



ashurst

Quarterly Public M&A Review

Q3 2022



Overview

Thirteen firm offers were announced in Q3 2022 (compared with 16 in Q2 2022) with an aggregate offer value of approximately £20.7 billion (which represents an increase from £13.61 billion in Q2 2022). Of those 13 firm offers, 12 were solely for cash. These figures include the competing bids from Tetra Tech and WSP Global, for RPS Group.

In the last quarter, Ashurst's UK public M&A mandates have included advising:

- **Lamprell plc** on the joint offer from Blofeld Investment Management and AIGihaz;
- **Nomura International** on the £2 billion recommended cash offer for Mediclinic International plc comprising a consortium of Remgro and MSC Mediterranean Shipping Company;
- **Barclays** on the £1.3 billion recommended cash offer for Biffa plc from Energy Capital Partners; and
- **finnCap** on the £63.2 million recommended cash offer for Attraqt Group plc from CrownPeak Holdings, which is majority owned by K1 Investment Management.

After a summer that was dominated in the UK by a Conservative Party leadership election, further Central Bank interest rate hikes and a prolongation of the Russian invasion of Ukraine, September heralded the arrival of a new UK Government administration. The 'honeymoon period' traditionally afforded to new administrations however, proved relatively short lived after a fiscal event in mid-September sent shockwaves through the markets, causing UK gilt yields to soar and the value of sterling to plummet significantly against the dollar. Although attempts have subsequently been made to reassure and stabilise the markets, the ongoing macro-economic uncertainty – which has also resulted in a significant tightening in the credit markets – will likely continue to act as a dampener on UK public M&A activity for the remainder of 2022.

From a legal and regulatory standpoint, this update includes the usual summary of the Takeover Panel's annual report (published in July as normal) as well as some commentary on recent schemes of arrangements for companies with a single or small number of nominee shareholders and the practical challenges that are faced when implementing takeovers of such companies by way of a scheme. Further details of these and other matters are set out in the News Digest on pages 3 to 5 of the publication.

Finally, the Ashurst public M&A team is also pleased to announce that Ashurst has been awarded Corporate Team of the Year at the Legal Business Awards 2022 for advising on last year's high profile takeover of Morrisons.

13

ANNOUNCED BIDS

12

RECOMMENDED ON
ANNOUNCEMENT

11

SCHEMES OF
ARRANGEMENT

53.9%

AVERAGE OF BID PREMIA
(% UNWEIGHTED)

41.2%

AVERAGE OF BID PREMIA
(% WEIGHTED)

A summary of the key features of each announced offer is set out in a table in the Appendix.

News digest

Schemes of arrangement: difficulties relating to the requirement for a 'majority in number'

A recent scheme of arrangement application for Ortho Clinical Diagnostics Holdings plc ("**Ortho**") illustrated the challenges that the 'majority in number' of those voting or 'headcount' test from s899(1) of the Companies Act 2006 can bring about. For some UK public companies – particularly those with an overseas listing such as on Nasdaq or Euronext – a large proportion of their shares are held by a single or small number of nominees on behalf of many beneficial owners. In circumstances where these companies have been taken over by way of a scheme of arrangement, the following different solutions have been used to ensure that the headcount test does not obstruct an otherwise acceptable scheme.

- (a) *Re Equitable Life Assurance Society (No. 1) [2002] BCC 319* – Where a member has different beneficial owners who instruct the member to vote for or against the scheme, the court may direct that the member be counted as having voted both for and against. However, this approach may not produce a majority in number if there are only a few members in total because such votes cancel each other out.
- (b) *Re Cardtronics plc [2021] EWHC 1617 (Ch)* – Cardtronics (whom Ashurst advised) initially had only one registered member who was a nominee for American depository receipt holders. In order to satisfy the headcount test, two shares were converted into certificated form by two directors and they became registered members. The court noted that it would be informed as to the value of the underlying voting interests and was content that such arrangements did not amount to a manipulative share split. The court saw this as providing a pragmatic solution while acknowledging that different approaches existed. The key question was whether the court felt "able to rely on the outcome of the meeting as a true expression of the will of the members when the time comes for sanction".

- (c) *Re GW Pharmaceuticals plc [2021] EWHC 716 (Ch)* – In this case, the court accepted a different approach from *Equitable Life*: For the purposes of the headcount test, the chair of the court meeting should treat a holder of scheme shares (that cast a vote both for and against the scheme) as voting in favour if that holder cast more votes in favour than against, and otherwise the holder should be treated as voting against. As compared to *Equitable Life*, this means the nominee's vote would have an effect for one side.

