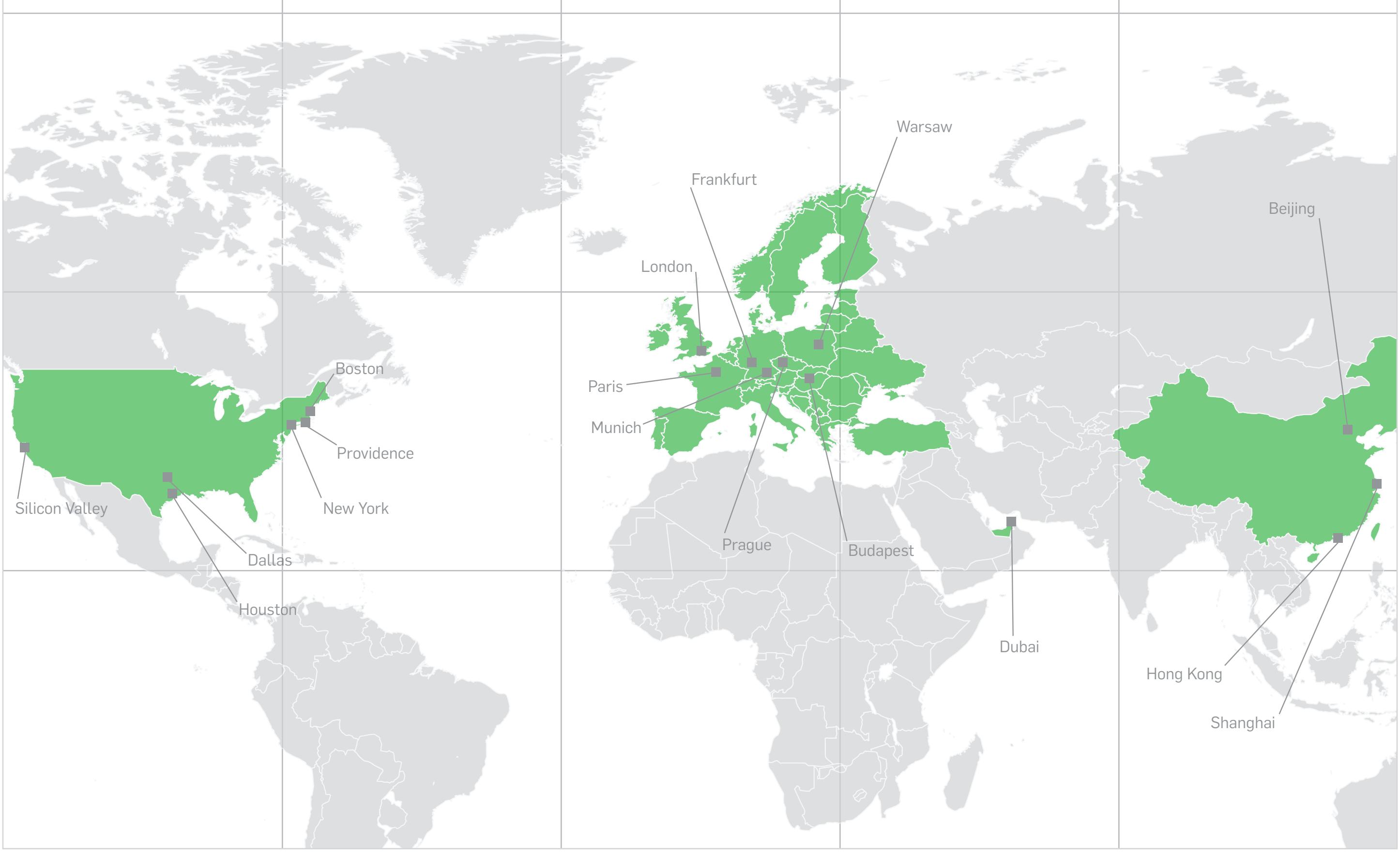
A Look At

Sponsor-Backed Going Private Transactions

Our Global Private Equity Presence



July 2014

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Introduction

Welcome to the seventh survey of sponsor-backed going private transactions prepared by Weil, Gotshal & Manges LLP. We hope that you will find this information thought-provoking and useful. We believe this survey is unique in that it analyzes and summarizes for the reader the material transaction terms of going private transactions involving a private equity sponsor in the United States, Europe, and the Asia-Pacific region. We believe that Weil is uniquely positioned to perform this survey given our international private equity platform and network of offices across these regions. We are happy to discuss with clients and friends the detailed findings and analyses underlying this survey.

We want to offer special thanks to the many attorneys at Weil who contributed to this survey, including Jean Beauchataud, Andrea Bidegaray, Trina Bose, Mariel Dator, Elliott DeRemer, Gautier Elies, Erika Evasdottir, William Fong, Anna Frankowska, Lukasz Gasinski, Annabell Grupp, Patrick Joy, Pierre-Alexandre Kahn, U-Hyeon Kwon, Nathan Langford, Dianna Lee, Samuel Peca, Jeremiah Phillips, Emma Robinson, Thomas Schmid, Barbara Sobowska, Piotr Tomaszewski, William Welty, Jakub Wronski and Josephine Yung, as well as Alexander Abelson.

We would also like to thank the following law firms who contributed to this survey: Giliberti Pappalettera Triscornia e Associati Studio Legale in Italy, Lenz & Staehelin in Switzerland, Potamitisvekris Law Partnership in Greece, Schjødt in Norway and Stibbe in the Netherlands.

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Research Methodology

We surveyed 49 sponsor-backed going private transactions announced from January 1, 2013 through December 31, 2013 with a transaction value of at least $100 million (excluding target companies that were real estate investment trusts).

27 of the surveyed transactions in 2013 involved a target company in the United States, 15 involved a target company in Europe, and seven involved a target company in the Asia-Pacific region. The United States transactions that are included in the survey are only transactions that have closed or that are pending.

The publicly available information for certain surveyed transactions did not disclose all data points covered by our survey; therefore, the charts and graphs in this survey may not reflect information from all surveyed transactions.

The 49 surveyed transactions included the following target companies:

United States

Anaren, Inc.
Assisted Living Concepts, Inc.
Bioclinica, Inc.
BMC Software, Inc.
Dell Inc.
Digital Generation Inc.
Energy Solutions, Inc.
Flow International Corporation
Gardener Denver, Inc.
Globecomm Systems Inc.
Greenway Medical Technologies, Inc.
H.J. Heinz
Hot Topic, Inc.
Innotrac Corporation
Keynote Systems, Inc.
Mac-Gray Corporation
National Financial Partners Corp.
National Technical Systems
Rue21, Inc.
Steinway Musical Instruments, Inc.
Tellabs, Inc.
Telular Corporation
The Active Network, Inc.
The Jones Group, Inc.
TMS International Corp.
True Religion Apparel, Inc.
Websense, Inc.

Europe

Acino Holdings AG (Switzerland)
Adler Modemärkte AG (Germany)
Betfair PLC (UK)
Cam Finanziaria SpA (Italy)
CinemaxX (Germany)
Club Mediteranée (France)
Fiberweb PLC (UK)
G4S PLC (UK)
Hologram Industries SA (France)
Infratek ASA (Norway)
P&I Personal & Informatik AG (Germany)
S&B Industrial Minerals SA (Greece)
Theolia SA (France)
Unit4 NV (Netherlands)
Xeikon NV (Netherlands)

Asia

1st Holdings, Inc. (Japan)
HELP International Corporation Berhad (Malaysia)
Kreuz Holdings Limited (Singapore)
Kumpulan Hartanah Selangor Berhad (Malaysia)
Macromill, Inc. (Japan)
Simplex Holdings, Inc. (Japan)
Tysan Holdings Limited (Hong Kong)

Key Conclusions

Key trends for going private transactions in the United States in 2013 include:

