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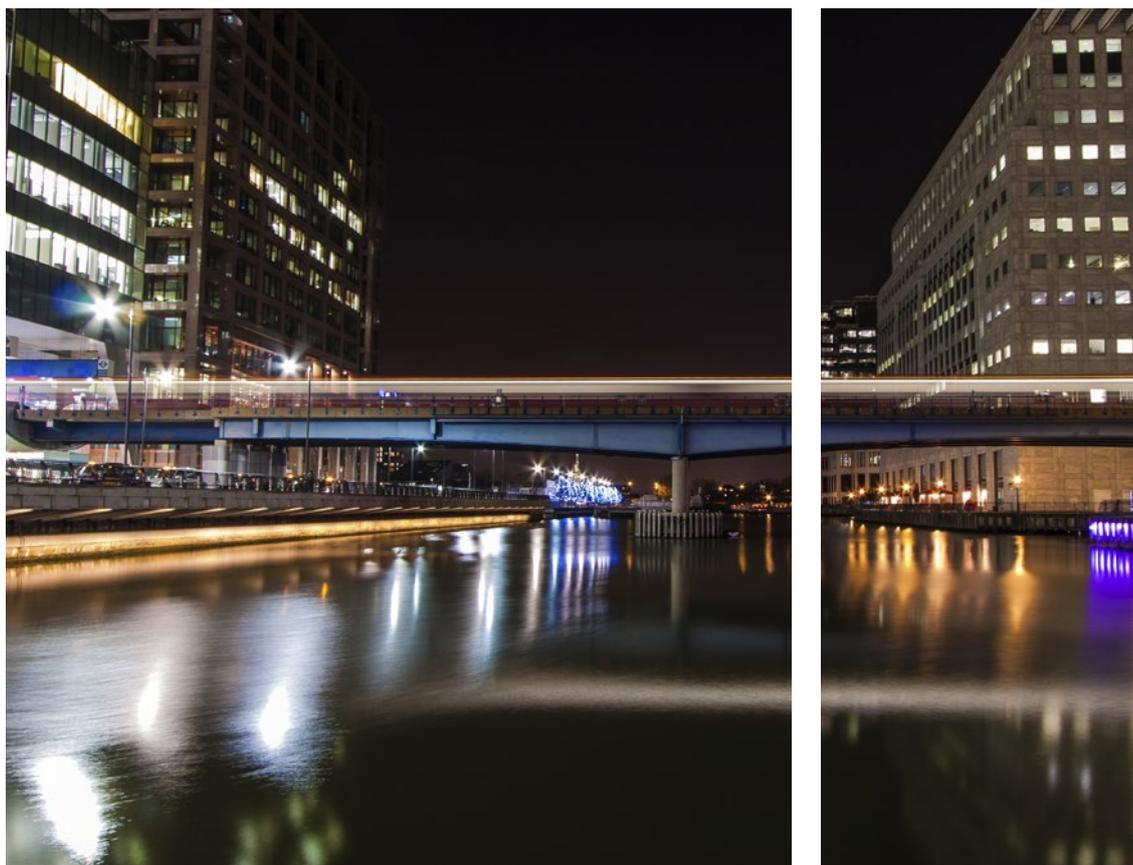
Market Tracker Trend Report
Trends in UK public M&A deals in 2014

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Background and approach

This report aims to provide an insight into trends in public M&A activity in 2014 and takes a look at what we might expect to see in the coming year.

LexisNexis Market Tracker has conducted research to examine market trends in respect of the UK public M&A deals announced in 2014. We reviewed a total of 85 transactions that were subject to the Takeover Code (the **Code**): 48 firm offers (24 each for Main Market and AIM companies) and 37 which were at the possible offer stage¹ as at 31 December 2014 (17 for Main Market companies, 20 for AIM).

Our cut off point for announced deals for the preparation of this report is 31 December 2014, although we have also covered bid progress, outcomes and features running into 2015 where this might be helpful in considering the highlighted trends. The final date for inclusion of developments in this report is 31 January 2015.

This report augments and updates our report in respect of the first half of 2014: [Analysing the market: Trends in UK public M&A for the first half of 2014](#).

1. Comprising 27 possible offers subject to a PUSU deadline, 9 formal sale processes and 1 commencement of offer period initiated by a third party seeking to dispose of its majority shareholding in a target company.

Executive summary

Importantly, 2014 saw a greatly increased deal flow, with 29% more firm offers announced compared with 2013. Even more significantly, aggregate deal values were over 500% greater than in 2013, with a big upsurge in deal values in the second half of the year. Bidder certainty also improved in 2014, with 25% more offer periods commencing with a firm offer announcement than in 2013. These are clear indicators that the public M&A market is recovering and this positive momentum is expected to continue into 2015.

2014 also 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.

We have also seen strong activity in the pharmaceutical industry and the technology, media and telecommunications (TMT) sector, US tax inversion activity (at least in the first half of the year), an increase in takeover activity backed by private equity bidders and the use of cooperation agreements. While cash remains king in the present market, we have seen alternative forms of consideration ranging from shares only (suggesting a growing confidence in equity value) to a mixture of cash and contingent value rights (which may indicate that shareholders are more willing to accept a certain level of risk for the prospect of future gain). Lenders also appear to be more willing to step in where dependable dealmakers are involved in credible transactions. The Panel continues to be proactive in policing the boundaries of offer-related arrangements, particularly in relation to irrevocable undertakings.

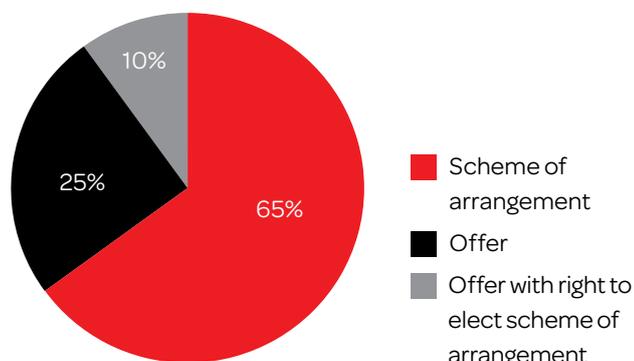
2015 is set to witness a significant change in offer structures, with the imminent demise of the cancellation/capital reduction scheme of arrangement. Current market sentiment is that the scheme will continue to offer valuable benefits over a traditional takeover offer in many circumstances, despite the loss of the stamp duty savings, and that transfer schemes are likely, on the whole, to take the place of cancellation schemes.



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1. Deal structure

Firm offers in 2014: Structure by number of deals (48 transactions)



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

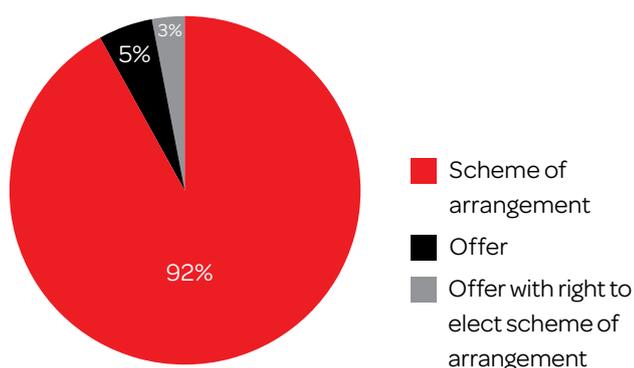
Structuring the deal to suit the circumstances

Schemes of arrangement remain the deal structure of choice among bidders: of the 48 firm offers announced in 2014 (24 each for Main Market and AIM companies), 31 were by way of scheme, with a further 5 offers providing a right for the bidder to elect to implement the deal by way of a scheme.

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.
- A scheme can (currently) be structured so that no stamp duty is payable by the bidder, saving approx. 0.5% of the deal value.

Firm offers in 2014: Structure by deal value



Deal size affects structure

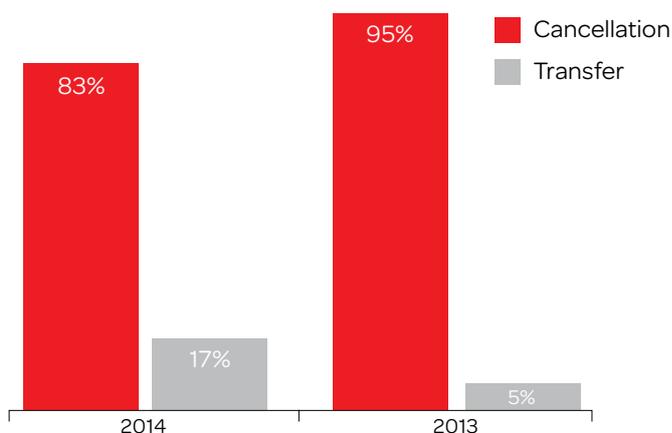
In 2013, a scheme was more often agreed where the deal was larger in size and this trend continued into 2014. 8 of the 10 largest deals firmly announced in 2014 were structured as schemes. Of the remaining 2 deals, one provided a right to elect to implement the acquisition by way of a scheme (offer for *Essar Energy plc* by *Essar Global Fund Limited*) and the other, valued at £2.6 billion, was a hostile takeover (offer for *Songbird Estates plc* by *Qatar Investment Authority* and *Brookfield Property Partners L.P.*).

Of the 10 smallest deals, ranging between £790,000 and £16 million in value, only 3 were structured as schemes, with 2 further deals providing a right to elect to implement the acquisition by way of a scheme (offer for *Mallett* by *The Stanley Gibbons Group plc* and offer for *Manroy plc* by *Herstal SA*).

Types of scheme

The two forms of scheme of arrangement traditionally used in a takeover context are cancellation schemes and transfer schemes. 83% of schemes recorded in 2014 (excluding one deal, the *merger of Shire plc and AbbVie Inc.*, where the scheme type was not specified in the firm offer announcement and the deal terminated before the scheme document was issued) were structured as cancellation scheme. Usage of transfer schemes increased compared to 2013, but remains low.

2014 v 2013: Form of scheme*



*Comprising 30 deals structured as schemes (excl merger of Shire plc and AbbVie Inc.) in 2014 and 19 deals in 2013

Cancellation or transfer scheme?

