GLOBAL LEGAL INSIGHTS

Mergers & Acquisitions

Third Edition

Editors: Michael E. Hatchard & Scott V. Simpson
Published by Global Legal Group

CONTENTS

Preface	Michael E. Hatchard & Scott V. Simpson, *Skadden, Arps, Slate, Meagher & Flom (UK) LLP*	
Argentina	Marcelo E. Bombau & Adrián L. Furman, *M. & M. Bomchil*	1
Brazil	Adriano Chaves, Fabiano Gallo & André Marques Gilberto, *Campos Mello Advogados*	5
Canada	Simon A. Romano & Elizabeth Breen, *Stikeman Elliott LLP*	12
Cayman Islands	Ramesh Maharaj, Rob Jackson & Melissa Lim, *Walkers*	20
Chile	Pablo Guerrero, Bernardo Simian & Lucas Marinovic, *Barros & Errázuriz Abogados*	28
Colombia	Alejandro Linares-Cantillo & Pablo Carrizosa-Ramírez, *Gómez-Pinzón Zuleta Abogados*	34
Ecuador	Daniel Pino Arroba, Gabriela Guzmán Flores & Pedro José Izquierdo, *Coronel & Pérez*	40
Germany	Dr. Mark Odenbach, *Barber Odenbach*	44
India	Sumes Dewan & Yeshika Dublish, *Desai & Diwanji*	50
Indonesia	Theodoor Bakker & Herry N. Kurniawan, *Ali Budiardjo, Nugroho, Reksodiputro*	57
Italy	Luca Cuomo & Michele Cicchetti, *Pavia e Ansaldo Studio Legale*	62
Japan	Yuto Matsumura & Hideaki Roy Umetsu, *Mori Hamada & Matsumoto*	68
Luxembourg	Eugenio Travaglini, *Beerens & Avocats S.à r.l.*	75
Mexico	Daniel Del Río & Jesus Colunga, *Basham Ringe y Correa S.C.*	82
Morocco	Dr Kamal Habachi, Salima Bakouchi & Houda Habachi, *HB Law Firm LLP*	89
Netherlands	Charles Honée, Katinka Middelkoop & Jelle Krings, *Allen & Overy LLP*	99
Norway	Ole K. Aabø-Evensen, *Aabø-Evensen & Co Advokatfirma*	107
Paraguay	Estefania Elicetche, *Peroni, Sosa, Tellechea, Burt & Narvaja*	123
Poland	Sławomir Uss, *Sołtysiński Kawecki & Szlęzak*	128
Russia	Vladislav Zabrodin & Anastasia Fomicheva, *Capital Legal Services, L.L.C.*	134
Singapore	Andrew Ang & Sing Yee Chan, *WongPartnership LLP*	143
Spain	Marta Gil de Biedma, *Ventura Garcés & López-Ibor Abogados*	150
Switzerland	Martin Weber, Lorenzo Olgiati & Jean Jacques Ah Choon, *Schellenberg Wittmer Ltd*	156
Turkey	Dr. Umut Kolcuoğlu, Kemal Aksel and Merve Naz Uğurlu, *Kolcuoğlu Demirkan Attorneys at Law*	163
United Kingdom	James Dawson & Max Mittasch, *Macfarlanes LLP*	169
USA	Ann Beth Stebbins & Kenneth M. Wolff, *Skadden, Arps, Slate, Meagher & Flom LLP*	178
Venezuela	Juan Jose Delgado & Maria Cecilia Rachadell, *DLA InterJuris Abogados, S.C.*	185
Vietnam	Hoang Nguyen Ha Quyen, Nguyen Anh Tuan & Truong Anh Vu, *LNT & Partners*	190

United Kingdom

James Dawson & Max Mittasch
Macfarlanes LLP

Overview of UK regulatory field

Primary means of acquiring a UK company – summary

In public M&A deals in the UK, there are two main ways of structuring a takeover: (i) a contractual (or "general") takeover offer, pursuant to which a bidder makes its offer directly to the target shareholders who, if they wish to do so, accept by completing and returning an acceptance form; and (ii) a scheme of arrangement, which is an arrangement between the target and its shareholders that requires court sanction before it can take effect. A scheme of arrangement is generally used in recommended offers where there is no likelihood of a competing bid. The main advantage of a scheme of arrangement is that it can be structured in such a way as to avoid having to pay stamp duty on the target company's shares. Stamp duty on transfers of shares currently stands at 0.5% of the consideration and this would always be payable on a contractual offer.

