



Tracking the market:
Trends in UK public M&A
deals for the first half of 2013

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Tracking the market: Trends in UK public M&A deals for the first half of 2013

Background and research approach

LexisNexis conducted research to examine current market trends in respect of UK public M&A deals in the first half of 2013. We reviewed a total of 24 transactions that were subject to the Takeover Code (“the Code”), 17 of which were firm offers (three for Main Market companies, 14 for AIM) and seven of which were possible offers (six for Main Market companies, one for AIM). There has been a greatly reduced deal flow when compared with the previous year, although a number of deals that have completed in 2013 are sizeable.

This report aims to provide an insight into the dynamics of public M&A activity within the UK. The study focuses on market trends for Q1 and Q2 of 2013 (1 January – 30 June 2013) based on a detailed analysis of public M&A deals that have been the subject of announcements within this period, whether firm or possible. A number of trends emerged; among them were the continued preference for schemes of arrangement on the larger deals, the decline in the level of takeover activity backed by private equity bidders, the increase in popularity of cash consideration and the granting of dispensations from disclosing market flex terms until the offer or scheme document is posted.

“The first six months of 2013 saw the continuing trend of reduced public M&A deal flow in the UK. Whilst a number of factors point to a likely increase in activity in the second half of the year, many prospective bidders remain reluctant to embark on a public M&A deal, against the backdrop of perceived full stock market valuations, adverse shareholder sentiment and perceived regulatory uncertainty and delay.”

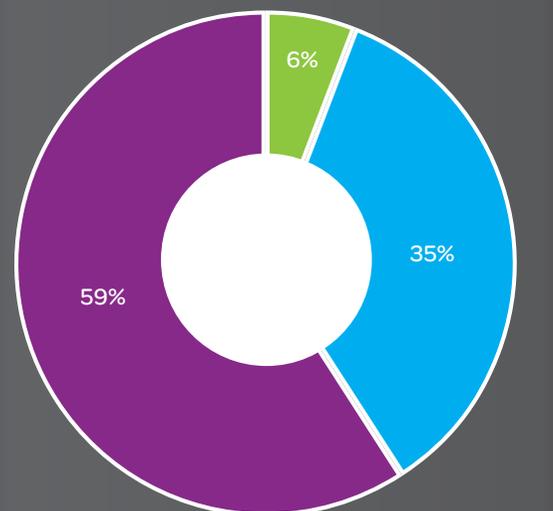
Piers Prichard Jones, Partner, Freshfields Bruckhaus Deringer LLP

1. Deal structure

Structuring the deal to suit particular circumstances:

Schemes of arrangement remain popular among bidders: of the 17 firm offers announced in the first half of 2013 which were subject to the Takeover Code (three for Main Market companies and 14 for AIM companies), six were by way of scheme of arrangement and one offer provided a right to elect to implement the deal by way of a scheme.

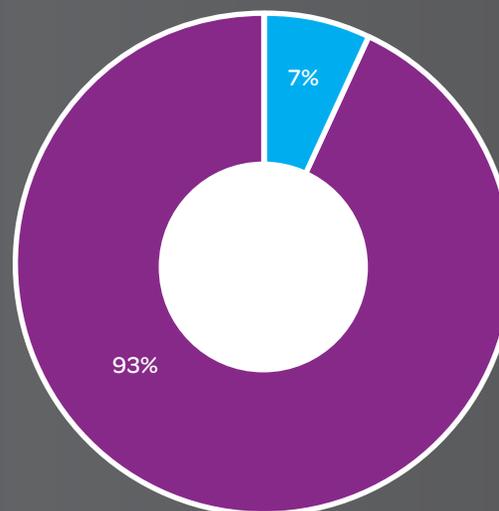
Firm offers in the first half of 2013 which were structured by way of scheme of arrangement or offer (17 transactions)



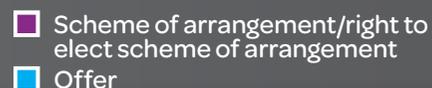
Proportion of total deals (%)



Proportion of aggregate deal value of firm offers in the first half of 2013 structured by way of scheme of arrangement or offer



Total aggregate deal value for firm offers in first half of 2013 = £4160.86 million



Deal size affects structure:

- In the first half of 2013, a scheme of arrangement was more often agreed where the deal was larger in size.
- Four out of five of the largest deals firmly announced in the first half of 2013 were structured by way of a scheme of arrangement. The remaining deal, valued at £3.04 billion, provided a right to elect to implement the acquisition by way of a scheme (*Alexander Machkevitch, Alijan Ibragimov, Patokh Chodiev, the State Property and Privatisation Committee of the Ministry of Finance of the Republic of Kazakhstan and Kazakhmys PLC for Eurasian Natural Resources Corporation PLC*).
- Of the remaining 12 deals, ranging between £1.07 million and £106.1 million in value, only two were structured as a scheme (*United Farmers Holding Company for Continental Farmers Group plc* and *The Parkmead Group plc for Lochard Energy Group PLC*) with the remaining ten, many of which were smaller transactions, structured by way of contractual offer.

Schemes of arrangement generally remain the preferred form of offer on the larger deals

2. Target response: recommended or hostile?

Target board recommendations were a priority for most bidders in the first half of 2013. Of the 17 firm offers announced, 14 (82%) received a target company recommendation but only 13 (76%) of these retained the recommendation or, in the case of ongoing recommended offers, remain recommended as at 30 June 2013.

In one instance, the bidder's offer was initially recommended by the target board but was subsequently lost following the announcement of a more favourable competing offer (*Costain Group plc for May Gurney Integrated Services plc*). Those offers that did not gain favour with the target board from day one of the offer period were instead met with either an expressly hostile board (6%) or no definitive recommendation (12%).

Of the seven possible offers announced in the first half of 2013 that failed to progress to either a firm or a mandatory offer, three of the target boards were expressly hostile (43%) and three did not give a definitive response either way (43%). The most common reasons attributed to the target boards' rejections were due to the undervaluation of the target company, its underlying assets and growth prospects and offers being either opportunistic or highly conditional. For the remaining deal, the company put itself up for sale through a formal sale process (thus commencing an offer period), which it later terminated due to an absence of offers (*Ark Therapeutics Group plc*).

Of all 24 deals examined, both firm and possible, only 14 of these received express recommendations from the target board (58%). A recommendation by the target board had a significant influence on the ultimate success of a bid: all but one of the offers that received a recommendation from the target

Target response to firm offers announced in the first half of 2013



Target response and outcome for all deals announced in the first half of 2013 (24 transactions)



board proceeded to completion (93%). The one recommended offer that did not complete, *Costain Group plc for May Gurney Integrated Services plc*, lost favour with the board following a higher competing offer and subsequently lapsed.

