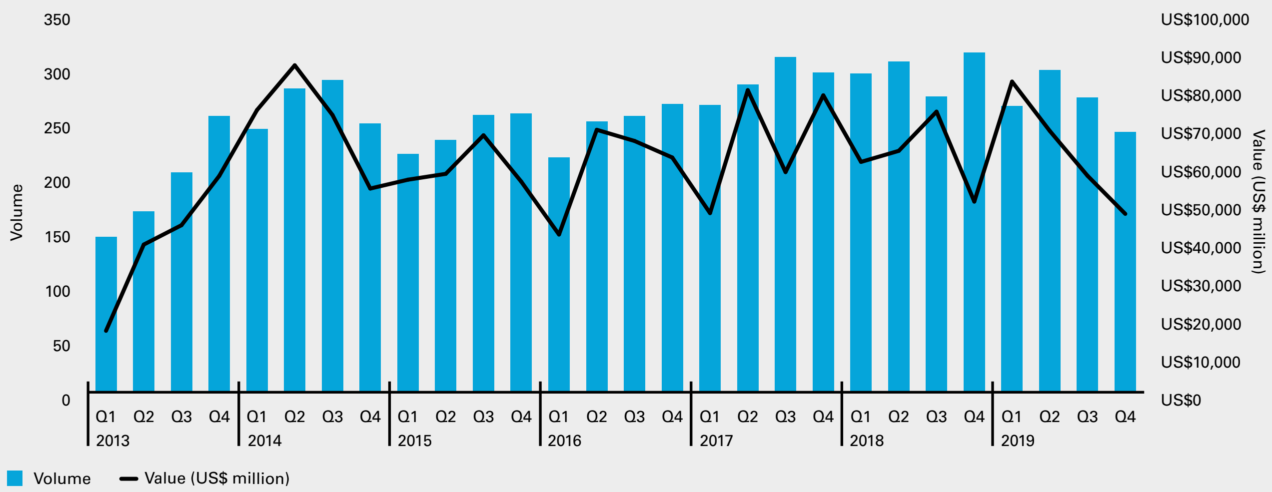
Rising private company multiples are making public company valuations more attractive for PE. As a result, the market has seen public-to-private transactions find favor once more with PE firms. Hellman & Friedman, for example, led the acquisition of publicly listed human capital software group Ultimate in May 2019 for US$11 billion. Meanwhile, drugstore group Walgreens Boots Alliance is reported to be in talks with PE firms about a US$70 billion take-private in what would be the largest-ever buyout.

In the club

Club deals have also re-emerged as PE firms seek to team up to spread risk and pursue larger targets. One recent example of this is the US$4 billion buyout of healthcare consultancy Press Ganey Associates by Leonard Green & Partners, Ares Management, GIC and others.

Indeed, the largest buyout deal of 2019—the US$14.1 billion buyout

US private equity exits 2013 – 2019



of communications infrastructure provider Zayo Group—was also completed by a consortium, led by Digital Colony Partners, EQT and Stonepeak Infrastructure Partners.

TMT takes pole position

The Zayo deal helped boost the value totals for TMT buyouts for the year to US$73.8 billion, although volumes were also high, with 380 deals recorded, to make the sector the most active for PE firms. TMT has become an increasingly popular target for PE, as the technology subsector has matured and as firms seek to capitalize on the digitalization and technological transformation occurring across sectors. Vista Equity Partners, for example, raised the largest-ever technology-focused PE fund, with US$16 billion, earlier in the year.

Energy, mining and utilities was the second most popular sector for PE by value, with deals totaling US$39.9 billion across 44 buyouts. However, a substantial proportion of this asset class was accounted for by IFM Investors' US$10.2 billion acquisition of midstream logistics player Buckeye Partners.

Where's the exit?

With private company valuations riding high, PE houses are taking the opportunity to realize their investments, with 1,069 exits recorded in 2019, valued at US$253.8 billion. This is a 3 percent increase in value and a fall of 9 percent by volume, compared to 2018. With dry powder at record levels, secondary buyouts remain a popular exit route, while IPOs are possible for the right businesses. PE firms are also taking advantage of strong leverage supply to complete recapitalizations and return cash to investors ahead of an exit.

Sector overview: Tech and healthcare take the top spots

In terms of value, the technology and healthcare sectors—separately and, sometimes, in tandem—have ruled the M&A markets in 2019. Meanwhile, the consumer industry faced tough times—though there could be a rebound in 2020

By John Reiss, Gregory Pryor

The US technology, media and telecommunications (TMT) sector was the leading M&A sector for both volume and value in 2019, with 1,377 deals responsible for US$279.7 billion in value.

The key to this substantial total was the performance of the technology subsector. The tech sector generated US$206 billion of value from a total of 1,138 deals.

The largest deal in the sector saw Global Payments, the electronic payment processing company, purchase rival Total Systems Services for US$25.7 billion. This was one of several megadeals in the fintech arena and proves that there is plenty of life in the burgeoning payments subsector.

