

# Market Tracker Trend Report

## Trends in UK public M&A deals in H1 2015

← Heron Quays E



# Contents

Background and approach	1
Executive summary	2
Deal structure	3
Deal value	7
Target response: recommended or hostile?	8
Competing and potential competing bids	9
Industry focus	10
Nature of consideration	12
Public to private transactions	15
Financing the offer	16
International bidders	18
Possible offer outcomes: announcements v withdrawals	20
Put up or shut up regime	21
Formal sale processes (FSPs)	23
Offer-related arrangements	24
Irrevocable undertakings	25
Disclosure of bidder's intentions – employees	26
Employee representatives' opinions	29
Disclosure of bidder's intentions – pension schemes	30
Pension scheme trustees' opinions	31
Deals included in the report	32
The Lexis®PSL Corporate team	33



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## Background and approach

This report aims to provide an insight into the current dynamics of public M&A activity within the UK and what we can expect to see in the 6 months ahead.

LexisNexis Market Tracker has conducted research to examine current market trends in respect of UK public M&A deals announced in the first half of 2015. We reviewed a total of 46 transactions that were subject to the Takeover Code (the **Code**): 23 firm offers (12 for Main Market companies, 11 for AIM) and 23 which were at the possible offer stage<sup>1</sup> as at 30 June 2015 (11 for Main Market companies, 12 for AIM).

The percentages included in this report have been rounded up or down to whole numbers, as appropriate.

1. Comprising 14 possible offers subject to a PUSU deadline, 8 formal sale process announcements and one commencement of offer period initiated by a target's strategic review announcement (under Practice Statement No. 6 of the Code) confirming that it was exploring its options including a sale of the company.

## Executive summary

Deal flow increased in the first half of 2015, with 5% more firm offers announced than the same period in 2014. Even more significantly, aggregate deal values were 587% higher than in the first half of 2014. These are clear signs that the UK public M&A market remains buoyant and this positive momentum is expected to continue into the second half of the year.

The first half of 2015 saw a continuance of a number of trends observed in recent years, amongst them the continued preference for schemes of arrangement on larger deals, the popularity of cash consideration, an increase in use of the formal sale process, a predominance of non-UK bidders and market flex dispensations.

Following the recent prohibition on the use of cancellation schemes of arrangement on deals announced after 4 March 2015,<sup>1</sup> bidders must now choose between a transfer scheme of arrangement or a contractual offer structure. Since 4 March 2015, 15 firm offers were announced, of which 10 were structured as transfer schemes and 5 as contractual offers; indicating that despite the prohibition on cancellation schemes, schemes of arrangement remain as bidders' preferred choice of deal structure.

Continuing the trend from last year we have also seen strong interest in the technology, media & telecommunications (TMT) sector, an increase in the use of co-operation agreements and green shoots of recovery in private equity backed bidder activity. While cash remains king in the present market, we have seen increased uptake in deals financed entirely with third-party debt and other forms of consideration including loan notes and a combination of cash and shares. Bidders appear to be more willing to use third-party debt (wholly or in part) to finance the acquisition.

The final date for inclusion of developments in this report is 30 June 2015.

1. Statutory Instrument: Companies Act 2006 (Amendment of Part 17) Regulations 2015, came into force on 4 March 2015 and amended section 641 of the Companies Act 2006. The changes effectively prevent a company from reducing its share capital as part of a scheme of arrangement to effect a takeover.

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“General uncertainty around the outcome of the general election may have resulted in boards adopting a “wait and see” approach and putting transactions on hold in H1 2015. This would suggest that H2 2015 will be stronger and, although evidence of a steady uptick is already evident, there are other global macro uncertainties which abound.”

Selina Sagayam, Partner, Gibson Dunn

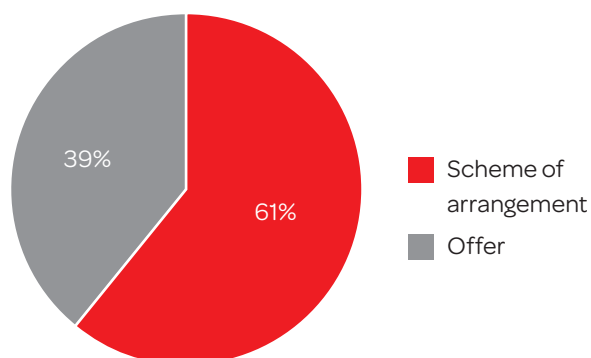
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# 1. Deal structure

Firm offers in H1 2015: Structure by number of deals (23 transactions)



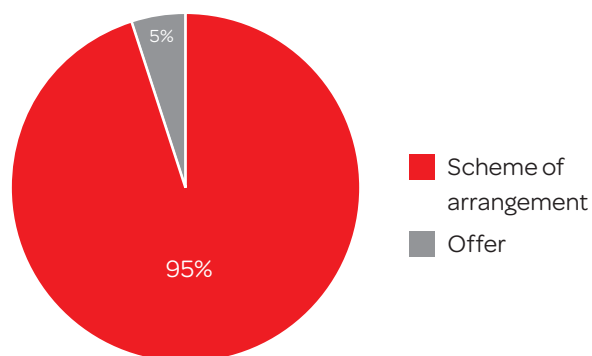
Schemes of arrangement generally remain the preferred structure on the larger deals

## Structuring the deal to suit the circumstances

Schemes of arrangement remain the deal structure of choice among bidders: of the 23 firm offers announced in the first half of 2015 (12 for Main Market companies, 11 for AIM), 14 were by way of scheme and 9 structured by way of an offer.

Schemes of arrangement are popular amongst bidders for a number of reasons, including certainty of obtaining 100% control: a scheme, if approved by a 75% majority of shareholders (in value) present and voting at the relevant meeting(s) and sanctioned by the court, will be binding on all a target's shareholders, giving the bidder full control at an earlier stage than an offer, with no possibility of minority shareholdings. Prior to 4 March 2015, schemes were also able to be structured so that no stamp duty was payable by the bidder, saving approx. 0.5% of the deal value (see: *Types of scheme*, below).

Firm offers in H1 2015: Structure by deal value



## Deal size affects structure

In the first half of 2015, as in the equivalent period in 2014, a scheme was more often agreed where the deal was larger in size. 8 of the 10 largest deals firmly announced in the first half of the year were structured as schemes.

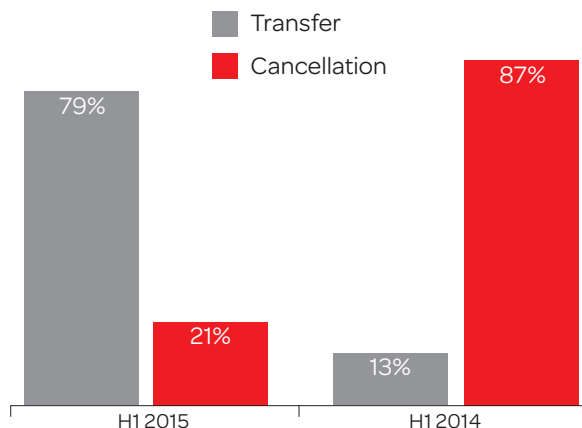
The remaining 2 deals were structured as offers; both were made by foreign bidders, with targets operating in the financial services industry (*offer for TSB Banking Group plc by Banco de Sabadell S.A.* and *offer for Brit plc by Fairfax Financial Holdings Limited*).

Of the 8 smallest deals, ranging between £1.23 million and £46 million in value, only 3 were structured as a scheme, with the remaining 5 deals structured as an offer.

## Types of scheme

The two forms of scheme of arrangement traditionally used in a takeover context were cancellation schemes and transfer schemes. Prior to the introduction of the prohibition on the use of cancellation schemes on takeovers, the majority of schemes of arrangement used were cancellation schemes. In the first half of 2015, 11 (79%) schemes were structured as transfer schemes (66% more than the same period in 2014); only one (9%) of these 11 transfer schemes was announced before 4 March 2014.

### H1 2015 v H1 2014: Form of scheme\*



\*comprising 14 deals structured as schemes in H1 2015, 15 in H1 2014

The 3 (21%) schemes structured as cancellation schemes were announced in the two months prior to the prohibition which came into effect on 4 March 2015<sup>1</sup>.

## Cancellation and transfer schemes

Before 4 March 2015, in a cancellation scheme, all target shares (other than any held by the bidder) were cancelled and new target shares immediately issued to the bidder. No stamp duty was payable on the acquisition of the target, because no share transfers were involved. In addition, once the scheme was approved, it became binding on all shareholders and gave the bidder 100% control of the target. This made the cancellation scheme a very popular choice although, as the cancellation involved a formal court-sanctioned reduction of share capital, the overall deal timetable was longer and the costs greater than for a contractual offer. There is now a prohibition on this type of scheme to effect a takeover; however, a cancellation scheme can still be implemented after 4 March 2015 to the extent that the announcement of a firm intention to make an offer was made before 4 March 2015.

Under a transfer scheme, target shareholders are bound to transfer their shares to the bidder once the scheme conditions are satisfied. Stamp duty is payable on the consideration payable to target shareholders on the transfer of their shares to the bidder, but as with cancellation schemes, once the scheme has been approved, it becomes binding on all shareholders giving the bidder 100% control of the target.

## AIM companies

An exemption from stamp duty has been available on the transfer of shares traded on AIM since 28 April 2014. The choice therefore between a transfer or cancellation scheme structure has been stamp duty neutral.

There have been voices proposing change, exhibited by the London Stock Exchange CEO Xavier Rolet's call for the abolition of stamp duty payable on all listed shares<sup>2</sup>. No such plans were announced in the Chancellor's 2015 Summer Budget but this change may be introduced in the forthcoming Autumn Statement. We shall be following this market development with interest and will report on its advance in our next full year report, to be published in January 2016.

1. Statutory Instrument: Companies Act 2006 (Amendment of Part 17) Regulations 2015, amending the Companies Act 2006 and in force on 4 March 2015.