Although for Ortho, the court considered that the *GW Pharmaceuticals* approach was best in the circumstances, whether to adopt the approach in *Cardtronics* or *GW Pharmaceuticals* is largely a matter of preference with both options having been found acceptable (it being noted that *Cardtronics* is more consistent with the legislation).

Overall, this demonstrates that the court is generally willing to adopt a pragmatic approach in finding a solution such that the headcount test does not obstruct an otherwise acceptable scheme.

News digest

The Panel's 2022 Annual Report and Accounts

The Panel published its latest Annual Report and Accounts, for the year ended 31 March 2022, on 19 July 2022.

Key points from the latest Annual Report and Accounts include the following.

- Activity levels were high in the first half of the 2021/2022 financial year – there were 33 announced firm offers which totalled £45 billion.
 - Activity levels, affected by economic conditions including the war in Ukraine, came down in the second half of financial year – there were 27 announced firm offers which totalled £11 billion.
 - The effect of Takeover Code changes that were implemented in July 2021 relating to offer timetables and offer conditions has not been fully felt as most takeover bids are structured as schemes of arrangement and not contractual offers.
 - There were numerous bids involving competing bidders. Two such situations were resolved by way of auctions overseen by the Panel Executive, namely the acquisition of Wm Morrison Supermarkets plc by Clayton, Dubilier & Rice, LLC (on which Ashurst advised Morrisons) and the acquisition of Augean plc by a consortium of investment funds (on which Ashurst advised Augean).
 - The Panel Executive issued four educational/warning letters and one letter of private censure in the past financial year.
- Key statistics are as follows.
 - Out of 60 firm offers, at the time of the firm offer announcement, 48 were structured as a scheme of arrangement and 12 were structured as a contractual offer (compared to 34 and 12 respectively, in the previous year).
 - Four offers were mandatory offers at the time of the firm offer announcement (compared to 2 in the previous year).
 - The Panel Executive granted 30 whitewash dispensations and 7 Code waivers (compared to 39 and 5 respectively, in the previous year).

News digest

Panel Bulletin No. 5 on possible offer announcements

Panel Bulletin No. 5, which was published on 20 July 2022, reminds financial advisers of guidance set out in Practice Statement No. 20. That Practice Statement sets out in detail how the Panel Executive normally interprets and applies provisions of Rule 2 of the Takeover Code, including steps expected of parties to a possible offer and their advisers. In particular, the Panel Executive expects that possible offer announcements are made within a matter of minutes once the Rule 2.2 requirement for an offeror or offeree company to make that announcement has been triggered. To that end, the Panel Executive expects financial advisers to prepare a draft announcement in advance which is complete, fulfils the Code requirements and has been approved by its client.

CLLS responds to Public Consultation Paper 2022/2

On 22 September 2022, the Joint Working Party of the Company Law Committees of the City of London Law Society and the Law Society of England and Wales published its response to the PCP 2022/2 regarding the presumptions of the definition of 'acting in concert' and related matters. The CLLS recognises that certain of these presumptions have become unwieldy in light of the complex structures operated by participants in UK public takeovers. It therefore welcomes the Panel's review of these matters. In its response, the CLLS also expresses concern over the proposed change in approach to funds (or consortia of funds) as it may add unnecessary complexity to transactions, in particular in relation to the treatment of limited partners.

Reduction from two to one AFME appointees to Takeover Panel

On 14 July 2022, the Takeover Panel amended the Code (by way of Instrument 2022/5) to reduce the number of members appointed by the Association for Financial Markets in Europe from two to one. This followed the retirement of a member of the Panel who had been appointed by the AFME's Securities Trading Committee. The AFME's Securities Trading Committee will no longer have a separate appointee.

First prohibitions under the National Security and Investment Act

The National Security and Investment Act came into force on 4 January 2022. The NSIA is a regime for the UK government to review investments and acquisitions on national security grounds. To read Ashurst's expert commentary on the first prohibitions under the NSIA and new guidance from the Department for Business, Energy & Industrial Strategy, please see [here](#).