- The number and size of sponsor-backed going private transactions increased as compared to 2012 though it remained down from 2011 and 2010. The average deal size in 2013 was $2.5 billion ($903 million excluding the two transactions with the largest transaction values), compared with $714 million, $1.25 billion and $1.49 billion in 2012, 2011 and 2010, respectively. Sponsor-backed deal activity was fairly consistent during each quarter of 2013.
- We have continued to see a decrease in the use of some of the financial-crisis-driven provisions, such as the sponsors' express contractual requirement to sue their lenders upon a financing failure. Most of the acquisition agreements entered into in connection with the 2013 surveyed transactions are silent on the requirement that sponsors sue their lenders upon a financing failure though even in such a case the sponsor may be required to use its reasonable best efforts to enforce its rights under its debt commitment letter, which could include suing the lender.
- Consistent with the trend since 2010, go-shop provisions (which appeared in 40% of the surveyed transactions in 2010) continued to be used less frequently in 2013 (appearing in only 26% of the surveyed transactions in 2013). As evidenced by the acquisition agreements entered into in connection with the Duff & Phelps acquisition in 2012, the Dell Inc. and Websense, Inc. acquisitions in 2013 and the Chuck E. Cheese acquisition in 2014, go-shop provisions are becoming more specifically tailored to the particular deal circumstances.
- Consistent with 2012, the tender offer construct was used in approximately 30% of the surveyed transactions. As further discussed in the *New and Noteworthy* section, the new Section 251(h) of the Delaware General Corporation Law eliminated the need for a top-up option if parties expressly agree to effect their transaction pursuant to the new Section 251(h). We have seen an increase in the use of the tender offer construct since August 1, 2013 when the amendment to the Delaware General Corporation Law which added the new Section 251(h) became effective.
- Specific performance "lite" continues to be the predominant market remedy with respect to allocating financing failure and closing risk in sponsor-backed going private transactions. Specific performance lite means that the target is only entitled to specific performance to cause the sponsor to fund its equity commitment and close the transaction in the event that all of the closing conditions are satisfied, the target is ready, willing, and able to close the transaction, and the debt financing is available.
- Reverse termination fees appeared in all debt-financed going private transactions in 2013. The average single-tier reverse termination fee was equal to 6.76% of the equity value of the transaction and the average company termination fee was equal to 3.34% of the equity value of the transaction but there were a number of outliers.
- As was the case in 2012 and 2011, no sponsor-backed going private transaction in 2013 contained a financing out (i.e., a provision that allows the buyer to get out of the deal without the payment of a fee or other recourse in the event that debt financing is unavailable).

New and Noteworthy

The following is a list of new and noteworthy deal terms, concepts or trends that have recently been seen in US sponsor-backed transactions.

Transaction Size

2013 marked the return of mega-size deals that we have not seen since before the financial crisis with the $23 billion acquisition of H.J. Heinz Company by Berkshire Hathaway Inc. and 3G Capital and the $21 billion acquisition of Dell Inc. by Silver Lake Partners, Microsoft Corp., and Michael Dell. The Dell and Heinz transactions were each larger in size than all of the 2012 sponsor-backed going private transactions combined.

In 2013, there were four other announced transactions with transaction values in excess of $1 billion (including the $6.9 billion acquisition of BMC Software, Inc. by Bain Capital and Golden Gate Capital and the $3.8 billion acquisition of Gardner Denver, Inc. by KKR & Co. L.P.), for a total of six transactions with transaction values over $1 billion, all of which have now been completed. Although we did not see a major uptick in deal flow in 2013, given the strong debt market, it is not surprising that many of the deals announced and completed in 2013 were at higher transaction values than in prior years.

The 27 surveyed deals had an aggregate transaction value equal to approximately $67 billion, which is significantly larger than the aggregate transaction values of approximately $17 billion in 2012, $41 billion in 2011 and $55 billion in 2010.

However, no transaction with a transaction value in excess of $1 billion was announced in the first quarter of 2014.

Tender Offer Top-Ups

Delaware recently enacted an amendment to the Delaware General Corporation Law that added a new Section 251(h). The amendment, which became effective on August 1, 2013, eliminated the need for a top-up option if parties expressly agree to effect their transaction pursuant to Section 251(h).

Prior to the amendment, a sponsor needed to ensure that the minimum condition was high enough for there to be a sufficient number of target shares authorized to exercise the top-up option and increase the acquiror's ownership to 90% to be able to complete the back-end merger. The risk that sponsors previously faced was that even if the percentage of stockholders in favor of the transaction was very high (and definitely higher than the 50.1% generally required to approve a merger), the lack of authorized shares could prevent the acquiror from exercising its top-up option and closing the back-end merger immediately following the completion of the tender offer.

Pursuant to the new Section 251(h), only 50.1% of the outstanding shares (or a greater percentage if required in the charter) is required to be tendered in the front-end tender offer for the back-end merger to be completed without a stockholder vote. This both avoids uncertainty for an acquiror with a minimum condition greater than 50.1% and eliminates the timing delay (and closing risk) of convening a stockholder meeting and vote if the top-up option cannot be used.

Since August 1, 2013 when the amendment to the Delaware General Corporation Law which added the new Section 251(h) became effective, 38.5% of the 2013 surveyed transactions used a tender offer construct, while only 21.4% of the 2013 surveyed transactions that were completed or announced prior to August 1, 2013 used the tender offer construct. Of the sponsor-backed going private transactions in excess of $100 million that were announced or completed in the first quarter of 2014, 50% used the tender offer construct. All of the 2013 surveyed transactions that were entered into after August 1, 2013 and that used the tender offer construct had top-up option mechanics although the parties ultimately relied on Section 251(h) rather than on the top-up option mechanics.

Delayed Reverse Termination Fee

While the H.J. Heinz deal generally followed the specific performance lite construct, the reverse termination fee provision in the H.J. Heinz acquisition had a unique twist in that it seemed to be designed to give the buyer some time to consider alternatives with respect to the financing required for the transaction and to address any hold-up in obtaining debt financing. Specifically, if a debt financing failure had occurred, H.J. Heinz would have been prohibited from terminating the acquisition agreement until (a) 10 business days after the delivery of a notice of such failure if the buyer did not initiate legal proceedings against its lenders or (b) four months after the delivery of a notice of such failure if the buyer initiated legal proceedings against its lenders (or sooner if the buyer ceased to diligently pursue such legal proceedings). The delayed reverse termination fee provision is a construct that could catch on in future deals, especially in instances where the buyer feels the need to add flexibility to address potential delays in obtaining debt financing.

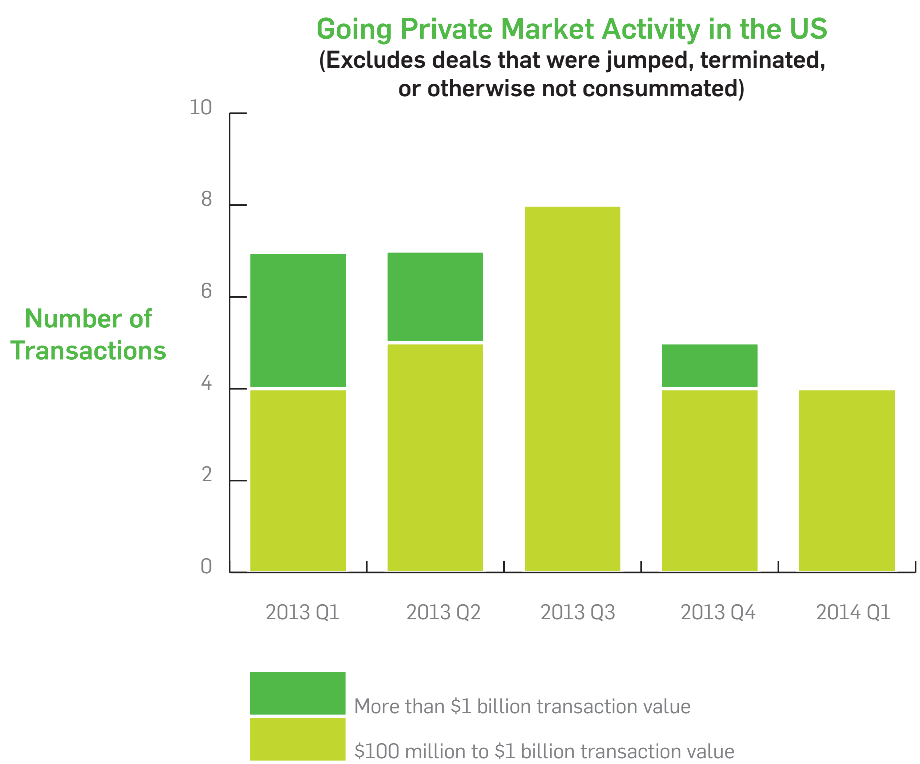
Highlights of 2013

Sponsor-backed going private deal activity marginally increased in 2013 in terms of frequency but noticeably increased in terms of deal size. In 2013, there were 27 announced and currently pending or completed sponsor-backed going private transactions with transaction values in excess of $100 million, up from 24 such deals in 2012 though still down from 33 and 35 such deals in 2011 and 2010, respectively. The 2013 deal activity represents a 93% increase over the depths of the financial crisis, when in 2009 only 14 such transactions were entered into.