In a cancellation scheme, all target shares (other than any held by the bidder) are cancelled and new target shares immediately issued to the bidder. No stamp duty is (currently) payable on the acquisition of the target, because no share transfers are involved. This makes the cancellation scheme a very popular choice although, as the cancellation involves a formal court-sanctioned reduction of share capital, the overall deal timetable is longer and the costs greater than for a transfer scheme.

Under a transfer scheme, the target shareholders are bound to transfer their shares to the bidder once the scheme conditions are satisfied. Transfer schemes are quicker and less complex, and are generally used if timing is an issue. In practice, the stamp duty savings currently available on cancellation schemes tend to be the driving factor for using that structure.

Proposed prohibition on cancellation schemes

In his 2014 Autumn Statement, the Chancellor announced his intention to introduce regulations to prevent the avoidance of stamp tax on takeovers, aimed at the use of cancellation schemes which do not attract stamp duty. The regulations have been published but are not yet in force. Since EU law prevents any tax charge on the raising of capital, an amendment to company law is proposed which will prohibit the use of capital reductions to effect takeovers. Cancellation schemes will therefore not be permitted once the change in law comes into force.

Transfer schemes will still be permitted, and it is likely that offer parties will look instead at the other factors that have typically influenced the choice of bid structure. In many circumstances a scheme will continue to offer valuable benefits over a traditional takeover offer, despite the loss of stamp duty savings, and it is likely that transfer schemes will largely take the place of cancellation schemes.

We shall be following this market development with interest and will report on its advance in our next half yearly report, to be published in July 2015.

AIM companies

An exemption from stamp duty has been available on the transfer of shares traded on AIM since 28 April 2014. The choice of an offer or scheme structure was therefore stamp tax neutral for an AIM company bidder for a significant part of 2014.

Interestingly, of the 13 firm offers for AIM companies structured as schemes in 2014, 11 were proposed as cancellation schemes and only 2 (offers for *Green Compliance plc* and *Waterlogic plc*) as transfer schemes. This is despite the abolition of stamp duty on transfers of AIM which, logically, should have levelled the playing field. The two transfer schemes which were implemented in 2014, however, were both announced after 28 April 2014, which may be an indication that AIM companies and their advisers are becoming more familiar with the procedural advantages associated with transfer schemes.

Any bid will, once the prohibition on cancellation schemes comes into effect, need to be structured either as a transfer scheme or an offer, either of which will remain stamp duty exempt.



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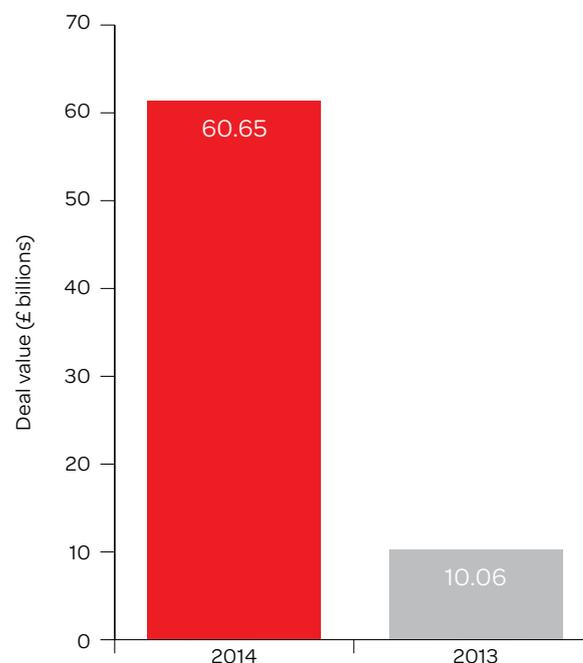
2. Deal value

The aggregate value of deals firmly announced in 2014 was £60.65 billion, up 503% compared with 2013 (£10.06 billion). Deal values increased significantly during the last six months of 2014 and accounted for over 78% of the total aggregate deal value in 2014. With clear signs that the UK public M&A market is heating up, the stream of high value deals is expected to continue in 2015. Between 31 December 2014 and our 31 January 2015 final cut-off date, a further 3 firm offers were announced, with a total deal value of £105.13 million, significantly higher compared to the same period in 2013¹.

The pharmaceutical industry saw the highest value deal, with the £32 billion cash and share offer for Shire plc by AbbVie Inc. which later terminated. The mandatory *offer for Toye plc by Mr Bryan Toye*, valued at £0.79 million, was the lowest.

Of the 48 firm offers announced in 2014, 9 (19%) had a deal value of over £1 billion, compared to only 3 (8%) in 2013². The average deal value was £1.26 billion (2013: £264.6 million) and the median deal value was £16 billion (2013: £1.7 billion).

2014 v 2013: Deal values



1. Total deal value in January 2013 of £26.72 million.
2. Based on 38 firm offers announced in 2013.



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3. Target response: recommended or hostile?

Firm offers

On the whole, bidders are still showing a reluctance to launch hostile bids, and securing a target board recommendation was a priority for most bidders in 2014. Of the 48 firm offers¹, 42 (88%) began with a recommendation, with 41 (85%) of these retaining their initial recommendation or, in the case of ongoing recommended offers, remaining recommended as at 31 December 2014.

In the bid battle for *Hyder Consulting*, both offers were recommended at the outset, with *Arcadis*'s initial offer losing its recommendation to the competing offer made by *Nippon Koei*; *Arcadis* won back the support of the *Hyder* board after announcing an increased offer.

The target board was expressly hostile in 5 (10%) of the 48 firm offers. Of these 5, 4 (80%) were hostile from the outset. The other deal was initially recommended but later became hostile (*offer for Hyder Consulting plc by Nippon Koei*).

The remaining 2 (4%) offers (for *Avanta* and *Expansys*) were launched with no definitive recommendation one way or the other, but both were subsequently supported by the target after increased offers were made.

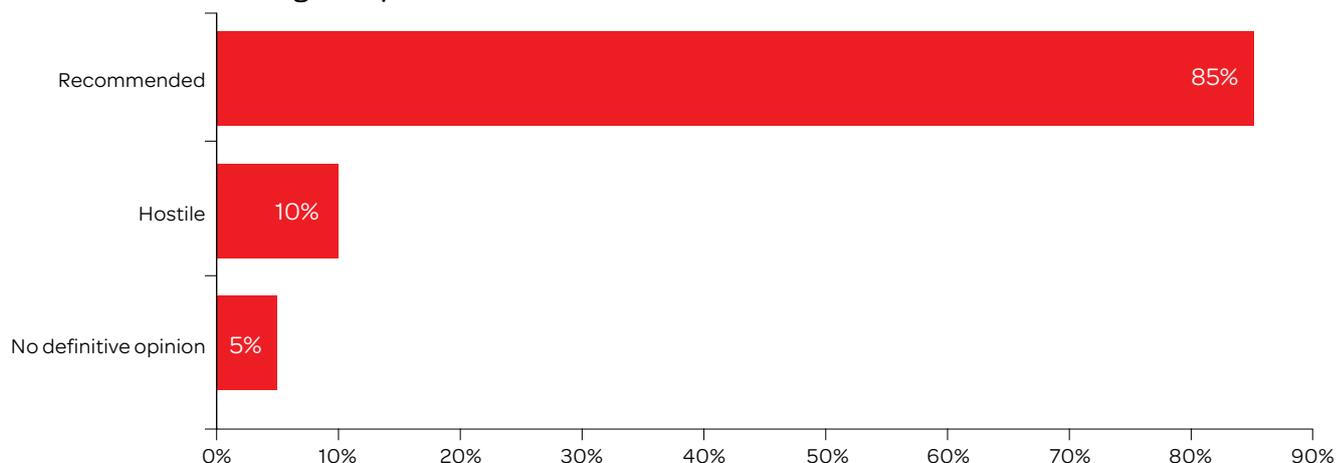
Possible offers

Of the 11 possible offers which had failed to progress to either a firm or mandatory offer by 31 December 2014, 6 (55%) were expressly hostile; the boards of the other 5 (45%) targets did not give a definitive response 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 16 possible offers which progressed to a firm offer in 2014, the target board changed its original hostile opinion (given during the possible offer stage) to a recommendation in only 2 (13%) instances (possible offers for *Spirit Pub Company* and *Shire*).

Greene King's possible offer for *Spirit Pub Company* announced in the second half of the year was originally hostile. By the time a firm offer had been announced on 4 November 2014, *Greene King* had secured the target board's recommendation to a significantly increased offer; this recommendation was given despite interest from a potential competing bidder (*C&C plc*), announced 11 days earlier.

2014: Target response to firm offers



1. Figure combines *Arcadis*'s initial recommended offer (made on 31 July 2014) and its increased and recommended offer (made on 21 August 2014).

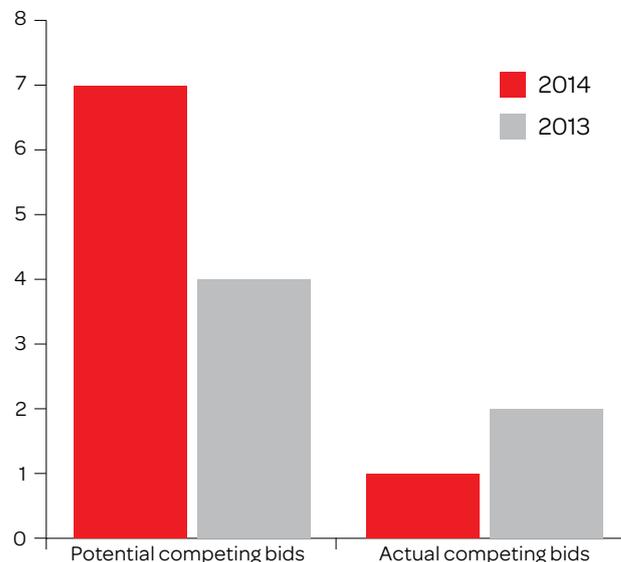
4. Competing and potential competing bids

In 2014, there was only one instance of a target being subject to an actual competing bid (2 in 2013) but 7 potential competing bid scenarios (4 in 2013).