2. LSE head: 'abolish stamp duty on listed shares' (14 June 2015), The Telegraph, available at [www.telegraph.co.uk/finance/budget/stamp-duty/11674050/LSE-head-abolish-stamp-duty-on-listed-shares.html](http://www.telegraph.co.uk/finance/budget/stamp-duty/11674050/LSE-head-abolish-stamp-duty-on-listed-shares.html)

## Prohibition on cancellation schemes to effect a takeover

### Why has the prohibition on cancellation schemes been introduced?

The change is likely to have been driven by concerns about 'lost' income from stamp duty receipts on cancellation schemes. To take just one example (albeit the transaction was terminated), if pharmaceutical company AbbVie, Inc's 2014 £32bn offer by way of a scheme of arrangement for Shire plc had been successful and had been structured as a takeover offer, AbbVie would have paid HMRC £160m in stamp duty.

### What does this mean for takeovers going forward?

Although capital reduction schemes will be prohibited, it will still in theory be possible to effect a public takeover using a share transfer scheme. That mechanism has been employed far less frequently to date than a reduction scheme—for the very reason that it achieves the same end as a reduction scheme, but stamp duty is payable by the bidder. Going forward, when it comes to a choice between adopting the contractual offer route or implementing a transfer scheme, offer parties will look instead at the other factors such as cost, timetable, flexibility and ease of acquiring 100% control.

### What will the cost implications be?

Apart from bringing all public takeovers within a charge to stamp duty, there will be no change in the former position which was always that a scheme (whether it be a capital reduction scheme or a transfer scheme) will be marginally more expensive to implement than a takeover offer due to the need to:

- obtain court sanction for the scheme, and
- to hold a shareholders' meeting to approve the scheme

### Will this result in a lower number of takeovers taking place?

This is very unlikely. The increased transaction costs occasioned by the stamp duty charge will certainly need to be factored into a bidder's calculation on the net return on its investment, but any company acquisition is made for financial and strategic business reasons and the initial transaction costs are only one factor in a bidder's decision whether to proceed with an acquisition.

In the impact assessment (para 10) in the [explanatory memorandum](#) prepared by the Department for Business, Innovation and Skills, the government states its view that, in the context of the value of a takeover as a whole, the charge to stamp duty is unlikely to deter companies from pursuing takeovers.

*Based on an article for LexisPSL by Julian Henwood, M&A partner at Wragge Lawrence Graham & Co.*



## Bidders' shareholding (in target)

Of the 23 firm offers announced in the first half of 2015, in 10 (43%) deals the bidder disclosed a shareholding in the target as at the firm announcement date.

Of these 10, 7 (70%) were structured as contractual offers and 3 (30%) as schemes. Bidders' average shareholding in the target on the firm announcement date was 26.3% for offers compared to 4.6% for schemes.

On a contractual offer, shares held by the bidder count towards the 50% acceptance condition threshold (although not the 90% squeeze-out threshold), whereas on a scheme of arrangement shares held by a bidder and its associates cannot be voted at the shareholders meeting to approve the scheme. A bidder is therefore more likely to acquire an initial stake in the target company where the transaction is structured as a contractual offer as opposed to a scheme.

## Irrevocable undertakings

Of the 23 firm offers announced in the first half of 2015, in 14 (61%) deals the bidder disclosed that irrevocable undertakings in excess of 5% had been received from target shareholders as at the firm announcement date.

Of these 14, 6 (43%) were structured as contractual offers and 8 (57%) were structured as schemes.

On a contractual offer, shares held by the bidder count towards both the 50% acceptance condition threshold and the 90% squeeze-out threshold. There is some debate over whether the shares the subject of irrevocable undertakings form a separate class and therefore can only vote in favour of the scheme at a separate class meeting of shareholders, although market practice seems to be that such shares can be voted in favour of the scheme. This (and the fact that shares actually acquired by the bidder and its associates cannot be voted at the shareholders meeting to approve the scheme) may explain why irrevocable undertakings are more commonly used on schemes.



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## 2. Deal value

The aggregate value of deals firmly announced in the first half of 2015 was £60.38 billion, up 587% compared with the same period in 2014 (£8.79 billion). UK public M&A activity is reaching new highs and the stream of high value deals is expected to continue into the second half of the year.

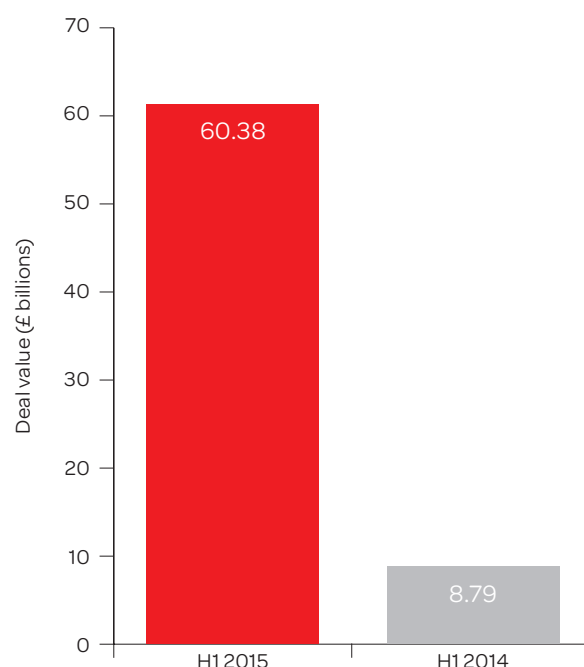
The oil & gas industry saw the highest value deal: the £47 billion cash and share offer for BG Group plc by Royal Dutch Shell plc. The offer for Beale plc by Mr Andrew Perloff, valued at £1.23 million, was the lowest.

It should be noted that the offer for BG Group plc accounted for 78% of the total value of deals announced in the first half of 2015; excluding this deal, the total deal value for the period was £13.38 billion (a 52% increase on the first half of 2014).

Of the 23 firm offers announced in the first half of 2015, 7 (30%) had a deal value of over £1 billion, compared to only 3 (14%)<sup>1</sup> in 2014. The average deal value was £2.63 billion (H1 2014: £399 million) and the median deal value was £111.9 million (H1 2014: £53.63 million).

1. Based on 22 firm offers announced in H1 2014.

H1 2015 v H1 2014: Deal values



**“We have continued to see an increase in takeover activity during the first half of 2015 with a particular focus on the energy sector.”**

Rebecca Gordon, Partner, Dentons

**“Expectations are high that 2015 will be a record year for public M&A – that 2015 will be the new 2007. We need to temper our excitement on this front – whilst the value of deals has certainly rocketed the volume of deals has not increased significantly.”**

Selina Sagayam, Partner, Gibson Dunn

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### 3. Target response: recommended or hostile?

#### Firm offers

No hostile bids were announced during the first half of 2015, unlike the same period in 2014 which saw 2 hostile bids announced.

Of the 23 firm offers, 19 (82%) began with a recommendation and remained recommended as at 30 June 2015. A recommendation had a significant influence on a bid's ultimate success. All recommended offers had either completed or were still in progress as at 30 June 2015.

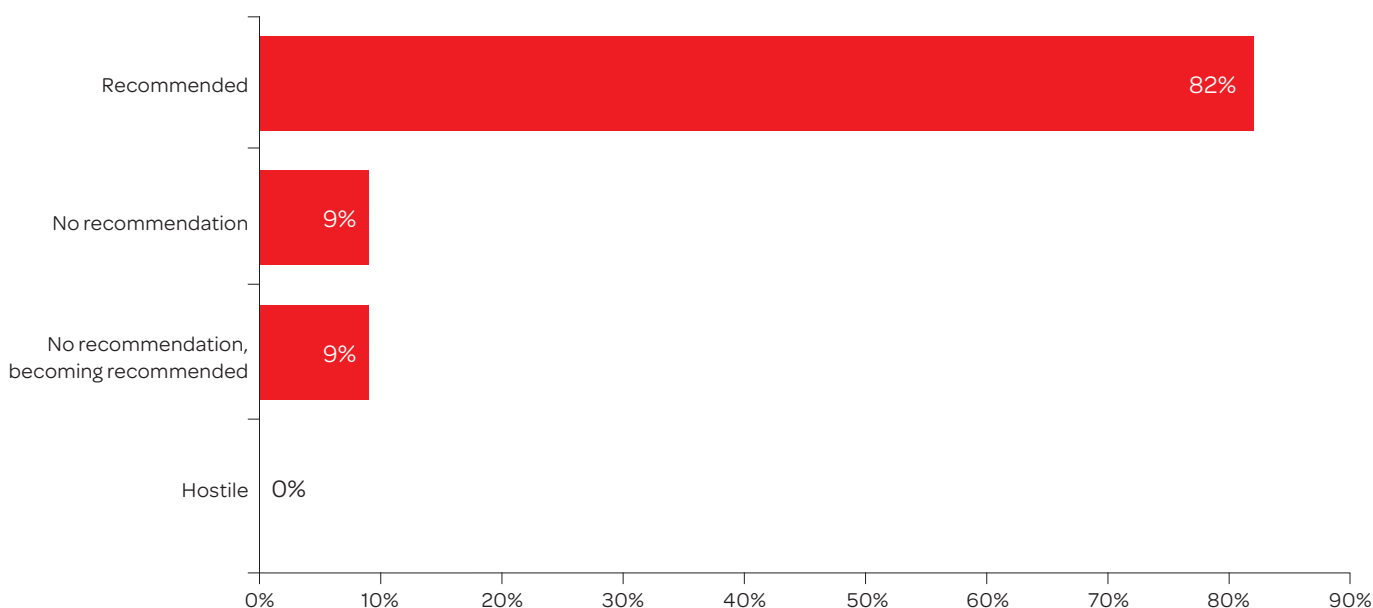
The other 4 (18%) were initially met with no definitive recommendation one way or the other, although in two of these deals the target board subsequently supported the offer. Of the remaining 2 deals only 2 were subsequently supported by the target after formal acceptances and irrevocable undertakings for offer were received (*offer for API Group plc by Steel Partners Holdings L.P. and offer for Asia Resource Minerals plc by Argyle Street Management Limited*). Of the remaining 2 deals, one deal, the offer for Forum Energy plc completed and the other deal, offer for Inspired Capital plc, was still in progress as at 30 June 2015.

#### Possible offers

Of the 3 possible offers which failed to progress to either a firm or mandatory offer by 30 June 2015, one was expressly hostile (*possible offer for Rangers International Football Club plc by Mr Robert Sarver*); the boards of the other 2 targets did not give a definitive recommendation either way. The most common reasons for rejection were undervaluation of the target, its underlying assets and growth prospects and offers being either opportunistic or highly conditional.