Another key advantage of a scheme of arrangement is that it requires a lower percentage approval from the target shareholders in order to guarantee that the offeror will secure control of all of the outstanding shares in the target company. A scheme requires the approval of 75% in value and a majority by number of the target company's shareholders who vote (whether in person or by proxy) at the relevant shareholders' meeting to approve the scheme. A contractual offer requires an acceptance level of 90% of the shares to which the offer relates to be able to employ the "squeeze out" provisions ensuring 100% ownership.

It should be noted that both under a contractual offer and under a scheme of arrangement the offeror and the target will remain separate companies after completion, unlike in a true merger. However, under the Companies (Cross-Border Mergers) Regulations 2007 there are now two additional structures available to implement a takeover by means of a true merger. The first involves the formation of a new company which acquires two or more targets, each target transferring its assets and liabilities to the new company and then being dissolved. The second involves the transfer of a target's assets and liabilities to the offeror, followed by the target's dissolution. For both structures, at least part of the consideration given must be an issue of shares in the offeror.

In private M&A deals, a company is usually acquired through a share sale by means of a private contract. In this case, the entire company stays intact and merely its ownership changes. As an alternative, the assets of a company (or a subset thereof) can be acquired by means of an asset deal or business transfer. In this case, the company does not change ownership and merely sells all (or some) of its assets to the purchaser.

Key UK regulatory bodies

The Takeover Panel regulates compliance with the City Code on Takeovers and Mergers (the "**Code**"), which is the principal rulebook governing the conduct of takeovers in the United Kingdom. The Takeover Panel can apply to a court to seek enforcement of the provisions of the Code.

Government departments and other regulatory bodies may become involved in M&A transactions, especially if the proposed deal involves entities in regulated sectors (e.g. financial services, telecoms or utilities). Examples are the Financial Conduct Authority and the Prudential Regulation Authority (the United Kingdom's two main financial services regulators), Ofcom (for telecommunications),

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Ofwat (for water services), Ofgem (for gas and electricity markets) and the Office of Fair Trading and the Competition Commission (soon to become a single Competition and Markets Authority) (for anti-trust matters).

Overview of the M&A market

Global overview

2013 was the third consecutive year in which global M&A activity declined. The aggregate deal value fell by six per cent, making 2013 the worst-performing year since 2009. The weakness of the global M&A arena could not even be masked by the "mega-deals" of 2013, which included the third-largest deal in corporate history, Verizon Communication Inc.'s acquisition of Vodafone Group PLC's indirect 45% interest in Verizon Wireless (see next page).

UK overview

The weakness of the global M&A market was also reflected in the UK, where the 2013 deal value reached its lowest point since 2001, with an aggregate of £71.4bn. This figure represents a decrease of 11.5% from 2012's aggregate deal value of £80.7bn. Deal volume, however, was identical in both 2012 and 2013 with 1,099 deals recorded and, interestingly, there were twice as many offers for Main Market companies with a deal value in excess of £1bn (six in 2013, compared to three in 2012).

The value of inbound deals from foreign entities during the last quarter of 2013 was the lowest for nearly four years, at £9.1bn-worth of deals. When compared to the last quarter of 2012, this represents a 22.9% decline.