The increase in potential competing bids may be an indicator of the improving competitive tension in the UK public M&A market. Potential bidders are more ready to engage in potential competing offers and still see value in the UK public M&A market despite risking having to pay more for the target as a result.

With the resurgence in UK public M&A activity seen during the review period likely to continue, we may see further actual and potential competing bid situations arise in 2015.

2014 v 2013: potential and actual competing bids



Deals in Focus

Bid battle for *Hyder Consulting plc*

An actual competing bid emerged during the second half of the year. On 8 August 2014, *Nippon Koei Co.* announced a competing firm offer for *Hyder Consulting plc* at a deal value 4.6% higher than the recommended cash offer made 8 days earlier by rival bidder *Arcadis B.V.*

Almost 3 weeks later, *Arcadis* announced an increased cash counter offer at a 7.4% premium to *Nippon's* offer and, at the same time, bought over 6 million target shares for a 15.6% stake. This was followed, 15 days later, by *Arcadis* announcing a revised increased cash offer at a 10.3% premium to *Nippon's* offer and further (target) share purchases, increasing *Arcadis's* stake to 25.2%.

On 12 September 2014, *Nippon* confirmed the withdrawal of its offer. The acquisition of *Hyder Consulting* by *Arcadis* completed on 16 October 2014.

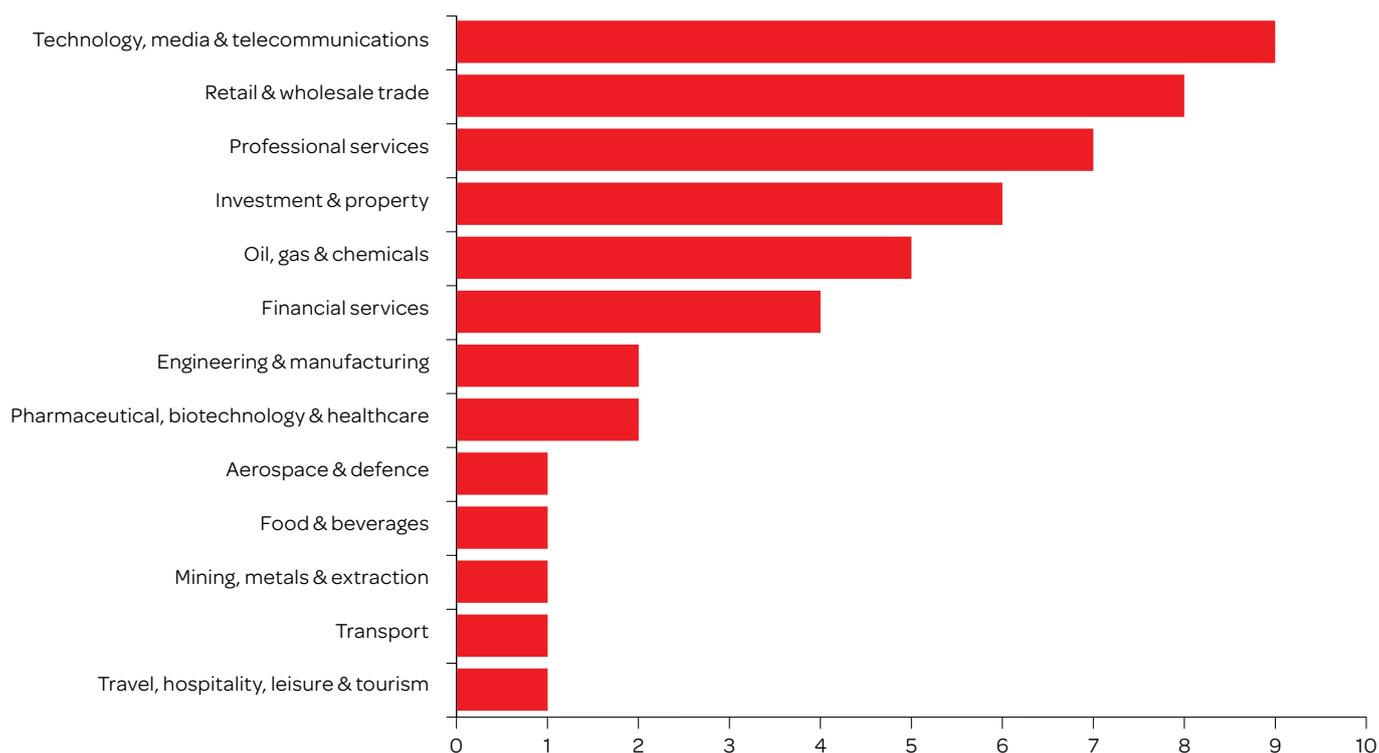
5. Industry focus

The majority (63%) of bidder activity seen in 2014 occurred in four industries: technology, media & telecommunications, retail & wholesale trade, professional services and investment & property.

The TMT industry saw the most deal volume, 78% of which involved foreign bidders. Private equity bidders continue to see value in TMT: over 33% of public-to-private transactions were in this industry. There was also a growth in private M&A activity in the TMT industry during 2014, with sizable deals including *Vodafone's* €7.2 billion acquisition of Spanish cable operator *Ono*.

Activity in the pharmaceutical, biotechnology and healthcare sector was solely conducted by foreign bidders (also operating within this industry) using the UK public M&A market to consolidate their global position. The industry accounted for 55% of the total aggregate deal value in 2014 and saw the highest value deal, US pharma giant *AbbVie's* £32 billion merger with *Shire plc*. Globally there has also been a surge in private M&A activity, as seen with Ireland-incorporated *Actavis's* USD\$66 billion acquisition of *Allergan*. Further bidder activity in the private and public M&A spheres is expected in 2015.

2014: Target response to firm offers



6. Nature of consideration

Firm offers

Of the 48 firm offers announced in 2014, only 7 (15%) involved a combination of consideration types, all of which included some cash element – see chart ‘Firm offers in 2014 & 2013: Nature of Consideration’ for details. Of the other 41 (85%), 35 (85%) were all-cash offers and 6 (15%) were all-share offers. In summary, 42 of the 48 firm offers had a cash element, either solely or in combination, accounting in total for 88% of firm offers announced in 2014.

There is a continuing trend of all-cash consideration remaining popular amongst bidders; use of cash consideration was up 12% on 2013. Usage of other forms of consideration remained broadly comparable in 2013 and 2014.

Possible offers

Of the 11 possible offers announced in 2014 which failed to progress to a firm (or mandatory) offer, 3 did not specify the likely form or level of consideration (given that the bids were still in the early stages), 5 offered cash consideration, 2 offered a combination of cash and shares and the remaining deal offered shares only.

Cash remains the consideration of choice in UK public M&A

Why is cash king?

The popularity of cash consideration is due to a combination of factors, most notably the need for certainty of value in a deal-making environment which is still challenging, continuing unpredictability in financial markets, strong balance sheet positions of some UK bidders and a substantial proportion of UK target companies attracting foreign bids.

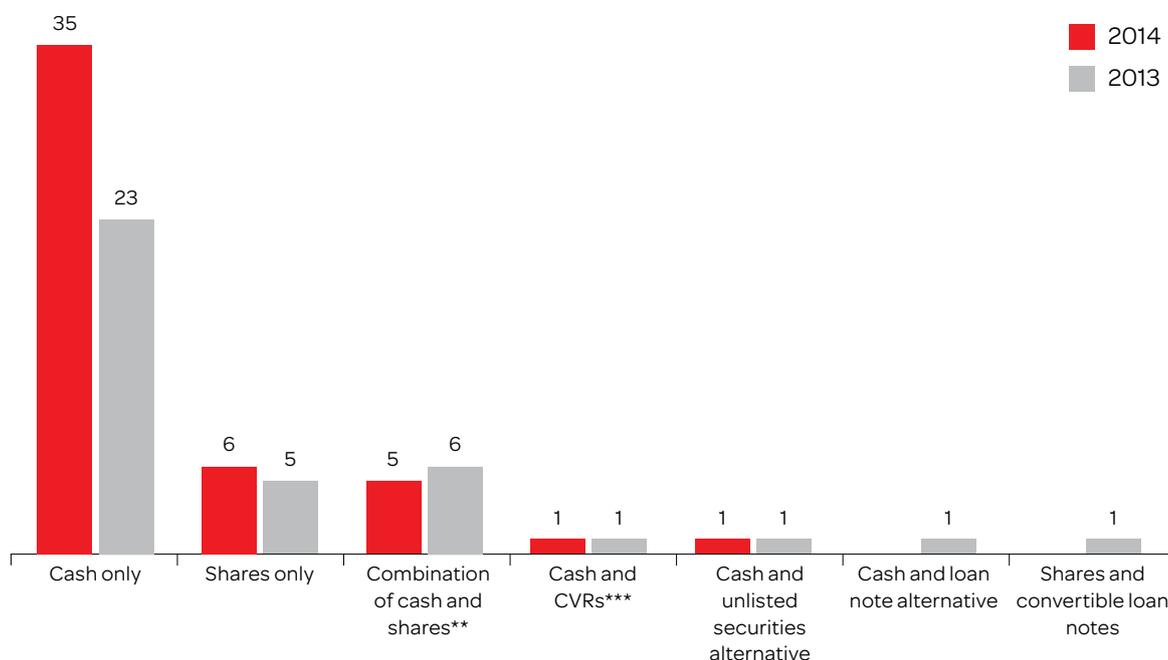
Cash is expected to remain the consideration of choice for bidders in 2015.

Firm offers in 2014 & 2013*: Nature of consideration

*Based on a total of 48 firm offers announced in 2014 and 38 in 2013.

**Figure for 2014 includes offer for Mediterranean Oil & Gas plc where CVRs were offered in addition to cash and shares.

***Figure for 2014 includes offer for Fortune Oil plc where a loan note alternative was offered under CVRs.



Alternatives to all-cash and all-share offers

We saw a variety of consideration structures in 2014, with some bidders offering flexible alternatives to all-cash or all-share offers; these included contingent value rights (deferred consideration), unlisted securities and mix & match facilities.