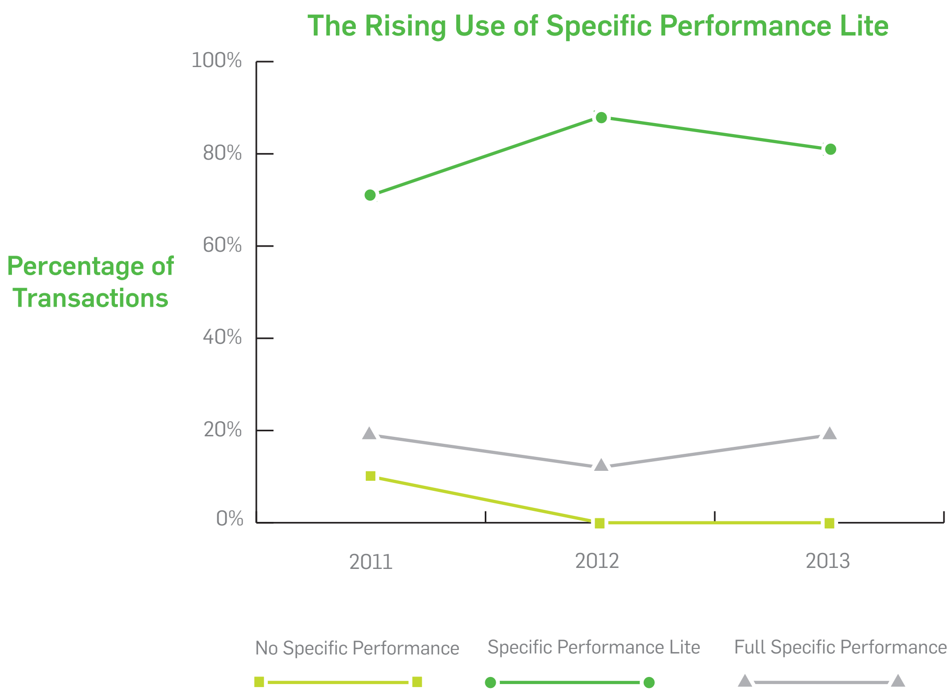
Transaction values in our 2013 study ranged from $108 million to $23 billion. The average deal size in 2013 was $2.5 billion ($903 million excluding the two transactions with the largest transaction values), compared with $714 million, $1.25 billion and $1.49 billion in 2012, 2011 and 2010, respectively. The two largest completed sponsor-backed going private transactions in 2013 were just over $23 billion and just under $21 billion, respectively, while the largest completed sponsor-backed going private transaction during the period between 2010 and 2012 was just over $5.6 billion. The 27 surveyed deals had an aggregate transaction value equal to approximately $67 billion, compared with aggregate transaction values of approximately $17 billion in 2012, $41 billion in 2011 and $55 billion in 2010.

Sponsor-backed deal activity was fairly consistent throughout 2013 (with seven such deals per quarter during the first three quarters and five such deals during the last quarter) and more on par with the three preceding years.

In the first quarter of 2014 there were four sponsor-backed going private transactions with transaction values in excess of $100 million.

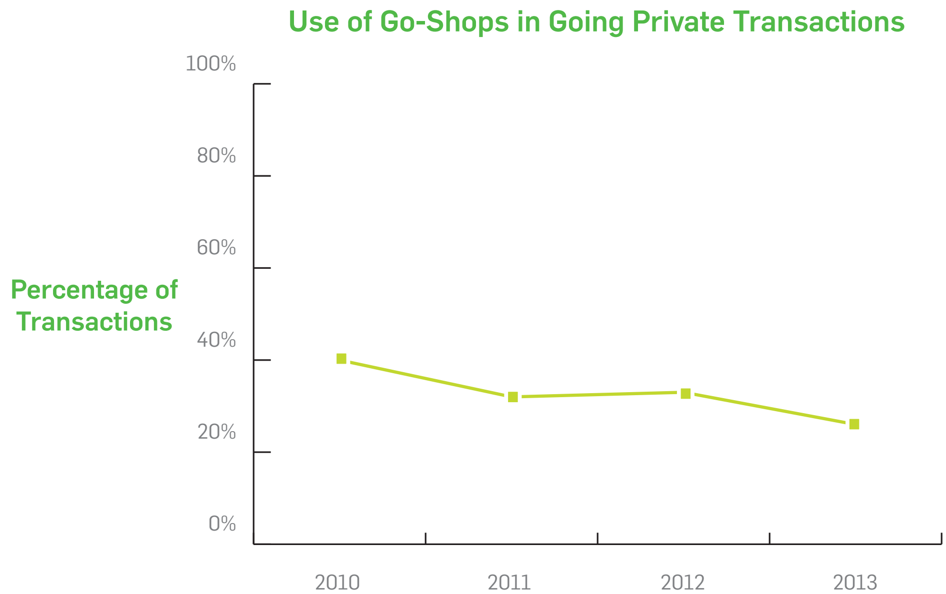


Specific performance lite is market. Specific performance lite, whereby the target has the limited right to seek specific performance to force the closing only if all conditions to closing are satisfied and the debt financing is available and ready to be funded, was utilized in approximately 81% of the 2013 surveyed deals (compared with 88% in 2012, 74% in 2011 and 36% in 2010). The 2013 surveyed deals that did not provide for specific performance lite either did not contemplate debt financing or the parties agreed that the full purchase price would be funded using equity if the debt financing was not available.



Specific performance lite first emerged after the financial crisis as a compromise between targets, which sought to limit the optionality built into the reverse termination fee structure, and sponsors, which could not accept the risk of being forced to close transactions in the event their lenders failed to fund the debt proceeds (in part due to "diversity" limitations in fund documents that restrict sponsors from investing more than a specified percentage of the fund in any one deal). While specific performance lite was initially prevalent only in larger buyouts (i.e., those in excess of $1 billion), it has clearly become the market remedy in middle market buyouts as well. The specific performance lite model has become the accepted norm with respect to allocating financing failure and closing risk in sponsor-backed transactions.

Use of go-shops is continuing to decrease from 2010. While still a common feature in many going private transactions, go-shop provisions that permit the target to canvas the market and solicit other potential bids after a deal is announced were less widely used in 2013 (26% of the surveyed transactions) (compared with 33% of the surveyed transactions in 2012, 32% of the surveyed transactions in 2011 and 40% of the surveyed transactions in 2010).



Go-shops are often included as a way to assist a target's board in maximizing shareholder value and are particularly prevalent in transactions where the target's board does not have the opportunity to commence a full sales process or otherwise perform a market check prior to signing the transaction. The continued decrease in the percentage of transactions in 2013 that contain go-shops is likely indicative of the fact that an even larger number of deals in 2013 was the result of competitive pre-signing processes, perhaps in large part due to the seller-friendly environment resulting from the favorable debt financing market and the large war chests of dry powder held by sponsors and strategics.

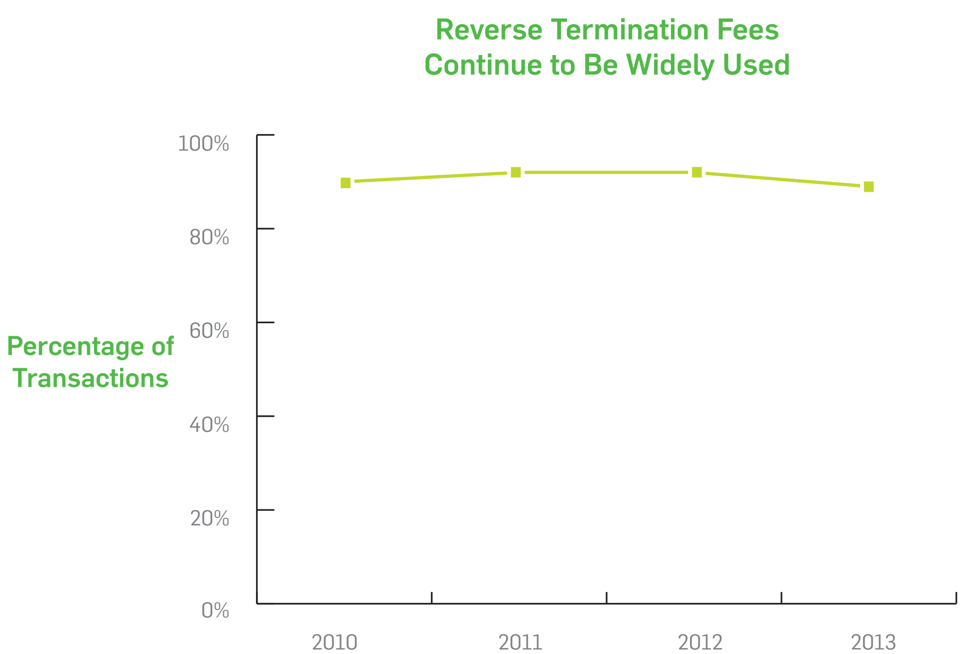
The length of the go-shop periods in the surveyed transactions in 2013 ranged from 17 days to 46 days, with an average of 31 days. The average reduced go-shop termination fee was equal to just under 50% of the termination fee. The go-shop provisions in the acquisition agreements entered into in connection with the acquisition of Websense, Inc. and the acquisition of Chuck E. Cheese (which was announced in 2014) further limited the target's ability to solicit a superior proposal by only permitting the target to communicate with a subset of the bidders who were involved in the target's sale process.