The most active acquirers of UK companies in 2013 were US-based companies. 216 such deals were recorded and their aggregate value of £27.4bn represented a 63.4% share of the total inbound M&A activity. It is worth noting the impact of the acquisition of Virgin Media Inc. by Liberty Global Inc. (discussed in more detail below) on these figures. It alone accounted for 30.7% of inbound M&A activity and without this deal the value of US inbound investment would have totalled £11.9bn – merely half of the 2012 value.

In terms of outbound M&A, overall deal value was similar to 2012, with only a 4.6% drop. Most of this activity occurred in the last quarter of the year, which saw 141 outbound deals with an aggregate value of £13.8bn. This represents the highest number since the second quarter of 2011 and an increase of 76.9% on the third quarter of 2013, and could consequently point to a return of market confidence and a gradual increase in momentum in terms of deal activity.

Public M&A overview

Of the 1,099 deals recorded in 2013, 39 firm public takeover offers were announced – nine for Main Market companies and 30 for companies listed on AIM, the London Stock Exchange's ("**LSE**") market for smaller growing companies. Public M&A activity was significantly down from the levels seen in 2012, the most marked drop (of nearly 33%) being seen in the number of offers announced for Main Market companies. The number of offers for AIM-listed companies in 2013 was down a more modest 6.25% when compared to 2012.

Deal values in the public M&A arena also decreased in 2013 – of the 39 firm offers announced, 13 (33%) had a deal value of over £100m, compared to 21 (38%) of the 56 firm offers announced in 2012.

The spilt between schemes of arrangement and contractual offers was relatively even in 2013, but schemes were, broadly, the more popular deal structure for larger-value, recommended bids in 2013, continuing 2012's theme. However, one large transaction which bucked that trend was the £4.6bn offer for Eurasian Natural Resources Corporation PLC ("**ENRC**"), which was announced as a hostile contractual offer. As far as offers for Main Market companies were concerned, the split between schemes of arrangement and contractual offers was more even than in 2012, with four announced as schemes and five as contractual offers. This was equally the case for the 30 offers for AIM-listed companies, though the majority of firm offers with a deal value of £50m or more were structured as schemes. True hostile offers are still rare, as demonstrated by the 39 takeover offers announced in 2013, of which 32 (82%) were recommended.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Interestingly, only 13% of the 39 public takeover offers announced in 2013 featured shares as the sole form of consideration, with cash being offered as the sole form of consideration in 64% of transactions. If taken together with other forms of consideration, cash featured in 33 (85%) of the transactions announced in 2013, and in around half of those deals (17) the bidder's cash resources were the sole means of funding. This would seem to indicate that corporates have significant cash reserves on their balance sheets which they are seeking to invest if the right opportunity presents itself.

Private equity overview

In the private equity arena, 219 buyouts were announced in 2013, only two fewer than in 2012. Deal value, however, dropped sharply to £14.9bn (representing a 32.9% drop from 2012's total of £22.2bn). Nonetheless, this was still up from the low of £14.4bn in 2011.

Private equity exits fared only slightly better, with the aggregate deal value of £15.6bn representing a 19.6% drop from 2012's £19.4bn. With the expected rise in the number of IPOs (see below), this might change in 2014.

The most targeted companies for buyouts in 2013 were those in the leisure industry, in which £3.2bn-worth of deals was recorded. This was both the highest value and the highest volume since 2009 and over three times the value in 2012 (£0.9bn).

Lloyds Development Capital held on to its place as the top private equity firm for buyouts in terms of deal volume, backing 14 deals during the year with an aggregate value of £329m (three more deals than in 2012). Electra Partners jumped from 72nd place in 2012 to third place in the 2013 buyout league table, advising on five deals totalling £417m and Isis Equity Partners moved up to second place (from 35th in 2012), with seven deals totalling £217m.

The statistics paint a rather bleak picture for private equity backed public M&A deals. Of the 39 public takeover offers announced in 2013, only four (10%) involved private equity backers. All these four deals were for AIM-listed companies and the highest deal value was approximately £25m (the other three deals having a deal value of under £10m).