Contingent value rights

In the offer for *Mediterranean Oil & Gas plc* by *Rockhopper plc*, shareholders were offered the right to receive contingent consideration of up to 3.55 pence per share, payable if contingent resources of liquid hydrocarbons estimated to be potentially recoverable from the Hagar Qim Prospect (HQ Prospect) oil well in Malta are at least 80 million barrels in total. This contingent consideration was offered in addition to initial cash and paper consideration to allow target shareholders to benefit from the potential success of the HQ Prospect oil well in which the target had a 25% interest. The total value of the contingent consideration, if paid, is £11.9 to £16 million.

Mix & match

The merger of *ACM Shipping Group plc* and *Braemar Shipping Services plc* included a 'mix and match facility', giving *ACM* shareholders the option of varying the proportions of cash and new *Braemar* shares receivable on their sale of shares to *Braemar*. This means of giving the *ACM* 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.

Unlisted securities alternative

An unlisted securities alternative was offered by *Middlewich* in its cash offer for *Pochin's* (offer for *Pochin's plc* by *James Nicholson and the members of the Cedric Pochin concert party*). *Pochin's* shareholders were given the option to elect, for each target share, either cash or an unlisted securities alternative in the form of new B shares in the bidder. The B shares were unlisted, redeemable, non-transferable, did not carry voting rights and would receive dividends only at the absolute discretion of the bidder board. Each share was valued (by *Middlewich's* financial adviser) at approximately 25 pence per share, significantly lower than the cash consideration of 45 pence per share offered. Accordingly, the directors of *Pochin's* did not recommend that its shareholders accept this unlisted securities alternative.

Drafting Examples

The offer document in the offer for *Pochin's* contained the following wording: 'As an alternative to some or all of the Cash Consideration to which they would otherwise be entitled under the Offer, accepting *Pochin's* Shareholders (other than certain Overseas Shareholders) may elect to receive B Shares to be issued by *Middlewich* on the following basis:

- For each *Pochin's* Share One B Share

The B Shares will be issued by *Middlewich* credited as fully paid and in certificated form. The rights of the B Shares are governed

by the *Middlewich* Articles. No application has been or will be made for the B Shares to be admitted to listing or trading on any stock exchange. *Middlewich* has no shares admitted to listing or trading on any stock exchange and it is not intended that any application for such admission will be made.

The B Shares are (save upon death, when they are transferable to a family member) non-transferable B preferred shares in *Middlewich* carrying no voting rights and the holders of the B Shares will be entitled to receive dividends and other distributions solely at the discretion of the *Middlewich* Board.'

7. Public to private transactions

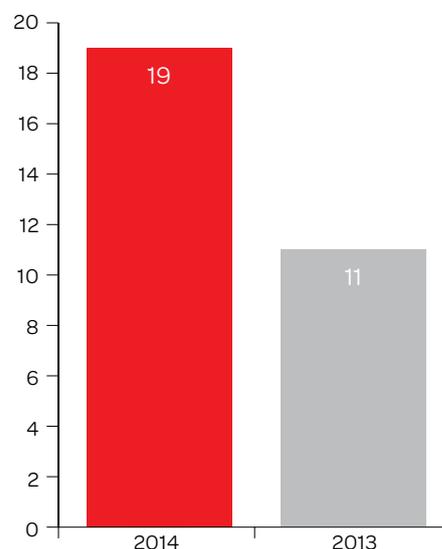
2014 saw a growth in P2P takeover activity. Of the 48 firm offers announced, 9 (19%) were private equity-backed bids compared to only 4 (11%)¹ such transactions in 2013. These comprised 2 offers for Main Market companies and 7 for AIM companies.

This is an indication that public to private activity is recovering. With the improving 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 9 transactions, for instance, was £2 billion, over 460% higher compared to the 4 deals in 2013.

“Stub equity is often a feature of PE backed deals where management are incentivised to roll-over their equity in order to participate in the upside of the business in the future.”

Rebecca Gordon, Partner, Dentons

2014 v 2013: P2P offers*



*Based on 48 firm offers in 2014 and 38 in 2013.

1. Based total of 38 firm offers announced in 2013.

Deals in Focus

- Advanced Computer Software Group plc by the Vista Funds
- Allocate Software plc by HG Capital LLP
- Avanta Serviced Office plc by Toscafund Asset Management LLP
- Brightside Group by AnaCap FP GP II Limited
- Daisy Group plc by Toscafund Asset Management LLP, Penta Capital LLP and Matthew Riley
- office2office plc by Evo Business Supplies Limited
- Prezzo plc offer by TPG Capital LLP
- Tamar European Industrial Fund Limited by Starwood Capital Group
- Waterlogic plc by Castik Capital S.A.R.L.

The deal values of these 9 private equity backed bids were relatively modest (average of £222 million), so whilst the number of P2P offers has increased, private equity activity in the UK was limited to medium-sized deals. The TMT industry remains popular for private equity bidders, claiming 33% of public to private transactions

There were 4 non-UK private equity backed bidders: Starwood and the Vista Funds are incorporated in the US, AnaCap in Guernsey and Castik Capital in Luxembourg.

8. Financing the offer

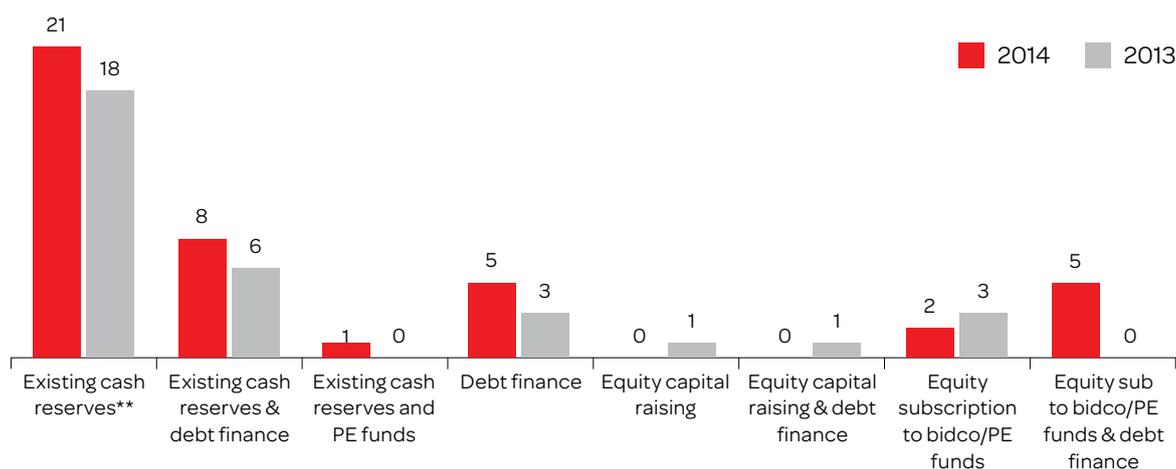
Of the 42 firm offers that involved a cash element (accounting for 88% of all firm offers in 2014), 21 were funded by existing cash resources only and 8 were financed with a combination of existing cash resources and debt facilities. 5 deals were funded by debt alone. See chart for details of the financing arrangements in the other 8 bids.

The continued use of existing cash reserves was largely due to the strong balance sheet positions of some UK bidders and their cash-rich non-European counterparts. With the availability of acquisition finance slowly improving, many sizeable deals successfully completed. Banks were more

prepared to lend, but only for credible transactions by dependable dealmakers, the largest deal in 2014 by deal value (*offer for Shire plc by AbbVie Inc.*) was partially funded by debt.

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.

2014 v 2013: Proportion of firm offers funded by cash from different sources*



*Based on 42 firm offers involving a cash element in 2014 and 32 in 2013.

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

Deals in Focus

Kentz Corporation Limited by SNC-Lavalin Group Inc.

SNC-Lavalin (GB) Limited's £1.16 billion all-cash offer for Kentz was partly financed by a new CAN\$2.75 billion facility with Bank of Montreal and Royal Bank of Canada made available to the bidder via inter-company loan.

Advanced Computer Software Group by the Vista Equity Partners

Financed via a combination of equity, invested indirectly by the Vista Funds, and debt from Morgan Stanley Senior Funding, Inc. and Goldman Sachs Bank USA (comprising (i) term facility of £320.5 million and revolving credit facility of USD\$50 million, and (ii) term facility of £128 million.

Songbird Estates plc by Qatar Investment Authority and Brookfield Property Partners L.P.

Qatar IA and Brookfield each provided 50% of the equity required to Stork Holdco L.P. (bid vehicle).

9. International bidders

Non-UK bidders continued to dominate the public M&A market in 2014, being involved in 8 of the 10 largest deals. Of the 48 firm offers announced, 30 were made by non-UK bidders (63%), which is broadly the same compared to 2013 (68%)¹. Only 37% firm offers were therefore made by a bidder incorporated in the UK.

Non-UK bidders accounted for almost £48.95 billion (81%) of the aggregate deal value in 2014. Of the deals made by

a non-UK bidder, the offer for *Shire plc* by US incorporated *AbbVie Inc.* had the highest deal value in 2014 (£32 billion). US incorporated bidders accounted for the majority of all deals involving foreign bidders (8 or 27%).

This is a continuing trend from 2013, when US bidders also accounted for the majority of deals involving a foreign bidder (6 or 23%).

Country of incorporation of bidder*	Number of bidders**	Total deal value (approx.)
United States	8	£36.4 billion
Germany	1	£4.4 billion
Qatar	2	£3.5 billion
Bermuda	2	£2.99 billion
Canada	2	£1.9 billion
Cayman Islands	2	£1.58 billion
The Netherlands	1	£296 million
Japan	1	£268.1 million
Belgium	2	£212 million
Guernsey	2	£131.6 million
Luxembourg	1	£122.6 million
Israel	1	£63.3 million
France	1	£41 million
British Virgin Islands	1	£23.4 million
Italy	1	£18 million
Malaysia	1	£17.2 million
Ireland	1	£10.7 million
Jersey	1	£8.6 million
Kazakhstan	1	£6.3 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 31 December 2014).

