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CITELINE COMMERCIAL

27 Mar 2023 | **Analysis**

Cross-Border M&A: 10 Key Trends To Watch In 2023

by

It will come as no surprise that cross-border M&A is impacted by the world we live in, with geopolitical tensions, rising inflation and interest rates, currency fluctuations, and increased regulatory scrutiny all playing their part in making deals more challenging to execute.

Cross-border M&A remained largely resilient in 2022, with a return to healthy pre-pandemic levels, and while the types of deals we see in 2023 may evolve, many observers believe that deal volume will remain buoyant throughout the year.

Here we highlight 10 key trends that shaped the global M&A market activity in 2022 – and will likely continue to impact deals into 2023.

1. Show Me The Cash

With the slowdown in capital markets, increased interest rates and the end of "easy money" from traditional lenders, the need for access to cash and financing drove M&A deals in 2022. Companies lacking cash turned to M&A to provide liquidity, while companies with cash on hand were able to capitalize on depressed valuations and undertake strategic transactions. The life sciences industry was no exception to this trend. For example, biopharmaceutical company *Chimerix, Inc.* agreed to sell its worldwide rights to brincidofovir, including TEMBEXA, to *Emergent BioSolutions, Inc.* in a transaction intended to enhance Chimerix's balance sheet while allowing Chimerix to participate in the longer-term economics of the drug through milestone payments and royalties.

We expect the need for cash to continue to drive M&A decision-making well into 2023 until borrowers come to terms with higher interest rates, and banks shed the weight of the syndicated loans underwritten in connection with big-ticket deals made in 2022. For public companies with well-performing stocks (or at least for those doing better than their peers) looking for strategic acquisitions, using stock as acquisition consideration will present a viable alternative to cash.

2. Antitrust And Merger Review

Heightened regulatory scrutiny of transactions shaped the global M&A market in 2022 by extending timelines and resulting in more enforcement actions, and this trend looks set to continue in 2023. Transactions are coming under increasingly detailed review by the regulatory agencies, particularly where targets are innovative disrupters or acquirers have entrenched market positions, even if those positions are in vertical or adjacent markets. Regulators, particularly in the US, are becoming more skeptical of remedies in merger cases. Consistent with this skepticism, in 2022 regulators brought enforcement actions even where merger remedies were on the table, and we can expect to see more deals challenged, rather than being permitted subject to remedies. Furthermore, regulators in different countries are continuing to collaborate and exchange information when reviewing transactions, so we expect greater international alignment on treatment of transactions going forward.

Life sciences, particularly pharmaceutical and medical devices companies, remains a focus of antitrust agencies. The US Federal Trade Commission, which reviews pharmaceutical and medical device deals, is stepping up enforcement in the industry, even though life sciences deals already represented half of the FTC's antitrust enforcement actions between 2016 and 2020. In response to calls from the White House, the FTC also is going beyond traditional enforcement and exploring entirely new approaches to enforcement in the life sciences industry. For example, the FTC hosted a June 2022 workshop, "*The Future of Pharmaceuticals*," which was the culmination of the work of *the international task force of agencies formed in 2021* to review the fundamental aspects of antitrust enforcement and update their approach to analyzing the effects of pharmaceutical mergers. The workshop explored new potential theories of harm, such as reviewing overall sizes and drug portfolios of the merging companies rather than specific product-level overlaps, as well as considering the effect on innovation caused by mergers.

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3. National Security Is Par For The Course

Scrutiny of foreign investment continued to rise in 2022, with national security concerns driving political agendas, and more and more countries either introducing or strengthening their foreign direct investment (FDI) regimes. Given the enhanced scrutiny and consequences for noncompliance (which may include monetary fines and, in certain cases, criminal sanctions for the individuals involved), global M&A deal teams are reminded of the importance of carefully checking the FDI implications of cross-border deals as early as possible in their transactions.

Regimes similar to the Committee on Foreign Investment in the United States (CFIUS) are commonplace throughout Europe and beyond, and they often cover the life sciences, health and tech industries, sometimes well beyond the traditional national security industries of yesteryear. The timing of review by the relevant FDI authority must be factored into cross-border deals' timetables and are often a bar to closing.

