



Current Partnering



SAMPLE: Merger & Acquisition Agreements in Pharma, Biotech and Diagnostics

- Trends in merger and acquisition
- Merger and acquisition agreement structure
- M&A contract documents
- M&A agreement terms
- Top M&A deals by value
- Most active M&A dealmakers
- Bigpharma M&A dealmaking activity

Publication date: October 2010

Report code: CP2051

Version: 4

www.currentpartnering.com

CurrentPartnering Reports.

CurrentPartnering provides industry executives with partnering best practice and essential business intelligence. Further details about the range of services offered can be found at our website:

www.currentpartnering.com

This report edition was updated and published in October 2010.

The report was first published in February 2008.

For inquiries about the content of this report, please contact:

Email: enquiry@currentpartnering.com

Telephone: +44 (0)1904 693200

Fax: +44 (0)8703 305993

Mail: CurrentPartnering
Wildwood Ventures Ltd
Eco Business Centre
Amy Johnson Way
York
YO30 4AG
United Kingdom

All rights reserved.

No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of the publisher, Wildwood Ventures Limited.

The facts in this report are believed to be correct at the time of publication but cannot be guaranteed.

Findings, conclusions and recommendations will be based on information gathered in good faith from both primary and secondary sources, whose accuracy we are not always in a position to guarantee. As such Wildwood Ventures can accept no liability whatsoever for actions taken based on any information that may subsequently prove to be incorrect.

© CurrentPartnering, a division of Wildwood Ventures Limited.

This report is a licensed product and is not to be photocopied.

Executive Summary

Welcome to the revised and updated **Merger and Acquisition Agreements in Pharma, Biotech and Diagnostics** report.

The report provides a detailed understand and analysis of how and why companies enter merger and acquisition deals. The majority of deals are acquisitions whereby the acquirer acquires the target company in a cash and/or equity transaction. Fully revised and updated, the report provides details of merger and acquisition agreements from 2003 to early 2010.

Understanding the flexibility of a prospective partner's negotiated deals terms provides critical insight into the negotiation process in terms of what you can expect to achieve during the negotiation of terms. Whilst many smaller companies will be seeking details of the payments clauses, the devil is in the detail in terms of how payments are triggered – contract documents provide this insight where press releases and databases do not.

Merger and acquisition is a constant activity within the biopharma sector. In the past, biopharma companies have sought to merge or acquire competitor companies in order to achieve critical mass both in R&D and sales and marketing, thus ensuring continued growth and dominance in a highly competitive and global marketplace.

In 1987, the largest ten companies were responsible for approximately twelve percent of global pharmaceutical sales. By 2002, this figure had become nearly fifty percent. This concentration was principally due to bigpharma mega mergers.

The rewards offered for the successful marketing and sale of a block buster drug are enormous, therefore it is not surprising to see bigpharma seeking ways of maximizing returns. Licensing has often been a means of achieving such global presence, but increasingly bigpharma has sought to acquire its way into the major pharmaceutical markets. Until recently the mega merger was a popular means of growing presence globally; however the last few years have seen a concentration on smaller acquisitions to bolster R&D pipelines.

Historically, M&A has seen short term value creation (at least in the reasoning for the deal) as the driver for the deal to go ahead. Recent examples include Sanofi Synthelabo – Aventis merger in 2004 to create Sanofi-Aventis, Pfizer – Warner Lambert merger in 2000, Bayer-Schering in 2002 to create Bayer Schering, Glaxo Wellcome – SmithKline Beecham in 2000 to create GlaxoSmithKline, and Merck – Serono in 2006 to create Merck Serono - creating several of the leading bigpharma companies in the industry today.

M&A deals are by far the highest value deals seen in the biopharma sector. One of the largest recent mergers was between AstraZeneca and MedImmune – a deal valued at \$15,600 million in April 2007. Many analysts suggested that AstraZeneca overpaid for MedImmune and the stock dropped by 4% after the announcement. This was primarily because analysts were looking at the short term value generation that was considered limited, whilst the company was seeking longer term value growth in the increasingly important biotech sector.

Bigpharma M&A activity seems to oscillate from low to high to low, as companies seek different means of generating value and critical mass. At the present time, we appear to be in a low M&A activity period, with only a handful of bigpharma-bigpharma deals in the past few years. This may be due to some disillusionment amongst investors due to the failure of past deals to deliver on the promises at the time of the transaction. These 'promises' often include increased R&D, improved development and marketing product pipelines, consolidated marketing and sales activities and so on. However, delivery on these promises is often overtaken by a need to again bolster the R&D pipeline as compounds fail in development, marketed products reach patent expiry, and safety concerns result in product withdrawal.