**Offers for *Songbird Estates plc* and *Fortune Oil plc* identified 2 joint non-UK bidders, both incorporated in different countries; these bidders were treated separately for country of incorporation comparison purposes.

1. Based on 26 firm offers made by non-UK bidders and a total of 38 firm offers in 2013.

US redomiciles - tax inversions

A driving force behind US bidder activity has been tax inversions, where US corporations re-domicile their headquarters overseas for tax savings. This was the case both in the possible offer for AstraZeneca plc and the offer for Shire plc, where the bidders confirmed their intention to redomicile the enlarged group in the UK.

However, this increasing tax inversion activity by US corporations has prompted the US administration to look again at the use of tax inversion strategies and has led to the US treasury department introducing new rules, closing certain corporation tax loopholes, including tax inversion.

The new rules severely curtail the benefits of the tax inversion model and therefore make it more difficult for US corporations to reduce the amount of tax they have to pay. Where tax reduction is the primary driving force for making a bid for an overseas company, bidders are likely to re-assess the merits of making such a bid. Going forward we are less likely to see bids for UK listed companies by US corporations until there is greater certainty on the new rules and what any forthcoming rules will look like.

“We have seen more takeover interest from overseas bidders this year in LSE listed targets. We believe this is a feature of how many global companies are now listed in London with greater transparency and corporate governance standards.”

Rebecca Gordon, Partner, Dentons

“Inbound investment in the UK from across the globe has been a real accelerant of public M&A. Advisers need to work closely with overseas bidders to navigate the complexities of the UK Takeover Code.”

George Swan, Partner, Freshfields Bruckhaus Deringer



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Deals in Focus

AstraZeneca plc by Pfizer Inc.

An offer period commenced for AstraZeneca with Pfizer's announcement on 28 April 2014 that it was in discussions with the company in relation to a possible offer. The announcement confirmed Pfizer's intention to redomicile the enlarged group in the UK in order to avoid tax liability under the US tax regime. AstraZeneca turned down a number of proposals offers by Pfizer, including a final possible offer made on 18 May 2014, which was rejected as it considered that Pfizer's approach was driven by cost savings and tax minimisation and that an offer for the company would present significant risks to target shareholders, employees and the global life sciences sector. On 27 May 2014, the date of the PUSU deadline, Pfizer announced that it did not intend to make an offer.

Shire plc by AbbVie Inc.

US incorporated AbbVie announced on 20 June 2014 that it had submitted an indicative proposal for Shire which had been rejected by the target board. On providing the transaction rationale, AbbVie set out its intention to create a 'competitive tax domicile' by re-domiciling the enlarged group in the UK. A £32 billion recommended merger was announced on the date of the PUSU deadline. After 89 days AbbVie announced its intention to reconsider its recommendation for AbbVie stockholders to approve the merger and stated that it would consider the impact of recent changes to US tax legislation on the financial benefits of the transaction. On 20 October 2014, AbbVie announced that both parties had agreed to terminate the merger.

Synergy Health plc by STERIS Corp

An offer was announced for Synergy Health by US incorporated STERIS in the second half of the year. In the offer announcement STERIS outlined its intention to lower its annual tax rate to 25% by re-domiciling its tax base in the UK. The offer is currently ongoing and it remains to be seen whether US bidders will follow STERIS and engage in tax further inversion deals in 2015 despite the US administration's moves to prevent this means of tax avoidance.

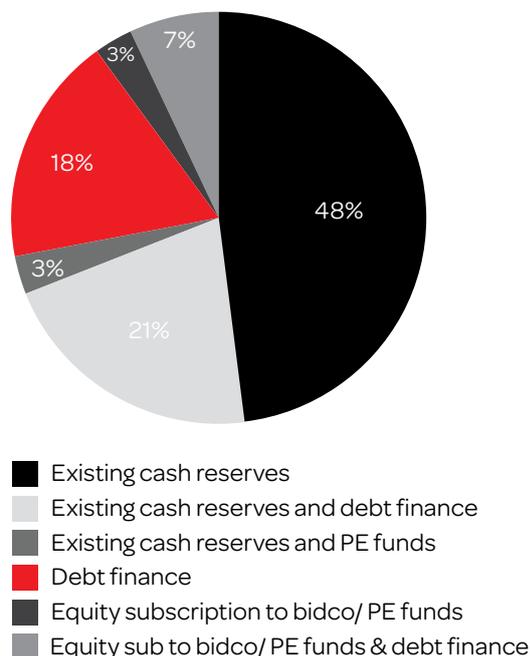
Financing non-UK bids

Of the 30 firm offers made by non-UK bidders, cash formed an element of the consideration in all but one deal (97%).

The exception was the all-share nil-premium merger of *TUI Travel plc and TUI AG*, implemented by way of a scheme under which new *TUI AG* shares (to be listed in the UK as well as traded on the regulated markets in Germany) were offered to *TUI Travel* shareholders.

For the 29 deals where cash formed an element of the consideration, 14 were financed by existing cash reserves (48%), only 6 were financed with a combination of existing cash reserves and debt finance (21%), 5 were solely financed by debt facilities (18%), 2 were financed with a combination of equity subscription to bid vehicle / private equity funds & debt finance (7%), 1 by existing cash reserves and private equity funds (3%) and the other by equity subscription to bid vehicle / private equity funds (3%).

2014: Bid financing by non-UK bidders



10. Possible offer outcomes: announcements v withdrawals

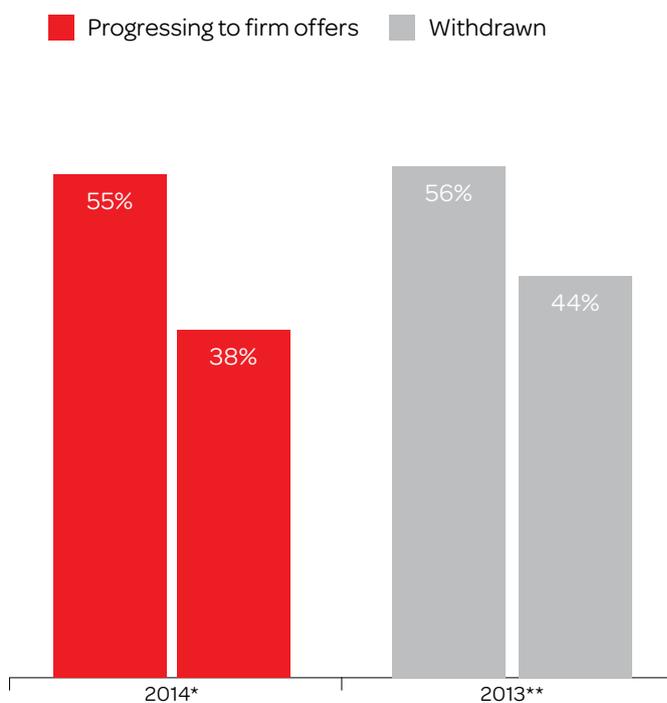
We reviewed a total of 27 possible offer announcements made under Rule 2.4 in 2014 which identified a potential bidder. We also included 2 possible offer announcements made in late 2013 (possible offers for *Pochin's plc* and *Manroy plc*) which were followed up by firm offer announcements in 2014.

In respect of the 29 targets subject to a possible offer in 2014, 16 (55%) resulted in a firm offer during the review period, and 2 (7%) were ongoing as at 31 December 2014. Only 11 possible offers (38%) were withdrawn during 2014.

The two ongoing possible offers are *SEPLAT Petroleum's* 'highly preliminary approach' for *Afren* and *H&H Group's* indicative cash offer for *John Swan and Sons*, both announced in December 2014.

The likelihood of possible offers progressing to firm remained broadly the same across 2014 and 2013, but there was a greater chance of possible offers being withdrawn in 2013. However, a more accurate comparison can be made when the outcome of the 2 possible offers which remained ongoing as at 31 December 2014 is determined.

2014 v 2013: Possible offers under Rule 2.4 - outcomes



*Based on 29 transactions in 2014 (includes possible offers for *Manroy* and *Pochin's* announced in 2013 which progressed to firm in 2014).

**Based on 32 transactions in 2013 (excluding possible offers for *Manroy* and *Pochin's*).

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11. Put up or shut up regime

Firm offers

In 2014 an offer period began with a firm offer announcement under Rule 2.7 of the Code in relation to 15 Main Market companies and 17 AIM companies, including 5 deals which were Rule 9 mandatory bids. Consequently, 32 (67%) of the 48 firm offers announced were not subject to the automatic put up or shut up (PUSU) regime, and only 16 (33%) were. This is an indicator of increased bidder certainty compared with 2013, where an offer period commenced with a firm offer announcement in only 42% of deals¹.

Possible offers

An offer period for 27 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. This is 21% fewer compared to 2013², reflecting bidders' preference to make a firm offer at the outset. A number of possible offer announcements referred to potential joint bidders or consortiums, but only 3 identified more than one potential bidder (*Salamander*, *Nakama* and *Prezzo* all identified three potential bidders). Spirit Pub Company was subject to two separate Rule 2.4 announcements by different bidders within the same 31 day period.

Formal sale processes

For a further 9 targets, an offer period began with an announcement that they were commencing a formal sale process; 33% more compared to 2013³. 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

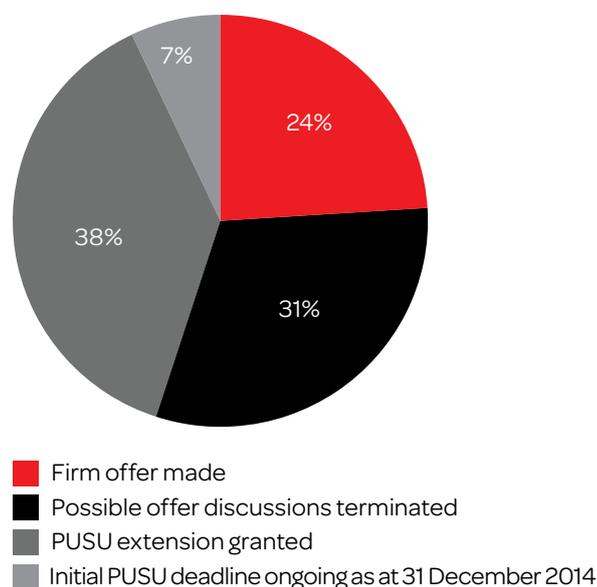
In 2014, firm offers were made for 7 (24%) of the 29 targets⁴ subject to ongoing possible offers during the initial 28 day PUSU period. Offers for another 11 (38%) targets were subject to at least one PUSU deadline extension and 9 (31%) did not proceed beyond their initial deadline. Of the 11 offers subject to a PUSU extension, multiple extensions to this deadline were granted by the Panel for 3 possible offers.