Other drivers in the tech industry include the continued attraction of Software as a Service (SaaS) companies, contributing two of the top three tech deals; security-focused buyouts such as Broadcom's acquisition of Symantec's enterprise assets for US$10.7 billion; and the convergence between healthcare and technology (healthtech), which is likely to be a major growth area in 2020 and beyond.

Healthy returns

The healthcare sector itself had a bumper 2019, at least in terms of deal value. A slew of megadeals saw the total value rise by 121 percent year-on-year to US$256.5 billion. A significant proportion of this was based on two biotechnology megadeals. The biggest deal of the year (in any sector) saw Bristol-Myers Squibb (BMS) spend US$89.5 billion on biotech Celgene. In a statement at the time of announcement, Giovanni Caforio, CEO of BMS, said: "We are creating a biotech leader with…a deep and broad pipeline that will drive sustainable growth."

These kinds of deals are likely to continue in 2020 and beyond, as Big Pharma companies look to create product pipelines to circumvent the threat from generics manufacturers.

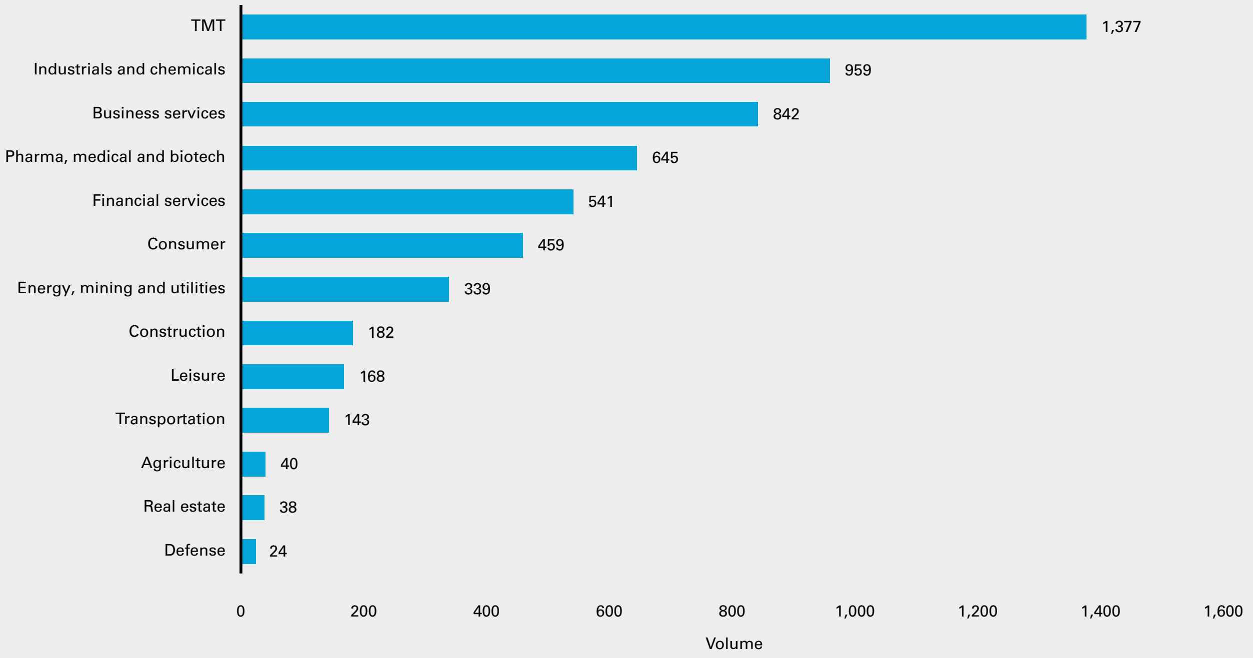
US $256.5 billion

The total value of deals targeting the US healthcare sector in 2019—an increase of 121 percent compared to 2018