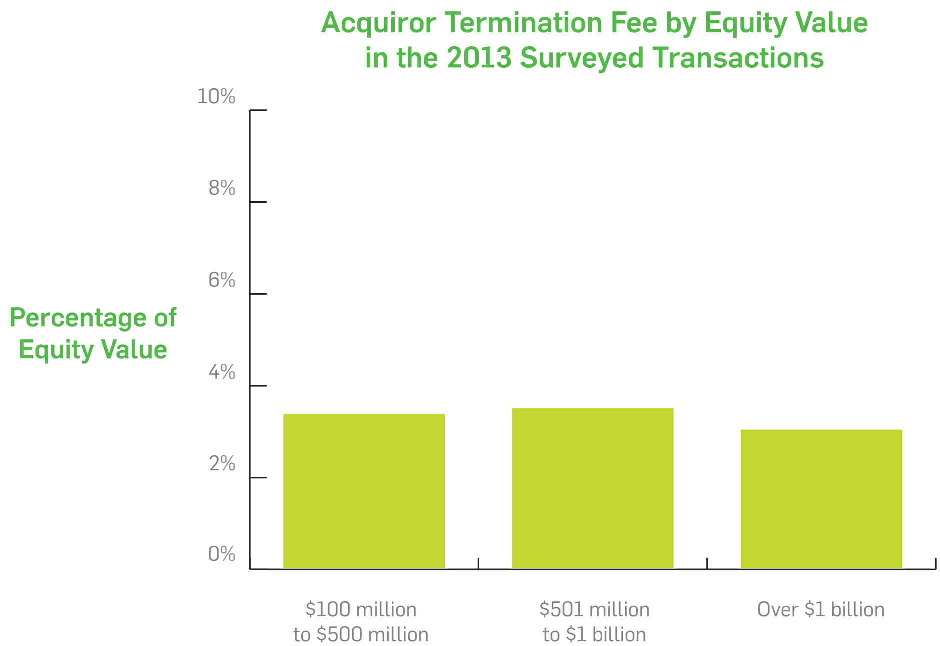
A hard-stop was utilized in 71% of the surveyed transactions in 2013 that contained a go-shop period. A hard-stop imposes a deadline (often an abbreviated period after the end of the go-shop period) on the target board to negotiate a definitive agreement with a competing bidder solicited during the go-shop period in order for the target to benefit from the reduced go-shop termination fee. Of the seven transactions with go-shop periods in 2013, (a) two had hard-stops on the last day of the go-shop period, (b) three had hard-stops after the last day of the go-shop period, which in such cases permitted the target to engage in negotiations with a competing bidder solicited during the go-shop period for time periods of 10 days in the case of two of the surveyed transactions and 25 days in the case of one of the surveyed transactions after the end of the go-shop period, and (c) two had no hard-stops.

Notably, the Dell Inc. and BMC Software, Inc. transactions had no hard-stops after the initial go-shop periods of 45 days and 30 days, respectively, giving the targets' management the right to negotiate and sign up an alternative deal with a competing bidder solicited during the go-shop period up until the shareholders' meeting and still benefit from the reduced go-shop termination fee. In the case of Dell Inc., this extended period to negotiate and finalize a deal and still benefit from the reduced go-shop termination fee may have been the factor contributing to the submission of competing bids prior to the end of the go-shop period.

The use of reverse termination fees and termination fees in 2013 was consistent with prior years. Some form of reverse termination fee appeared in all of the surveyed transactions in 2013, other than in three of the transactions which were full specific performance "all-equity" deals. The average single-tier termination fee in the surveyed transactions in 2013 that would have been payable by sponsors in certain termination scenarios (e.g., financing failure) as a percentage of equity value in the transaction was 6.76%, which is consistent with the prior three years.

The two-tier reverse termination fee construct, whereby the sponsor would pay a higher reverse termination fee for willful breaches and/or a refusal to close (other than in connection with a financing failure), has been rarely utilized in recent years and was not used in any of the surveyed transactions in 2013 (it was only used in two of the surveyed deals in 2012).





- In the surveyed transactions in 2013, the average termination fee as a percentage of equity value of the transaction was 3.43%. This is the average termination fee that would have been payable by targets in certain termination scenarios (e.g., entering into an alternative acquisition agreement in connection with a superior proposal). It is consistent with, albeit down slightly from, the average termination fees of 3.35% in the 2012 surveyed transactions and 3.49% in the 2011 surveyed transactions.
- In all of the 2013 surveyed deals with go-shop provisions, a superior proposal entered into as a result of the go-shop period would have triggered the payment of a reduced termination fee. Target boards took the view that the traditional fee (which averaged at 3.34%) was inconsistent with the spirit of the go-shop as a true post-signing “test the market” process. On average, the reduced termination fee in the 2013 deals was just under 50% of the normal termination fee.

Target termination fee scenarios. In the 2013 surveyed transactions, the typical trigger for the payment of the termination fee by the target was the entering into or consummation of an alternative transaction during the 12 month period beginning on the date of termination; however, two of the 2013 surveyed transactions had nine-month tail periods and one of the 2013 surveyed transactions had an 18-month tail period.

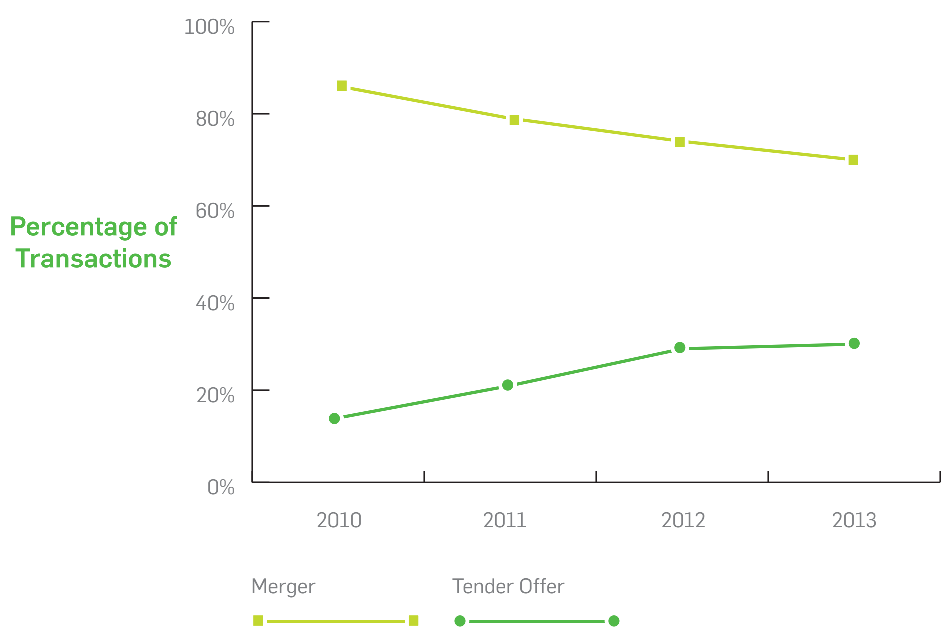
Ability of the target board to change its recommendation. All of the 2013 surveyed deals contain provisions allowing the target board to change its recommendation in certain situations to satisfy its fiduciary duties. Of the 2013 surveyed deals:

- 4% allow the target board to change its recommendation only in connection with a superior proposal.
- 81% allow the target board to change its recommendation in connection with a superior proposal or an “intervening event” (typically defined as an event or circumstance unknown or unforeseeable to the target board at signing that now occurring or known would require the target board to change its recommendation in order not to act in a manner inconsistent with its fiduciary duties).
- 15% allow the target board to change its recommendation in connection with a superior proposal or if required to satisfy its fiduciary duties generally.

Sponsors are not expressly being required to sue their lenders. While initially popular following the financial crisis, provisions expressly requiring sponsors to sue their lenders in the event that these lenders fail to provide the committed debt financing have become less common. In fact, in 2013, only 26% of the surveyed deals expressly contained such a provision (compared with a majority of the deals surveyed in 2010). It is important to note, however, that a majority of deals are silent on this and such agreements may require the sponsor to use its reasonable best efforts to enforce its rights under the debt commitment letter, which could include suing a lender.