The remaining 2 possible offers (for *Afren plc* and *John Swan and Sons plc*) were still within their respective initial PUSU periods as at 31 December 2014. If we follow these two deals beyond our 2014 review period, *Afren* announced an 11-day extension and *John Swan* a 28 day extension in January 2015.

The length of PUSU extensions granted in 2014 varied widely, depending on the reason for the request, with first extensions ranging from 3 to 56 days. The Panel was more likely to grant lengthier extensions for deals with a high value. A 56 day extension was granted for the possible £3.8 billion *Dixons/Carphone Warehouse merger* and to *TUI AG* on its possible £4.4 billion offer for *TUI Travel plc*. Firm offers were announced in both deals within the 56 day PUSU extensions.

This is further evidence to suggest that the Panel's more restrictive PUSU regime introduced in September 2011 is working to reduce the number of speculative bids and to encourage potential bidders to do their homework and to maintain secrecy until they are ready to make a firm offer.

2014: Possible offers subject to an initial PUSU deadline - outcomes



The Panel has considered deal size and complexity when granting PUSU extensions

1. 16 (of the total 38 firm offers) commenced with a firm offer announcement in 2013.

2. 34 possible offer announcements made under Rule 2.4 of the Code in 2013.

3. 6 formal sale processes recorded in 2013.

4. Figure of 29 targets includes possible offers for *Manroy* and *Pochin's* both announced in the second half of 2013 and which continued into 2014.

Deals in Focus

Possible offer for Pochin's plc by James Nicholson and the members of the Cedric Pochin concert party

A possible offer was first announced on 8 December 2013. Six months on from the initial announcement of a possible offer, and following six PUSU extensions, the bidder announced a firm offer.

Possible offer for Manroy plc by Herstal SA and Beretta Holding S.p.A. and U.S. Ordnance, Inc.

An offer period commenced on 26 November 2013 with an announcement that Manroy was in preliminary talks with Herstal, Beretta Holdings and U.S. Ordnance. Two days later Manroy announced that discussions with U.S. Ordnance had terminated. The potential bidders were each granted three separate extensions to their PUSU deadlines. On 28 March 2014, Herstal announced a firm offer for Manroy, which was followed three days later by an announcement by Beretta Holdings that it did not intend to make an offer.

Possible offer for TUI Travel plc by TUI AG

A possible offer by TUI AG for TUI Travel was announced on 27 June 2014 and on the date of the initial PUSU deadline (25 July 2014) a PUSU extension of 56-days was granted at TUI Travel's request in order to allow the parties to continue their merger discussions. Only four days before the expiry of this extended PUSU deadline, TUI AG announced a recommended all-share merger with TUI Travel.



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12. Formal sale processes (FSPs)

In 2014, 9 companies announced a formal sale process (2 Main Market, 7 AIM). Interestingly, in each of these cases the announcement was made in the wider context of a strategic review of the company's options.

Of these 9 FSPs, only 1 (11%) resulted in an offer being made for the target in 2014 (offer for *Waterlogic plc* by *Castik Capital S.À R.L.*) and another 5 (55%) concluded without an offer being made. 3 (33%) FSPs were still ongoing as at 31 December 2014.

There has been a decline in the number of firm offers announced as a result of a FSP compared to 2013. Of the 6 companies engaged in a FSP in 2013 (including 2 FSP announcements made in late 2012 - *Datong* and *Valiant* - which were still ongoing in 2014), 3 resulted in a firm offer being made.

Despite the fewer number of FSPs concluding with an offer being made, their usage increased during 2014, with 125% more announced compared to 2013. This indicates an upward trend in the use of FSPs as a mechanism for the possible sale of UK public companies, although the numbers are still too small to make any definitive calls.

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.

Exclusions include commitments by a bidder for the benefit of a target (provided it is not a reverse takeover) (Rule 21.2(b)(v)).

Under a FSP, the Panel may 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.

Deals in Focus

Salamander Energy plc

An offer period commenced on 30 April 2014 on Salamander's announcement that it was reviewing its options, including a sale of the company, to be conducted by way of a FSP. The process terminated on 21 July 2014 with Salamander's announcement that it had reached agreement with a third party for the disposal of its 40% working interest in an oilfield located in the Gulf of Thailand.

Over 3 months after the termination of the FSP, Salamander announced (on 27 October 2014) that it was in discussions with both (i) *Ophir Energy plc* and (ii) *Compañía Española de Petróleos, S.A.U.* and *Strategic Energy* in relation to a possible offer. A firm offer was announced by *Ophir Energy plc* 28 days later (on the date of the PUSU deadline).

CPP Group plc

The board of CPP decided that in light of its financial position it would be in the best interests of the company's shareholders (and creditors) to seek potential offerors by means of a formal sale process, which it announced on 14 November 2014. The FSP was concluded over a month later, when CPP announced that it had secured new equity funding (via a £20 million placing) which, combined with a restructuring of its liabilities and refinancing of its debts, provided, in its view, the best value for all stakeholders.

Waterlogic plc

On 30 June 2014 *Waterlogic* announced that, as a result of an unsolicited approach from a third party to acquire one of its subsidiaries, it would be reviewing its options, including a sale of the company, to be conducted by a FSP. On 12 November 2014, almost 5 months after the commencement of the FSP, Luxembourg-incorporated *Castik Capital* announced a firm offer for the company which was welcomed by the target board.

Elektron Technology plc

Following a strategic review of its options to maximise shareholder value, *Elektron* announced on 7 April 2014 that it was initiating a FSP. A number of approaches by potential purchasers were received, including an indicative offer conditional on certain shareholders giving hard irrevocable undertakings. However, discussions broke down after two of the company's major shareholders announced they would not accept such an offer, if made. *Elektron* decided to terminate the FSP only 10 weeks later, announcing it had decided instead to pursue an equity fundraising.

13. Offer-related arrangements

Cooperation agreements 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 48 firm offers announced in 2014, 10 involved the bidder and target entering into a cooperation agreement and a further 4 featured 'Bid Conduct Agreements', making 29% in all. Usage of cooperation (and bid conduct) agreements increased by over 350% compared to 2013, when only 3 (8%) of the 38 firm offers featured such agreements.

All of the cooperation agreements recorded in 2014 were entered into in the context of a scheme, 7 in respect of Main Market targets and 3 for AIM. 9 out of the 10 agreements covered target share schemes and the assignment of various awards and options in respect of those schemes. 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.

The 4 schemes featuring bid conduct agreements all involved targets listed on the Main Market. In the agreement entered into in the course of Al Mirqab Capital's offer for Heritage Oil, each party agreed to discuss and cooperate in good faith with a view to finalising an appropriate offer structure to result in the bidder holding 80% of the target's ordinary shares, and to collaborate on the conduct of discussions with the target's shareholders, liaison with the Panel and press and on decisions in relation to the offer.

2014 schemes	
Cooperation Agreements	Bid Conduct Agreements
Advanced Computer Software Group plc by the Vista Equity Partners	Fortune Oil plc by Vitol Holdings B.V. and First Level Holdings Limited
CSR plc by Qualcomm Incorporated	Heritage Oil plc by Al Mirqab Capital SPC
F&C Asset Management plc by Bank of Montreal	Hyder Consulting plc by Arcadis N.V.
Friends Life Group Limited by Aviva plc	Hyder Consulting plc by Nippon Koei Co Ltd
MCB Finance Group plc by International Personal Finance plc	
Probability plc by GTECH S.p.A.	
Salamander Energy plc by Ophir Energy plc	
Shire plc by AbbVie Inc.	
Spirit Pub Company plc by Greene King plc	
Wolfson Microelectronics by Cirrus Logic, Inc.	

“Notwithstanding the Code restrictions on wide-ranging cooperation agreements, bidders will continue to seek the comfort of some form of offer-related arrangement, especially where the target operates in a regulated sector.”

George Swan, Partner, Freshfields Bruckhaus Deringer

Break fees

There was one instance of the Panel granting a dispensation from the prohibition on break fees under Note 2 on Rule 21.2 (formal sale process dispensation). Following a formal sale process initiated by *Waterlogic* which lasted for nearly 5 months, *Castik Capital* announced a firm offer. The parties were granted dispensation to enter into a break fee arrangement under which, on the occurrence of a break fee event, *Waterlogic* was to pay the *Castik Capital*'s bid vehicle a compensation fee of £1.23 million.

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 2014 there were two instances of a bidder agreeing to pay a reverse break fee to the target if the transaction failed to complete. In the offer for *Mecom Group plc* by *De Persgroep N.V.*, the fee was €2.5 million. In the offer for *Shire plc*, *AbbVie*, the fee was 3% of the deal value on the date of the possible offer announcement.

The exclusion is not limited to reverse break fees. In the same deal, *AbbVie* undertook to *Shire* to reimburse the costs and expenses incurred by *Shire* in connection with the offer, up to a maximum of USD\$500 million, if *AbbVie*'s stockholders did not approve the merger. The reverse break fee and the reimbursement payment (set out in a cooperation agreement) were mutually exclusive. On 20 October 2014, *AbbVie* announced that both parties had agreed terminate the merger and that it was liable to pay *Shire* a reverse break fee amounting to USD\$1.635 billion.