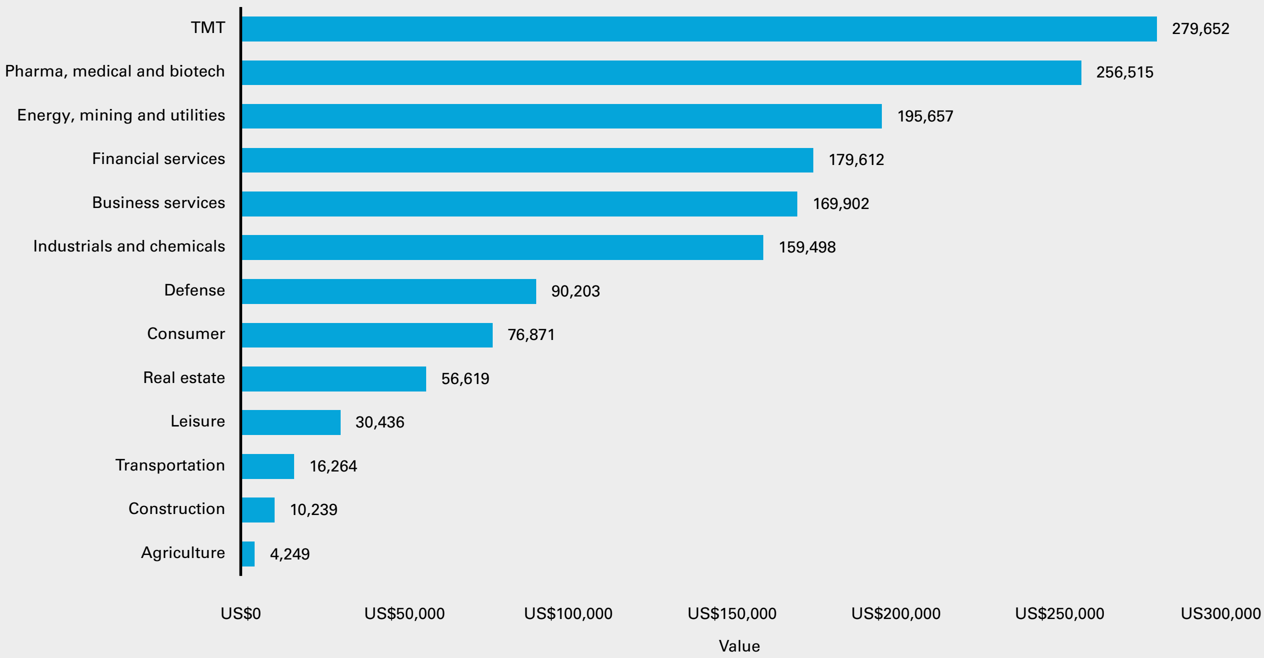
Consumer woes

One sector that experienced a challenging 2019 was consumer. Industry deal volume fell by 11 percent and value dropped 36 percent to US$76.9 billion. A combination of restructurings, bankruptcies, uncertainty and the ongoing battle between online and physical retail has hit the sector hard. However, it's worth noting that these issues could provide opportunities for restructuring specialists and PE buyers in the coming year. Watch this space.

US M&A sectors by volume



US M&A sectors by value



SaaS, cashless and convergence drive tech to the top

Technology continued to be among the most active subsectors for US M&A in 2019, with 1,138 deals announced worth a total of US$206 billion. This represents a marginal decrease of 3 percent in volume and 7 percent in value compared to 2018 activity

By Arlene Arin Hahn, Tali Sealman

While tech M&A deal value and volume were both fractionally down from 2018's figures, these numbers need to be put into perspective, as 2018 was a particularly strong year. Last year's total M&A value was higher than all years on record with the exception of 2018 and 2015. The 2019 numbers attest to the continued appetite for M&A in a sector that is transforming industries as diverse as automotive, financial services and healthcare.

Software as a Service (SaaS) remains a highly active M&A target, with two of the top three technology deals—Tableau Software's US$15 billion acquisition by Salesforce.com, and the US$11.8 billion consortium deal led by Hellman & Friedman and Blackstone for Ultimate Software—demonstrating the popularity and size of this part of the market, where buyers are consolidating and/or attracted by its recurring revenues.

US $206 billion

The value of 1,138 deals targeting the US tech sector in 2019

7%

Percentage decrease in deal value compared to 2018

Mobile moving M&A

The largest deal, Global Payments' acquisition of Total System Services for US$25.7 billion, also demonstrates there is plenty of room left for M&A in the payments technology area. Indeed, the arrival of 5G in the US is expected to transform the payments landscape. The transition to cashless and cardless transactions has been far slower in the West than in markets in Asia (mobile payments grew in China at a 123 percent CAGR between 2013 and 2018, according to a recent McKinsey report). This is likely to spur significant M&A activity over the short- to medium-term as financial services and technology players seek to grasp the growing cashless opportunities.

Healthtech drives deals

The convergence of technology and healthcare (healthtech) is also rapidly maturing and investors and strategic buyers are increasingly seeing the potential for digital healthcare to improve efficiency and outcomes for patients. J.P. Morgan Chase, for example, acquired electronic medical billing and information specialist InstaMed for US$500 million in May. Meanwhile, technology giants are also entering the healthcare space through M&A: Deals such as the acquisition of online pharmacy PillPack by Amazon for US$753 million demonstrate their intentions, in particular, as more traditional acquirer Walmart was outbid in the process.

Convergence keeps coming

Absent a major shock, convergence-driven M&A is expected to continue for the foreseeable future, with advances in technologies such as artificial intelligence set to continue to disrupt a variety of sectors. Apple's June 2019 acquisition of Drive.ai, a self-driving startup, for US$200 million is one example, while others include Hewlett Packard Enterprises's deal to buy analytics business MapR for an undisclosed sum and Nike's purchase of retail predictive analytics company Celect for a reported US$110 million.