Significant transactions and sector focus

Technology, media and telecommunications ("TMT")

The best-performing sector by deal value in 2013 was TMT, with telecommunications being the shining light. Undoubtedly the stand-out transaction in this sector in 2013 – and one of the largest transactions in corporate history – was Verizon Communication Inc.'s acquisition of Vodafone Group PLC's indirect 45% interest in Verizon Wireless, valued at $130bn (£84bn). The transaction, structured as a scheme of arrangement, saw Verizon issuing approximately $60bn of new shares, paying cash consideration of approximately $59bn and giving other consideration worth approximately $11bn (e.g. the sale of its interest in Vodafone Italy and the issue of certain loan notes).

Another of the most significant transactions of 2013 was also in the telecommunications sector – Liberty Global Inc.'s acquisition of Virgin Media Inc. for £15.96bn to create the world's largest broadband company with 25 million customers in 14 countries. Virgin Media Inc. shareholders received $17.50 in cash and two types of shares in Liberty Global for each Virgin Media Inc. share held by them. As part of the transaction, Liberty Global Inc. redomiciled from Delaware to the UK by becoming a subsidiary of a new holding company, a UK public limited company.

Vodafone Group PLC and Liberty Global Inc. were also involved in another large deal in the TMT sector in 2013, when Vodafone agreed to buy Kabel Deutschland, seeing off a competing bid from Liberty Global Inc. Vodafone secured the deal, valued at £6.6bn, by offering €87 per share in cash, trumping a previous bid by Liberty Global rumoured to have been in the region of €85 per share.

The strong performance in the UK TMT sector was, to some extent, mirrored in other European jurisdictions, for example in France which saw the $35bn merger of advertising giants Omnicom and Publicis.

Financial services

The financial services industry remained active, though deal value was down by 36.7% compared to 2012.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Continuing the theme seen in 2012, retail banking M&A continued to be an active part of this sector. Investors have shown increased confidence, given that some UK banks have started again to turn a profit. Interest rates are expected to rise sooner than initially predicted by the Bank of England, and this should favourably affect banks' profitability. If George Osborne, Britain's Chancellor of the Exchequer, is to be believed, the economic cycle is once again moving out of recession and it is expected that the UK retail banking sector will show increased competition as alternative high-street banks and lenders seek to establish themselves within the changing marketplace. One example of such increased competition comes in the form of peer-to-peer lending (an online facility which allows investors to make loans directly to small businesses and individuals), which has seen a significant increase in recent activity. At the time of writing, the world's largest peer-to-peer loan of £4.1m had just been raised by Lendinvest.

The debt collection market saw significant activity in 2013. J.C. Flowers & Co acquired Britain's leading debt collector, Cabot Credit Management Limited, in May 2013 and then promptly sold a majority stake to Encore Capital Group Inc. in the same month for £128m. At the time of writing, Cabot Credit Management had just announced the acquisition of Marlin Financial Group, a leading specialised debt buyer, for £295m. Further deals in the debt collection sector included the auction acquisition of Mackenzie Hall by Portfolio Recovery Associates Inc. and Hoist AB's purchase of Robinson Way and Lewis Group. In addition, Arrow Global Group became the first UK debt purchase business to list its equity.

One of the highlights in the asset management sector was the acquisition by Schroders PLC of Cazenove Capital. The transaction, structured as a scheme of arrangement, valued Cazenove at approximately £424m and created one of the UK's biggest asset management companies, with a combined AUM of £28.4bn.

Energy, mining and utilities

The second most active sector by deal value was energy, mining and utilities, in which over five times as many deals as in the telecommunications sector were recorded throughout the year. The deal value was, however, significantly lower than in 2012 (a drop of 44%) and deal count was slightly lower as well (three deals fewer than in 2012).

The deal which grabbed most headlines in this sector was the consortium bid for ENRC, valued at £4.6bn. Eurasian Resources Group B.V., a newly incorporated company formed by a consortium which included the Ministry of Finance of the Republic of Kazakhstan, put in a bid for ENRC, the UK-listed diversified natural resources group based in Kazakhstan. Following acceptance of the offer by ENRC's shareholders, the company delisted from the LSE on 25 November 2013.