M&A activity is very active amongst bigpharma-smaller company or smaller company-smaller company. During 2009 over three hundred M&A deals were announced. This has resulted in create faster growth, international market penetration, combining of development pipelines, and synergizing sales and marketing

resources. In addition, M&A has recently been seen as a viable alternative to IPO for investors seeking to exit an investment.

This report focuses on M&A between bigpharma-bigpharma, bigpharma – smaller company, and smaller company-smaller company, providing a detailed insight into all such deals.

This report contains over 750 links to online copies of actual merger and acquisition contract documents as submitted to the Securities Exchange Commission by biopharma companies and their partners.

Contract documents provide the answers to numerous questions about a prospective partner's flexibility on a wide range of important issues, many of which will have a significant impact on each party's ability to derive value from the deal.

For example, analyzing actual company agreements allows assessment of the following:

- What are the precise merger or acquisition terms agreed between the parties?
- What is the plan of merger and how will it be implemented?
- What is actually being acquired by the acquiring company?
- What is the payment structure for the deal?
- What are conditions of merger or acquisition?
- What are the rights of shareholders and dissenters?
- How are the key terms of the agreement defined?
- How are IPRs handled and owned?
- Who is responsible for what in the acquisition?
- How is confidentiality and publicity managed?
- Under what conditions can the deal be terminated?
- Which boilerplate clauses does the company insist upon?
- Which boilerplate clauses appear to differ from acquisition to acquisition?
- Which jurisdiction does the company insist upon for agreement law?

The initial chapters of this report provide an orientation of merger and acquisition dealmaking and business activities. Chapter 1 provides an introduction to the report, whilst chapter 2 provides an analysis of the trends in mergers and acquisitions as well as a discussion on the merits of each type of deal.

Chapter 3 provides an overview of the structure of merger and acquisition deals. The chapter includes numerous case studies to enable understanding of both pure merger/acquisition deals and multicomponent deals where acquisition forms a part.

Chapter 4 provides a review of the leading M&A deals since 2000. Deals are listed by headline value, signed by bigpharma, most active bigpharma, and most active of all biopharma companies. Where the deal has an agreement contract published at the SEC a link provides online access to the contract.

Chapter 5 provides a comprehensive listing of the top 50 bigpharma companies with a brief summary including M&A frequency and acquired companies since 2000 followed by a comprehensive listing of M&A

contract documents available in the public domain. Each deal title links via Weblink to an online version of the actual contract document, providing easy access to each contract document on demand.

Chapter 6 provides a comprehensive listing of all merger and acquisition agreement contracts available in the public domain, respectively. The chapter is organized by A-Z company name. Each deal title links via Weblink to an online version of the actual contract document, providing easy access to each contract document on demand.

The report also includes numerous tables and figures that illustrate the trends and activities in merger and acquisition dealmaking since 2000.

In conclusion, this report provides everything a prospective dealmaker needs to know about M&A by using actual contract documents and clauses to provide real-life analysis and insight.

SAMPLE

Chapter 2 – Trends in M&A dealmaking

The fear is about survival: if you don't acquire, you will be acquired

2.1. Introduction

There are two major forms of company combination activity that are used to combine companies, namely merger and acquisition.

M&A has often been the reaction of the biopharma industry when things have got tough in the past. However, bigpharma growth through M&A seems to have reached a plateau. The number of bigpharma mergers seems to have slowed since the mega-mergers of the earlier part of the decade and the 1990s. This is probably due to the fact that the companies are realizing that being bigger is not necessarily delivering the returns expected.

However, there are always exceptions: One of the largest, recent mergers was between AstraZeneca and MedImmune – a deal valued at \$15,600 million in April 2007. Many analysts suggested that AstraZeneca overpaid for MedImmune and the stock dropped by 4% after the announcement. This was primarily because the analysts were looking at the short term value generation that was considered limited, whilst the company was seeking longer term value growth in the increasingly important biotech sector.

Another rumoured deal of 2007 was whether Sanofi-Aventis would seek to merge or acquire Bristol-Myers Squibb. The problem for Sanofi-Aventis's management is do they focus on the company's internal R&D program or do they instead focus their efforts on acquiring and integrating another bigpharma company. There may be no right answer, instead the decision being made by those who hold sway in the board room, and this may be driven by what they know best – organic growth or M&A growth.