Tender offers appear to be becoming more popular in light of the new Section 251(h). In 2013, sponsors utilized the two-step tender offer/back-end merger structure in 29.6% of the surveyed deals (compared with 26% in 2012, 29% in 2011 and 15% in 2010). Tender offers have remained popular particularly due to the speed with which an acquisition structured through a tender offer (followed by a short-form merger) can be completed (in as few as six weeks, if not less time). With the recently enacted amendment to the Delaware General Corporation Law that added a new Section 251(h) as discussed in the *New and Noteworthy* section, tender offers are becoming even more popular for sponsors. Since August 1, 2013 when the amendment to the Delaware General Corporation Law which added the new Section 251(h) became effective, 38.5% of the 2013 surveyed transactions used a tender offer construct, while only 21.4% of the 2013 surveyed transactions that were completed or announced prior to August 1, 2013 used the only tender offer construct. Of the sponsor-backed going private transactions in excess of $100 million that were announced or completed in the first quarter of 2014, 50% used the tender offer construct. All of the 2013 surveyed transactions that were entered into after August 1, 2013 and that used the tender offer construct had top-up option mechanics although the parties ultimately relied on Section 251(h) rather than on the top-up option mechanics.

Deals Structured as Tender Offers vs. Mergers



Key Conclusions

Key trends for going private transactions in Europe in 2013 include:

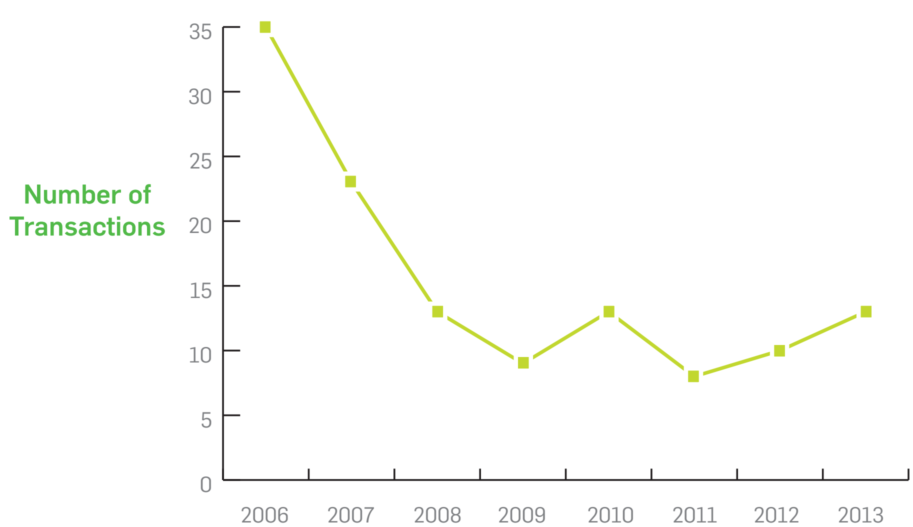
- After a slow first half of the year, 2013 saw an increase in activity in the European going private market, with a 30% increase by volume in sponsor-backed transactions in excess of $100 million as compared to 2012. However, the average value of these transactions has decreased by 26% as compared to 2012.
- Q3 and Q4 of 2013 featured a flurry of take-private activity, with as many offers being made during that six-month period as were made during the whole of 2012. Low deal activity in Q1 2014 suggests that this may have been an isolated peak in activity rather than indicative of an upward trend.
- There was only one UK sponsor-backed going private transaction in excess of $100 million during 2013, suggesting that the once-popular UK market is losing favour to markets in continental Europe, particularly Germany and France.
- In newer markets, Avista and Nordic Capital completed the first ever successful sponsor-backed take private transaction in Switzerland, acquiring pharmaceuticals company Acino Holdings AG at a market capitalisation of $439 million in 2013.
- The UK Takeover Code Panel Executive clarified that irrevocable undertakings from directors may not be used to circumvent the rules restricting offer-related arrangements with a target or those acting in concert with a target (including directors).
- The trend in the Netherlands towards restricting the operations of a target post-closing was seen once again in the acquisition of Unit4 NV by Advent International.
- 'Pre-wiring' a transaction (involving the approval by the board and shareholders of the target of certain post-closing restructuring steps to ensure that an offeror will acquire 100% of the share capital, even if less than the statutory squeeze-out percentage is tendered) has become more common in the Netherlands, although it is notably still largely subject to the negotiating power of the target as compared to the offeror.
- The Italian financial market regulatory authority has been granted and made use of increased investigative powers in respect of the disclosure of information by the offeror at or prior to the announcement of an offer, including with respect to the offeror's ownership structure and its future plans for the target.

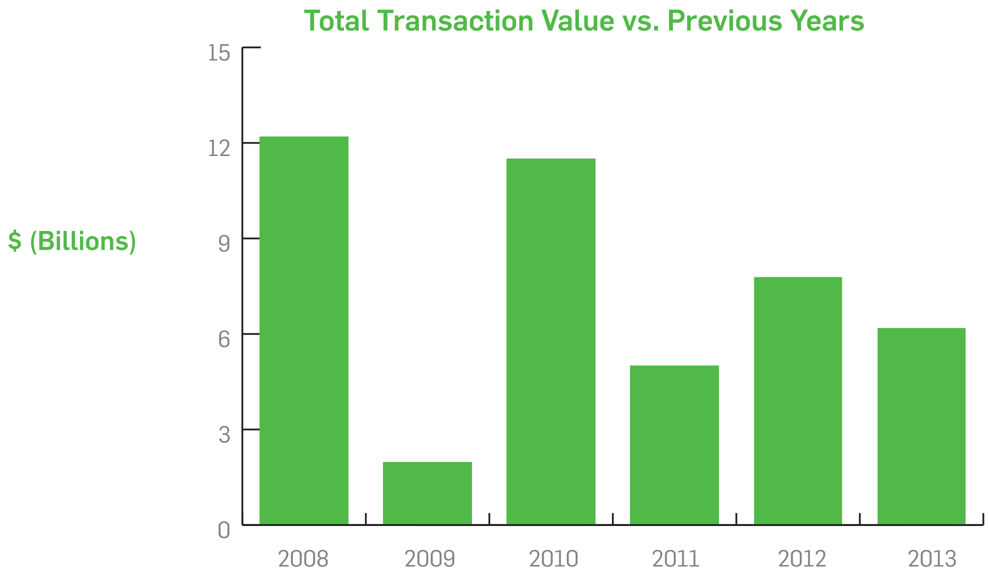
Highlights of 2013

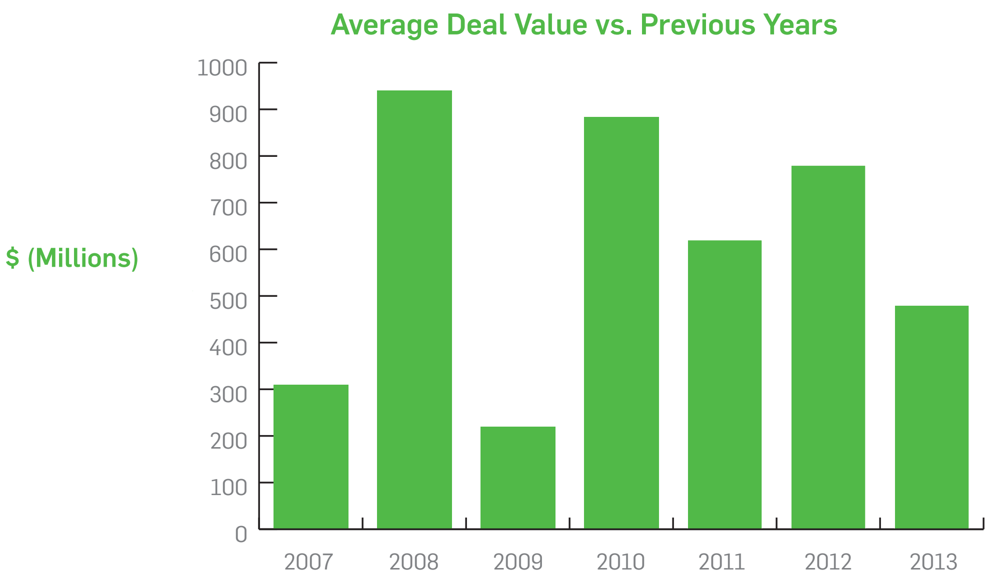
Volume of sponsor-backed going private activity increased in 2013 against 2012, but deal values remain low. In 2013 there were 13 announced sponsor-backed going private transactions in excess of $100 million in Europe with a total value of $6.2 billion and two additional potential transactions that were rejected by the relevant target's board. This represents a 30% increase from 2012 by volume (2012: ten deals) but a 26% decrease by deal value (2012: $7.8 billion). Of the 13 transactions announced in 2013, the average deal size was $480 million with a range from $134 million to $1.58 billion. This is a significant reduction from the average value and range of transactions above the survey threshold from both 2012 (average: $780 million; range: $109 million to $2.3 billion) and 2011 (average: $620 million; range: $136 million to $2 billion). This trend of a larger volume of lower value deals is consistent with the 'new normal' within the market of generally reduced fund sizes and increased scrutiny of investments, alongside an increasing availability of debt finance with more favourable terms (the average debt/EBITDA ratio in 2013 was 6.2x, as compared to 5x in 2012). Another potential factor is the prevalence of significant strategic and trade acquisitions during 2013 and increased interest from trade bidders generally, which has seen prices pushed up to a level at which sponsors may not be able to realise meaningful returns.