2013 also saw what would have been one of the largest deals of the year, when Borealis Infrastructure Management Inc., the Kuwait Investment Office and the Canadian Universities Superannuation Scheme Limited combined to launch a £5.3bn cash offer for Severn Trent PLC, a company providing and treating water and waste water in the UK and internationally. The deal fell through after Severn Trent's board rejected all three of the consortium's offers (the final of which was an offer of £22 per share), reportedly incurring advisory and other costs of around £19m in doing so.

Activity in this sector is set to continue in 2014, with U.C.E. Synttech Holdings Limited having announced a hostile cash offer for $15 per share for IG Seismic Services PLC, a UK-listed company based in Russia which offers onshore and offshore seismic data processing and interpretation services. The deal is noteworthy as it marks the first time that the Takeover Panel has shared jurisdiction with the Cyprus Securities and Exchange Commission. At the time of writing, the independent directors had recommended to IG Seismic Services' shareholders that the offer should be rejected on the grounds that, among other things, it fails to fully reflect the value of the company.

Industrials and chemicals

Whilst deal count in this sector was down by 13 deals when compared to 2012 (169 deals in 2013 and 182 in 2012), it was still the second most active in terms of deal count, and overall deal value rose by nearly 20%.

The largest deal of 2013 in this sector was the acquisition of Invensys PLC by the French company

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Schneider Electric SA for £3.3bn. The deal was structured as a scheme of arrangement under which the shareholders received both cash and shares as consideration. Invensys produces software and control systems used in the running of power stations and oil refineries. The acquisition represented an opportunity for Schneider to focus on the industry automation sector which would enable it to compete with fierce rivals within the sector. The sale generated much commentary on the loss of a great British engineering business to a foreign rival during a period when the government was trying to promote domestic manufacturing.

A further important transaction in this sector was Merck KGaA's £1.7bn acquisition of AZ Electronic Materials S.A.. An interesting feature of this transaction was that it was subject to the shared jurisdiction of the Takeover Panel and the Luxembourg Commission de Surveillance du Secteur Financier, as the target was a company incorporated in Luxembourg whose shares are traded on the LSE. The Code applied in respect of consideration and procedural matters, whilst matters relating to employee information and company law (in particular the percentage of voting rights which conferred control, and any derogation from the obligation to launch a mandatory offer, as well as the conditions under which AZ Electronic Materials S.A. could undertake any actions which might result in the frustration of the offer) were governed by Luxembourg corporate law and the provisions of the Luxembourg law governing takeover bids.

Consumer

Deal value in this sector dropped by 21.9% and the number of deals dropped from 145 to 127 in comparison to 2012.

One of the most significant deals was the disposal by GlaxoSmithKline PLC of its Lucozade and Ribena brands to Suntory Beverage and Food Ltd (based in Japan) for cash consideration of £1.35bn. GlaxoSmithKline's decision to sell the brands came as a result of its desire to focus on its consumer healthcare business and Suntory sought to pre-empt an auction of the two soft drinks brands. Under the terms of the deal, Suntory acquired global rights to the two brands and the UK manufacturing site.

Continuing the theme of deals in the food and beverage industry, Tyrells Group Holdings Limited, the gourmet crisp manufacturer, was the target of an acquisition by Investcorp, the Bahrain-based investment group from private equity firm Langholm Capital LLP for £100m, and Coca-Cola Enterprises Inc. agreed to acquire a further interest in Innocent Limited, the soft beverage manufacturer, from its three founders, also for £100m.

Transport

2013 deal value in the transport sector dropped by 11.8% compared to 2012 although the number of deals increased by three.