2.2. Difference between merger and acquisition deals

There are two major forms of company combination activity that are used to combine companies, namely merger and acquisition.

The following figure provides a simple definition for each term.

Figure 1: Definition of merger and acquisition

Content removed from sample

An acquisition can be either friendly or hostile. In the event of a friendly acquisition, the management of the acquired company will recommend acceptance of the terms of the acquisition to its investors.

In contrast, in the event of a hostile acquisition the management of the acquired target company will oppose the acquisition offer. In these circumstances, there are one of several outcomes – the company remains independent, the acquiring company succeeds in acquiring a controlling stake in the company through equity purchases on the stock market or direct from shareholders, or the acquiree target seeks and secures another acquiring company providing improved acquisition terms. Hostile acquisitions can be potentially damaging as it can result in management spending time avoiding acquisition rather than concentrating on the management of the business.

2.3. Trends in M&A deals since 2000

M&A deals have become an increasingly popular form of combination arrangement in recent deals, providing a means by which larger companies can grow and develop, and smaller companies a means by which an exit can be achieved for investors.

The figure below indicates that the number of M&A agreements announced has fallen and then risen steadily since 2000, suggesting that M&A has become ever more popular for biopharma. The number of M&A deals peaked in 2006 and dropped slightly during 2007 and further in 2008 and 2009 .

Figure 2: Trends in M&A deal announcements, 2000-2009

Content removed from sample

Source: CurrentPartnering, 2010

The following figure shows that mergers are far less popular than acquisitions as a format for business combinations. The primary reason for this is that merger often involves the combining of each company's shareholding resulting in the issuing of new shares/equity. For many investors in smaller companies, they are seeking it, not a new shareholding. Mergers between bigpharma companies forming a new merged company have been relatively rare in recent years, with the exception of Kirin-Kyowa Hakko in 2007 to form Kyowa Hakko Kirin.

2.6.2. Equity as part of partnering deal

The taking of equity in a partner company is increasingly common as shown in the figure below.

Figure 3: Partnering deals including equity stake – 2000 to 2009

Content removed from sample

Source: CurrentPartnering, 2010

In recent years there has been an increase in the number of partnering deals where an equity component has been present, demonstrating that licensees are increasingly interested in acquiring an interest in the licensor company as part of the partnering deal.

Figure 4: Recent partnering deals involving equity participation in the licensor

Content removed from sample

Further details of each of the above deals are provided in the case studies below.

Chapter 3 – Overview of M&A deal structure

3.1. Introduction

A merger agreement is the combining of two or more companies into one, through a purchase acquisition of one company by another. A merger normally results in new shares being issued to replace the shares in circulation of the companies merged

An acquisition agreement is the acquiring of control of another company through purchasing of the equity of the acquired company by the acquiring company. An acquisition can be either friendly or hostile.

This section of the report provides a detailed review of M&A deal structure together with real life examples drawn from actual deal agreements available in the public domain.

3.2. Pure versus multi-component acquisition deals

There are two types of acquisition deal announced:

- Pure acquisition – a standalone agreement between two or more companies agreeing to co-promote a product or products
- Multicomponent deal including acquisition option – an agreement where one of the components of the deal covers potential acquisition of the licensor company

The pure acquisition agreement is normally announced alongside the time when the proposed acquisition is announced by press release. This is by far the most common form of M&A agreement with the M&A agreement published into the public domain in the format of a document titled: Agreement and Plan of Merger, or Asset Purchase Agreement.

The multicomponent deal where acquisition forms just one element of the deal is normally announced earlier in the product development process. The acquisition element normally takes the form of a retained right by the licensee to acquire the licensor at some time in the future. This is relatively unusual, however an example is discussed further later in this chapter.

3.3. Pure M&A agreement structure

The pure M&A agreement is a standalone agreement between two or more companies agreeing to come together to become a single business entity.

The agreement contract is structured in the standard format for such an agreement whereby the contract is composed of the parties, recitals, the primary terms of the acquisition and finally boilerplate clauses that appear in all agreements.

The wording of each clause may differ significantly due to the deal subject matter, parties drafting the agreement, and the negotiated terms between the parties.

An agreement contract is a legally binding document between the signatories to the agreement.

In order to obtain an insight as to how each bigpharma company drafts such clauses and the breadth of drafting, view the agreement contracts listed in the bigpharma A-Z later in the report.

The agreement is generally comprised of the following components. Detailed wording for clauses are outlined later in this chapter.