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**CORPORATE TEAM
OF THE YEAR**
LEGAL BUSINESS AWARDS
2022

Announced* UK takeover bids

(1 July 2022 to 30 September 2022)

Target (Market)	Bidder(s)	Bid value	Bid premium**	Recommended	Hostile/No Recommendation	Rule 9 offer	Cash	Shares (L/U/A)	Other consideration	Mix and match	Offer***	Partial Offer	Scheme	Offer-related arrangements	Formal sale process	Non-solicit undertaking of bid in shareholder	Matching/Topping rights****	Shareholder vote	Profit forecast/QPFS
Attraqt Group plc (AIM)	Crownpeak Holdings, LLC	£63.2m	71.43%	•			•						•						
Biffa plc (Main Market)	ECPV, LLC	£1.3bn	28%	•			•						•						
RPS Group plc (Main Market)	Tetra Tech, Inc.	£636m	89.7%	•			•						•	•C ¹					
RPS Group plc (Main Market)	WSP Global Inc.	£591.1m	76%		• ²		•						•	•C					
AVEVA Group plc (Main Market)	Schneider Electric SE	£9.48bn	41%	•			•						•	•C					
Countryside Partnerships PLC (Main Market)	Vistry Group PLC	£1.25bn	9.1%	•			•	•L		• ³			•	•C				• ⁴⁵	• ⁶⁷
Diurnal Group plc (AIM)	Neurocrine Biosciences, Inc.	£48.3m	144%	•			•						•	•				• ⁸	
Micro Focus International plc (Main Market)	Open Text Corporation	£1.8bn	98.3%	•			•						•	•C				• ⁹	
MySale Group plc (AIM)	Frasers Group plc	£18.99m	25.7%		•		•				•								
Ted Baker plc (Main Market)	Authentic Brands Group, LLC	£211m	11.4%	•			•						•	•C	•	• ¹⁰			
Mediclinic International plc (Main Market)	Remgro Limited MSC Mediterranean Shipping Company SA	£3.7bn	19%	•			•						•	•C					• ¹¹
Lamprell plc (Main Market)	Blofeld Investment Management Limited AlGihaz Holding Closed Joint-Stock Company	£38.8m	NP	•			•				•		•	•C					
Euromoney Institutional Investor PLC (Main Market)	Astorg Asset Management S.à r.l. Epiris GP Limited Epiris GP III Limited	£1.61bn	33.5%	•			•						•	•C					• ¹²

Key

- * This table includes details of takeovers, set out in chronological order, in respect of which a firm intention to make an offer has been announced under Rule 2.7 of the Code during the period under review (including any offers which subsequently lapsed or were withdrawn).
- ** Premium of the offer price over the target's share price immediately prior to the commencement of the relevant offer period
- *** Standard 90% (waivable) acceptance condition, unless otherwise stated
- **** In shareholders' irrevocables (unless indicated otherwise)
- Permitted agreements under Rule 21.2 of the Code
- A AIM traded shares
- C Co-operation agreement/bid conduct agreement
- F Break fee given under formal sale process or white knight dispensation
- L Listed/traded shares
- NP No premium given in offer documentation or nil premium
- R Reverse break fee
- S Standstill agreement
- U Untraded shares
- B Bidder shareholder approval
- T Target shareholder approval