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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 2014, 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 48 firm offers announced in 2014, in 11 instances (23%) one or multiple irrevocable undertakings given by non-director shareholders contained matching or topping rights in the event of a competing bid. Of these 11, 6 (55%) provided for a matching right, 4 (36%) for a topping right and the remaining deal (9%) for both matching and topping rights (*office2office plc by Evo Business Supplies Limited*).

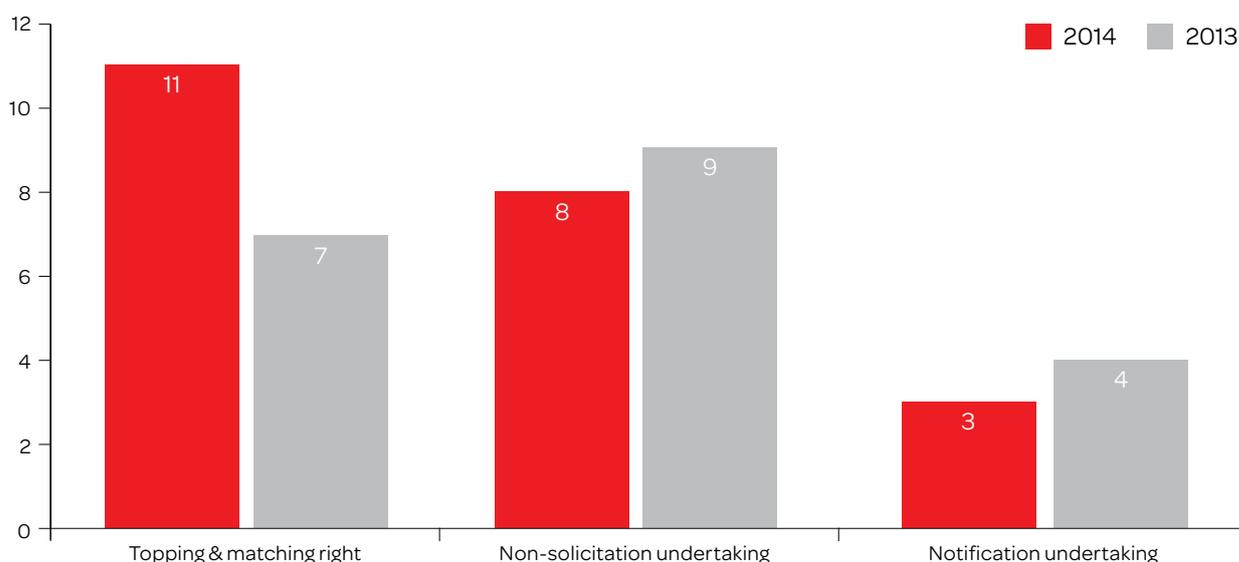
These rights allow the original bidder a limited period of time in which to match or improve on a higher competing offer before the undertaking lapses.

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

In 8 cases (17%), 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. In 3 of the 48 firm offers (6%), these undertakings 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.

Usage of topping and matching rights, non-solicitation undertakings and notification undertakings has remained relatively similar compared to 2013.

2014 v 2013: Comparison of non-director shareholder irrevocable undertakings



Target directors' irrevocables

Irrevocable undertakings and letters of intent are excluded from the definition of an 'offer-related arrangement' (Rule 21.2(b)(iv)). Irrevocables provide bidders with important protection now that most other traditional methods of reducing execution risk have been prohibited. The Panel is, however, continuing to take a hard line with director irrevocables, showing that it is prepared to enforce its position as set out in its Practice Statement No. 27 to halt the rising trend of directors' irrevocables incorporating deal protection measures by the back door (see below).

In 2014, there were two offers where the Panel deemed certain commitments in the target directors' irrevocable undertakings to be prohibited offer-related arrangements and, accordingly, required them to be replaced with revised irrevocables.

The Panel continues to take positive steps to enforce the Code

Irrevocable undertakings – Practice Statement 27

Irrevocable undertakings are sought to secure as much comfort as possible that the bid will be successful, particularly after the removal of other traditional deal protection measures in September 2011. They enable the bidder to show it has substantial support for its offer as soon as it is announced and may also assist in obtaining the target board's recommendation.

Following the ban on break and inducement fees etc, the practice had developed of including deal protections in irrevocables given by director shareholders. The Panel's Practice Statement 27, issued in January 2014, reminds practitioners that such irrevocables should cover no more ground than undertakings given by non-director shareholders, and should be limited to provisions which have the sole purpose of giving effect to the commitment to accept the offer (or vote in favour of the scheme). These include undertakings not to dispose of shares or withdraw their acceptance or to elect a specific form of consideration, and representations on title to shares. The Panel gives a non-exhaustive list of prohibited commitments:

- not to solicit a competing offer
- to recommend an offer to target shareholders
- to notify the bidder on becoming aware of a potential competing offer
- to convene board meetings and/or vote in favour of board resolutions which are necessary to implement the offer
- to provide information in relation to the target for due diligence or other purposes
- to assist the bidder with the satisfaction of its offer conditions
- to assist the bidder with the preparation of offer documentation, and
- to conduct the target's business in a particular way during offer period

A key point is that Panel regards such commitments as having been entered into in the individual's capacity as a director of the target, and not as a shareholder.

Deals in Focus

Pochin's plc by James Nicholson & the Cedric Pochin concert party

Pochin's directors gave undertakings containing commitments:

- to provide the bidder with relevant offer information and to notify the bidder on becoming aware of any material change to this information, and
- not to make any public statement or take any action in their capacity as shareholders likely to prevent the offer conditions being fulfilled or delay or impede the success of the offer

Less than a month following the firm offer announcement, Pochin's announced that the Panel deemed that these commitments amounted to prohibited offer-related arrangements. Pochin's directors were therefore required to be released from them, but fortunately for the bidder, agreed to enter into new ones without the offending commitments.

ACM Shipping Group plc and Braemar plc

ACM (target) directors gave irrevocable undertakings to vote in favour of the scheme which included a commitment not to solicit a competing offer for the company. Over a month after the firm offer was announced, Braemar confirmed, following discussions with the Panel, that it should not have included the non-solicitation commitments and that revised undertakings without this commitment would be put in place.

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 20 (42%) of the firm offers announced in 2014 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.

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 21 of the 48 firm offers (44%), 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.

For one deal where the target had no employees (offer for *Tamar European Industrial Fund Limited* by *Starwood Capital Group*), the bidder stated that it would not change the target's business locations or redeploy any of its fixed assets.

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.

Drafting Examples

Spirit Pub Company plc by Greene King plc

'Spirit Board and the Greene King Board both recognise that in order to achieve some of the expected benefits of the combination of Spirit and Greene King, it will be necessary to perform a detailed review of how best to incorporate Spirit into the Combined Group.

The synergy work carried out to date has confirmed the potential to generate cost savings for the Combined Group in areas such as overlapping corporate and support functions where there may be duplication, which the Greene King Board anticipates will involve headcount reductions of less than 1% of the workforce of the Combined Group. However, at this stage, Greene King has not yet fully developed proposals as to how such headcount reductions will be implemented.'

Waterlogic plc by Castik Capital S.À R.L.

'[Bidco] recognises the strength and experience of the existing management team and employees of Waterlogic and confirms that its current plans for Waterlogic do not include (i) any

changes to Waterlogic Management and employees; (ii) any changes to the principal location of the Waterlogic Group's business save for considering the relocation of the Waterlogic Group's office in Basingstoke elsewhere within the UK; or (iii) any redeployment of the Waterlogic Group's fixed assets.

'[Bidco] confirms that it has given assurances to the Waterlogic Independent Directors that the existing employment and pension rights of all 16 Waterlogic employees will be fully safeguarded on completion of the Acquisition and that it will comply with the Waterlogic Group's pension obligation for existing employees.'

Tamar European Industrial Fund Limited by Starwood Capital Group

'[Bidco] does not intend to change the location of TEIF's place of business or to redeploy any of its fixed assets. TEIF has no employees, does not operate any pension schemes and does not have any arrangements in place for any employee involvement in capital.'

Post-offer undertakings and post-offer statements of intention

During *Pfizer's* possible offer for *AstraZeneca*, *Pfizer* stated publicly that (subject to a successful combination with *AstraZeneca*) it would make several binding commitments for a minimum of five years. *Pfizer's* statements caused confusion in the market—there was uncertainty about their weight, impact and enforceability in the event of non-compliance by *Pfizer*.

In direct response to *Pfizer's* statements, the Panel Executive issued on 15 September 2014 its Consultation on post-offer undertakings and statements of intention, proposing amendments to the Code to deal with post offer assurances. The amendments to the Code became effective on 12 January 2015 (Rule 19.7 on post-offer undertakings and Rule 19.8 on post-offer statements of intention).

With these changes 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 now 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.

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.

We shall be following this market development with interest and will report on its advance in our next report, to be published in H2 2015.



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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 48 offers firmly announced in 2014, there were only 3 instances of the target's employee representatives issuing such an opinion (see inset box). Statistically speaking, this is an improvement of 50% over 2013, when only 2 opinions were issued, although less than impressive in terms of the numbers.

Of the 3 opinions issued in 2014, only 2 were expressly positive towards the takeover. The employee representative did not give a definitive opinion one way or the other in the other deal (*Friends Life Group*).

Poor employee representative involvement in UK public M&A continued in 2014

Drafting Examples

Mecom Group plc by De Persgroep N.V.

Published on website - The European Works Council of Mecom

'In principle we are positive towards the takeover of Mecom by De Persgroep, and we are confident in a future under DPG. We share a belief in the value of media and publishing, and we are looking forward to continued development of the companies.'

Friends Life Group Limited by Aviva plc

Contained in Scheme Document - Unite the Union

'With predicted cost savings of £225 million already announced, employees of both companies will be concerned about how this might impact them and their colleagues. Unite the Union has members at both Aviva and Friends Life and expects both companies to commit to working closely and constructively with the Union and in particular to seek to avoid compulsory redundancies.'

Consultation must be both full and meaningful, and challenges from employee representatives should be welcomed to ensure that any decisions made are fair, robust and sustainable. Unite the Union consider that Friends Life has benefited from having the Union as the formally recognised body to represent, consult and bargain for all employees.'