In comparison, only two out of ten (20%) offers that were either hostile or received no definitive recommendation from the target board proceeded to completion or were ongoing, as at 30 June 2013. Based on our findings, recommended offers are

therefore almost five times as likely to complete successfully as deals which are not recommended. In most cases where no definitive recommendation was given, the bid was in its early stages and the offer was withdrawn before the board could provide a response.

Deals in focus

Hostile bid:

Alexander Machkevitch, Alijan Ibragimov, Patokh Chodiev, the State Property and Privatisation Committee of the Ministry of Finance of the Republic of Kazakhstan (“Consortium”) and Kazakhmys PLC for Eurasian Natural Resources Corporation PLC (“ENRC”)

The target board of Eurasian Natural Resources Corporation PLC was expressly hostile in respect of the offer by the Consortium. Following the announcement of a firm offer by the Consortium, the target board indicated that it considered that the offer materially undervalued ENRC, its underlying assets and growth prospects and therefore it could not recommend the proposed offer to the target shareholders at that level. Moreover, the board of Kazakhmys PLC (which had a 26 per cent shareholding in ENRC and was treated as a party to the offer for the purpose of the Code, following the ruling by the Panel Executive on the basis that Kazakhmys' shares were included as part of the consideration), publicly acknowledged that the offer may have undervalued the target but concluded that there was no prospect of obtaining improved terms.

Following acceptance of the offer by Kazakhmys pursuant to its irrevocable undertaking, and the offer then being declared unconditional as to acceptances, the Consortium indicated that

it hoped ENRC would reconsider the offer and recommend its shareholders to accept. As at 30 June 2013, the offer was still ongoing.

Offer recommended but recommendation subsequently withdrawn: ***Costain Group plc for May Gurney Integrated Services plc***

An all-share offer by *Costain Group plc for May Gurney Integrated Services plc* was initially recommended by the target board when first announced in March 2013. The offer valued the target at £164.5 million. Following a significantly higher competing cash and share offer of £221 million by Kier Group plc, Costain's bid lost favour with the board and the recommendation was withdrawn. Consequently, Costain opted not to make a revised offer, citing the interests of its shareholders as the reason for its decision and instead allowed its offer to lapse.

No definitive recommendation: ***Pyrrho Investments Limited for MWB Business Exchange plc***

In *Pyrrho Investments Limited for MWB Business Exchange plc*, the board welcomed the approach by Pyrrho as they considered that shareholders would get significantly greater value than under the existing

offer by Regus plc. Although the board did not give a definitive recommendation as to the merits of the offer, the board recommended that shareholders should await further developments and should take no further action in respect of their shareholding. Regus plc subsequently made a revised increased offer which was declared wholly unconditional in all respects.

No definitive recommendation: ***Kimono Investment Holdings Limited and Mrs Susan Vandyk for Evolve Capital plc***

Kimono Investment Holdings Limited for Evolve Capital plc was another deal where no definitive recommendation was given by the target board. In this deal, only one of the target's directors was not a member of the concert party and thus the only director considered to be independent, for the purposes of the Code, to assess the merits or otherwise of the offer. The board did not consider it appropriate to give a definitive recommendation since they considered that the offer price did not reflect the value of the target. Accordingly, they suggested that shareholders should themselves carefully consider their own individual circumstances in determining whether or not they should accept the offer, in addition to considering the company's position, prospects and potential.

3. Nature of consideration

The total value of those deals firmly announced in the first half of 2013 was £4160.86 million. Only one of the 17 firm offers announced had a deal value of over £1 billion, *Alexander Machkevitch, Alijan Ibragimov, Patokh Chodiev, the State Property and Privatisation Committee of the Ministry of Finance of the Republic of Kazakhstan and Kazakhmys PLC for Eurasian Natural Resources Corporation PLC*, where the deal was valued at £3.043 billion. The average deal value for this six month period was £244.76 million and the median deal value was £30.81 million, although the former is skewed slightly by the very high deal value of the offer for Eurasian Natural Resources Corporation PLC.

Of the 17 firm offers announced, three (18%) offers involved a combination of consideration types and for the remaining 14 (82%), shareholders could accept one form of consideration only (i.e. either all-cash or all-shares and in one case, a loan note alternative). Of those 14, 11 were all-cash offers (65%), two were all-share offers (12%) and one offered a loan note alternative (6%). In summary, 15 of the 17 firm offers had a cash element, either solely or as a combination, accounting in total for 88% of firm offers announced in Q1 and Q2 of 2013.

The popularity of cash consideration is due to a combination of factors, most notably the need for certainty of value in a challenging deal-making environment, continuing volatility in equity markets, strong balance sheet positions of some UK bidders and a substantial proportion of UK target companies attracting foreign bids. Bidders were able to accommodate this, particularly as the transactions in this period were

relatively small in comparison to those effected in 2012. A variety of consideration structures were witnessed in the first half of 2013 with some bidders offering flexible alternatives to all-cash or all-share offers; these included loan note alternatives, contingent value rights (deferred consideration) and mix and match facilities:

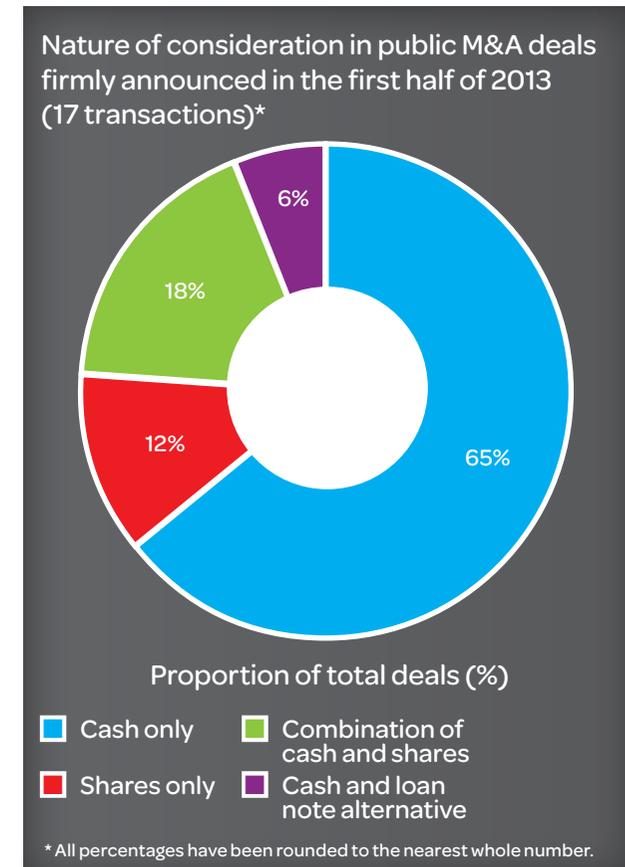
Loan note alternative

An unsecured loan note alternative was offered by Abu Dhabi Capital Management LLC in respect of its cash offer for Northacre PLC (*Abu Dhabi Capital Management LLC for Northacre PLC*). Northacre shareholders were given the option of electing to accept either the cash offer or the loan note alternative for their entire (but not part) holding of Northacre shares. The loan notes were unsecured, non-transferable and were interest bearing with interest payable upon the redemption date of the loan notes, at a rate of 10% per annum. The availability of the loan note alternative was conditional upon the consent of the Jersey Financial Services Commission to the issue of the loan notes.