The increased adoption of these technologies, combined with improved mobile capability as 5G rolls out, may create fertile ground for M&A. However, there may be some softening of valuations, prompted by the fact that we are entering an election year and as a result of the strengthening of powers held by CFIUS (see page 5) to investigate technology M&A.

Top technology deals 2019

1. Global Payments acquired Total System Services for **US$25.7 billion**
2. Salesforce.com acquired Tableau Software for **US$15.0 billion**
3. Hellman & Friedman acquired Ultimate Software Group for **US$11.8 billion**

Consumer deals fall, but disruption may be a driver

Restructurings and uncertainty are hitting the US consumer sector. Retail M&A deal volume dropped 11 percent year-on-year to 459 deals, while deal value dropped 36 percent to US$76.87 billion

By Raymond Bogenrief

Consumer M&A activity declined in 2019, reflecting uncertainty around the future political and economic direction of the market as well as the longer-running trend of digital disruption in the sector. Further, the US is gearing up for a presidential election in 2020, and the Conference Board reported that consumer confidence fell for the fourth consecutive month in November 2019.

Restructurings—issues and opportunities

A number of high-profile retail restructurings and bankruptcies over the past few years—including Sears, Forever 21, Gymboree and Toys 'R' US—are dampening the appetite for M&A. Nevertheless, as ESL Investment's US$5.2 billion acquisition of Sears attests, these processes are also providing investment opportunities for those with an interest in turnarounds. The sector also continues to attract PE attention—as seen with Apollo Global Management's US$1.1 billion take-private of loss-making grocery chain Smart & Final Stores.

Convergence—disruptor and driver for delivery of products

Convergence has also provided opportunities for deals as e-commerce and bricks-and-mortar businesses continue to merge. Retailers are increasingly attempting to offer shoppers the best of both worlds: the convenience of online shopping with the ability to "try before they buy" in stores and receive goods without having to wait at home. Physical and digital retail groups are finding ways to provide consumers with a seamless omnichannel experience and, following on from deals such as Amazon's 2017 US$13.7 billion acquisition of Whole Foods, we'd expect more M&A activity between e-commerce and bricks-and-mortar groups to achieving these synergies.

Change—consumers and China

Shifts in consumer habits and a need to diversify supply chains away from China are also likely to drive deals in the consumer sector. As spending patterns move towards more personalized experiences and brands with socially and environmentally positive credentials, we may see smaller and more targeted M&A activity. At the same time, a need to avoid US tariffs on Chinese imports is likely to push retailers to invest in new supply chains. As a result, PE, with its high levels of dry powder and access to relatively cheap financing, looks set to become more involved in the retail sector over the medium-term. The challenge for many of these players, however, will be to move away from more standardized approaches to retail businesses and to create the kinds of differentiated offerings that consumers are increasingly demanding.

US $76.9 billion

The value of 459 deals targeting the US consumer sector in 2019

11%

Percentage decrease in volume of deals compared to 2018

Top consumer deals 2019

1

LVMH Moet acquired Tiffany & Co. for **US$16.64 billion**

2

JAB Holdings acquired Coty, Inc. for **US$9.12 billion**

3

ESL Investment acquired Sears for **US$5.2 billion**

Real estate deals build on very solid foundations

The trend for megadeals in US real estate continued in 2019, with 38 transactions in the sector, worth a total US$56.6 billion—but overall deal volume was down 17 percent and deal value fell 25 percent year-on-year

By Eugene Leone, David Pezza

Real estate deals in the US may be down on the previous year but only because 2018 saw a particularly marked uptick in M&A value of 117 percent. Megadeals are still driving the market.

Funds finding a home

Transactions in the sector have been driven by portfolio purchases, with PE real estate funds in the driver's seat. These investors have raised significant amounts of capital over recent years, with 2018 seeing 300 funds raise an aggregate of US$124 billion worldwide, according to Preqin. 2018 marks the sixth consecutive year in which fundraising topped US$100 billion.

This is where we see appetite from overseas investors for the US market manifest itself. Driven by a quest for yield at a time of persistently low or negative interest rates in some markets, many institutions are ploughing their real estate allocations into funds, where they can benefit from diversification as well as property management and development expertise.

Indeed, two of the four largest real estate deals in 2019 featured a single PERE fund—Blackstone. It acquired the US logistics real estate assets of Singaporean investment manager GLP in a transaction valued at US$13.4 billion, and it purchased Colony Capital's US logistics assets for US$5.7 billion.

US $56.6 billion

The value of 38 transactions in the US real estate sector in 2019

25%

Percentage decrease in deal value compared to 2018

Logistics in the lead

As the Blackstone deals demonstrate, industrial, logistics and warehousing assets are in high demand among dealmakers, with the second-largest transaction—Prologis's acquisition of Liberty Property Trust—making this space account for the top three real estate deals by value in 2019.