The year's largest deal in this sector was the sale of Stansted Airport by Heathrow Airport Holdings Limited to The Manchester Airports Group PLC for £1.5bn, giving it ownership of its fourth UK airport. The disposal followed the Competition Commission's ruling in 2009 that Heathrow Airport Holdings Limited's ownership of all three of Britain's main airports, Heathrow, Gatwick and Stansted, was anti-competitive. The deal was conducted as an auction and other bidders included Macquarie Group Limited and Malaysia Airports Holdings Bhd. The Manchester Airports Group PLC received new equity investment from Industry Funds Management, a private equity house based in Australia, for a 35.5% interest in the company, which coincided with the Stansted acquisition. The transaction was a good example of how regulatory issues can influence the timing and progress of a transaction.

Distressed high street retailers

In a similar vein to 2012, 2013 saw a number of transactions arising from the distressed state of the UK's high-street retailers.

One high-profile insolvency on the UK high street was that of HMV Retail. Restructuring specialist Hilco UK Limited acquired the distressed music retailer in a debt-for-equity swap believed to be worth around £50m. The deal saved 141 branches from closing and was reported at the time to have saved around 2,500 jobs.

It is reported that there are plans to float Game Retail in 2014, following its collapse in 2012 which

© Published and reproduced with kind permission by Global Legal Group Ltd, London

saw it closing 600 of its stores. Elliott Advisors, the hedge fund which now owns 99% of Game Retail, is said to stand to make a large profit if a successful flotation is achieved.

Leisure industry

The leisure industry was the most active in terms of private equity buyouts during 2013.

A significant management buyout came in the form of the acquisition of Vue Entertainment Limited, the developer and operator of multiplex cinemas, by two Canadian pension funds, Alberta Investment Management Corporation and OMERS Private Equity, for £935m. The seller, private equity house Doughty Hanson & Co, bought the business in 2010 for £450m. The deal is an example of pension funds' changing approach to the private equity market, as they become increasingly willing to cut out buyout fund managers in order to save fees.

The sector looks set to perform strongly in 2014 and at the time of writing it had been announced that the year will see the business combination of Cineworld Group PLC and Cinema City International N.V. for at least £5.3bn to create the second-largest cinema operator in Europe (by number of screens).

Resurgence of IPOs

One of the main features of 2013 was the return of London as a market for initial public offerings ("**IPOs**"). Last year saw 105 companies floating on the LSE, raising £15.7bn and pushing IPOs on the LSE to their highest level since 2007. This represented 56% of total European IPO proceeds and included the largest flotation on any European market, namely that of Royal Mail (the first privatisation on the LSE for some time), which raised £1.7bn and generated a great deal of public and political interest.

Financial services businesses generated more activity than usual in the IPO arena, with four such businesses coming to the market in 2013 (debt purchaser Arrow Global Group and insurers Direct Line Group, Esure Group and Partnership Assurance Group). This compares favourably with previous years, which only saw two financial services IPOs between 2010 and 2012.

The IPOs of the Esure Group and Partnership Assurance Group were both examples of another emerging trend in this arena – that of private equity houses returning to the use of IPOs as an exit strategy. Private equity-backed companies made up a significant number of the flotations in 2013, the largest being that of Merlin Entertainments (owner of Madame Tussauds and Legoland), backed by investors including Blackstone and CVC Capital Partners, which raised €3.8bn.

The listing of estate agents Foxtons, another private-equity backed business, raised £390m and was indicative of the recovery of the UK property market. Other successful flotations in the property sector included those of private equity-backed estate agent and property services group Countrywide and Crest Nicholson, the property developer.

Key developments

Changes to the Takeover Code

On 30 September 2013, changes to the rules determining which companies are subject to the Takeover Code came into effect. Broadly, the Code now applies to all companies with a registered office in the UK, the Channel Islands or the Isle of Man whose securities are traded on a regulated market (such as the Main Market of the LSE) or a multilateral trading facility (such as AIM) in the UK or on any stock exchange in the Channel Islands or the Isle of Man. Previously, such companies had been subject to the provisions of the Code only if the Takeover Panel considered the company to have its place of central management and control in the UK, the Channel Islands or the Isle of Man. Bid activity levels so far appear unaffected by the changes, despite the increased certainty provided to AIM companies in respect of the Code's application.