Contingent value rights

In *United Farmers Holding Company for Continental Farmers Group plc* (“CFG”), shareholders were offered the right to receive deferred consideration upon the registration of up to 7,000 ha of unregistered land which, at the date of the offer, formed part of the target’s land bank in the Ukraine.

Shareholders were deemed to accept the basic offer, which included the deferred consideration, unless they elected to receive the cash alternative of 36 pence in cash for each CFG share. Under the basic offer, shareholders agreed to receive 35 pence in cash for each CFG share and up to a further 2 pence in cash for each CFG share by way of deferred consideration, contingent upon the amount of land registered during the period commencing 1 May 2013 and ending on 31 October 2014.



Cash remained the preferred form of consideration within UK public M&A due to the strong balance sheet positions of some UK bidders and a substantial proportion of UK target companies attracting foreign bids.

Mix and match

Kier Group plc's offer for May Gurney Integrated Services plc included a "mix and match facility", where May Gurney shareholders were given the option of varying the proportions of cash and new Kier shares they received on their sale of shares to Kier Group plc. This means of giving the May Gurney 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.

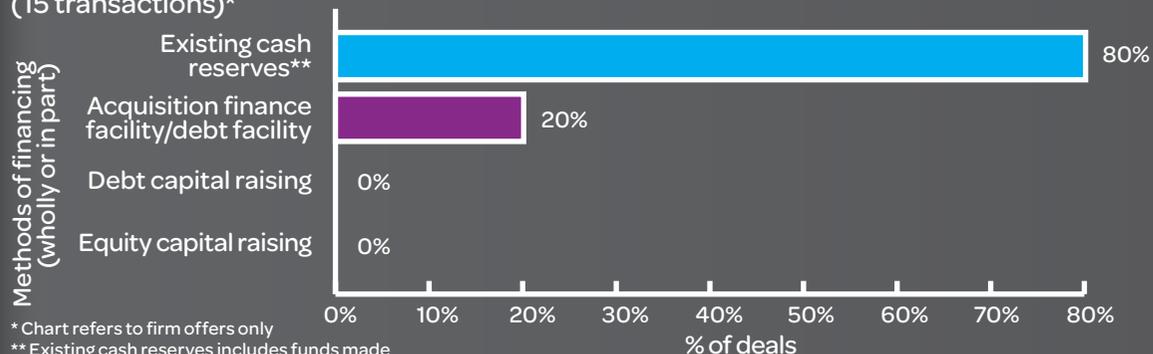
consideration (given that the bids were still in their early stages), two offered cash-only consideration, two offered all shares and one offered cash or a share and loan note alternative. In addition, in *Ark Therapeutics Group plc*, although an offer period commenced on the announcement of a formal sale process, no bids were forthcoming save for one possible offer which did not specify the likely form or level of consideration and which was subsequently withdrawn.

4. Financing the offer

For the six month period we examined, of the 15 firm offers that involved a cash element (accounting for 88% of all firm offers in the first half of 2013), 12 were funded by existing cash reserves only and just three were funded, either wholly or in part, by acquisition finance facilities/debt facilities. The rise in the 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, several sizeable deals successfully completed in the first half of 2013. Banks were more prepared to lend but only for credible transactions by dependable dealmakers. The three deals funded by acquisition finance were the three largest deals announced in Q1 and Q2 by value.

Proportion of deals in the first half of 2013 funded by cash from different sources (15 transactions)*



* Chart refers to firm offers only

** Existing cash reserves includes funds made available pursuant to inter-company loan agreements

Deals in focus

FS Africa Limited (BIH S.A. and Rainer-Marc Frey) for Lonrho Plc

The £174.5 million cash consideration payable pursuant to FS Africa Limited's bid for Lonrho PLC was financed through equity contributions provided by BIH S.A. and Rainer-Marc Frey as members of the consortium formed for the purpose of implementing the acquisition. FS Africa relied solely on these equity contributions and did not require the use of third party debt finance.

Ithaca Energy Holdings (UK) Limited (Ithaca Energy Inc) for Valiant Petroleum plc

The cash element payable by Ithaca Energy Inc under the terms of its £203 million cash and share offer for Valiant Petroleum plc was funded by utilising funds made available

to its bid vehicle pursuant to a bridge credit agreement entered into between Ithaca, Ithaca's bid vehicle and a variety of lenders, together with Ithaca's existing cash resources. The bridge credit facility provided a facility of US\$350 million to bridge the transfer of Valiant's assets into Ithaca's existing borrowing base facility, with such funds utilised to satisfy the cash consideration payable under the terms of the acquisition and the repayment of all outstanding Valiant debt.

Kier Group plc for May Gurney Integrated Services plc

On 22 April 2013, Kier Group plc entered into a £50 million term loan facility and a £70 million revolving credit facility agreement with a number of lenders to fund the cash element of its £221 million cash and share offer for May Gurney Integrated Services plc.

Market flex in focus

Market flex relates to the provisions in debt facilities which permit the arranger to change the pricing and, on occasions, the terms of the loan, if market conditions require, in order to successfully syndicate the loan. Under Rule 24.3(f) of the Code, the offer document must contain a description of, among other things, how the offer is to be financed and the source of the finance. In addition, under Rule 26.1(b) any documents relating to the financing of the offer are required to be published by 12 noon on the day following the announcement of an offer.

Under such rules, the bidder would normally be obliged to disclose details relating to the loan, including the limits set out within the market flex provisions at the time of the announcement of a firm intention to make an offer. Publicly disclosing the market flex arrangements would have the likely effect of distorting the market in favour of the potential syndicate members, as they would have knowledge of the maximum amount to which the lead arrangers could flex particular terms of the loan. Potential syndicatees would be

likely to negotiate more favourable terms and it would be difficult to avoid flexing the terms of a loan right up to the agreed limit, thereby increasing financing costs for the bidder.