Figure 5: Components of the acquisition deal structure

Content removed from sample

Source: CurrentPartnering, 2010

3.3.1. Example acquisition agreements

The following provide a more specific understanding of the acquisition agreement through analysis of real acquisition agreements as submitted to the SEC in the USA.

The analysis focuses on the specifics of the acquisition elements of the example agreements. Therefore, the initial terms in the form of parties, recitals and definitions, and latter clause in the form of boilerplate clauses have been excluded. However, these can be viewed in full by clicking on the link for each case study agreement.

The clauses from each agreement that are directly relevant to the acquisition arrangement have been reproduced in their entirety with brief explanatory notes for each section.

3.3.1.a. Case study 16: Novartis – Eon Labs – February 2005

Content removed from sample

Chapter 4 – Leading M&A deals

4.1. Introduction

Merger and acquisition is a popular method of acquiring the value of a company and its products and development pipeline assets.

There have been numerous high value deals announced since 2000. Many of these deals have combined two bigpharma into a still larger bigpharma player. However, there are also numerous examples of smaller biotech and drug delivery companies been consumed by bigpharma companies as well as a few examples of private equity acquiring small to mid-sized biopharma companies.

This chapter provides an overview of M&A deals by headline value, bigpharma M&A activity, and leading players in mergers and acquisitions.

4.2. Top M&A deals by value

The following figure provides details of the top fifty M&A deals by value announced since 2000. The list includes deals irrespective of whether the deal is a merger or acquisition deal. The majority of deals announced are acquisitions. For a listing of top merger deals see chapter 4.3.

It is significant that most of the deals involve bigpharma as the acquirer. This is the primary means by which bigpharma have acquired market share, pipeline candidates and sales and marketing efficiencies.

Where the actual agreement contract is available the ✓ symbol links to the contract filing. Simply click on the ✓ to download the contract document.

Figure 6: Top 50 M&A deals by value since 2000

Parties	Date	Value, US\$m	Subject	Contract available
Pfizer - Warner-Lambert	Feb-00	\$90,000	Acquisition of Warner Lambert	✓

Content removed from sample

Source: CurrentPartnering, 2010

Where the actual agreement contract is available the ✓ symbol links to the contract filing. Simply click on the ✓ to download the contract document.

Chapter 5 – Bigpharma M&A agreements

5.1. Introduction

For each company, the available contracts filed with the SEC are listed from 2003 to end 2008. In addition, for convenience the listing includes asset purchase agreements as well. These include deals where the Acquiror has acquired part of another company such as its brands, products or other assets such as property or business division.

The availability of contract documents at the SEC tends to lag deal announcement by 2-6 months, depending upon the speed with which the company(s) file the contract with the SEC.

CurrentPartnering maintains an updated database of agreement contracts and updates this report every six months. Users can receive the updated version by signing up for our report update subscription – details at the rear of the report.

5.2. How to use M&A agreements

Each bigpharma company is listed alphabetically and has a listing of available contract documents by contract type.

Each contract agreement listing is linked to the complete text of the contract as filed with the Securities and Exchange Commission.

The table used for each company is as shown below.

Partner	Date	Stage	Therapy area	Description
---------	------	-------	--------------	-------------

List of contract documents available in the public domain. The description links through to the contract filing available online.

In addition, if not already received, the full contract set can be obtained by report buyers by filling in and sending the CD-Rom request form at the rear of this report.

Company contract agreements can be used to develop a more in-depth understanding of the prospective partner company's agreement style and the types of clauses that a company accepts as part of a deal.

For example, analyzing actual company agreements allows assessment of the following:

- What is actually granted by the agreement to the partner company?
- What exclusivity is granted?
- What is the payment structure for the deal?
- How are sales and payments audited?
- What is the deal term?
- How are the key terms of the agreement defined?

- How are IPRs handled and owned?
- Who is responsible for commercialization?
- Who is responsible for development, supply, and manufacture?
- How is confidentiality and publication managed?
- How are disputes to be resolved?
- Under what conditions can the deal be terminated?
- What happens when there is a change of ownership?
- What sublicensing and subcontracting provisions have been agreed?
- Which boilerplate clauses does the company insist upon?
- Which boilerplate clauses appear to differ from partner to partner or deal type to deal type?
- Which jurisdiction does the company insist upon for agreement law?

For each prospective partner company, the most suitable agreements should be downloaded by clicking on the link provided, and reviewed to better understand the terms that a company has previously agreed.