Of the 7 possible offers which progressed to a firm offer in the first half of 2015, there were no instances of an initial hostile opinion being given, 2 (29%) offers (for Asia Resource Minerals plc and Forum Energy plc) were initially met with no definitive recommendation.

#### H1 2015: Target response to firm offers



There were no instances of hostile firm offers in the first half of 2015

## 4. Competing and potential competing bids

There were no instances of actual competing bids (H1 2014: 0) and only one potential competing bid scenario in the first half of 2015 (H1 2014: 2). This is broadly comparable with the same period in 2014 and indicates that the competitive tension in the UK public M&A market remains weak.

Record-high deal values seen in the first half of 2015 may potentially be triggering bidder concerns that targets are becoming overvalued, discouraging them from entering into competitive bid scenarios which may cause them to have to pay more for the target as a result.

However, with the resurgence in UK public M&A activity during the first half of 2015, we may see a number of competing and potential competing bid situations arise.

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**“We are seeing more interloper/competitive activity in the US and predictions are that H2 for the UK may also see a similar change in landscape.”**

Selina Sagayam, Partner, Gibson Dunn

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**“The put up or shut up period can still act as a deterrent to bidders particularly in competitive scenarios where financing is required.”**

Rebecca Gordon, Partner, Dentons

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## Deals in Focus

### Potential competing bids for Asia Resource Minerals plc

A competing bid scenario emerged during the first half of the year. On 20 April 2015, NR Holdings Limited and SUEK plc announced a possible offer for Asia Resource Minerals plc, competing with the possible offer made 6 days earlier by Argyle Street Management Limited.

Almost 3 weeks later, Argyle Street announced (through its bid vehicle) an all-cash offer for Asia Resource. At the date of the offer announcement Argyle Street held 4.65% of Asia Resource's issued share capital. This was followed, 32 days later with an increased cash offer by Argyle Street at a 37% premium to its earlier offer.

On 20 May 2015, NRH and SUEK announced that following the completion of due diligence, they do not intend to make an offer and commented on Argyle Street's approach, stating that it was *'an opportunistic attempt to deny independent shareholders the opportunity to recover value.'*

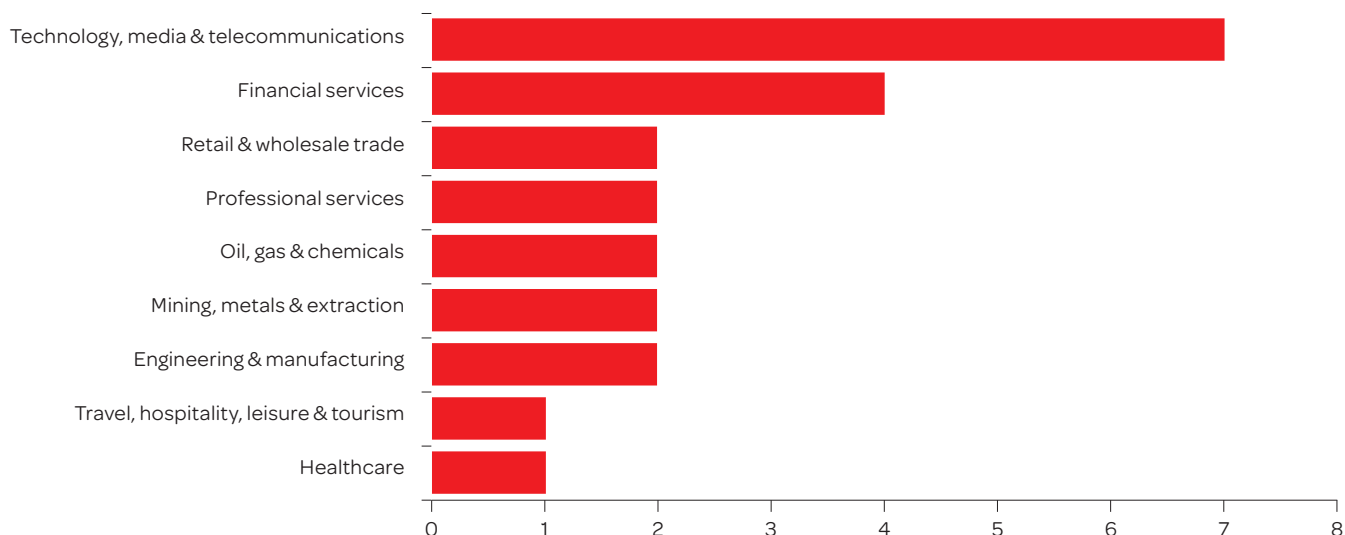


## 5. Industry focus

The majority (47%) of bidder activity seen in the first half of 2015 occurred in technology, media & telecommunication and financial services industries. The TMT industry saw the highest deal volume, 57% of which involved foreign bidders (also operating within this industry) using the UK public M&A market to consolidate their global position.

There has been a global surge in the TMT industry. In the US, March 2015 saw the \$77 billion acquisition of Broadcom Corporation by Singapore-incorporated Avago Technologies, followed 2 months later by the \$78.7 billion acquisition of Time Warner Cable by Charter Communications. Private M&A activity in the TMT industry also grew during the first half of 2015, with sizable deals including BT Group plc's £12.5 billion acquisition of mobile telecommunications operator EE. Further bidder activity in the private and public M&A spheres is expected in 2015.

### H1 2015: Firm offers by industry type



Activity in the mining, metals & extraction industry was solely conducted by private equity backed bidders, indicating that these bidders are capitalising on (generally) depressed commodity prices and are increasingly seeing value in the industry – unlike the comparable period in 2014 when P2P activity was not concentrated within a specific industry.

“The hot sector of course is TMT and although the anti-trust (domestic and EU) regulators are ‘all over’ these deals, the sector should see a strong second half of the year. Surprisingly, we saw a dip in pharma deals this year – a sharp contrast to the highs of 2014 – we expect this to be a temporary retreat following some of the major mishaps of 2014 (whether tax inversion driven or otherwise).”

Selina Sagayam, Partner, Gibson Dunn

## H1 2015: Deal activity breakdown in TMT and financial services industries

### TMT

Target	Bidder(s)	Deal value	Deal structure
Telecity Group plc	Equinix, Inc.	£2.35 billion	Scheme of arrangement (transfer)
Pace plc	ARRIS Group, Inc.	£1.4 billion	Scheme of arrangement (transfer)
Domino Printing Sciences plc	Brother Industries, Ltd.	£1.03 billion	Scheme of arrangement (transfer)
Anite plc	Keysight Technologies Inc	£338 million	Scheme of arrangement (transfer)
Phoenix IT Group plc	Daisy Group Limited and Toscafund Asset Management LLP	£135 million	Scheme of arrangement (transfer)
Accumuli plc	NCC Group plc	£55 million	Scheme of arrangement (transfer)
Enables IT Group plc	1Spatial plc	£2.08 million	Scheme of arrangement (transfer)

### Financial services

Target	Bidder(s)	Deal value	Deal structure
TSB Banking Group plc	Banco de Sabadell S.A.	£1.7 billion	Offer
Brit plc	Fairfax Financial Holdings Limited	£1.22 billion	Offer
Ashcourt Rowan plc	Towry Holdings Limited	£120 million	Scheme of arrangement (transfer)
Inspired Capital plc	Bentley Park Ltd	£43.8 million	Offer



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## 6. Nature of consideration

### Firm offers

Of the 23 firm offers announced, 8 (35%) involved a combination of consideration types; the remaining 15 (65%) offered one form of consideration only. Of those 15, 14 (93%) were all-cash offers and the remaining deal (7%) was an all-share offer. In summary 22 of the 23 firm offers had a cash element, either solely or in combination, accounting in total for 96% of firm offers announced in the first half of 2015.

Cash only consideration was less frequently used by bidders in the first half of 2015 but continues as the most popular consideration structure. There was also a fall in share only consideration being offered. However these decreases were offset by a 17% rise in the usage of a combination of cash and shares in the first half of the year. This indicates that, with the FTSE 100 breaking record highs in March 2015 and the growing strength of other major indices, bidders are increasingly confident of offering shares as a form of consideration along with cash.

Usage of other forms of consideration in the first half of the year remained broadly comparable against the same period in 2014.

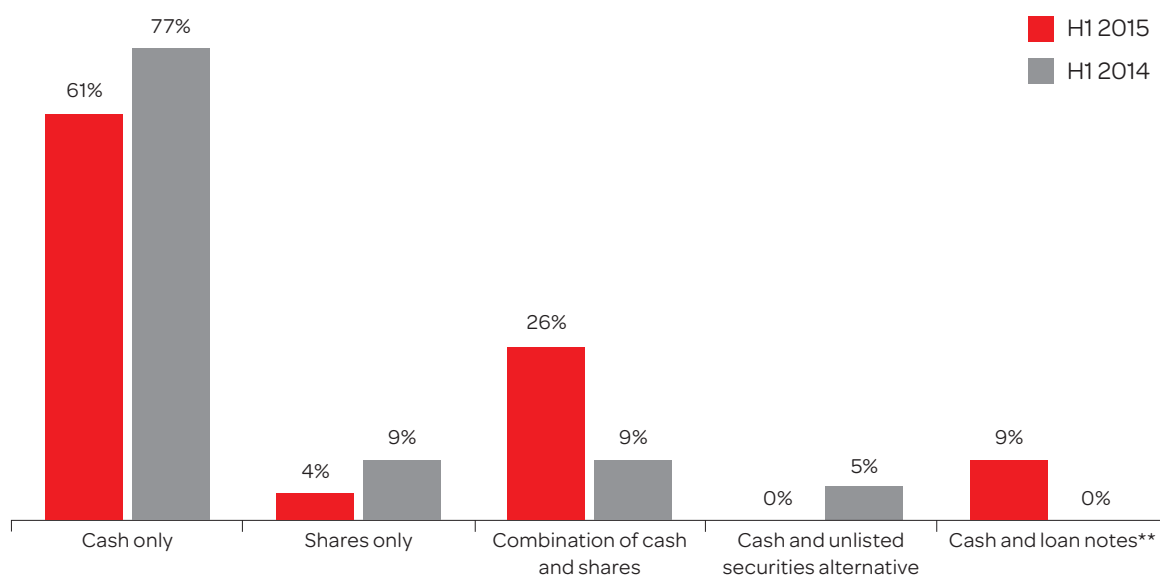
Cash continues to be a popular consideration choice

### Possible offers

Of the 3 possible offers announced in the first half of 2015 which failed to progress to a firm (or mandatory) offer within our review period, one did not specify the likely form or level of consideration (given that the bids were still in the early stages) and the remaining 2 offered cash consideration.