Of the 13 transactions, only one involved a competitive situation with competing offers (Unit4). Three failed to achieve a total acquisition due to non-take up by shareholders (Cam Finanziaria, Theolia, Xeikon), one of which failed to reach the minimum offer threshold (Theolia). Two were aborted due to board hostility (Adler Modemärkte, CinemaxX). One offer was postponed pending court approval that the offer is compliant with French regulations (Club Mediteranée). In the UK, the proposal by CVC for a $1.5 billion take-private of Betfair PLC and several subsequent improved proposals were rejected by Betfair's board in May 2013 prior to any formal offer being made to shareholders due to an inability by the sponsor and the board to agree financial terms. The same situation was seen in October 2013, when the board of G4S PLC rejected an approach by Charterhouse on the basis that its proposed $2.5 billion offer significantly undervalued the prospects of the business.

Deal Volume vs. Previous Years

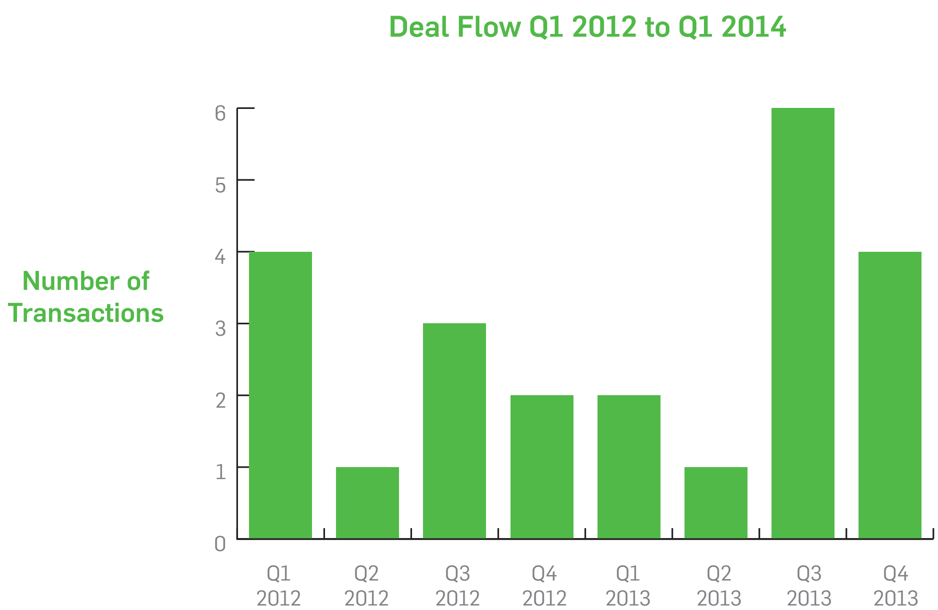



Total Transaction Value vs. Previous Years
$ (Billions)
15
12
9
6
3
0
2008
2009
2010
2011
2012
2013


Average Deal Value vs. Previous Years
$ (Millions)
1000
900
800
700
600
500
400
300
200
100
0
2007
2008
2009
2010
2011
2012
2013


Failed Offers
Failed Offers
Successful Offers

Inconsistent deal flow, building through 2013. The first half of 2013 saw a slow market for going private transactions both in terms of deal volume and size: only three offers worth more than $100 million were made (Adler Modemärkte, Club Mediteranée, S&B Industrial Minerals) with an aggregate deal value of just $1.3 billion up to the end of Q2. However, deal pace picked up during the third quarter, with the third and fourth quarters seeing six and four offers above $100 million, respectively, with an aggregate value of $2.1 billion and $2.8 billion, respectively. This contrasts with recent years which have seen generally consistent deal flow throughout the year. Unfortunately it appears that this trend for a slow start to the year may be repeated in 2014, there being only one sponsor-backed going private transaction above the $100 million threshold during Q1 2014, with a deal value of just $121 million.



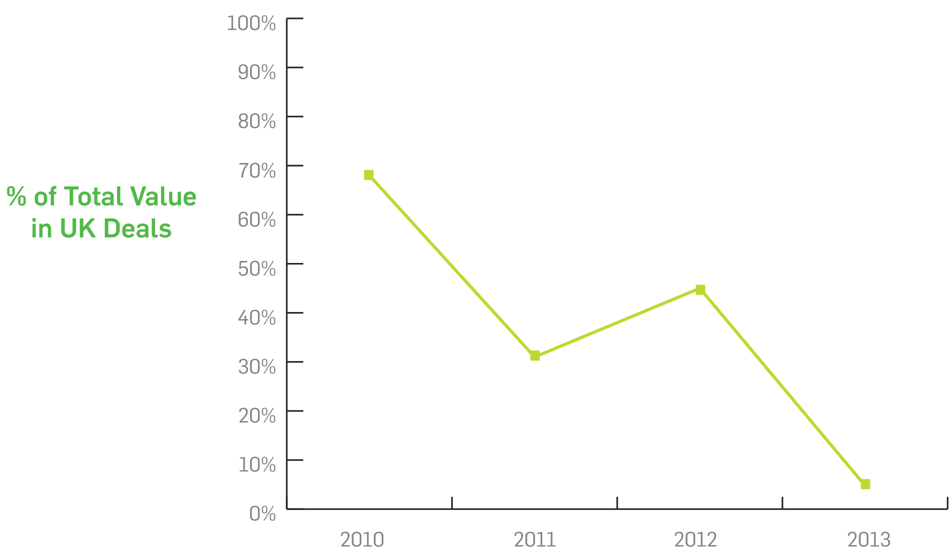
Sector diversity. Sponsor-backed going private transactions in Europe had no specific sector focus during 2013, with target companies in the fields of, amongst others, retail, mining, construction, pharmaceuticals, computer software, manufacture and hotel operations.

Popular markets. The transactions surveyed in 2013 involved targets in France, Germany, Greece, Italy, the Netherlands, Norway, Switzerland and the UK. France and Germany saw the majority of these deals, with 46% of the transactions surveyed involving a target in one of these two countries.

- **The UK** – There was only one successful take private of a UK company (Fiberweb) in 2013, for a value of $302 million (i.e., just 8% of the surveyed transactions by volume and just 4.8% by value). Previous years have seen the UK as a prime market for going private transactions, with 50% of the surveyed transactions by volume and 45% by value in 2012, 25% by volume and 31% by value in 2011, 54% by volume and 68% by value in 2010, 33% by volume and 37% by value in 2009, and 54% by volume and 67% by value in 2008.

UK Share of Transactions vs. Previous Years by Volume

UK Share of Transactions vs. Previous Years by Value



- **The Netherlands** – The Netherlands remains a popular jurisdiction for going private transactions despite the continuing trend for increased post-closing commitments that are enforceable against the bidder by the former independent directors of the target (reported in last year's survey), including commitments to maintain 'proper financing' post-closing and to keep a minimum number of independent directors on the board of the target for a period of time post-closing.

- **Switzerland** – 2013 saw the completion of the first ever successful sponsor-backed take private transaction of a Swiss company (Acino). The reluctance of sponsors to launch takeover bids in Switzerland may be due in part to the high squeeze out thresholds in operation there (these are 90% of voting rights for a squeeze out merger and 98% of the voting rights for the cancellation of the shares by court order) and the relative lack of successful precedent transactions.
- **Poland** – Whilst going private deal activity in Poland has remained low to date, recent pension reform in Poland may lead to certain pension funds restructuring their holdings of equity securities of companies listed on the Warsaw Stock Exchange during 2014. It is not yet possible to predict what effect this may have on the going private market (either generally or for sponsors), but it is certainly a space worth watching through 2014.

Increased regulation in France. Despite the making of four offers above the $100 million survey threshold in France during 2013, several factors conspired to create a hostile environment for sponsor-backed take private transactions within the jurisdiction. The recently adopted 'Florange' law (which was approved during 2013 but came into force on 29 March 2014) provides (amongst other things) that an offer (whether voluntary or mandatory) will automatically fail should the offeror fail to secure acceptance in respect of at least 50% of the target. If a mandatory offer (triggered upon a shareholder's holding exceeding 30%) fails in this way, the voting rights attached to the shares held by the offeror are effectively 'capped' at 30%, and the offeror is not permitted to acquire any additional shares in the target unless it initiates a new offer. Other changes introduced by the law include:

- the introduction of a consultation procedure (rather than a notification procedure, as under the previous regime) with applicable works councils in the event of a change of control, pursuant to which the board may not respond to an offer until the relevant works council has issued an opinion on the offer;
- in the event a shareholder whose stake is between 30% and 50% increases its stake by more than 1% (previously 2%), calculated on an annual basis, the obligation to launch a mandatory offer is triggered;
- automatic double voting rights for existing shares that have been registered in the name of a holder for two years or more (previously these double voting rights would only be applied if specifically included in a company's bylaws, whereas under the Florange law they will apply automatically unless the company 'opts out' under its bylaws); and
- revision of the requirement for board neutrality during an offer period, such that the board of a target may take steps to frustrate a hostile bid without the approval of the shareholders.