The rise of e-commerce continues to drive this part of the market, while others spot potential to redevelop and repurpose physical retail spaces to create mixed-use developments with residential, retail, entertainment and specialty office assets. With long lead times—five years or more from redevelopment through stabilization—these opportunities are well suited to those armed with patient capital.

Pressures and potential

In the coming months, some contraction may occur as WeWork contracts. The rapid expansion of the past few years may come to a halt if the US experiences a downturn over the coming period. However, a market contraction is likely to offer real estate dealmakers some attractive opportunities.

Top real estate deals 2019

1

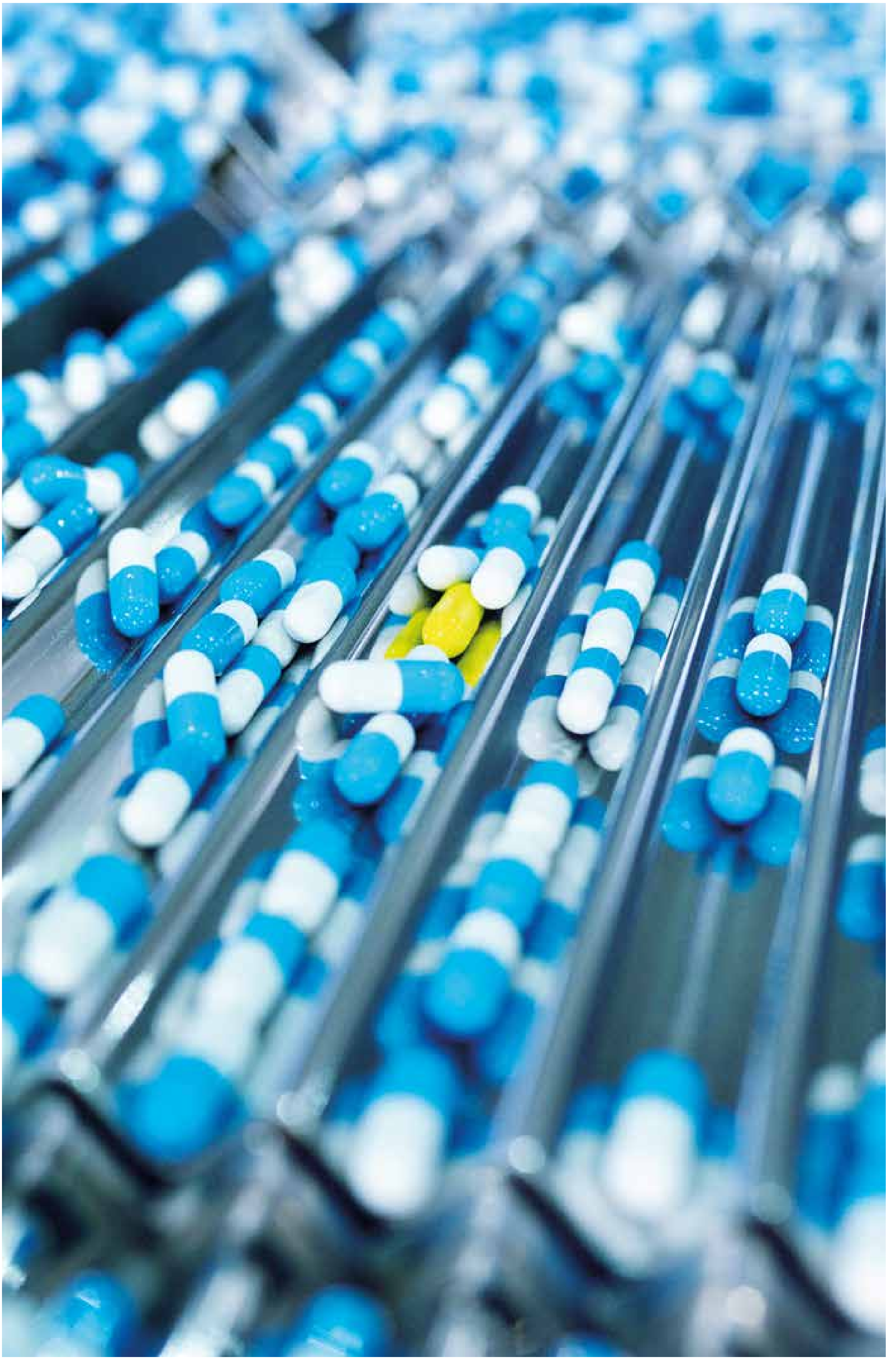
Blackstone acquired the US real estate logistics assets of GLP Pte. for **US$13.4 billion**

2

Prologis acquired Liberty Property Trust for **US$12.2 billion**

3

Mirae Asset Global acquired Strategic Hotels & Resorts for **US$5.8 billion**



Biotech boosts US healthcare M&A in 2019

The healthcare sector (incorporating pharma, medical and biotech) has seen M&A valued at US$256.5 billion across 645 deals in 2019. This is a decrease of 9 percent by volume, but an increase of 121 percent by value

By Mort Pierce

While 2019 has seen activity across the board in pharma and healthcare, it's clear that biotechnology assets continue to be highly attractive to acquirers. A significant proportion of the rise in deal value is attributable to the US$89.5 billion acquisition of biotech Celgene by BMS, one of the largest deals in the sector's history. The third-largest deal also involved a biotechnology business—Danaher Corporation's US$21.4 billion purchase of GE Healthcare Life Sciences.