CSR plc by Qualcomm Inc.

Contained in Scheme Document - CSR Technology GmbH in Germany ("Works Council")

'[CSR's] employees...welcome Qualcomm's intention to acquire CSR. It would be much appreciated if the Works Council is informed and consulted at an early stage about the planned integration review so that it is in a position to contribute to a fast and smooth combination of the two businesses.'

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 on those schemes of its strategic plans, 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 48 firm offers made in 2014, bidders disclosed their intentions (or made a negative statement) in 16 (33%) cases. This is more a case of the dwindling number of defined benefit schemes, rather than an indication of non-compliance with the Code.

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)(i)

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.

Deals in Focus

Essar Energy plc by Essar Global Fund Limited

The target board was hostile and did not provide the bidder with sufficient access to details of its pension schemes. As a result, the bidder indicated in the offer document that it had not formed any plans for the target's defined pension schemes.

Toye plc by Mr Bryan Toye

The bidder stated in the offer document that plans for it to make contributions to the target's defined benefit pension scheme would be reviewed 'in the ordinary course'. No plans (or a negative statement) in regard to changes to the scheme were given by the bidder.

Drafting Examples

Perform Group plc by Access Industries group

'the Purchaser's plans for the Company do not involve...any change to employer contributions into Perform's pension scheme(s), the accrual of benefits for existing members of such schemes and/or the admission of new members.'

Dixons Retail plc and Carphone Warehouse Group plc

'Carphone and Dixons intend that, following implementation of the Scheme, Dixons will continue to comply with all of its pensions obligations, including its commitment to make employer contributions. It is not expected that the defined benefit section of the ... Scheme will be reopened to new entrants or future accrual for existing members.'

office2office plc by Evo Business Supplies Limited

'EVO intends to continue the existing arrangements to fund the deficit in the [defined benefit] Pension Scheme. It is expected that EVO will continue to discuss the funding

and investment strategy in relation to the Pension Scheme with the Trustees following completion of the office2office Acquisition.'

ACM Shipping Group plc and Braemar Shipping Services plc

'Following the completion of the Merger...the management of the Enlarged Group intends, by means of a consultation exercise following due process to the extent required by applicable law, to close the ACM Defined Benefit Pension Scheme to future accruals.

It is Braemar's current intention to continue the current employer contribution arrangements for the funding of the ACM Defined Benefit Pension Scheme (including the funding of any scheme deficit), to continue on their current terms without change until a new schedule of contributions is agreed with the trustees pursuant to the requirements of the Pensions Act 2004 in relation to the actuarial valuation with an effective date 31 March 2014.'

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.

Only 2 opinions were given by a pension scheme trustee in 2014 (offers for *F&C Asset Management plc* and *Friends Life Group*) – the same as in 2013. In both cases the opinions were preliminary in nature. There is currently nothing to suggest that the low take-up by pension trustees of the opportunity to publish their opinion on an offer is any more likely to improve in 2015 than the take-up in respect of employee representatives' opinions (see section 16. above).

Pension scheme trustees are still failing to provide their opinions

Deals in Focus

F&C Asset Management plc by Bank of Montreal

F&C received an opinion in relation to the F&C pension plan. The trustees benefited from a guarantee (expiring on 31 July 2014) given by F&C covering funding obligations up to £120 million. Under the guarantee, if F&C failed to meet any liability to pay pension contributions, the trustees would have a claim on the assets of the whole F&C group.

The trustees commenced discussions with BMO to understand the potential implications of the transaction on the Plan in order to ensure that the Plan continues to have access to F&C's assets and that BMO will not take any action which reduces the inherent value of such assets.

Friends Life Group Limited by Aviva plc

Aviva received an opinion from the trustees of Friends Life's pension scheme. As the trustees had only engaged in preliminary discussions with Aviva and Friends Life, the trustees considered it 'too early' to provide an opinion on the effects of the offer on the pension scheme.

Drafting Examples

F&C Asset Management plc by Bank of Montreal

'The Trustees of the Plan currently benefit from a guarantee from F&C Asset Management plc (the "**Guarantee**") covering the funding obligations of the Plan's direct sponsor up to a maximum of £120m (which was agreed at a level sufficient to cover the Plan's anticipated solvency deficit at 31 March 2010 with some leeway for volatility). The Guarantee expires on 31 July 2014.

As result of this Guarantee, the Trustees would have a claim on the assets of the whole F&C group to meet any liability to pay pension contributions while it is in force.

Following the announcement of the Offer, the Trustees have commenced discussions with the bidder to understand the potential implications of the transaction for the Plan with a view to protecting members' interests in the enlarged Group, as appropriate. In particular, they are seeking to ensure that the Plan continues to have access

to the assets of the whole F&C group and that the bidder could not take any action...which reduces the inherent value of such assets.'

Friends Life Group Limited by Aviva plc

'The Trustee is still at an early stage in terms of its assessment of the impact of the Offer on the FPPS [defined benefit pension scheme]. However, at this stage some uncertainties and possible risks appear to be introduced by the Offer as well as some potential improvements in covenant [imposing liability on Friends Life to fund the pension].

The Trustee is seeking to understand these areas with the help of Friends Life and Aviva and is engaged in constructive dialogue in this regard...these discussions are still continuing and it is too early for the Trustee to reach a final opinion on the effects of the Offer on the FPPS'

Deals included in the report

2014: Firm offer announcements

ACM Shipping Group plc and Braemar Shipping Services plc (merger)
 Advanced Computer Software Group plc by the Vista Equity Partners
 Allocate Software plc by HG Capital LLP
 Armour Group plc by Mr Bob Morton and Mrs Susan Morton
 Avanta Serviced Office Group plc by Toscafund Asset Management LLP
 Brightside Group plc by AnaCap GP II Limited
 CSR plc by Qualcomm Incorporated
 Daisy Group plc offer by Toscafund Asset Management LLP, Penta Capital LLP and Matthew Riley
 Dixons Detail plc and Carphone Warehouse Group plc (merger)
 Essar Energy plc by Essar Global Fund Limited
 Expansys plc by Mr Peter Jones
 F&C Asset Management plc by Bank of Montreal
 Fortune Oil plc by Vitol Holdings B.V. and First Level Holdings Limited
 Friends Life Group Limited by Aviva plc
 Fusion IP plc by IP Group plc
 Green Compliance plc by APC Technology Group plc
 Heritage Oil plc by Al Mirqab Capital SPC
 Hyder Consulting plc by Arcadis N.V.
 Hyder Consulting plc by Nippon Koei Co Ltd
 incadea plc by Dealertrack Technologies, Inc.
 Kentz Corporation Limited by SNC-Lavalin Group Inc.
 Mallett plc by The Stanley Gibbons Group plc
 Manroy plc by FN Herstal SA
 MCB Finance Group plc by International Personal Finance plc
 Mecom Group plc by De Persgroep N.V.
 Mediterranean Oil & Gas plc by Rockhopper Exploration plc
 Motivcom plc by Sodexo SA
 office2office plc by Evo Business Supplies Limited
 Pan European Terminals plc by Belphar Limited
 Perform Group plc by Access Industries group
 Pilat Media Global plc by SintecMedia Ltd
 Pochin's plc by James Nicholson & the Cedric Pochin concert party
 Prezzo plc by TPG Capital LLP
 Probability plc by GTECH S.p.A.
 Salamander Energy plc by Ophir Energy plc
 Shire plc by AbbVie Inc. (merger)
 Songbird Estates plc by Qatar Investment Authority and Brookfield Property Partners L.P.
 Spirit Pub Company plc by Greene King plc
 Straight plc by One51 plc
 Sunkar Resources plc by Almas Mynbayev
 Synergy Health plc by STERIS Corporation (merger)
 Tamar European Industrial Fund Limited by Starwood Capital Group
 Tex Holdings plc by The EB Burrows 2001 Settlement Trust
 The Narborough Plantations plc by Riverview Rubber Estates, Berhad
 Toye & Co plc by Bryan Toye
 TUI Travel plc and TUI AG (merger)
 Waterlogic plc by Castik Capital S.À R.L.
 Wolfson Microelectronics plc by Cirrus Logic, Inc.

2014: Possible offer announcements

Afren plc by SEPLAT Petroleum Development Company plc
 AstraZeneca plc by Pfizer Inc.
 Balfour Beatty plc and Carillion plc
 Bellzone Mining plc by China Sonangol International Singapore Pte. Ltd.
 CSR plc possible offer by Microchip Technology Inc.
 Daisy Group plc by Toscafund Asset Management LLP, Penta Capital LLP and Matthew Riley
 Dixons Retail plc and Carphone Warehouse Group plc
 Elektron Technology plc by Microgen plc
 Essar Energy plc by Essar Global Fund Limited
 F&C Asset Management plc by Bank of Montreal
 Friends Life Group plc by Aviva plc
 Incadea by Dealertrack Technologies, Inc.
 Iomart plc by Cinven
 John Swan and Sons plc by H&H Group plc
 London Capital Group Holdings plc by Spreadex.com Limited
 MCB Finance Group plc by International Personal Finance plc
 Mothercare plc by Destination Maternity Corporation
 Nakama Group plc by Talent International Holdings Pty. Limited and The Rethink Group plc
 Prezzo plc by Advent and TPG Capital LLP
 Salamander Energy plc by Ophir Energy plc, Compania Espanola de Petroleos and Jynwel Capital
 Shire plc by AbbVie Inc.
 SnackTime plc by Uvenco UK Ltd
 Songbird Estates plc by Qatar Investment Authority and Brookfield Property Partners L.P.
 Spirit Pub Company plc by Greene King plc
 Spirit Pub Company plc by C&C Group plc
 Straight plc by One51 plc
 TUI Travel plc by TUI AG

2014: Formal sale processes

CPPGroup plc
 Elektron Technology plc
 Empyrean Energy plc
 Interquest Group plc
 Max Petroleum plc
 Salamander Energy plc
 Sinclair IS Pharma plc
 Volga Gas plc
 Waterlogic plc

2014: Commencement of offer period

Infinis Energy plc

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