The more restrictive attitude towards take private transactions in France has also been reflected in shareholder activism, with two high profile sponsor-backed bids being derailed by minority shareholders in 2013 (Club Mediteranée, Theolia) despite both having board and management support. However, at the time of going to press, a Paris court has opened the door to a proposed takeover of Club Mediteranée by rejecting a challenge to the deal by minority shareholders. This could deter bidders. In addition, the rise in the CAC40 (the benchmark index of the 40 companies listed on Euronext Paris with the highest market capitalisation) by around 18% during 2013 (a trend which is expected to continue during early 2014) has led to a significant increase in the market capitalisation of listed entities, making the achievement of a significant return on a take private transaction more uncertain.

Acquisition thresholds/conditions in Greece. In Greece, recent changes in legislation have increased the $100 million thresholds required to effect certain takeover actions. Of particular interest to private equity sponsors, any corporate action which would end up in the target being delisted must be approved by the holders of at least 95% of the voting rights in the target (previously this had to be approved by the holders of at least two thirds of the voting rights in the target, following which a mandatory tender offer had to be made).

Irrevocable undertakings in the UK. Market practice within the UK has previously been to require irrevocable undertakings from directors who are shareholders in the target company prior to the announcement of an offer, which are drafted widely to include not only an undertaking to sell shares but also certain matters unrelated to the acceptance of the offer as a shareholder. These have included undertakings to vote in favour of the offer at a board meeting, not to solicit a competing offer, and to recommend the offer to the shareholders. In September 2011, the Takeover Panel Executive introduced a general prohibition on certain offer-related arrangements during an offer period or when an offer is reasonably in contemplation, which includes these types of enhanced irrevocable undertakings. However, this prohibition was not strictly followed by all offerors, a significant proportion of which have continued to seek and obtain enhanced irrevocable undertakings from directors who are shareholders. On January 17, 2014 the Panel Executive issued a practice statement to clarify that such additions to irrevocable undertakings are in breach of the Takeover Code and are not permissible, even if stated to be subject to the director's fiduciary or statutory duties. Sponsors should therefore ensure that such additional undertakings are not sought from directors of a target on future transactions.

In practice, we expect that this clarification and the increased focus on this issue by the Panel Executive will reduce in scope the assurances sought from directors who are shareholders with respect to behaviour as a director in relation to the offer, the distinction being whether the undertakings are in the target director's capacity as a shareholder (likely to be acceptable) or as a director (likely to not be acceptable).

Pre-wiring in the Netherlands. Several recent going private transactions in the Netherlands have displayed a trend towards 'pre-wiring' certain post-closing restructuring steps to ensure that an offeror will acquire 100% of the share capital even if less than 95% (the percentage required to initiate statutory buy-out proceedings in the Netherlands) of the share capital is tendered.

Until recently, it was common that the offer document would detail the post-closing restructuring steps that the bidder could take after completion of the offer if it closed the public offer with less than 95% ownership. In many transactions, these steps are now 'pre-wired,' meaning that the target's board and shareholder meetings approve the implementation of those steps prior to completion of the offer. This reduces the time needed to implement the post-closing actions and reduces the risk of litigation (the steps are approved by a truly independent board and the shareholders themselves, and shareholders may be less inclined to initiate litigation prior to closing in case the bidder withdraws).

However, in the Unit4 transaction, a strong target bargaining position and competitive process (Apax, Bain and Hellman & Friedman were all separately interested in the target) meant that the target was able to refuse to pre-wire any post-closing steps.

Disclosure obligations in Italy. The Italian financial market regulatory authority, CONSOB, has been granted more pervasive investigative powers under recent regulations. As a result, CONSOB has recently shown a more demanding attitude in respect of the disclosure of information by the offeror at or prior to the announcement of an offer, particularly in relation to shareholder structure and ultimate beneficial ownership, prior transactions involving the target's shares, persons acting in concert, and future plans for the target following completion of the transaction. Recent trade and sponsor-backed transactions have seen CONSOB requiring disclosure of:

- every potential conflict of interest on the part of the persons involved in the transaction, including advisors, lenders and investment banks (Cam Finanziaria: the offer was made following the acquisition of shares by the CEO (an existing significant shareholder) from another significant shareholder, in the context of the settlement of a dispute between the two);
- extensive information on the offeror's future plans for the target (Impreglio: the offer was being made by a competitor); and
- the offeror's ownership structure (Dada: the offeror was ultimately owned by a Jersey trust; CONSOB requested full disclosure in relation to the settlor, beneficiary, trustee and protector of the trust).

Whilst these enquiries could be off-putting for a sponsor-backed offeror, the new powers are exercisable only when CONSOB has a strong belief that a violation of market rules has occurred or will occur, and not as part of the routine evaluation of an offer document. The more pervasive approach is designed to give the market a very clear picture of the background to the offer and of the offeror's future plans in relation to the target.

Key Conclusions

In 2013, total private equity activity in the Asia-Pacific region[1] increased more than 20% from 2012 and was approximately equal to 2011. There was a slight increase in the number of surveyed sponsor-backed going private transactions in the region, while the value of these transactions declined compared to 2012. Seven going private transactions form part of our survey this year, and constitute about 5% of private equity deal activity, by deal value, in the region.

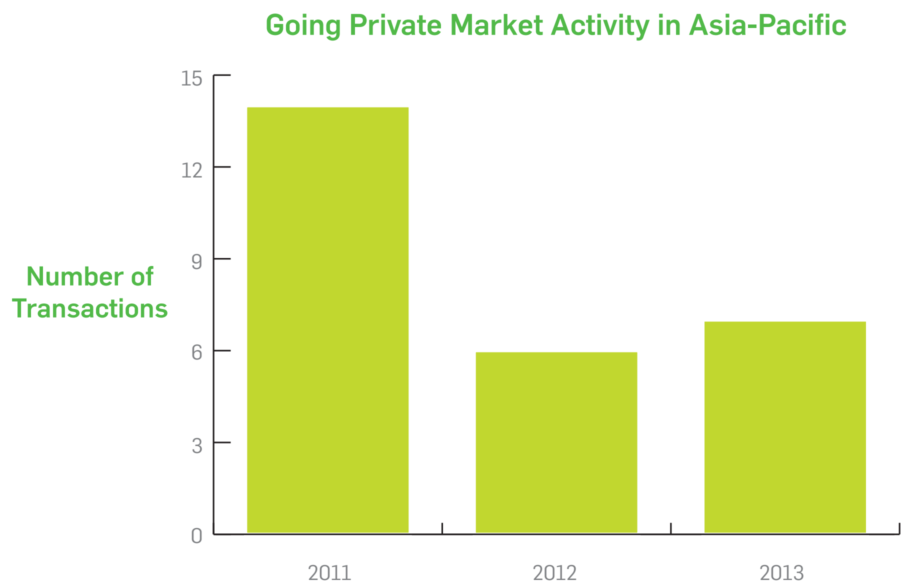
Some conclusions and trends for going private transactions in the region for 2013 include:

- The seven sponsor-backed going private transactions surveyed in 2013 represented a slight increase from six transactions in 2012 and a significant decrease from 14 transactions in 2011.
- As in prior years, tender offers and schemes of arrangement continued to be the two principal forms used in takeover bids.
- The use of debt financing by sponsors in the region increased, with four of the seven surveyed transactions utilizing debt financing. The remainder utilized only equity.
- While not found in this year's surveyed transactions, termination fee provisions are often seen in transactions effected through a scheme of arrangement, some of which also contain reverse termination fee provisions. If used, reverse termination fees in the region tend to be similar in size to termination fees.
- Fiduciary outs are treated very differently in different jurisdictions in the region. In some jurisdictions, a fiduciary out provision is common in a scheme of arrangement. In other jurisdictions, a fiduciary out provision is prohibited without shareholder approval.
- Go-shop provisions remain a relatively unused concept in the region. None of the surveyed transactions in 2013, 2012 or 2011 had a go-shop provision.
- Financing-out provisions are uncommon in acquisition agreements entered into in connection with transactions in the region. For transactions effected by cash offer, certainty of funding typically has to be confirmed before the offer can be launched. For transactions effected by a scheme of arrangement, a financing condition can sometimes be included in the scheme agreement, but often all conditions must be satisfied before the scheme can be sanctioned by a court.
- An MAE-out is common in many jurisdictions in this region, though it is typically not permitted in mandatory offers. In some jurisdictions, an MAE-out has to be objective, while in other jurisdictions it is possible to have a broader, more subjective MAE-out.
- As with previous years, a number of sponsor-backed going private "indicative proposals" in the region were either rejected by the target or withdrawn, or otherwise did not result in a definitive agreement. As a result, these "indicative proposals" are not reflected in the survey.