This insight into a prospective partner's contract document drafting allows you to better understand how a company drafts clauses and what terms it has agreed in the past. Whilst this may not provide a guide to acceptance of such terms in the past, it does allow countering of negotiation positions which state that a company would 'never' consider such a clause.

5.3. Company M&A agreement listings

SAMPLE

Abbott

Address	Dept R50A, Building AP34 200 Abbott Park Road Abbott Park IL 60064-6187 USA
Tel	+1 847 938 7500
Fax	+1 847 937 1771
Email	
Busdev email	licensing@abbott.com
Web	www.abbott.com http://licensing.abbott.com
Top 50 ranking	12 ↑ (2008: 13)
Pharma revenues 2008, US\$bn	\$16.7 ↑ (2007: \$14.6)
Number of M&A deals	2003: 4 2004: 3 2005: 0 2006: 1 2007: 0 2008: 1 2009: 5
Acquired companies (since 2003)	EAS Evalve I-Stat Ibis Biosciences Integrated Vascular KOS Pharma Solvay Spinal Concepts Spine Next Starlims Technologies TheraSense Visiogen Zone Perfect Nutrition

Recent M&A deals (2003-2009) where contract document available

Partner	Date	Stage	Therapy area	Description
M&A				
<i>Sample deal:</i> Ibis Bioscience	Jan-08	--	--	Acquisition agreement for Ibis Biosciences Collaborative R&D agreement

Content removed from sample

SAMPLE

Chapter 6 – M&A agreement directory 2003-2010

6.1. Introduction

The following is a comprehensive directory of the available M&A contract documents for actual M&A deals as signed by biopharma companies since 2003.

Each description links to the full or redacted contract document as filed at the Securities Exchange Commission.

6.2. Company A-Z

The following provides a comprehensive listing of M&A contract documents available in the public domain, sorted by company party to the announced deal.

3-Dimensional Pharmaceuticals

Partner	Date	Value, \$m	Description
<i>Sample deal:</i> Johnson & Johnson	Jan-03	\$88	Company acquisition agreement

Content removed from sample

About CurrentPartnering

CurrentPartnering is an online provider of partnering best practice, business intelligence and information for dealmakers.

CurrentPartnering was established in 2007 to offer an objective and informal business tool for business development executives, providing an opportunity for the dissemination of the latest trends in partnering activity within the biopharma sector. In addition, CurrentPartnering will seek to share best practice with other industry sectors.

Publisher

CurrentPartnering is a publisher in its own right. We publish a series of reports each year, providing access to critical decision making and best practice intelligence from leaders in the partnering field.

Best practice – reports providing insight into best practice and trends in partnering

Directories – detailed analysis of partnering interests and activity of companies worldwide

Contracts – obtain an insight and understanding of the terms acceptable to a potential partner

Best practice articles

The core of the service is to provide access to latest best practice, business intelligence and information for dealmakers. We search out the latest information s you don't have to and place it in one location, saving you precious time and resources.

Publications

CurrentPartnering provides you with access to the latest and best publications from leading publishers, ensuring you have direct access to the best information and intelligence available.

Reports – the latest reports from leading publishers worldwide, all available to purchase online

Books – the latest books on licensing, M&A and business development best practise, available to purchase, or to borrow if out of print

Community tools

Events – a comprehensive listing of forthcoming partnering events, conferences and training courses for business development executives

Careers – resources for people on the move

Resources – links to other online information sources on all matters relating to partnering

Glossary – need to know what a partnering terms means? Find it in our comprehensive glossary of partnering terms, together with real examples from contract documents

Discussion – our CurrentPartnering blog will keep you posted on the latest articles and reports as well issues and trends in business development

For more information, to join our growing community, and to contribute, visit our website at

www.currentpartnering.com.

© 2010 – CurrentPartnering, a division of Wildwood Ventures Limited. All rights reserved.

CP2051 17

CurrentPartnering Reports

CurrentPartnering provides industry executives with partnering best practice and essential business intelligence. Further details about the range of services offered can be found at our website:

www.currentpartnering.com

This report edition was updated and published in October 2010.

The report was first published in February 2008.

For inquiries about the content of this report, please contact:

Email: enquiry@currentpartnering.com

Telephone: +44 (0)1904 693200

Fax: +44 (0)8703 305993

Mail: CurrentPartnering
Wildwood Ventures Ltd
Eco Business Centre
Amy Johnson Way
York
YO30 4AG
United Kingdom

All rights reserved.