Biotech and bulking up

The rush for biotechnology acquisitions looks set to continue, as pharmaceuticals companies seek out ways of gaining an edge over generics manufacturers—biotech drugs are harder to replicate than more traditional pharma products—as well as finding products to fill their pipelines.

Building scale also continues to be an important driver for M&A in the sector. For companies opting to continue research and development work to create patented drugs, scale is vital given the substantial costs involved. For those focused more on generics, deals are being struck to create synergies, cut costs and build a global presence. Mylan's US$24.6 billion acquisition of Pfizer is one example, where the combined business will focus on generic and off-patent drugs.

121%

Percentage increase in deal value compared to 2018

US $257 billion

The value of 645 deals targeting the US healthcare sector in 2019

Out with the old, in with the new? Or both

There are also moves to reshape companies in the sector. Vertical integration deals are one aspect of this reshaping. In these transactions, companies are acquiring what currently appear to be non-core businesses that bring new capability. CVS's acquisition of health insurance provider Aetna in 2018 is a prime example of this type of transaction. On the other hand, the divestment of non-core units continues, with consumer health assets a particular target, although other assets are also changing hands, as pharma companies rebalance their portfolios. Examples of this are Johnson & Johnson's divestment of Advanced Sterilization Products for US$2.8 billion to Fortive Corporation in 2019 and its acquisition of Ci:z Holdings in Japan, a dermocosmetic, cosmetic and skincare product business.

Finally, the sector is also bracing itself for the upcoming presidential elections in the US. Depending on the outcome, there could be a material change in healthcare reimbursement systems and Boards of Directors will be considering how to respond to potential changes to the current reimbursement system.

Top healthcare deals 2019

1. Bristol-Myers Squibb acquired Celgene for **US$89.5 billion**
2. Mylan acquired Pfizer for **US$24.6 billion**
3. Danaher Corporation acquired GE Healthcare Life Sciences for **US$21.4 billion**

Pricing and pullbacks affect oil & gas M&A in 2019

M&A in the US oil & gas sector slowed in 2019, with 190 deals worth US$158 billion, down 38 percent in volume and 45 percent in value, mirroring steep declines in global M&A in the industry

By Steven Tredennick

The fall in M&A in the oil & gas sector has been driven by a number of factors, including a reduction of capital flowing to the industry, as some institutional investors pull back from fossil fuel investments, and continuing uncertainty in the price environment after an initial recovery from December 2018's lows.

Indeed, the sharp decline in oil prices in late 2018, when US crude ended the year almost 25 percent down at US$45.1 a barrel, affected deal activity for the first quarter despite a price bounce-back from January to March. Yet, there were still some significant transactions through the year, including Occidental Petroleum's US$54.4 billion acquisition of Anadarko Petroleum and MPLX's US$10.3 billion purchase of Andeavor's logistics and pipeline business.

Long-term thinking

One of the drivers for larger deals in the sector has been a transition toward long-term development and the need for large capital expenditure within the sector. Exxon and Chevron, for example, announced plans to increase production growth in the Texas Permian Basin during 2019. The scale of such moves and the capital required has led to further consolidation in the industry, as oil majors seek assets to acquire and develop over the long term.

US $158 billion

The value of 190 deals targeting the US oil & gas sector in 2019

38%

Percentage decrease in volume compared to 2018

Inbound activity

The year also saw the return of overseas buyers to the US oil & gas sector, lured in part by low asset prices. Osaka Gas acquired East Texas gas producer Sabine Oil & Gas for US$610 million, while Spain's Enagas joined Blackstone Infrastructure Partners and GIC, Singapore's sovereign wealth fund, in an US$836 million deal to acquire oil & gas pipeline operator Tallgrass Energy. In addition, an overseas buyer completed one of the top three deals in the sector—Australia-based IFM Investors' acquisition of Buckeye Partners for US$10.2 billion.

Despite the fall in deals in 2019, there are expectations in 2020 that the logjam could start clearing, as the higher valuations that sellers set have failed to materialize. The drive to optimize portfolios, which continues to grow as activist investors remain vocal in the sector, and refinancing on a significant amount of company debt is likely to put pressure on restructured businesses to sell assets. As a result, we expect there to be a strengthening of M&A activity in the sector through 2020.