One particular trend emerging from recent deals financed by third party debt is the Panel's general willingness to grant dispensations from the requirement to disclose market flex terms (under Rule 26.1(b)) until the offer or scheme document is posted. The main advantage of obtaining such a dispensation is that the lead arranger has an opportunity to syndicate the debt in the window of up to 28 days prior to the offer document being published. If the debt is syndicated by that time, the market flex provisions will have become redundant and so will not have to be disclosed. In the event that the debt is not syndicated by the time the offer or scheme document is required to be posted, the market flex arrangements must still be described in the offer documents and the terms of the loan disclosed via publication on a website.

"If requested by a bidder, the Panel has generally been willing to grant the dispensation from the requirement to disclose market flex terms until the offer or scheme document is posted. If the bidder is under pressure to post quickly – for example because the bid may be competitive – and/or the syndication may take some time – the dispensation doesn't necessarily solve the problem for the bidder."

Piers Prichard Jones, Partner, Freshfields Bruckhaus Deringer LLP

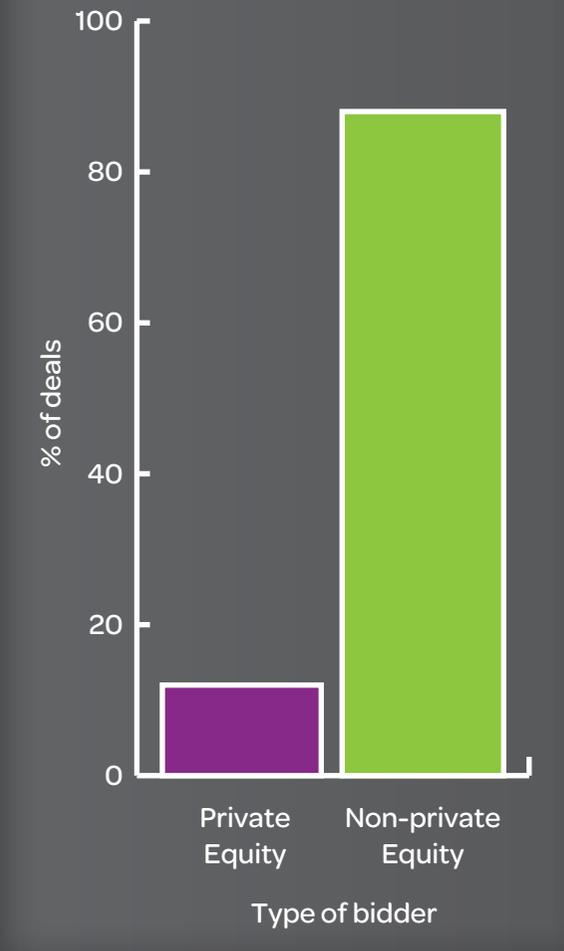
5. Private equity bidders: public to private transactions

In the first half of 2013, of 17 firm offers announced for Main Market or AIM companies, only two were private equity backed bids (12%). This shows a marked difference from previous years and other international markets where private equity bidders have become increasingly active within public M&A, primarily due to depressed market prices and the significant amounts of capital many private equity funds have raised and retained in the past few years.

“There are a number of possible reasons for the low level of UK P2P activity including full stock market valuations following the rally in equities and a perception in some quarters that UK P2Ps are becoming more challenging to execute, particularly where the target board is not receptive to a deal. However, sponsors continue to look at possible P2Ps and most are unlikely to be deterred by a P2P if the prize is sufficiently attractive.”

Piers Prichard Jones, Partner, Freshfields Bruckhaus Deringer LLP

Firm offers in the first half of 2013 which have involved private equity backers



Deals in focus

Angel Acquisitions Limited (Toscafund Asset Management LLP and Ares Capital Europe Limited) for Healthcare Locums plc

Abu Dhabi Capital Management LLC for Northacre PLC

Both of these bids were for AIM target companies and in each case the bids were structured as contractual offers. For both private equity backed bids the deal value was relatively modest at £6.63 million and £25.65 million respectively, showing that for this period, private equity activity in the UK was limited to small and medium-sized deals.

6. International bidders

Non-UK bidders dominated the public M&A market in the first half of 2013, with seven of the ten largest deals involving foreign bidders. The international bidders came from a variety of countries and continents. Of the 17 firm offers announced, ten were by non-UK bidders (59%), accounting for almost £3,570 million (86%) of the aggregate deal

value in the first half of 2013. It should be noted that the offer announced by Alexander Machkevitch, Alijan Ibragimov, Patokh Chodiev, the State Property and Privatisation Committee of the Ministry of Finance of the Republic of Kazakhstan and Kazakhmys PLC for Eurasian Natural Resources Corporation PLC itself accounted for 73% of the aggregate deal value for Q1

and Q2 of 2013. Therefore only 41% of the firm offers announced in the first half of 2013 were made by a bidder incorporated in the United Kingdom, together representing just 14% of the aggregate deal value for this period.

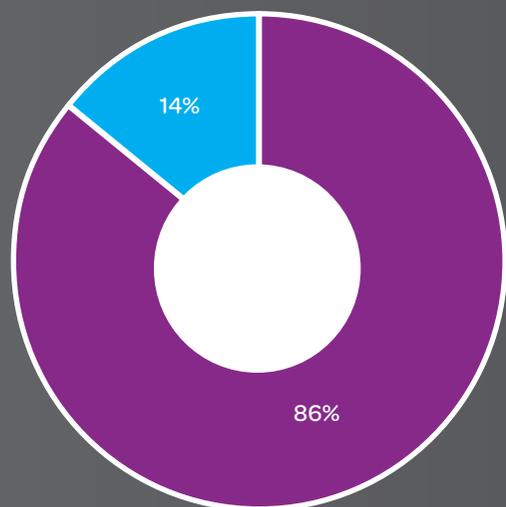
Country of incorporation of bidder*	Deal**	Total deal value (approx)
Republic of Kazakhstan	<i>Alexander Machkevitch, Alijan Ibragimov, Patokh Chodiev, the State Property and Privatisation Committee of the Ministry of Finance of the Republic of Kazakhstan and Kazakhmys PLC for Eurasian Natural Resources Corporation PLC</i>	£3,043 million
Canada	<i>Ithaca Energy Holdings (UK) Limited (Ithaca Energy Inc) for Valiant Petroleum plc</i>	£203 million
Republic of Ireland	<i>Pattington Limited for FfastFill PLC</i>	£106.1 million
British Virgin Islands	<i>Pyrrho Investments Limited for MWB Business Exchange plc</i>	£65 million
Kingdom of Saudi Arabia	<i>United Farmers Holding Company for Continental Farmers Group plc</i>	£61.5 million
Czech Republic	<i>CPI Group for Ablon Group Limited</i>	£30.81 million
United Arab Emirates	<i>Abu Dhabi Capital Management LLC for Northacre PLC</i>	£25.65 million
Philippines	<i>DMCI Mining Corporation for Toledo Mining Corporation plc</i>	£24.9 million
United States	<i>Cardtronics Inc. for i-design group plc</i>	£8.5 million
British Virgin Islands	<i>Kimono Investment Holdings Limited and Mrs Susan Vandyk for Evolve Capital plc</i>	£1.07 million

*For deals 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, lapsed or remained ongoing as at 30 June 2013).