Usage of cash and share consideration grew by 17% in the first half of 2015

### Firm offers in H1 2015 & H1 2014\*: Nature of consideration



\*Based on a total of 23 firm offers announced in H1 2015, 22 in H1 2014.

\*\*Figure for H1 2015 includes offer for Domino Printing Sciences plc by Brother Industries, Ltd. where a loan note alternative was offered.



## Alternatives to all-cash and all-share offers

### Loan notes

An unsecured loan note alternative was offered by Brother Industries in respect of its cash offer for Domino Printing (*offer for Domino Printing Sciences plc by Brother Industries, Ltd.*). Brother shareholders were given the option of electing to receive loan notes as an alternative to all-or-part of the cash consideration they would be entitled to under the offer. The loan notes had a nominal value of £1, were non-interest bearing, unsecured and non-transferable. The Domino directors did not give any advice in respect of the loan note alternative and instructed shareholders to consider the suitability of the alternative in light of their own personal circumstances and investment objectives.

In the recommended *offer for Ashcourt Rowan plc by Towry Holdings Limited* loan notes of a nominal value of 5 pence were offered in addition to the cash consideration. These loan notes were unsecured, non-transferable and with an interest payable upon the redemption date of the loan notes, at a rate of 20% per annum.

### Mix & match

The £4.3 billion *offer for Rexam plc by Ball Corporation* included a 'mix and match facility', giving Rexam shareholders the option of varying the proportions of new Ball shares and cash receivable in respect of their holding of Rexam shares. This method of giving Rexam shareholders a choice of consideration, subject to the elections of other target shareholders, made the offer more attractive in terms of taxation and investment options. Where shareholder elections could not be satisfied in full, they were scaled down on a pro-rata basis.

A mix and match facility was also offered in 3 other deals (*offers for Telecity Group plc, BG Group plc and Accumuli plc*) where the consideration structure comprised cash and shares. Usage of mix and match facilities quadrupled in the first half of 2015 compared with the same period in 2014, where only one deal provided shareholders with this facility.

### Contingent value rights and unlisted securities alternatives

None of the deals reviewed in the first half of 2015 had consideration structures providing contingent value rights or unlisted securities alternatives. In the same period in 2014, 2 deals offered one of these alternative forms of consideration.

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**“A choice of consideration can be attractive to shareholders who do not want to realise an immediate cash gain. However the prospectus requirements for mix and match facilities can be onerous.”**

Rebecca Gordon, Partner, Dentons

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## Drafting Examples

### Loan note alternative - Domino Printing Sciences plc by Brother Industries, Ltd.

As an alternative to all or part of the cash consideration which would otherwise be received pursuant to the Acquisition, Scheme Shareholders (other than Loan Note Restricted Scheme Shareholders) will, subject to certain conditions, be able to elect to receive Loan Notes to be issued by Brother on the following basis:

for every £1 of cash consideration to which the Scheme Shareholder would otherwise be entitled and has made a valid Loan Note Election £1 nominal value of Loan Notes

The Loan Notes will be governed by English law and will be issued by Brother, credited as fully paid, in amounts and integral multiples of £1 and any entitlement that is not a whole multiple of £1 will be rounded down to the nearest £1 and the balance of the consideration disregarded and not paid. The Loan Notes will constitute direct, unsecured and unsubordinated obligations of Brother.

The Loan Notes shall not bear interest.

The Loan Notes may be redeemed at the option of a Loan Note Holder on not less than 30 days' prior notice in writing, in minimum denominations of £1,000, unless such holder of Loan Notes has a total holding of less than £1,000, in which case such Loan Note Holder's total Loan Note holding, but not part thereof, may be redeemed. The Loan Notes are redeemable at the option of the Loan Note Holder for cash at par on (i) the next Business Day falling six months after the date of issue of the Loan Notes or 31 January 2016 if later, (ii) 31 January 2017, (iii) 31 January 2018, (iv) 31 January 2019 and (v) to the extent that Loan Notes are in issue on such date, 31 January 2020. Any Loan Notes not previously repaid, redeemed or purchased will be repaid in full at par on the fifth anniversary of their issue.

Except as provided in the terms of the Loan Note Instrument, the Loan Notes will not be transferable without the prior consent of Brother, and no application will be made for them to be listed on, or dealt on, any stock exchange or other trading facility.

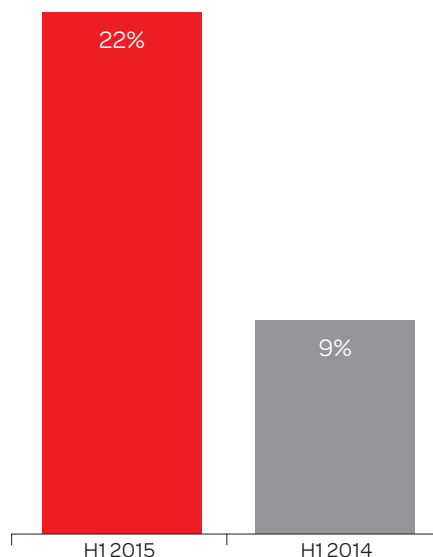
Citi has advised Brother that, in its opinion, based on market conditions on 20 March 2015 (the latest practicable date prior to publication of this document), the value of the Loan Notes (had they been in issue on that day) would have been not less than 98 pence per £1 in nominal value.

## 7. Public to private transactions

The first half of 2015 saw a growth in P2P takeover activity. Of the 23 firm offers announced, 5 were private-equity backed bids compared to only 2 such transactions in the same period in 2014. These comprised 2 offers for Main Market companies and 3 for AIM companies.

This is an indication that public to private activity is recovering. With global economic climate, PE funds are increasingly confident about utilising capital raised and retained over the past few years. The aggregate deal value of these 5 transactions, for instance, was £337.6 million, over 86% higher compared to the deal value of public to private transactions in the comparable period in 2014.

H1 2015 v H1 2014: P2P offers\*



\*Based on 23 firm offers in H1 2015, 22 in H1 2014

“We continue to see interest from private equity backers, especially in the energy and technology sectors.”

Rebecca Gordon, Partner, Dentons

## Deals in Focus

- *Asia Resource Minerals plc by Argyle Street Management Limited*
- *Baobab Resources plc by African Minerals Exploration & Development Fund SICAR, S.C.A.*
- *Essenden plc by Harwood Capital LLP*
- *Nationwide Accident Repair Services plc by The Carlyle Group*
- *Phoenix IT Group plc by Daisy Group Limited and Toscafund Asset Management LLP*

The deal values of these 5 private equity backed bids was relatively low (average of £67.52 million), so whilst the number and total aggregate value of P2P offers has increased, private equity activity in the UK was limited to small to medium-sized deals.

Activity in the mining, metals & extraction industry was solely conducted by private equity backed bidders, indicating that these bidders are capitalising on (generally) depressed commodity prices and are increasingly seeing value in the industry. There were 3 non-UK private equity backed bidders: Argyle Street is incorporated in the British Virgin Islands, The Carlyle Group in the United States and African Minerals Exploration in Luxembourg.



## 8. Financing the offer

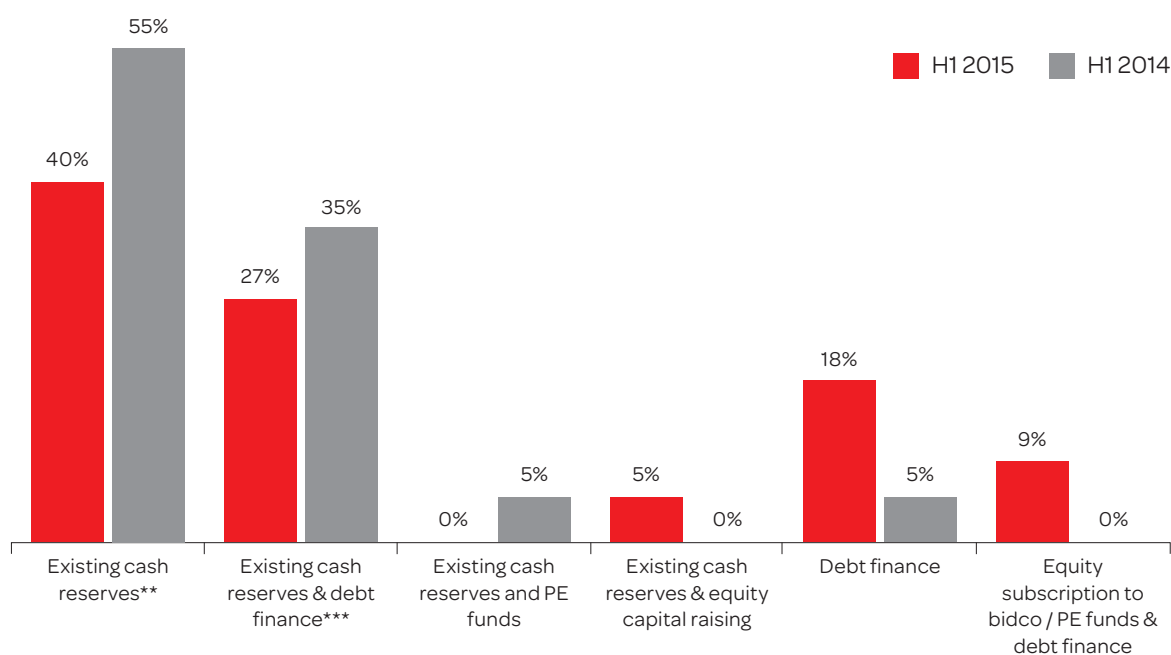
Of the 22 firm offers that involved a cash element (accounting for 96% of all firm offers in the first half of 2015), 9 were funded by existing cash resources only and 6 were financed with a combination of existing cash resources and debt facilities. 4 deals were funded by debt alone. See chart for details of the financing in the other 3 bids.

Use of existing cash reserves was 15% lower, whereas use of debt finance grew by 13% (4 deals) compared to the same period in 2014 (1 deal). Of the 8 largest transactions, 5 (63%) were funded (wholly or in part) with debt finance; the highest value deal in the review period (*offer for BG Group plc by Royal Dutch Shell plc*) was partially funded by debt.