On 20 May 2013, certain changes to the Code came into effect which extended to the trustees of certain pension schemes of target companies the rights afforded to employee representatives. Broadly, the amendments require details of the offeror's intentions in relation to the target company's relevant pension schemes and information usually provided to employee representatives to be provided to the trustees of those pension schemes. In addition, the board of the target company now has to append to

© Published and reproduced with kind permission by Global Legal Group Ltd, London

its circular a separate opinion from the trustees of the target company's relevant pension schemes on the effects of the offer on those pension schemes, provided such opinion is received by the board in good time. If not received in good time, the target's board must publish that opinion on a website and announce that publication to the market.

The Alternative Investment Fund Managers Directive ("AIFMD")

The AIFMD, which had to be implemented by EU member states by 22 July 2013, aims to introduce a harmonised regulatory framework across the EU for EU-established managers of alternative investment funds ("**AIFM**"). An AIFM includes any legal or natural person whose regular business is to manage one or more alternative investment funds ("**AIF**"). Broadly, the AIFMD applies to AIFs (wherever established), other than those funds covered by the UCITS IV Directive (2009/65/EC). This means that managers of hedge funds, private equity funds and other AIFs (such as commodity funds, venture capital funds, real estate funds and investment trusts) are within scope.

Whilst a detailed summary of the AIFMD is outside the scope of this chapter, two provisions are worth highlighting. First, the AIFMD restricts asset stripping and dividend recapitalisations. If a manager of an AIF acquires control of a non-listed EU company, for a period of 24 months following the acquisition, it cannot facilitate or support any dividends, capital reductions, share redemptions or share buy-backs which either: (i) reduce the company's net assets below its subscribed capital plus its non-distributable reserves; or (ii) exceed the amount of the company's cumulative profits (whether or not realised) plus other distributable reserves, less the aggregate of any cumulative losses and other non-distributable reserves.

Secondly, the AIFMD imposes disclosure requirements. If an AIF acquires more than 50% of the voting rights in a non-listed EU company, the AIF will have to notify the relevant regulator (being the Financial Conduct Authority in the UK) of the voting rights held by it any time it reaches, exceeds or falls below the thresholds of 10, 20, 30, 50 and 75%, and will have to provide the relevant regulator and its investors with information on the financing of the acquisition. The AIFMD also contains further disclosure obligations in relation to the AIFM and its policies.

Shares for rights

2013 saw the introduction of so-called "shares for rights" contracts which allow employees to sacrifice certain employment-related rights (such as the right to claim for unfair dismissal) in return for the tax-free receipt of shares in their employer company with a value of between £2,000 and £50,000. The scheme has largely been a failure; according to press reports only 19 enquiries had been received by the government in the six months to the end of December 2013. However, as part of the acquisition of Whitworths by private equity house Equistone, eight members of the management team were offered equity stakes under the scheme worth up to £50,000, potentially reducing any capital gains tax on those shares to nil. It remains to be seen how the scheme will be used to structure management incentives in such deals during 2014.

High Growth Segment

Introduced as the UK's response to the US JOBS Act, the High Growth Segment of the LSE, a new segment of the Main Market designed to help mid-sized European and UK companies requiring access to capital and a public platform, was launched in 2013. It has EU Regulated Market status but does not fall within the scope of the UK's Listing Regime. It is particularly aimed at companies which cannot fulfil the free float requirement of a Main Market listing but which are larger than typical AIM companies.

To join the High Growth Segment, companies must be incorporated in the EEA; be a revenue-generating, trading business; demonstrate revenue growth of at least 20% over the three years prior to admission; have at least 10% of the number of securities admitted in public hands with a value of at least £30m (the majority of which must be raised at admission); appoint a 'key adviser' in relation to the admission; and set out an intention to seek a listing on the Main Market over time.