Big deals by international bidders are driving public M&A in the UK

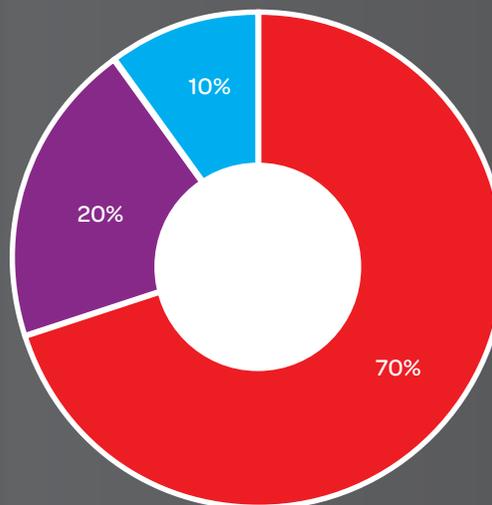
The proportion of aggregate deal value for Q1 and Q2 of 2013 attributed to UK and non-UK bidders



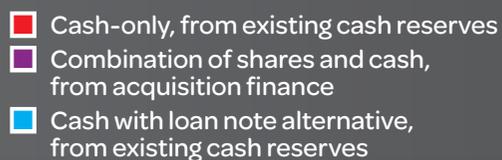
Total aggregate deal value of firm offers for the first half of 2013 = £4160.86 million



Consideration structures and bid financing by non-UK bidders in the first half of 2013



Proportion of total deals (%)



In relation to bid financing, of the ten firm offers made by non-UK bidders, including those that lapsed or did not proceed, eight were financed by existing cash resources only (80%), one of which offered a loan note alternative. Of the two bids financed, wholly or in part, by acquisition finance facilities (20%), in both instances a combination of cash and shares was offered.

80% of bids made by non-UK bidders were financed by existing cash resources

7. Competing and potential competing bids

There was a distinct lack of competitive tension in the UK public M&A market in the first half of 2013, with only four AIM target companies finding

themselves the subject of competing and potential competing bids. Moreover, only two of the four companies were the subject of competing firm

offer announcements, the other two subject only to potential competing bids.

Deals in focus

Kier Group plc for May Gurney Integrated Services plc and Costain Group plc for May Gurney Integrated Services plc

May Gurney Integrated Services plc found itself subject to two competing bids, both of which were structured by way of scheme of arrangement: a recommended all-share merger by Costain Group plc on 26 March 2013 and a higher competing cash and share offer by Kier Group plc on 24 April 2013, the former of which lost the target board's recommendation in favour of the latter. A day after Kier Group plc's competing offer was announced, Costain Group plc confirmed that it would not be making a revised offer and instead allowed the offer to lapse in accordance with its terms.

Pyrrho Investment Limited for MWB Business Exchange plc

MWB Business Exchange plc was subject to competing offers made by Regus plc (which announced an unsolicited all-cash offer of approximately £40 million on 20 December 2012) and

Pyrrho Investments Limited (which announced an all-cash offer of approximately £65 million on 14 February 2013). Regus plc was able to secure "matching rights" on its offer by means of an irrevocable undertaking from a shareholder of the target holding approximately 75% of its issued share capital, which gave it the option to raise its initial bid to the same level as Pyrrho's competing bid, plus at least £500,000. As a result, Regus announced a revised increased offer of £65.6m for MWB Business Exchange plc, representing a £600,000 increase on the figure bid by Pyrrho. The day after Regus plc announced the terms of its increased cash offer, the majority shareholder accepted it. The acceptance condition, which was the only condition to the revised offer, was satisfied and as a result Regus plc's revised offer was declared wholly unconditional in all respects.

Abu Dhabi Capital Management LLC for Northacre PLC

Northacre PLC announced that the company had received approaches and was in preliminary discussions with a number of parties. Despite the

announcement of multiple competing possible offers, Abu Dhabi Capital Management LLC was the only bidder to announce a firm offer for the company under Rule 2.7 of the Code, with the other potential bidders confirming that they did not intend to proceed with the offer.

Cantor Fitzgerald Europe, GAIN Capital Holdings Inc and City Index Limited for London Capital Group Holdings plc

On the 12 February 2013, London Capital Group Holdings plc announced that it had been approached by Cantor Fitzgerald Europe, GAIN Capital Holdings Inc and City Index Limited in regards to a possible acquisition of the company. Despite these three potential bidders being publicly identified in London Capital Group Holdings' possible offer announcement under Rule 2.4, not one of them chose to make a firm offer, instead announcing that they had "no intention to bid", in accordance with Rule 2.8 of the Code.

8. Formal sale processes

The rise in popularity of the formal sale process as a popular mechanism for the possible sale of UK listed companies is unsurprising, given the possibility that prospective bidders can avoid being publicly named (Note 2, Rule 2.6) and that a preferred bidder may benefit from a break fee or inducement fee agreement (under Note 2, Rule 21.2) where a formal sale process has been initiated, subject to obtaining a Panel dispensation, which is normally given.

Four of the target companies we reviewed commenced a formal sale process (three AIM, one Main Market), two of which were initiated in 2012. In all of these deals the announcement that the target company was commencing a formal sale process began an offer period.

Of the four target companies that commenced a formal sale process, three resulted in a firm offer

for the target company (all AIM) being announced within the first half of 2013. For the one formal sale process that did not result in a firm offer for the target (Main Market), the company chose to terminate the process six weeks later following a lack of bids, despite a number of parties having shown initial interest (*Ark Therapeutics Group plc*).

Deals in focus

The Parkmead Group plc for Lochard Energy Group plc

An offer period commenced on 3 September 2012 with Lochard Energy Group plc announcing that it was commencing a formal sale process for the entire issued and to be issued share capital of the company. The board had initially considered assigning two oil and natural gas discoveries to a third party through a farm-out process, but decided that there would be a higher level of interest were they to seek a buyer for the company. The Parkmead Group plc announced a firm offer for Lochard Energy Group plc on 23 May 2013, almost nine months after Lochard had announced that it was initiating a formal sale process.

Seven Technologies Holdings Limited for Datong plc

The board of Datong plc decided that it would be in the best interests of the company's

shareholders to seek potential offerors by means of a formal sale process, which it announced on 22 February 2013. As a consequence of this announcement, an offer period commenced in respect of the company. Almost three months after the commencement of the formal sale process, Seven Technologies Holdings Limited announced a firm offer for Datong plc.