With interest rates being kept low (on the whole) globally, lending markets are continuing to improve, leading to increasing use of debt finance to fund the acquisition. Assuming interest rates remain low we expect the surge of third-party debt to finance deals to continue into the second half of the year.

The Panel has continued its practice of granting limited dispensations from the requirement under Rule 26.2(b) to disclose market flex terms in facilities agreements until the offer or scheme document is posted. This delay gives the lead arranger an opportunity to syndicate the debt in for up to 28 days before the offer document is published and the loan documents need to go on display.

H1 2015 v H1 2014: Proportion of firm offers funded by cash from different sources\*



\* Based on 22 firm offers involving a cash element in H1 2015, 20 in H1 2014.

\*\* Existing cash reserves includes funds made available under inter-company loan arrangements.

\*\*\* Including 2 deals financed by existing cash reserves and / or debt finance (*offer for Telecity Group plc by Equinix* and *offer for Domino Printing Sciences plc by Brother Industries, Ltd.*).

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“As evident from the analysis on funding for deals, the weight of excess cash on balance sheets continues to be a driver for deals ... that combined with more bullish boards and a few active CEOs, there are positive indications for a stronger second half of the year. However, there needs to be clear, strategic rationale for transactions – boards and senior management are not escaping the scrutiny of the media but more importantly their major shareholders in justifying deals.”

Selina Sagayam, Partner, Gibson Dunn

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## Deals in Focus

### *BG Group plc by Royal Dutch Shell plc*

Royal Dutch Shell's £47 billion offer for BG Group was financed with existing cash reserves and a £10.07 billion bridge credit facility with a group of relationship banks. This facility was announced 23 days after firm offer was made and replaced (in full) the interim bridge credit facility set out in the firm offer announcement.

### *Brit plc by Fairfax Financial Holdings Limited*

Financed with CAD\$650 million equity capital raising and existing cash reserves; 3 days after the firm offer was announced, Fairfax confirmed that it may raise additional funding for the acquisition through possible future debt and / or preference share issuances.

### *Essenden plc by Harwood Capital LLP*

A combination of equity, invested directly by the Harwood Funds, and debt provided by the Royal Bank of Scotland plc comprising: £9 million from a senior term and revolving facilities agreement in the principal aggregate amount of up to £14 million.



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## 9. International bidders

Non-UK bidders continued to dominate the public M&A market in the first half of 2015, being involved in 8 of the 10 largest deals. Of the 23 firm offers announced, 15 were made by non-UK bidders (65%), a marginal increase on the same period in 2014 (63%). Only 8 (35%) firm offers were therefore made by a bidder incorporated in the UK.

Non-UK bidders accounted for almost £12.97 billion (21%) of the aggregate deal value in the first half of the year. It should be noted that the offer for BG Group plc by Royal Dutch Shell plc (which we have treated as a UK bidder on the basis of its country of incorporation, although it is headquartered in the Netherlands) itself accounted for 78% of the total value of deals announced in the first half of 2015; excluding this deal, non-UK bidders accounted for 97% of

aggregate deal value in the first 6 months.

Of the deals made by a non-UK bidder, the offer for Rexam plc by US incorporated Ball Corporation had the highest deal value (£4.3 billion). US incorporated bidders accounted for the majority of all deals involving foreign bidders (6 or 40%), a 27% increase on the same period in 2014.

This is a continuing trend from the second half of 2014, when US bidders also accounted for the majority of deals involving a foreign bidder<sup>1</sup>. Despite the US administration's new rules closing certain corporation tax loopholes including tax inversion, which was a driving force behind US bidder activity in late 2014, US bidder activity in the UK public M&A market remains strong and we expect to see further activity in the second half of 2015.

Country of incorporation of bidder*	Number of bidders**	Total deal value (approx.)
United States	6	£8.48 billion
Spain	1	£1.7 billion
Japan	2	£1.29 billion
Canada	1	£1.22 billion
Luxembourg	2	£132.4 million
British Virgin Islands	1	£98.8 million
Bahamas	1	£43.8 million
Philippines	1	£7.11 million

\* Where a bid vehicle was used, this table refers to the country of incorporation of the ultimate bidder.

\*\* This table includes all firm offers made by non-UK bidders that were analysed (whether they completed or remained ongoing as at 30 June 2015).

1. 6 deals by US bidders in H2 2014, 2 such deals in H1 2014.

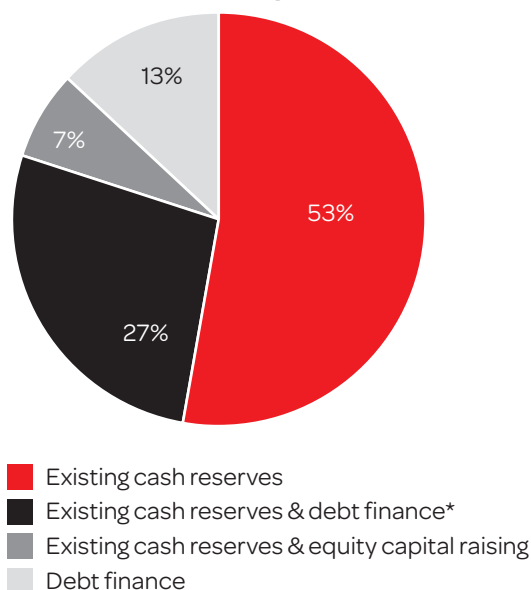
“We expect to see much more activity from the US – M&A in the US is at record level highs and in-bound US M&A generally saw a significant increase in the first part of this year. There has also been heightened interest from Asian bidders (particularly from Japan).”

Selina Sagayam, Partner, Gibson Dunn

### Financing non-UK bids

Cash formed an element of the consideration in all 15 deals made by non-UK bidders. Of these, 8 (53%) were financed by existing cash reserves, 4 (27%) were financed with a combination of existing cash reserves and debt finance, 2 (13%) were solely financed by debt facilities and one deal (7%) with a combination of existing cash reserves and equity capital raising. The proportion of firm offers made by non-UK bidders and financed with debt facilities (wholly or in part) and use of cash reserves to fund the acquisition remained broadly in line with the same period in 2014.

H1 2015: Bid financing by non-UK bidders



\* includes 2 deals financed by existing cash reserves and / or debt finance (offer for *Telecity Group plc* by *Equinix, Inc.* and offer for *Domino Printing Sciences plc* by *Brother Industries, Ltd.*)

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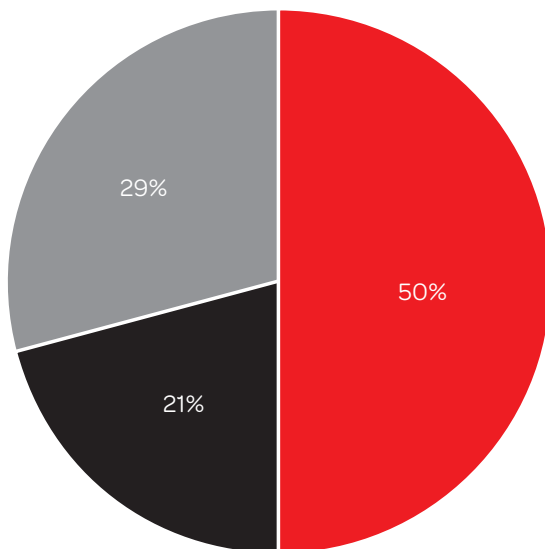
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## 10. Possible offer outcomes: announcements v withdrawals

We reviewed a total of 14 possible offer announcements made under Rule 2.4 in the first half of the year which identified a potential bidder. Of these 14, 7 (50%) resulted in a firm offer during the review period, and 4 (29%) were ongoing as at 30 June 2015. Only 3 possible offers (21%) were withdrawn during the first half of 2015.

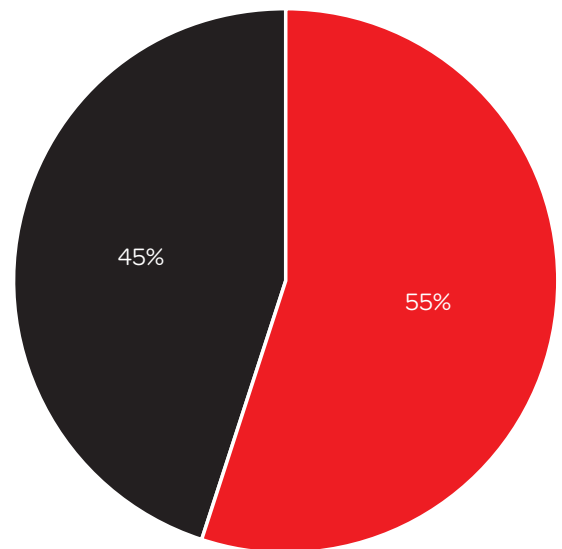
The likelihood of possible offers progressing to firm remained broadly the same compared with the equivalent period in 2014, but there was a lesser chance of possible offers being withdrawn in the first half of 2015. However, a more accurate comparison can be made when the outcome of the 4 possible offers which remain ongoing as at 30 June 2015 is determined.

H1 2015\*: Possible offers (made under 2.4)  
- outcomes



■ Progressing to firm offers  
■ Withdrawn  
■ Ongoing

2014\*\*: Possible offers (made under 2.4)  
- outcomes



■ Progressing to firm offers  
■ Withdrawn

\* Based on 14 transactions in H1 2015.

\*\* Based on 11 transactions in H1 2014.



## 11. Put up or shut up regime

### Firm offers

In the first half of 2015 an offer period began with a firm offer announcement under Rule 2.7 of the Code in relation to 7 Main Market companies and 9 AIM companies. Accordingly, 16 (70%) of the 23 firm offers announced were not subject to the automatic 'put up or shut up' deadline (PUSU) regime and only 7 (30%) were. The percentage of firm offers beginning without a PUSU deadline in the first half of the year remained broadly comparable to the same period in 2014 (73%)<sup>1</sup>.

### Possible offers

An offer period for 14 targets began with a possible offer announcement identifying a potential bidder and stating a PUSU deadline as required by Rule 2.4(c) of the Code; a 27% increase on the comparable period in 2014<sup>2</sup>. A number of possible offer announcements referred to potential joint bidders or consortiums but there were none which identified more than one potential bidder. Asia Resource Minerals was subject to two separate Rule 2.4 announcements by different bidders within the same 30 day period (see: 4. *Competing and potential competing bids*).