Top oil & gas deals 2019

1. Occidental Petroleum acquired Anadarko Petroleum for **US$54.4 billion**
2. MPLX acquired a 63.58 percent stake in Andeavor's logistics and pipeline business, Andeavor Logistics, for **US$10.3 billion**
3. IFM Investors acquired Buckeye Partners for **US$10.2 billion**

Sustainability is an increasing focus for global M&A

Dealmakers are placing more emphasis on sustainability in the context of their investment practices. This is occurring despite a lack of US federal regulation on companies' sustainability reporting

By Seth Kerschner

For decades, those who acquire, sell, finance or operate facilities have considered how environmental issues can impact their businesses. However, the evaluation of sustainability in the context of an M&A transaction differs from how environmental issues have historically been considered in deals.

A sustainability assessment not only looks at tangible and quantifiable risks, such as subsurface contamination or compliance with laws related to air and water pollution. Instead, it also goes further and looks at harder-to-quantify risks and opportunities, such as whether a business involved in an M&A deal is managing the environmental impacts of its operations and products to both achieve compliance with laws and deliver value, and how climate change will affect a business due to extreme weather events, water scarcity, or vulnerability of the supply chain.

Buyers and sellers should be aware of the range of Environmental, Social and Governance (ESG) reporting regimes that can guide the external presentation of sustainability risks and opportunities in the context of a deal. The Sustainability Accounting Standards Board (SASB) and Task Force on Climate-related Financial Disclosures (TCFD) are prominent regimes, particularly in light of BlackRock's recent letter to portfolio companies that focused on the importance of climate change and sustainability in BlackRock's investments. It asked companies in which it invests to provide sustainability disclosure in line with SASB guidelines, as well as climate-related disclosure in line with TCFD's recommendations.

Other voluntary reporting and sustainability evaluation frameworks include the Global Reporting Initiative Standards and Guide on Climate Change for Private Equity Investors. There are also third-party raters like the Dow Jones Sustainability Index and Bloomberg ESG Data that analyze company sustainability data, provide ESG ratings, and summarize businesses' relevant risks and opportunities.

Buyers and sellers, in environmentally sensitive industries in particular, can also work with outside advisors to prepare sustainability reports for the purpose of an M&A transaction much like environmental engineers have been utilized for decades to prepare phase I reports to identify hazardous substances at properties involved in M&A transactions.

Despite the increased focus in the private sector on sustainability, the Securities and Exchange Commission (SEC) has avoided the topic since issuing guidance on climate-related risk disclosure in 2010. Nevertheless, information disclosed in voluntary sustainability reports must be accurate and consistent, as the SEC and other regulators may compare information voluntarily provided with information disclosed in SEC filings or other public documents. Going forward, public and private companies should consider whether a company's sustainability practices can be presented externally, or whether existing disclosure can be enhanced, in a manner that is consistent with what investors are looking for, considering sustainability as a means of improving a company's profile in the event of an M&A deal.

> "The evaluation of sustainability in the context of an M&A transaction differs from how environmental issues have historically been considered in deals

Key dealmaking decisions from Delaware and New York

We focus on two H2 2019 rulings that could affect M&A transactions in the future

By Daniel Kessler

Genuine Parts: Acceptance of termination fee does not prevent further remedies

In September 2019, the Delaware Chancery Court refused to dismiss claims against Essendant in connection with its terminated transaction with Genuine Parts Company (GPC), even though Essendant had previously paid GPC a US$12 million termination fee. The decision highlights the importance of clearly drafted exclusive remedy provisions, as well as parties' responsibilities to comply with their contractual obligations.

Essendant and GPC signed a merger agreement in April 2018 that would have combined the two competitors in the office supply wholesale business. Shortly after the merger agreement was signed, however, a PE buyer who had previously expressed an interest in acquiring Essendant, made a formal offer at an alleged premium to GPC's offer.

The Essendant board rejected the offer, but, according to the Chancery Court, the PE buyer sweetened its bid by assuring that more would be offered if diligence justified an increased bid. The Essendant board determined that this renewed offer would likely lead to a better deal than the one it had agreed to with GPC. After the PE buyer completed confirmatory diligence, Essendant terminated the merger agreement with GPC, paid a US$12 million termination fee as required by the merger agreement, and closed its deal with the PE buyer.

GPC maintained, however, that the termination fee was neither an exclusive nor adequate remedy to compensate for its losses following Essendant's termination of the merger agreement. GPC alleged that the PE buyer's winning proposal was the result of Essendant's material breach of the merger agreement—in particular, the non-solicitation clause. When GPC brought an action seeking damages, Essendant moved to dismiss, claiming GPC's exclusive recourse was the US$12 million termination fee.

The Chancery Court declined to dismiss, GPC's claims, finding that the merger agreement does not "clearly and unambiguously" provide that GPC's remedy is limited to the termination fee when it has well-pled that Essendant breached the merger agreement's non-solicitation provision.

Following a detailed review of several interconnected provisions, the Chancery Court determined the termination fee should serve as the exclusive remedy only in connection with a competing transaction that did not arise from a material breach of the merger agreement's non-solicitation covenant. The Chancery Court found, at the pleadings stage, that GPC had adequately alleged enough in total to infer that Essendant, at least indirectly, encouraged or facilitated a proposal in breach of the non-solicitation covenant. As a result, the Chancery Court allowed GPC's claims for further damages to proceed.