Ithaca Energy Holdings (UK) Limited (Ithaca Energy Inc) for Valiant Petroleum plc

Following a strategic review of options open to the company to maximise value for shareholders, including the option of a sale of the business, Valiant Petroleum plc announced that it was initiating a formal sale process. On the 1 March 2013, almost six months after the commencement of the formal sale process (6 September 2012), Ithaca Energy Inc. announced a firm offer for the company which was welcomed by the target board.

Ark Therapeutics Group plc

Ark Therapeutics Group plc announced that it was starting a formal sale process on 21 January 2013. Following a number of failed funding strategies, Ark decided to review a number of alternative options open to the company to maximise value for shareholders, including a possible sale. A large number of potential purchasers were approached pursuant to the formal sale process and a number of them indicated early interest by conducting due diligence investigations. Save for one private equity fund, no other party participating in the process made an offer and, several weeks later, the private equity bidder withdrew its offer. Consequently, the target board terminated the discussions and took the decision to dispose of Ark Therapeutics Group plc's operating subsidiaries by means of a share sale, in light of pressure to meet existing financial commitments and avoid otherwise imminent insolvent liquidation.

9. Put up or shut up (“PUSU”) regime

Firm offers

In the first half of 2013 an offer period began with a firm offer announcement under Rule 2.7 of the Code in relation to six UK AIM companies and one Main Market company. Accordingly, the bidders were not subject to the automatic ‘put up or shut up’ (PUSU) regime. For one firm offer announced in 2013 (*Pyrrho Investments Limited for MWB Business Exchange plc*) the offer period commenced in December 2012 as a result of an earlier firm offer announced by a competing bidder, consequently it too was not subject to the PUSU regime.

Another deal completed in the first half of 2013 where the offer period began with a mandatory offer under Rule 9 of the Code (*DMCI Mining Corporation for Toledo Mining Corporation plc*) and as a result the PUSU deadline did not apply.

Possible offers

In respect of 11 target companies, an offer period began with an announcement under Rule 2.4 that identified a potential bidder and set out a PUSU deadline as required by Rule 2.4(c) of the Code. For one of these deals, the possible offer was announced in 2012 but was followed-up by a mandatory offer some months later in 2013 (*Abu Dhabi Capital Management LLC for Northacre PLC*). All other possible offers were announced in 2013.

Of these deals, five completed or were ongoing as at 30 June 2013, following either a firm offer or a mandatory bid. The remaining six 2.4 announcements were subsequently withdrawn.

A number of possible offer announcements referred to potential joint bidders or a consortium of companies and individuals, but only two of the 11 possible offer announcements identified more than one potential bidder (*Cantor Fitzgerald Europe, GAIN Capital Holdings Inc and City Index Limited for London Capital Group Holdings plc*, which identified three potential bidders and *Abu Dhabi Capital Management LLC for Northacre PLC*, which identified one other potential bidder).

Formal sale processes

For four deals announced or ongoing in the first half of 2013, an offer period began with an announcement by the target company that it was commencing a formal sale process. Accordingly, the Takeover Panel granted dispensations from the requirements for any interested party participating in that process to be publicly identified and to be subject to the compulsory 28-day PUSU deadline. Of these four deals, three resulted in a firm offer announcement for the target company. In respect of *Ark Therapeutics Group plc*, the target decided to terminate the formal sale process only six weeks after it was announced due to a lack of interest.

PUSU extensions

In respect of 11 target companies that have been subject to a possible offer (2.4 announcement) by a potential bidder, the Panel granted one or multiple extensions to the automatic 28-day ‘put up or shut up’ (PUSU) deadline on four potential bids. The length of the extensions varied widely, depending on the reason requiring the extension, with the first extension ranging from a single day to an extension of 37 days. In one case, the Panel granted a second extension of 92 days in recognition of the extended period of time required for the satisfaction of a number of pre-conditions relating to the completion of due diligence and new credit arrangements of the target (*Mr Hamish Macgregor Ogston CBE for CPPGroup plc*).

Target boards continue to request, and the Panel continues to grant, multiple extensions on a significant proportion of deals.

Deals in focus

Although not falling within the parameters of our research, it is interesting to note that a number of PUSU periods, having commenced in 2012, were still ongoing without a firm offer having been announced or a no intention bid statement having been made as at 30 June 2013.

Masraf Al Rayan Q.S.C for Islamic Bank of Britain plc (“IBB”)

A possible offer by Masraf Al Rayan Q.S.C for Islamic Bank of Britain plc was announced on 6 June 2012. Masraf Al Rayan Q.S.C was granted nine extensions to its PUSU deadline in respect of its possible offer, as at 30 June 2013. It has been over 12 months since Islamic Bank of Britain plc announced that it was in talks with Masraf Al Rayan Q.S.C about a possible offer. Discussions with the board of IBB and Masraf Al Ryan Q.S.C. regarding a possible offer for the whole of the issued share capital of IBB remained ongoing as at 30 June 2013.

EME Capital LLP for Theo Fennell plc

An offer period commenced on 5 September 2012 with an announcement that Theo Fennell plc was in preliminary talks with EME Capital LLP. The Panel granted nine extensions to EME Capital’s PUSU deadline, which at 30 June 2013 had still not been met with either a 2.7 or 2.8 announcement, 10 months on from the initial announcement of a possible offer. Having been locked in talks since last September, Theo Fennell plc and EME Capital LLP eventually came to an agreement on 1 August 2013, following discussions which in total required 10 PUSU extensions from the Panel.

10. Possible offer outcomes: announcements vs withdrawals

In respect of 11 target companies that have been subject to a possible offer by a potential bidder (one of which was announced in 2012 – *Abu Dhabi Capital Management LLC for Northacre PLC*), five (45%) of the possible offers announced, where a PUSU deadline was set, resulted in a firm offer for the target. The remaining six possible offers did not progress beyond a PUSU deadline (55%).

An offer period commenced for Ark Therapeutics Group plc following the announcement of a formal sale process, although the Panel granted a dispensation from the 28-day PUSU deadline to prospective bidders, as it could do for a formal sale

process. The process failed to attract sufficient interest and as a result Ark Therapeutics Group plc terminated it only six weeks after it was announced.

Further, Kier Group plc announced a possible offer for May Gurney Integrated Services plc in March 2013 but the offer was not subject to the compulsory PUSU deadline as Costain Group plc had announced a firm offer for the target one day earlier. Where a bidder has already announced a firm intention to make an offer for the target company, subsequent potential bidders are not bound by the PUSU requirements under Rule 2.6(a) of the Code.