In theory, the High Growth Segment could be a possible route for businesses which fail to meet the requirements for a Main Market IPO. It remains to be seen, however, whether the entry and ongoing compliance requirements of the High Growth Segment are light enough to prove attractive.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Resurgence of auction processes

Another noticeable trend of 2013 was the resurgence of the auction process. A variety of factors contributed to this, such as banks being more willing to lend, corporates sitting on accumulated cash reserves which they are looking to invest, and a relatively small number of attractive assets coming up for sale. On the whole, auctions held in 2013 saw a reasonable number of interested parties, made up of a mix of trade and private equity buyers. One consequence of the return to favour of the auction process was the increased use of locked box accounts, a mechanism traditionally favoured by auction sellers, instead of a full completion accounts net asset adjustment. In a locked box deal the parties to an acquisition agree a price payable for the target, generally based on a balance sheet, drawn up and settled between the parties to an agreed date in advance of signing. This gives a seller more certainty over the price and increased control of the sale process, and removes the cost and potential disputes often associated with completion accounts.

The year ahead

Despite the poor performance of the M&A market in 2013, the general outlook from commentators, investors and industry specialists is one of optimism. The economic recovery is well under way; the disruptive instability that has been seen in the global economy since the global financial crisis is much less pronounced than had been feared. The fears surrounding the sovereign debt crises proved to be largely unfounded as the global economy managed to withstand the strain rather than plummeting into free-fall as some had predicted. Corporate balance sheets show high levels of cash, and finance is significantly easier to obtain as banks demonstrate renewed confidence for lending (though government pressure on financial institutions to extend credit to borrowers will also have played a part).

The property market has continued to benefit from increased confidence (particularly in London and the south-east) and easier access to mortgages, helped partly by the government-backed incentive schemes aimed at first-time buyers, and it is expected that this trend will continue into 2014. This bodes well for companies active in the property sector, and for confidence levels.

Another major trend from 2013 – the re-awakening of the IPO market – is likely to continue in 2014. This major development can only be seen as a positive indicator of things to come, and perhaps continued expansion in this sphere will counteract caution in the private sector as confidence of both investors and corporate decision-makers increases. 2014 is predicted across the market to be a strong year for IPOs. A number of banks are expected to seek listings in 2014, including TSB Bank, Williams and Glyn's Bank, Virgin Money and the newly restructured Co-operative Bank. Effective and open capital markets should also provide private equity houses with a viable route for an exit.

The real question, however, is whether corporate appetite for M&A will respond to this positive backdrop. There is still a sense of caution in the market and it remains to be seen whether 2014 will remain a year of quiet consolidation while the economy continues to recover.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

James Dawson
Tel: +44 20 7849 2430 / Email: james.dawson@macfarlanes.com
James Dawson is a partner in the Corporate and M&A team and has been advising on corporate transactions for over 18 years. He undertakes a broad range of corporate work, acting for both public and private companies, with particular focus on the financial services and media sectors. Recent highlights include acting for RBS and The Economist.

Max Mittasch
Tel: +44 20 7849 2551 / Email: max.mittasch@macfarlanes.com
Max is a solicitor in the Corporate and M&A team. He works on a broad range of transactions, including public and private M&A work and group reorganisations. He also advises clients on general company law matters. Recent highlights include advising Verizon Communications Inc. on its acquisition of Vodafone Group plc's indirect interest in Verizon Wireless for $130bn.

Macfarlanes LLP

20 Cursitor Street, London EC4A 1LT, United Kingdom
Tel: +44 20 7831 9222 / Fax: +44 20 7831 9607 / URL: http://www.macfarlanes.com

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Other titles in the *Global Legal Insights* series include:

- Banking Regulation
- Bribery & Corruption
- Cartels
- Corporate Tax
- Employment & Labour Law
- Energy
- Litigation & Dispute Resolution
- Merger Control

Strategic partners:

www.globallegalinsights.com