### Formal sale processes

For a further 8 targets, an offer period began with an announcement that it was commencing a formal sale process; a 100% increase compared to the same period in 2014<sup>3</sup>. In each case, the Panel granted dispensations from the Code requirements for any interested party participating in that process (i) to be publicly identified and (ii) to be subject to the compulsory 28-day PUSU deadline.

### PUSU Extensions

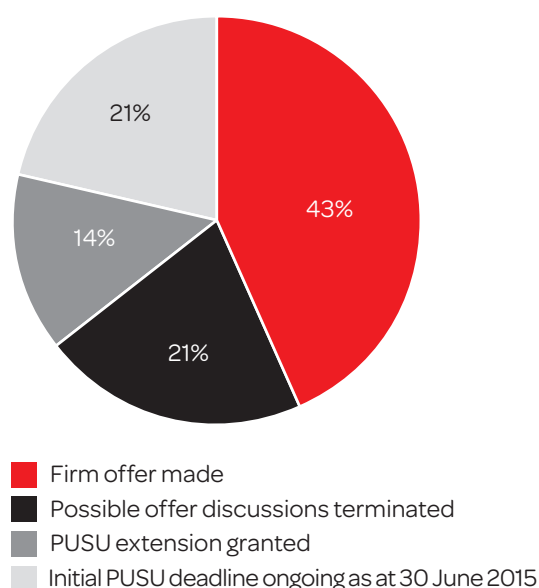
In the first half of 2015, firm offers were made for 6 (43%) of the 14 targets subject to ongoing possible offers during their initial 28-day PUSU periods. Offers for 3 (21%) targets did not proceed beyond their initial deadline.

Offers for another 2 (14%) targets were subject to at least one PUSU deadline extension, of the 2 targets subject to a PUSU extension, multiple extensions were granted by the Panel for one possible offer (for Essenden plc) as at 30 June 2015. The length of PUSU extensions granted in the first half of 2015 varied widely, with extensions ranging from 28 to 40 days.

The remaining 3 (21%) possible offers (for AGA Rangemaster Group plc, Promethan World plc and Netcall plc) were still within their respective initial PUSU periods as at 30 June 2015.

There was a 28% greater likelihood of a firm offer being announced within the initial PUSU period than in the comparable period in 2014<sup>4</sup>. This may be an indicator of increased bidder certainty in the UK public M&A market and suggests that the Panel's restrictive PUSU regime introduced in September 2011 is working to reduce the number of purely speculative bids.

### H1 2015: Possible offers subject to an initial PUSU deadline - outcomes



1. 16 (of the 22 firm offers) commenced with a firm offer announcement in H1 2014.

2. 11 possible offer announcements made under Rule 2.4 of the Code in H1 2014.

3. 4 formal sale processes recorded in H1 2014.

4. Of the possible offers subject to a PUSU deadline in H1 2014, 15% had a firm offer announced within the initial deadline.

## Deals in Focus

### *Possible offer for Essenden plc by Harwood Capital LLP*

A possible offer by Harwood was announced on 20 March 2015 and 2 days before the date of the initial PUSU deadline (19 April 2015) a 40 day PUSU extension was granted at Essenden's request. Harwood was granted a second extension of 28 days, to the PUSU deadline to 26 June 2015, on which date Harwood announced a recommended offer for Essenden.

### *Possible offer for Rangers International Football Club plc by Mr Robert Sarver*

An offer period commenced on 5 January 2015 with an announcement by Rangers that it had received a preliminary approach from Mr Robert Sarver. Rangers announced the next day that it had rejected Mr Sarver's initial proposal. Following Rangers' rejection of Mr Sarver's revised proposal six days later, Mr Sarver announced that he did not intend to make an offer for the company and commented, fuelling speculation of a future approach: 'I wish the club and fans the best of luck. If they want my support in the future, then they only have to ask'.

### *Possible offer for Worthington Group plc by NunaMinerals AS*

Worthington initially received a dispensation from the Panel from Rule 2.4(a) so it did not have to disclose the name of its proposed merger partner and of a PUSU deadline under Rule 2.4(b). After Worthington disclosed the name of the proposed merger partner (NunaMinerals AS), this potential bidder was subject to a PUSU deadline.

#### **31 March 2015**

Worthington announces that it is negotiating to merge with an overseas listed company on terms that would represent a significant premium to its share price and if completed, it is expected that the merged company would also apply for a secondary listing in London.

#### **15 April 2015**

After more than 2 weeks, Worthington clarifies that it was not in direct discussions with an overseas listed company (the proposed merger partner), but was in discussions with a group of investors in order to establish a special purpose vehicle to provide funding for the proposed merger partner. The announcement stated that whilst the Code applies, the Panel had agreed not to apply the requirement to disclose the name of the Proposed Merger Partner (under Rule 2.4(a)) and not to apply the PUSU deadline (under Rule 2.6(a)).

#### **15 May 2015**

30 days later Worthington announces, in response to speculation as to the identity of the potential bidder, confirming that the company is in discussions with Greenland Mining Management Limited, which is proposing to invest in a rescue refinancing of NunaMinerals, with a view to NunaMinerals subsequently making an offer for Worthington. As a result of this disclosure, NunaMinerals was subject to an initial PUSU deadline of 12 June 2015.

#### **12 June 2015**

Worthington announces that a 28 day extension to the PUSU deadline had been granted at its request. The PUSU deadline has been extended to 10 July 2015.

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## 12. Formal sale processes (FSPs)

In the first half of 2015, 8 companies announced a FSP (7 AIM, 1 Main Market). In each of these cases the announcement was made in the wider context of a strategic review of the company's options.

6 (75%) FSPs were ongoing as at 30 June 2015 and only 2 (25%) concluded without an offer being made; one where the target pursued a sale of certain assets (Kea Petroleum plc) and the other, where the target concluded that the indicative proposals received from various parties did not fully recognise the company's long term value (Monitise plc).

3 (38%) of the 8 FSPs were made by targets operating in the oil & gas industry (Kea Petroleum plc, Lansdowne Oil & Gas plc and Trinity Exploration & Production plc). Interestingly, these companies all had market capitalisations of below £20 million, indicating that smaller oil & gas companies are coming under significant financial pressure as a result of recent falls in oil prices. Of these 3 FSPs, only Kea Petroleum's terminated within our review period.

Despite no FSPs concluding with an offer being made in our review period, their usage increased in H1 2015, with 100% more announced compared to the same period in 2014. This indicates an upward trend in the use of FSPs as a mechanism for the possible sale of UK public companies and we expect the usage of FSPs to increase in the second half of the year.

### Rule 21.2

Rule 21.2 prohibits a target, a bidder or any of their respective concert parties from entering into deal protection measures, such as an inducement fee or other offer-related arrangement, without Panel consent, subject to certain limited exceptions.

Where, prior to an offeror having announced a firm intention to make an offer, the offeree announces a FSP, the Panel will normally permit dispensations under the Code from:

- the requirement to publicly identify prospective bidders,
- the PUSU requirements, and
- the prohibition on a preferred bidder benefiting from a break fee agreement.

**“Listed companies in distress or with lower market caps are more likely to enhance value through a well-run FSP. Bidders can also take advantage of the more relaxed code provisions in these scenarios.”**

Rebecca Gordon, Partner, Dentons

## Deals in Focus

### *Monitise plc*

An offer period commenced on 22 January 2015 with Monitise announcing that in light of share-price weakness, shareholder feedback and industry developments, it was reviewing its strategic options including a sale of the company, to be conducted by way of a FSP. The FSP concluded on 25 March 2015, with Monitise announcing that having received a number of expressions of interest from various parties, the board believed that none of these recognised the long-term value of the company and it decided to terminate the FSP, bringing the offer period to an end.

### *Bond International Software plc*

On 20 March 2015, software development company Bond announced that, despite the financial strength of the company, it is constrained as a result of being a small, independent company and it would be conducting an FSP in order to maximise its full growth potential. The FSP remained ongoing as at 30 June 2015.

### *Kea Petroleum plc*

In commencing its FSP, Kea announced on 16 February 2015, that it had been negatively impacted by falling oil prices and had, as a result, closed production at its onshore well in New Zealand's Taranaki Basin. The FSP was concluded over 4 months later, when Kea announced that it had pursued a sale of its 70% interest in certain oilfield licences and would be conducting a reorganisation of its share capital.

## 13. Offer-related arrangements

### Cooperation arrangements and other permitted arrangements

Cooperation agreements have grown in popularity, driven by the exclusion in Rule 21.2(b)(iii) which allows offer parties to agree to cooperate and commit to providing assistance and information to obtain necessary official authorisations and bid clearances.

Of the 23 firm offers announced in the first half of 2015, 8 involved the bidder and target entering into a cooperation agreement and one deal (*offer for Optos plc by Nikon Corporation*) featured a 'Bid Conduct Agreement', making 39% in all. All of the cooperation agreements were entered into with targets with a Main Market listing and were commonly used in the largest deals; 8 of the 10 largest deals (by aggregate deal value) featured such agreements.

Usage of cooperation agreements increased by over 21% compared to the comparable period in 2014, when only 3 deals featured such agreements. As would be expected, these agreements also included reciprocal obligations on the part of bidder and target to use their reasonable endeavours to provide each other with information or assistance for the purposes of obtaining any authorisations and clearances.

Bid conduct agreements remain unpopular; the same number of bid conduct agreements were recorded in the first half of 2014. The bid conduct agreement in the offer for Optos set out obligations on both parties to co-operate to ensure that the competition conditions and all clearances were met. Nikon also undertook to notify Optos if it sought Panel permission to invoke any of the firm offer conditions.

### Break fees

There were no instances of the Panel granting a dispensation from the prohibition on break fees under Note 2 on Rule 21.2 (formal sale process dispensation) as there were no firm offers announced following a formal sale process initiated by a target company.

### Reverse break fees

Agreements which impose obligations only on the bidder are not offer-related arrangements (except in the case of a reverse takeover) under the exclusion in Rule 21.2(b)(v).

In the first half of 2015 there were 4 instances of a bidder agreeing to pay a reverse break fee to the target if the transaction failed to complete. In its offer for Reexam plc, Ball agreed to pay the target a break fee of either 1%, 3% or 7% of the total deal value (£43 million, £129 million or £302 million respectively). The specific break fee payable was based on the occurrence of certain break fee events as set out in the cooperation agreement.