11. Inducement fees and other offer-related arrangements

Dispensations from the prohibition on break fees

In two offers announced in the first half of 2013 where the target initiated a formal sale process, the Panel granted a dispensation under Note 2 on Rule 21.2, permitting the target company in each deal to enter into a break fee arrangement with a participating bidder who announced a firm offer under Rule 2.7 of the Code.

In the offer by Ithaca Energy Inc for Valiant Petroleum plc, the Panel consented to Valiant entering into a break fee arrangement with Ithaca, whereby Valiant

agreed to pay a break fee of £2.03 million in the event that a competing offer was announced prior to the acquisition lapsing or being withdrawn, where such competing offer became or was declared unconditional in all respects or otherwise became effective.

Similarly, in *The Parkmead Group plc for Lochard Energy Group plc* offer, the Panel consented to Lochard entering into a break fee arrangement with Parkmead, whereby Lochard agreed to pay Parkmead a break fee of £145,267.

Shareholder break fees

In one offer announced in the first half of 2013, the bidder, the target's majority (approximately 75%) shareholder and the shareholder's parent company entered into a break fee agreement, pursuant to which the shareholder was under an obligation to pay, and the shareholder's parent agreed to guarantee the performance by the shareholder of its obligation to pay, a break fee in the event that another competing bidder made a higher offer (*Pyrrho Investments Limited for MWB Business Exchange plc*). The payment and exact amount of the break fee was conditional upon the consideration in respect of the competing bidder's (Regus plc) revised offer being received by the shareholder.

Co-operation agreements

Rule 21.2 of the Takeover Code prohibits a target, a bidder or anyone acting in concert with them from entering into an inducement fee or other offer-related arrangement, unless the Panel's consent has been obtained. There are limited exclusions to this general prohibition, including commitments and undertakings between the target and bidder to maintain the confidentiality of information (provided that it does not include any other provisions prohibited under the Code), to provide information or assistance for the purposes of obtaining any official authorisation or regulatory clearance and not to solicit the target's employees, customers or suppliers. Irrevocable commitments and letters of intent, agreements relating to existing employee

incentive arrangements and agreements between an offeror and the trustees of any of the offeree company's pension schemes in relation to the future funding of the pension scheme, also fall within the limited exclusions to the general prohibition in Rule 21.2 of the Code. These commitments and undertakings are frequently contained in a form of co-operation agreement.

Of the 17 firm offers announced in the first half of 2013, in relation to one offer it was disclosed that a bidder and target had entered into a co-operation agreement (*Ithaca Energy Holdings (UK) Limited (Ithaca Energy Inc) for Valiant Petroleum plc*). The co-operation agreement related to existing Valiant share schemes and the assignment of various awards and options in respect of those schemes. Under the co-operation agreement, Ithaca as bidder agreed that appropriate employee outplacement programmes would be provided in the event that any redundancies resulted after the scheme of arrangement became effective. The co-operation agreement also included reciprocal obligations on the part of the bidder and target to use their reasonable endeavours to provide each other with information or assistance for the purposes of obtaining any official authorisation or regulatory clearance required in connection with the implementation of the acquisition.

Whilst the Code prohibits a target and bidder, or either of their concert parties, entering into any agreement or arrangement connected with an offer except with the consent of the Panel (Rule 21.2), commitments by a bidder for the benefit of

a target are permitted (provided it is not a reverse takeover). In Kier Group plc's offer for May Gurney Integrated Services plc, both parties entered into a costs reimbursement agreement, pursuant to which Kier undertook to May Gurney to reimburse it in respect of third party costs and expenses, up to a maximum aggregate amount of £150,000, in connection with due diligence investigations from the period of Kier's possible 2.4 announcement to the date of completion, lapse or Rule 2.8 "no intention to bid" announcement, whichever was the earlier.

Other permitted arrangements

In *FS Africa Limited (BIH S.A. and Rainer-Marc Frey) for Lonrho plc*, the target and bid vehicle entered into a loan agreement whereby FS Africa Limited agreed to provide Lonrho plc with a \$10 million loan facility, for the purpose of its general working capital requirements.

Notwithstanding anything contained within the loan agreement, it was agreed by the parties that should any provisions within the loan agreement contravene or be in conflict with Rule 21.2 of the Code (prohibition on offer-related arrangements), then those provisions would be severed, void and not bind either party, without prejudice to the other terms of the agreement (specifically the provisions relating to interest and repayment of the loan), which would remain in force and continue to bind the parties.

The prohibition on target break fees and offer-related arrangements has seen other forms of agreements gain greater prominence.

12. Irrevocable undertakings

Matching and topping rights

Of the 17 firm offers announced in the first half of 2013, in five instances (29%) one or multiple irrevocable undertakings given by non-director shareholders entitled the bidder to use matching or topping rights in connection with a competing bid. Matching or topping rights allow the original bidder a limited period of time in which to match (or in the case of topping rights, to improve upon) a higher competing offer.

In *Pyrrho Investments Limited for MWB Business Exchange plc*, Pyrrho was unsuccessful in its bid for MWB Business Exchange plc largely because Regus plc was able to secure “matching rights” on its offer through an irrevocable undertaking given by a 75% shareholder of the target, which enabled it to raise its initial bid to the

same level as Pyrrho’s competing bid, plus £500,000. Regus plc’s revised offer was subsequently declared unconditional as to acceptances.

Notification and non-solicitation 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 2013, irrevocable undertakings were given by non-director shareholders in favour of bidders, covering a variety of matters.

In three instances (*FS Africa Limited for Lonrho plc*, *Costain Group plc for May Gurney Integrated Services plc* and *Kier Group plc for May Gurney Integrated*

Services plc), irrevocable undertakings included an undertaking not to solicit competing bids (18% of the 17 firm offers announced), pursuant to which the shareholder agreed that it would not solicit or encourage third parties to make a competing offer for the target company. In two of the 17 firm offers announced (12%) (*FS Africa Limited for Lonrho plc* and *Cardtronics Inc. for i-design Group plc*), irrevocable undertakings included an obligation on the target’s shareholder to notify the bidder if third parties indicated an interest that could lead to an offer for the company. In almost all of the firm offers announced in the first half of 2013, irrevocable undertakings to accept a bidder’s offer were obtained from shareholders.

13. Disclosure of bidder’s intentions

Disclosure of the bidder’s intentions for the target’s assets and employees

Under Rule 24.2 of the Code, a formal offer to acquire a company should set out the bidder’s intentions in respect of the 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 company on employment, place of business and any fixed assets.