4. Supply, Supply, Supply

The lingering effects of the COVID-19 pandemic, Russia's war with Ukraine and geopolitical tensions shone a spotlight on supply chain weaknesses – and 2022 saw a priority shift from global growth to supply chain security and resilience for many companies. We expect companies to continue to focus on identifying external dependencies in 2023, with many turning to M&A to address weaknesses in their supply chain models.

5. Deal Structuring To Generate Liquidity

In the second half of 2022, there was a sharp increase in corporate carve out and spinoff transactions, many engineered to create liquidity and bolster balance sheets. One such carveout transaction was *Jazz Pharmaceuticals plc*'s divestiture of Sunosi (solriamfetol) to *Axsome Therapeutics, Inc.*, which enabled Jazz to "sharpen its focus on its highest strategic priorities," the companies said. Axsome used the acquisition of Sunosi "to augment and accelerate [its] commercial preparedness" ahead of two potential near-term commercial launches of its existing medicine candidates. In the context of cross-border M&A, such transactions were most commonly structured as asset sales – and often were done by the selling party in order to move to leaner operations and a more narrowed focus on core products. We continue to see and expect this "less is more" trend to mature in 2023.

6. Getting Cozy Through Consolidation

The two years prior to 2022 were years of immense market opportunity and growth – certain industries boomed, new players rose to prominence and business success stories were predominant. As that momentum has slowed, in 2022 many companies sought to strengthen their industry positions via bolt-on acquisitions, partnerships and alliances. Strategic thinking around whom to partner with, particularly as financing was scarce, took on a big role in global M&A deal planning, along with heightened diligence in identifying synergies. We expect this trend to continue in 2023, particularly in the life sciences industry. For example, in August 2022, *Roche Holding AG* entered into a strategic collaboration and licensing agreement with Poseida Therapeutics, pursuant to which Poseida will receive equal amounts upfront and in near-term milestones, signaling the industry's willingness to make bets on Phase I therapies despite market uncertainty.

7. Reverse Mergers Rising Alongside deSPAC Activity

Reverse mergers gained substantial momentum in 2022 as the more traditional IPO market remained shut, share prices in the public market took a significant hit, and avenues for additional liquidity became scarce. Acquiring a distressed public target, especially one with a healthy cash balance, via a reverse merger provided an alternative path to becoming a public company and potentially gaining access to additional financing, and there is no sign of slowdown into 2023 as the number of distressed public companies remains on the rise.

While deSPAC transactions in the US declined significantly in 2022 – in light of relevant Securities and Exchange Commission guidance, record-high redemptions and fewer investors willing to provide private investment in public equity (PIPE) financing – we continued to witness solid deSPAC activity in 2022 in the cross-border M&A space. As many special purpose acquisition companies will be coming to the end of their lives in 2023, we expect to see a final push by sponsors to sign up business combination agreements this year as long as the relevant regulatory regimes remain open to allowing such transactions to proceed (e.g. the SEC does not shut the door on the use of projections in deSPACs).

8. Distressed Opportunities

Starting in the third quarter of 2022, distressed M&A represented a more meaningful percentage of global M&A volume. Stalking horse arbitrage opportunities in restructuring proceedings are likely to be explored by strategic buyers, and distressed companies must be ready to proactively participate in such proceedings. Restructurings are expected to be on the rise in 2023, and so is adjacent M&A activity and strategy.

9. Dollar Up, Pound Down

With the nominal broad US dollar index appreciating more than 12% and the British pound hitting a historical low in 2022, US investors were in a prime position to participate in cross-border acquisitions. As the dollar is expected to remain strong in 2023, we expect to see US investors active as buyers in the cross-border M&A space targeting weaker currency markets.

10. Brexit, Post-COVID

The UK is taking its final steps to implement Brexit after a COVID-justified delay by looking for opportunities to deregulate, including via the UK government pushing through the Retained EU Law (Revocation and Reform) Bill, which aims to remove all legacy European Union law from UK statutes, and striking new trade deal with more than 70 countries around the world. Finally, we continue to see cross-border M&A deals overwhelmingly governed by either English and US law post-Brexit, and we don’t expect co-prevalence of English law governed M&A to wane.