This decision highlights that parties intend for pre-agreed termination fees to act as exclusive remedies and bar claims for additional damages, therefore extra attention must be paid to ensure that such intentions are accurately reflected in the underlying agreements.

Askari: Attorney-client privilege regarding pre-merger communication remains with seller

In November 2019, a New York appellate court issued an important decision with respect to the treatment of attorney-client privilege in the context of M&A transactions. The decision highlights the different ways Delaware and New York approach the issue, and how courts will determine which state law to apply.

In Delaware, in the merger context, control of any privileged communications, including those between seller and its counsel related to merger negotiations, passes to the acquirer unless the parties agree otherwise in the merger agreement.

In New York, however, an exception applies to privileged communications relating to the deal negotiations, and control of such privilege stays with the seller after closing.

In this recent case, the New York appellate court applied New York law to evaluate which person owned pre-transaction privileged communications in connection with a corporate reorganization that ultimately transferred ownership of a corporation formed under the laws of New York to a limited liability company formed under the laws of Delaware, even though some of the documents involved in the underlying transaction contained Delaware choice-of-law provisions.

The Court found that the choice-of-law provisions were not implicated, as the cause of action simply pertained to the plaintiff's right to documents in counsel's possession. In such circumstances, the Court held that New York will apply the law of the forum where the evidence will be introduced at trial or the location of the proceeding seeking discovery. In this case, the privileged communications were being sought in a New York action; the communications were made in New York between New York–based attorneys and a New York corporation; and involved the New York corporation's then majority shareholder and president, a New York resident. As a result, the Court applied New York law.

While New York law provides sellers protection not found under Delaware law, parties are encouraged to specifically consider, and expressly reflect in appropriate documentation, how information subject to attorney-client privilege will be handled following M&A transactions.

Five trends that could move the M&A needle in 2020

After a solid 2019, the foundations are in place for a strong start to the M&A year in 2020. The following factors are likely to heavily influence the market in the months ahead

By John Reiss, Gregory Pryor

As we enter a new decade, the signs are that we can look forward to another year of steady US M&A activity. We anticipate the following five trends will emerge to move the market through the year:

1

Economic strength drives deals in H1

Despite challenges such as the US-China trade situation and Middle East tensions, the US economy is forecast to remain strong throughout the year—at a 2.1 percent growth rate, according to the Conference Board. Meanwhile, unemployment is at a 50-year low and consumer confidence is predicted to rise in 2020. In addition, financing for deals is low-cost and widely available, the rise of activist investors has focused boardrooms on portfolio optimization and PE firms have unprecedented levels of dry powder to deploy. The conditions are right for early-year dealmaking, especially ahead of the run-up to the presidential elections in November.

2

Further disruption

Advances in the application of artificial intelligence, machine learning and the rollout of 5G will result in yet more disruption of business models across diverse sectors. This is set to unleash further M&A activity, as incumbents seek to reposition themselves, upgrade their infrastructure, improve productivity and fend off competition from, in some spaces, the technology giants, which are themselves pursuing aggressive acquisition strategies.

3

A rebound in oil & gas M&A

While 2019 was a slow year for deals in the sector, 2020 should be more active (assuming Middle East tensions don't derail current trends). After a year in which oil prices bumped around the middling range, seller valuation expectations should now be more in line with what buyers are prepared to pay, which should help unblock the pipeline. In addition, debt maturities among restructured companies in the sector are looming, which will bring more deals onto the market through the year.

4

Greater emphasis on national security

With the full force of FIRRMA set to become a reality from February 2020, increased resources at CFIUS and rising scrutiny from US and overseas authorities, more preparation ahead of cross-border deals will become the norm. Buyers and sellers will need to think ahead about the involvement of overseas parties in their transactions and the extent to which dealmaking could be viewed as posing national security issues.

5

An increase in distressed opportunities

These will be caused by a variety of factors, including over-leverage; structural change in certain sectors; obsolescence where companies have been unable to reposition in the face of technological disruption; or even the start of the turning of the cycle after several years of benign economic conditions. Whatever the cause, however, the US market is well served with investors and turnaround specialists with the skill and capital to enable them to capitalize on distressed opportunities.

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Other M&A resources

WHITE & CASE
M&A Explorer

M&A Explorer is a platform that combines an interactive tool with a regular flow of short articles from White & Case partners. The tool enables users to create charts to explore trends in M&A in every country and sector, drawing on more than a decade of data from Mergermarket.

mergers.whitecase.com

CFIUS
PILOT PROGRAM

The CFIUS Pilot Program Covered Transaction Analysis Tool enables users to conduct a quick, online analysis to determine whether a transaction could be subject to the CFIUS pilot program that implements parts of the Foreign Investment Risk Review Modernization Act (FIRRMA).

whitecase.com/cfius-firrma-tool

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