In over half of the firm offers announced in the first half of 2013 (nine or 53%), 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. In two other instances, the bidders were unable to confirm the likely effect of the acquisition

on employees until they had undertaken discussions (but not a strategic review) in relation to operational improvements and administrative restructuring (*Pyrrho Investments Limited for MWB Business Exchange plc* and *Costain Group plc for May Gurney plc*).

Under Rule 24.2(b) of the Code, where the offeror has no intention to make any changes in relation to employment of management and employees, the target’s place of business and redeployment of assets, or it considers that its strategic plans for the offeree company will have no repercussions on such matters, it must make a statement to that effect. In five of the 17 firm offers (29%), the bidders gave definitive statements that they had no intention, or at least no current intention, to relocate office sites or other places of business, make material changes to terms of employment or re-deploy any fixed

assets, post-acquisition. Despite such assurances, many bidders still stated that where synergies could be made, changes would be inevitable.

Where bidders were in a position to disclose more detailed information in respect of their intentions for the future of the target’s employees and business, plans usually related to the likely reduction in headcount of the target, the relocation of the target’s headquarters, the combining of administrative and operational functions and the resignation of the target board.

In another offer, the bidder confirmed that upon the scheme becoming effective the board of directors would resign and no third party contractors would be retained (*The Parkmead Group plc for Lochard Energy Group PLC*). Apart from its board of directors, the target company did not have any employees.

Disclosure of the bidder's intentions for the target's pension scheme

Bidding companies are now required to state, in the offer document, their intentions with regard to the target company's pension schemes and the likely repercussions of its strategic plans on such pension plans. If no change in respect to pension schemes

is intended, bidders are required to make a negative statement to that effect.

Given that the new pension obligations only took effect from 20 May 2013, on just one occasion did a bidder announce its plans for the target's pension scheme. In *The Parkmead Group plc for Lochard Energy Group PLC* offer, Parkmead included a

statement in its scheme document to the effect that as Lochard Energy did not have any existing company pension scheme in place, upon the scheme of arrangement becoming effective, Parkmead would not have any future pension scheme obligations relating to Lochard Energy.

14. Employee representatives' opinions

In the first half of 2013, in only two of the 17 firm offers announced did the target's employee representatives issue an opinion on the likely effects of the acquisition for the target workforce. In the two instances where opinions were given, they were generally positive or at worst neutral towards the proposed takeover. The fact that relatively few employee representatives' opinions were given may be indicative of employee representative apathy or that the transactions in the period were unlikely to result in significant job losses, but without an actual opinion being issued it is difficult to know. On both occasions the employee representatives' opinions were received after publication of the target board circular and were therefore published on the target company website (Rule 25.9).

Where employee representative opinions were given, employees generally agreed or at worst were neutral towards a proposed takeover

Deals in focus

Angel Acquisitions Limited (Toscafund Asset Management LLP and Ares Capital Europe Limited) for Healthcare Locums plc

In *Angel Acquisitions Limited (Toscafund Asset Management LLP and Ares Capital Europe Limited) for Healthcare Locums plc*, the opinion stated that employees generally agreed with the board's decision to recommend the offer and understood that there were limited other options available if the group wanted to continue to pursue its growth strategy. The employees were neutral about the likely impact of the acquisition on employment at the target.

The employees' only concerns related to changes in employment rights despite reassurances in the offer document that Angel Acquisitions would fully safeguard existing employment rights of both management and employees. These concerns were partly due to a lack of information on this point provided in the 2.7 (firm offer) announcement.

FS Africa Limited (BIH S.A. and Rainer-Marc Frey) for Lonrho plc

In *FS Africa Limited (BIH S.A. and Rainer-Marc Frey) for Lonrho plc*, the employee representatives' opinion stated that the employees generally agreed with, or, at worst, were neutral about the board's decision to recommend the offer and the likely impact of the acquisition on employment at Lonrho.

Generally the employees appeared to welcome the clear support that was being shown for the strategy being pursued by Lonrho and hoped that the acquisition would maintain stability within the business and allow the business to grow. Employees also expressed the hope that going forward they would continue to have a dialogue with the wider group to keep all companies within all sectors of Lonrho engaged in the business.

15. Pension scheme trustees' opinions

As of 20 May 2013, a target board is under an obligation to append to its circular any opinions relating to the likely effects of the acquisition on the target company's pension scheme, received from the pension scheme trustees, provided the opinion

is received prior to the publication of the circular. If the trustees miss the publication of the circular, the target is required to publish the trustees' opinion on its website. Furthermore, trustees also have a right to publish further opinions if an offer is revised.

Unsurprisingly, given these requirements were only recently introduced, no pension scheme trustees' opinions were given in the first half of 2013.

List of deals included in the report

Public M&A deals for the first half of 2013 (firm offer announcements, mandatory offers and possible offers)*:

1. *The Parkmead Group plc for Lochard Energy Group PLC*
2. *MedicX Fund Limited for Assura Group Limited*
3. *Alexander Machkevitch, Alijan Ibragimov, Patokh Chodiev, the State Property and Privatisation Committee of the Ministry of Finance of the Republic of Kazakhstan and Kazakhmys PLC for Eurasian Natural Resources Corporation PLC*
4. *FS Africa Limited (BIH S.A. and Rainer-Marc Frey) for Lonrho plc*
5. *Seven Technologies Holdings Limited for Datong plc*
6. *Tracsis plc for Sky High plc*
7. *CVC Capital Partners Ltd and ors for Betfair Group plc*
8. *United Farmers Holding Company for Continental Farmers Group plc*
9. *Kier Group plc for May Gurney Integrated Services plc*
10. *Mr Hamish Macgregor Ogston CBE for CPPGroup plc*
11. *DMCI Mining Corporation for Toledo Mining Corporation plc*
12. *Pattington Limited for FfastFill PLC*
13. *Cardtronics Inc. for i-design Group plc*
14. *Angel Acquisitions Limited (Toscafund Asset Management LLP and Ares Capital Europe Limited) for Healthcare Locums plc*
15. *Kimono Investment Holdings Limited and Mrs Susan Vandyk for Evolve Capital plc*
16. *Borealis Infrastructure Management Inc for Severn Trent plc*
17. *CPI Group for Ablon Group Limited*
18. *Cantor Fitzgerald Europe, GAIN Capital Holdings Inc and City Index Limited for London Capital Group Holdings plc*
19. *Ark Therapeutics Group plc*
20. *TUI AG for TUI Travel plc*
21. *Ithaca Energy Holdings (UK) Limited (Ithaca Energy Inc) for Valiant Petroleum plc*
22. *Abu Dhabi Capital Management LLC for Northacre PLC*
23. *Pyrrho Investments Limited for MWB Business Exchange plc*
24. *Costain Group plc for May Gurney Integrated Services plc*

*Information in relation to deals in this report is based on publicly available information including RNS announcements and offer documentation.

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