

Mergers and Acquisitions (M&A) Insurance for Tech Deals in 2021



Our M&A team has seen the technology sector as the fastest growing purchaser of Warranty & Indemnity (W&I) insurance by deal value over the last four years but there remain significant limitations to W&I cover both for warranties in the purchase agreement and for events post-close.

Drawing together the latest developments in M&A insurance, Gallagher has developed a specific approach for tech M&A that tackles some of our clients' main considerations for M&A insurance in 2021.

Tech Deal Structures in 2021

W&I insurance can be used for the following:

- Corporate share sales
- Asset sales and hive downs
- Reverse Takeovers (RTOs) and Special Purpose Acquisition Company (SPAC) acquisitions

Key M&A add-ons:

- Tax Insurance for valuing and integrating IP on asset deals
- D&O and Public Offering of Securities Insurance (POSI) programmes for RTOs and SPACs

Intellectual Property (IP)

W&I insurance is limited to:

- Warranty scope
- Retrospective events
- Exclusions for known issues

Key M&A add-ons:

- IP Insurance cover for any allegation of IP infringement (past or future) regardless of whether the seller's warranties are limited under the purchase agreement
- Contingent Liability Insurance to cover known IP risks (such as existing third party claims)

Considerations for US buyers

We see the highest number of US-style Representations & Warranties (R&W) policy requests in the tech sector, with over a third of our deals between the US and UK involving tech assets.

Main barriers to US-style R&W policy:

- European style disclosure process
- Exceptions only disclosure letter/schedules

US-style enhancements to European W&I:

- Removal of de minimis and materiality qualifiers
- Removal of the warranty spreadsheet
- US basis of loss and actual knowledge definitions
- Synthetic non-disclosure of Data Room and DD reports (subject to US-style disclosure)

Cyber, Data Protection and IT

W&I insurance focus:

- W&I cover excess of target's Cyber Insurance programme
- Removal of data protection exclusions
- Cover for condition and adequacy of IT assets

Key M&A add-ons:

- Cyber Insurance for early stage targets

Tax Liabilities

W&I insurance is limited by:

- General exclusions for operating losses, Research & Development (R&D) credits, diverted profits tax and transfer pricing
- Exclusions for known tax issues

Key M&A add-ons:

- Tax Liability Insurance for retrospective and forward looking risks (such as availability of tax losses)
- Contingent Liability Insurance to cover known tax audits or future events which could trigger a tax liability

Regulatory

W&I insurance focus:

- Cover for competition and anti-trust matters

Key M&A add-ons:

- Contingent Liability Insurance for CFIUS and equivalent Foreign Direct Investment (FDI) regimes impacting completion

M&A Add-on Policy Metrics

Tax Liability Insurance

- Limit: tax liability plus defence costs
- Premium: 2-8% of limit
- Retention for tax liability: nil, likely settlement value and/or co-insurance
- Retention for defence costs: nil or GBP 50k+

IP Liability Insurance

- Limit: up to GBP 25m+
- Premium: 2-4% of limit
- Retention: GBP 10-50k+ each and every claim and 5-15% co-insurance

Contingent Liability Insurance

- Limit: estimated losses plus defence costs
- Premium: 5-30% of limit
- Retention: likely settlement value and/or co-insurance

Would you like to talk?

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These are brief product descriptions only. Please refer to the policy documentation paying particular attention to the terms and conditions, exclusions, warranties, subjectivities, excesses and any endorsements.



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