1. Tetra Tech, Inc., and RPS have implemented a regulatory clean team protocol which sets out how competitively sensitive confidential information can be disclosed and shared between both sides' legal counsel for the purposes of obtaining the consent of competition authorities and/or regulatory clearances in connection with the acquisition.
2. Initially recommended, but recommendation withdrawn in light of superior proposal from Tetra Tech.
3. Countryside shareholders will be entitled, subject to availability, to elect to vary the proportion in which they will receive cash and new Vistry shares. The total number of new Vistry shares to be issued and the maximum aggregate amount of cash to be paid under the terms of the combination will not be varied as a result of elections under the mix and match facility. Accordingly, satisfaction of elections made by Countryside shareholders under the mix and match facility will depend on the extent to which other Countryside shareholders make offsetting elections. To the extent that elections cannot be satisfied in full, they will be scaled down on a pro rata basis. As a consequence, Countryside shareholders who make an election under the mix and match facility will not necessarily know the exact number of new Vistry shares or the amount of cash they will receive until settlement of the consideration due to them under the terms of the combination. Elections under the mix and match facility will not affect the entitlements of those Countryside shareholders who do not make such elections.
4. Class 1 transaction under the Listing Rules requiring bidder shareholder approval.
5. For the purposes of Rule 16 of the Takeover Code, certain arrangements relating to a legacy bonus scheme implemented by Countryside for nine senior managers will require the approval of the independent shareholders.
6. The Rule 2.7 Announcement includes statements by Countryside, which for the purposes of Rule 28 of the Takeover Code constitute profit forecasts. This includes the following statement taken from the Countryside group's half year results for the period ended 31 March 2022: "As announced on 7 April 2022, the Board expects adjusted operating profit for the full year of approximately £150m (2021: £167.3m) including a significant profit growth in the second half." This forecast was repeated in the trading update published by the Countryside group on 21 July 2022 in respect of the period from 1 April 2022 to 30 June 2022, as follows: "FY 2022 guidance is unchanged at approximately £150m adjusted operating profit [...] While we are mindful of the challenging macro-economic backdrop, we reiterate our FY 22 guidance of approximately £150m adjusted operating profit."
7. The Rule 2.7 Announcement includes statements by Vistry, which for the purposes of Rule 28 of the Takeover Code constitute profit forecasts. Vistry has made the following statement in relation to the Vistry group's 2022 financial year guidance in the investor and analyst presentation published by Countryside and Vistry in connection with the combination: "While mindful of the wider economic uncertainties, Vistry remains positive on its outlook and continues to expect adjusted profit before tax for the 2022 financial year to be approximately £417m." These statements substantially repeat the same statement originally made in the Vistry group's trading update published on 18 May 2022 in respect of the period from 1 January 2022 to 18 May 2022, as follows: "Whilst we are mindful of the wider market uncertainties, we remain positive on our outlook. Our expectation for profit in the first half has moved forward, and for 2022 we expect adjusted profit before tax to be at the top end of market forecasts (17/05/2022 - Adjusted profit before tax: High - £415.0m, Mean - £396.3m) (07/07/2022 - Adjusted profit before tax: High - £417.0m, Mean - £397.7m)."
8. In the event of a higher competing offer being announced which represents an improvement of 15% or more on the value of Neurocrine's offer: (i) the irrevocable undertaking given by shareholder IP Group will not lapse unless Neurocrine fails to announce, within five business days of such higher competing offer being announced, a revised offer for Diurnal which exceeds the value of the competing offer, and (ii) the irrevocable undertakings given by shareholders Polar Capital Holdings plc and Development Bank of Wales will not lapse unless Neurocrine fails to announce, within 14 days of such higher competing offer being announced, a revised offer for Diurnal which is at least as favourable as the value of the competing offer.
9. In the event of a higher competing offer being announced which represents an improvement of 10% or more on the value of Open Text UK Holding Limited's ("Bidco") offer, the irrevocable undertaking given by shareholder Dodge & Cox will not lapse unless Bidco fails to announce, within ten business days of such higher competing offer being announced, a revised offer for Micro Focus which is at least as favourable as the value of the competing offer.
10. Each of the non-director shareholders has undertaken that it will not, directly or indirectly, solicit or encourage any person other than the bidder to make any offer for any shares or other securities of Ted Baker or take any action which is or may be prejudicial to the successful outcome of the acquisition or which would or might have the effect of preventing any of the conditions of the acquisition from being fulfilled.
11. The Rule 2.7 Announcement includes statements by Mediclinic, which for the purposes of Rule 28 of the Takeover Code constitute profit forecasts. These statements are based on Mediclinic's current internal forecast for the remainder of the year ending 31 March 2023. Mediclinic expects the positive momentum in revenue growth, margin improvement and earnings of FY22 to continue in FY23, driven by increased client activity supported by expected underlying economic growth in all three regions. Seasonal trends in patient activity levels, most notably in Switzerland and the Middle East, are expected to return, in the absence of any material new waves of COVID-19. Improving profitability and strong cash generation are expected to support continued deleveraging. Switzerland expects to deliver modest FY23 revenue growth and EBITDA margin improvement to around 16%. Southern Africa expects to deliver FY23 revenue growth in the mid-single digit percentage range and an EBITDA margin improvement, approaching 20%. The Middle East expects to deliver FY23 revenue growth in the high-single digit percentage range and an EBITDA margin improvement approaching the mid-15% range.
12. The scheme document includes statements by Euromoney, which for the purposes of Rule 28 of the Takeover Code constitute a profit forecast. On 19 May 2022, Euromoney released its interim results for the six months ended 31 March 2022 which included guidance for FY 2022 comprising "double-digit underlying revenue growth" and "an increase in adjusted operating profit margin" in each case versus FY 2021. On 18 July 2022, Euromoney released a trading update for the nine months ended 30 June 2022, which included the statement, "We delivered a stronger-than-expected Q3 performance; continued growth in subscriptions was accompanied by high demand for a number of our largest events of the year. Taking into account the Q3 performance, we now expect the results for FY 2022 to be ahead of the Board's previous expectations."