The highest fee was in recorded in the oil & gas industry; in its offer for BG Group plc, Shell agreed to pay the target £750 million. The lowest was in the TMT industry, in *offer for Pace plc by ARRIS Group, Inc.* where the fee was USD\$20 million (approximately 0.9% of total deal value).

The exclusion is not limited to reverse break fees. In the same deal, ARRIS undertook to Pace to reimburse the costs and expenses incurred by Pace in connection with the offer, up to a maximum of USD\$12 million, if ARRIS's stockholders did not approve the merger.

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**“Reverse break fees are becoming more common on the larger takeovers, especially on share for share deals where the target will have incurred greater costs.”**

Rebecca Gordon, Partner, Dentons

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## 14. Irrevocable undertakings

The prohibition on break fees and other offer-related arrangements has seen other forms of deal protection, such as irrevocable undertakings, gain greater prominence. In a number of deals in the first half of 2015, irrevocable undertakings were given by non-director shareholders in favour of bidders covering a variety of matters.

### Matching or topping rights (non-director shareholders)

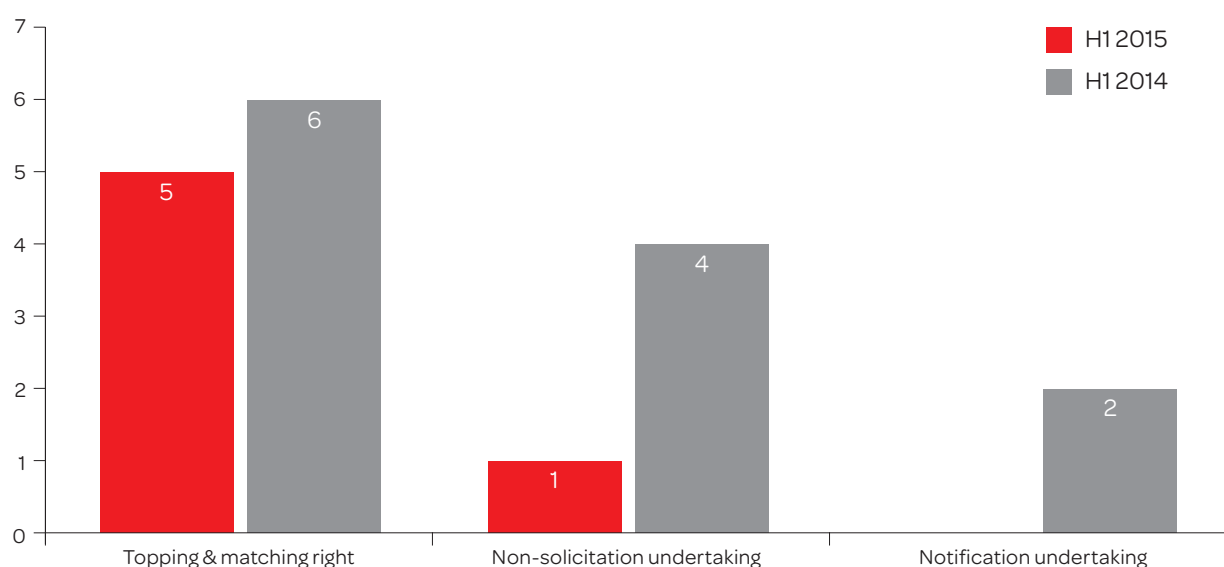
Of the 23 firm offers announced in the first half of 2015, in 5 instances (22%) one or multiple irrevocable undertakings given by non-director shareholders contained matching or topping rights in the event of a competing bid. Of these 5, none provided solely for a matching right, 3 (60%) solely for a topping right and the remaining 2 deals (40%) provided for both matching and topping rights (offers for Networkers International plc and Phoenix IT Group plc).

These rights allow the original bidder a limited period of time in which to match or improve on a higher competing offer before the undertaking lapses.

### Non-solicitation and notification undertakings (non-director shareholders)

In one case (4%), irrevocable undertakings included commitments pursuant to which the target shareholder agreed that it would not solicit or encourage third parties to make a competing offer for the target. There were no instances of undertakings which included a further obligation on the shareholder to notify the bidder if third parties indicated an interest that could lead to an offer for the company.

#### H1 2015 v H1 2014: Comparison of non-director shareholder irrevocable undertakings



In the first half of 2015, matching rights were only used in conjunction with topping rights in non-director shareholders' undertakings. Usage of non-solicitation and notification undertakings were significantly lower compared to the same period in 2014, possibly indicating a shift in bargaining strength of non-director shareholders who wish to retain the ability to solicit a competing offer and avoid having to notify the bidder if a third-party has indicated interest in an offer.



## 15. Disclosure of bidder's intentions – employees

### Plans for target's employees and business

Under Rule 24.2(a) of the Code, a formal offer should set out the bidder's intentions as regards continued employment of the target's employees, including any material change to the conditions of employment, as well as the likely impact of strategic plans for the target on employment, place of business and any fixed assets.

In 16 (70%) of the firm offers announced in the first half of 2015 the bidder issued a generic statement that it would initiate some form of post-acquisition strategic review to identify future operational improvements where synergies and efficiencies could be achieved across the enlarged group.

Interestingly, of these 16 offers, 7 (43%) contained a statement that, pending the outcome of the review, the bidder had no current intentions to make changes to employees, places of business and fixed assets. The conditional nature of these statements means that they are not negative statements for the purposes of Rule 24.2(b) (see paragraph below). This may be indicative

of an emerging new practice; we will track this development with interest and will report on it in our next full year report, to be published in January 2016.

Under Rule 24.2(b), the bidder must make a negative statement where it has no intention to make any such changes, or considers its strategic plans for the target will have no repercussions on such matters. In 6 of the 23 firm offers (26%), bidders made definitive statements that they had no intention (or at least no current intention) to make any material post-acquisition changes. Despite such assurances, many bidders still stated that where synergies could be identified changes would be inevitable.

Where bidders were in a position to disclose more detailed information, their plans usually related to the likely reduction in the target's head count, the relocation of its headquarters, the combining of administrative and operational functions and the resignation of the target board.



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## Drafting Examples

### **TSB Banking Group plc by Banco de Sabadell S.A.**

'Sabadell has confirmed that, following the completion of the Offer, Sabadell will fully safeguard the existing employment rights of all TSB employees, in accordance with contractual and statutory requirements. In addition, Sabadell intends to comply with all of the pensions obligations in relation to TSB's employees and any other members of TSB's pensions scheme.

Sabadell does not have any plans to significantly change TSB's existing plans with respect to the branch network or headcount at TSB in the short term after the completion of the Offer. Nor does Sabadell have any current intentions to change TSB's place of business, nor to redeploy the fixed assets of TSB. However, limited cost reductions may be undertaken as a consequence of TSB no longer being a public company. Sabadell may also adjust TSB's cost base after completion to reflect factors including market environment, financial performance and the pace of business development opportunities.'

### **BG Group plc by Royal Dutch Shell plc**

'The Shell Board recognises that in order to achieve the expected benefits of the Combination, operational and administrative restructuring will be required following completion of the Combination. The detailed steps for such a restructuring are not yet known but Shell will aim to retain the best talent across the Combined Group.'

### **Phoenix IT Group plc by Daisy Group Limited and Toscafund Asset Management LLPO**

'Daisy has not yet had any detailed discussions with Phoenix regarding the integration of their respective businesses and therefore Daisy has not made any decisions about how such integration should be carried out. However, the Board of Phoenix and the Board of Daisy recognise that, in order for Daisy to achieve the expected benefits of the combination... it will be necessary for the Enlarged Group to perform a detailed review of how best to integrate both businesses and that review is likely to lead to operational and administrative restructuring of the Enlarged Group.

Subject to the integration plan, Daisy confirms that it has no plans currently to: (i) change the principal locations of Phoenix's business; (ii) redeploy any of Phoenix's fixed assets.'

### **API Group plc by Steel Partners Holdings L.P.**

'Whilst the Steel Group has had preliminary discussions with API following the release of the 2.7 Announcement, it has not conducted detailed due diligence in relation to API and its operations. Accordingly, the Steel Group intends to conduct a detailed review of API and its operations should the Offer become unconditional.

In addition, save for conducting the review referred to above, the Steel Group does not have any current intentions with regard to any redeployment of API's fixed assets or the locations of API's places of business. Accordingly, the Steel Group intends that, pending the completion of this review, API's business will be conducted in the manner in which it is currently conducted and there will be no changes made to any of the foregoing.'

## Post-offer undertakings and post offer statements of intention

### Post-offer undertakings

Bidders seeking to make post-offer undertakings are required to consult the Panel in advance. An undertaking must specify the time period for which it is made or the date by which the action will be completed and any conditions to which it is subject (Rule 19.7 (b)). The Panel will play an active role in monitoring undertakings. Parties which give an undertaking are required to submit regular reports to the Panel on the status of the undertaking (Rule 19.7 (h)).

### Post-offer intention statements

Any other statement which does not meet the requirements of post-offer undertakings is a post-offer intention statement. These must be 'accurate' and 'made on reasonable grounds' (Rule 19.8 (a)). A bidder's obligation to follow through on their post-offer undertakings, reporting requirements and potential risk of Panel sanction for non-satisfaction may lead to bidders avoiding making such undertakings, opting for intention statements instead. Bidders may also steer clear of these undertakings having learnt the lessons from high profile deals such as HP's acquisition of Autonomy in 2011, which show that post-acquisition, the target's financial position may need to be re-assessed.

Under Rule 19.7 (post-offer undertakings) and Rule 19.8 (post-offer statements of intention) of the Code, introduced after the fall out from Pfizer Inc.'s failed possible offer for AstraZeneca plc in 2014, the Panel distinguishes between so-called "post offer undertakings", which it regards as being formal commitments for a target to take (or not to take) a stated course of action, and mere "intention statements".

The Panel has the power to regulate and monitor post-offer undertakings, and the stringent conditions on the making and revoking of such undertakings are likely to make bidders think twice about giving them in the first place.

There were no instances of a post-offer undertaking being made in the first half of 2015. Bidders do not wish to be bound by their commitments, risking Panel sanction for non-compliance. We may see post-offer undertakings being used in future in limited circumstances, for example, on the biggest deals, involving foreign bidders and/or iconic domestic or global targets where the proposed acquisition has created political interest and garnered public attention. Further, we expect that usage of these will be driven by increasing the likelihood of the offer being accepted by target shareholders and receiving all necessary approvals to effect the acquisition.

**"Following the changes to the Code post Cadbury, bidders are very reluctant to make any form of post-offer intention statements or undertakings. The recent changes to the Code have only increased their nervousness."**

Rebecca Gordon, Partner, Dentons



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## 16. Employee representatives' opinions

Under Rule 25.9 of the Code, introduced as part of the wholesale changes to the Code made in September 2011 in the aftermath of high profile bids such as Kraft's Cadbury, the target is required to publish any opinion prepared by the target's employee representatives on the effect of the offer (or any subsequent revised offer) on employment.

Of the 23 offers firmly announced in the first half of 2015, there was only one (4%) instance of the target's employee representatives issuing such an opinion (see inset box). The opinion issued in our review period was generally positive or at worst neutral towards the proposed takeover.

In the corresponding period for 2014 no employee representatives' opinions were issued.

### Disengagement by employee representatives in UK public M&A continued in the first half of 2015

#### Drafting Examples

**TSB Banking Group plc by Banco de Sabadell S.A.**

*Contained in Offer Document – Accord and Unite the Union*

'Accord and Unite are not opposed to the acquisition in principle. However, the unions remain to be convinced that the proposed acquisition is in the medium to long term interests of TSB employees...The unions' general view is that the acquisition will only be a success if the human consequences are fully and meaningfully considered and joint discussions on the key issues take place between the employers and the recognised unions... Nevertheless, the unions may be prepared to support the proposed acquisition, and recommend that their members do so too, if both TSB and Sabadell are prepared to respond positively [to certain points set out in the opinion].'

## 17. Disclosure of bidder's intentions – pension schemes

Changes to the Code were introduced in May 2013 requiring bidders to consider the effects of an offer on a target's pension scheme and to disclose in the offer document its intentions with regard to such scheme and the likely repercussions of its strategic plans on that scheme, or to make an appropriate negative statement. The new provisions do not apply to a pension scheme which provides pension benefits only on a 'defined contribution' basis.

Of the 23 firm offers made in 2015, bidders disclosed their intentions (or made a negative statement) in 7 (30%) cases, reflecting the reduction in the number of defined benefit schemes in existence. Varying levels of information were provided in these disclosures, with some opting for shorter negative statements and others providing detailed information. Some examples are set out on this page.

### The Code, Rule 24.2(a)(iv)

In the offer document, the offeror must state... its intentions with regard to employer contributions into the offeree company's pension scheme(s) (including with regard to current arrangements for the funding of any scheme deficit), the accrual of benefits for existing members, and the admission of new members;

### The Code, Rule 24.2(b)

If the offeror has no intention to make any changes...it must make a statement to that effect.

## Drafting Examples

### Thorntons plc by Ferrero International S.A.

'[The bidder] intends that, following the Offer becoming or being declared wholly unconditional, Thorntons will continue to comply with all of its obligations under relevant pension schemes (as defined in the City Code) as principal employer, including its commitment to make employer contributions and current arrangements for funding any scheme deficit in respect of such schemes to the extent required by the UK Pensions Regulator. It is not expected that the relevant pension schemes will be reopened to new entrants or future benefit accrual.'

### Networkers International plc by Matchtech Group plc

'Networkers operates a defined contribution pension scheme and Matchtech confirms that, following completion of the Acquisition, it does not intend to implement any changes with regard to employer contributions into the Networkers pension scheme, the accrual of benefits for its existing members, or the admission of new members to it.'

### Nationwide Accident Repair Services plc by The Carlyle Group

'Nationwide Accident Repair Services Group plc (**NARS**) operates a funded pension scheme in the UK with both defined benefit and defined contribution sections....The last full actuarial valuation of the scheme was carried out as at 31 December 2011 which ultimately resulted in a defined benefit section scheme-specific deficit of £27.1 million as at 5 November 2014.

'[The Carlyle Group] intends that the employer contributions into the defined contribution section of the Nationwide Accident Repair Services Pension Fund will be maintained in accordance with contractual and statutory requirements and that, in relation to the defined benefit section of the pension fund, employer contributions will be made in accordance with statutory requirements and any schedule of contributions agreed with the trustees and the pre-existing commitments of the Company to fund the deficit of the defined benefit pension section of the pension fund and the accrual of benefits for existing members will be respected. The defined benefit section of the pension fund is closed to admission of new members.'



## 18. Pension scheme trustees' opinions

Changes to the Code were made in 2013 to enhance the involvement of a target's pension fund trustees early in an offer process. Under Rule 25.9, the target board is under an obligation to append to its response circular (or, where the offer is recommended, the offer document itself) any opinion of the pension scheme trustees on the likely effects of the acquisition on the scheme, if received before the circular/offer document is published. If the trustees miss this deadline, the trustees' opinion must be published on the target's website. Trustees also have a right to publish further opinions if an offer is revised. Like the requirement for bidders disclose their intentions in respect of target pension schemes, this only applies to defined benefit schemes.

There were 3 opinions given by a pension scheme trustee in the first half of the year, an increase over the same period in 2014 where only one opinion was given. This may indicate an upward trend of pension scheme trustees providing their opinions, although the numbers are still too small to make any definitive calls.

2 of these pension scheme trustees' opinions were preliminary in nature. The remaining opinion, given in *offer for Beale plc by Mr Andrew Perloff* was expressly supportive of the offer on the grounds that it presented the best opportunity for securing pension scheme members' benefits in the long term.

There has been an increase in the number of pension scheme trustees' opinions provided

### Drafting Examples

#### **API Group plc by Steel Partners Holdings L.P.**

'the pension fund relies upon the employer covenant, being the current and future ability of the Company to meet its funding obligations to the pension fund under the fund's rules and relevant UK pensions legislation. The flexible apportionment arrangement that was agreed by the Company and the Trustees in 2014 apportioned all funding liabilities to the Company. For these reasons, the Cash Offer, if accepted by shareholders, must not result in any adverse or detrimental effect upon the employer covenant.'

#### **Nationwide Accident Repair Services plc by The Carlyle Group**

'The Trustees are still at an early stage in terms of their assessment of the impact of the Acquisition on the Fund. Whilst at this stage it is too early to form an opinion the Trustees welcome the representations from management

that the Carlyle Group is ideally placed to bring relevant operational and industry expertise to NARS, as well as capital, to support NARS' business strategy, though further investigation may reveal some uncertainties and possible risks introduced by the Acquisition as well as some potential improvements in the Employer Covenant.

The Trustees are seeking to understand these areas with the help of the management of NARS and CSP Bidco/the Carlyle Group and...look forward to continuing this dialogue to reach a definitive conclusion on the impact of the Acquisition on the Fund and to progressing discussions regarding the 2014 Valuation.'

#### **Beale plc by Mr Andrew Perloff**

'Trustees are of the opinion that the Offer, whilst not without risk, represents the alternative which has the greater chance over time of securing members' benefits under the Beales Pension Scheme. They are therefore supportive of the Offer.'

# Deals included in the report

## H1 2015: Firm offer announcements

Accumuli plc by NCC Group plc  
 Anite plc by Keysight Technologies Inc  
 API Group plc by Steel Partners Holdings L.P.  
 Ashcourt Rowan plc by Towry Holdings Limited  
 Asia Resource Minerals plc by Argyle Street Management Limited  
 Baobab Resources plc by African Minerals Exploration & Development Fund SICAR, S.C.A.  
 Beale plc by Mr Andrew Perloff  
 BG Group plc by Royal Dutch Shell plc  
 Brit plc by Fairfax Financial Holdings Limited  
 Domino Printing Sciences plc by Brother Industries, Ltd.  
 Enables IT Group plc by 1Spatial plc  
 Essenden plc by Harwood Capital LLP  
 Forum Energy plc by Philex Petroleum Corporation  
 Inspired Capital plc by Bentley Park Ltd.  
 Nationwide Accident Repair Services plc by The Carlyle Group  
 Networkers International plc by Matchtech Group plc  
 Optos plc by Nikon Corporation  
 Pace plc by ARRIS Group, Inc.  
 Phoenix IT Group plc by Daisy Group Limited and Toscafund Asset Management LLP  
 Rexam plc by Ball Corporation  
 Telecity Group plc by Equinix, Inc.  
 TSB Banking Group plc by Banco de Sabadell S.A.  
 Thorntons plc by Ferrero International S.A.

## H1 2015: Possible offer announcements

AGA Rangemaster Group plc by The Middleby Corporation  
 Asia Resource Minerals plc by NR Holdings Limited and SUEK plc  
 Asia Resource Minerals plc by Argyle Street Management Limited  
 Essenden plc by Harwood Capital LLP  
 Forum Energy plc by Philex Petroleum Corporation  
 JXX Oil & Gas plc by Proxima Capital Group Inc  
 Netcall plc by Eckoh plc  
 Phoenix IT Group plc by Daisy Group Limited and Toscafund Asset Management LLP  
 Promethean World plc by NetDragon WebSoft Inc  
 Rangers International Football Club plc by Mr Robert Sarver  
 Rexam plc by Ball Corporation  
 Telecity Group plc by Equinix, Inc.  
 TSB Banking Group plc Banco de Sabadell S.A.  
 Worthington Group plc by NunaMinerals AS

## H1 2015: Formal sale processes

Bioquell plc  
 Bond International Software plc  
 Energy Technique plc  
 Ensor Holdings plc  
 Kea Petroleum plc  
 Lansdowne Oil & Gas plc  
 Monitise plc  
 Trinity Exploration & Production plc

## H1 2015: Commencement of offer period

WYG plc

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Key issues to be considered at the annual general meeting in 2015. Hot topics include directors' remuneration, new Listing Rules on controlling shareholders, recent changes to the UK Corporate Governance Code and new rules on mandatory auditor rotation.

### Market Tracker | Forthcoming trend reports (2015)

#### Trends in equity capital markets

Trends and themes around IPOs and secondary offers on the Main Market and AIM over the last year (Q4 2014 to Q3 2015).

#### AGM season 2015

Looking at latest trends in narrative reporting, notice of AGM and shareholder voting in 2015 season (1 October 2014 – end Sept 2015).

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