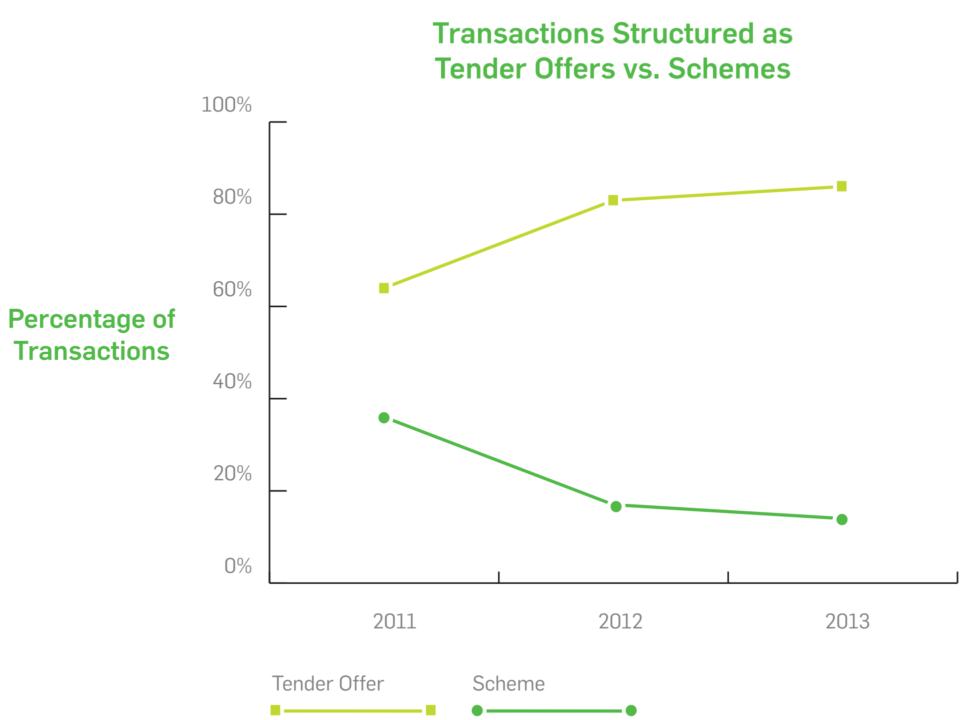
1 For the purposes of this survey, the Asia-Pacific region includes Australia, China (including Hong Kong), India, Indonesia, Japan, South Korea, Malaysia, New Zealand, Philippines, Singapore, Taiwan, Thailand, and Vietnam. Information regarding market activity is based on publicly available information and has not been independently verified.

Highlights of 2013

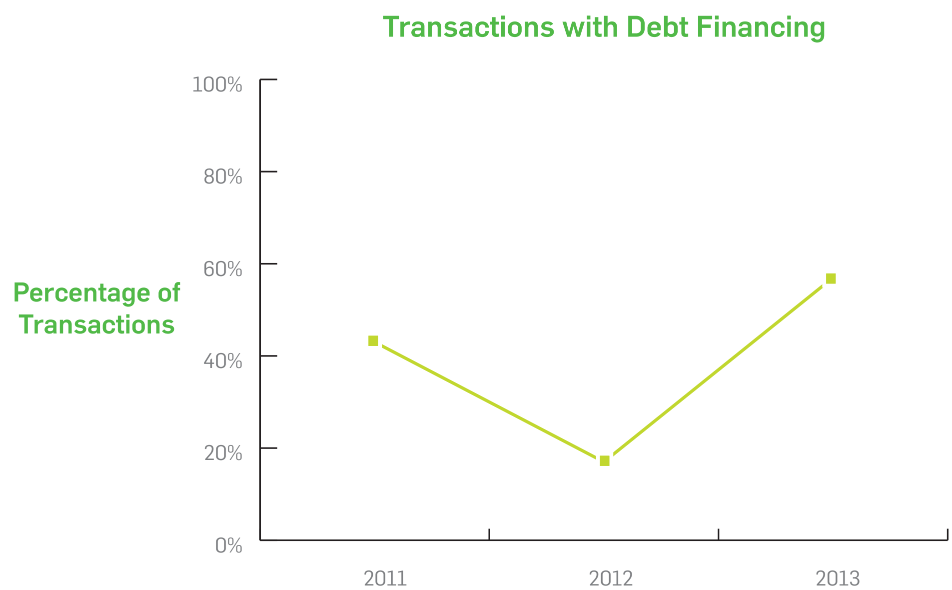
Sponsor-backed going private deal activity increased slightly in 2013. In 2013, there were seven announced sponsor-backed going private transactions in excess of $100 million in the region, up from six such deals in 2012 but down from 14 such deals in 2011. Transaction values of the seven surveyed 2013 deals ranged from just over $100 million to just over $500 million. The seven surveyed deals represent an aggregate transaction value equal to approximately $1.9 billion, compared with aggregate transaction values of approximately $2.8 billion in 2012 and $9.2 billion in 2011.



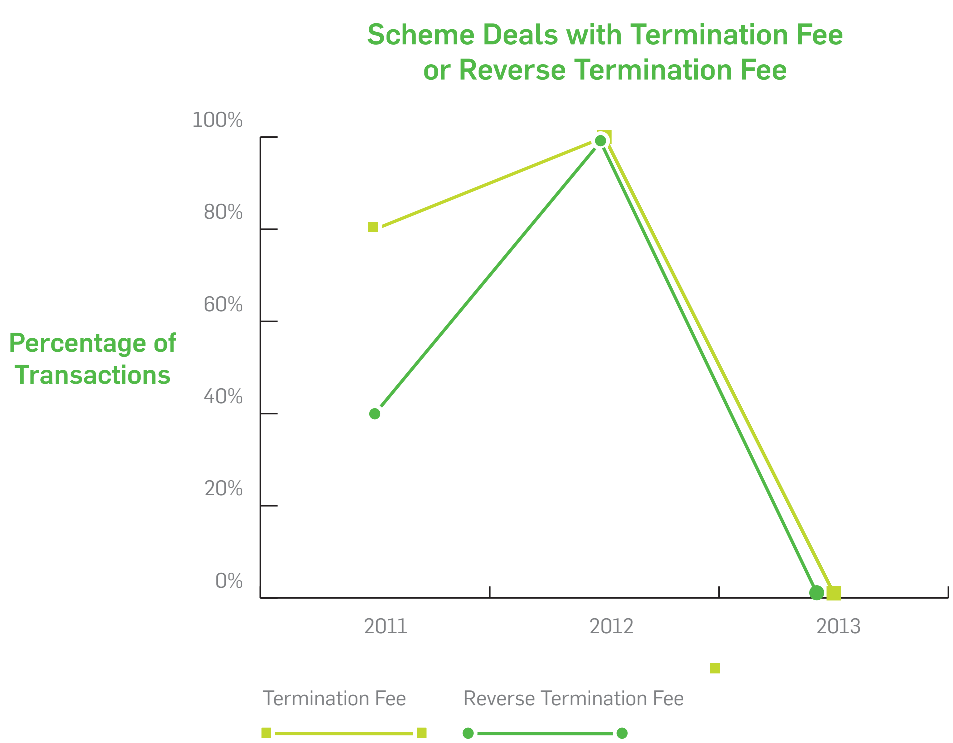
Tender offers and schemes of arrangement are the more commonly seen takeover transaction forms in the region. As would be expected, the legal regimes applicable to public takeovers in the jurisdiction of the target company determine the form of the transaction. As in previous years, the 2013 surveyed transactions were accomplished by either a cash offer for shares or a scheme of arrangement. Cash offers continue to be the more popular form for the 2013 surveyed transactions in this region.



Number of debt financed transactions increased in 2013. In 2013, four of the seven surveyed transactions (or approximately 57% of the 2013 surveyed transactions) utilized debt financing (up from 17% in 2012 and 43% in 2011). As can be expected, debt financing appears to be more commonly used by sponsors in the more mature markets in the region.



Termination fees were not utilized in 2013, but are often found in transactions effected through a scheme of arrangement. The single surveyed transaction effected through a scheme of arrangement in 2013 did not include a termination fee. However, in previous years schemes have often included a termination fee payable by the target if the transaction was terminated as a result of a superior offer or certain material breaches by the target. Reverse termination fees are generally less common in Asia-Pacific markets than in the United States but, if used, they tend to be similar in size to termination fees. In some jurisdictions in this region, termination fees are normally at or below 1% of the transaction value.



Different jurisdictions in this region have a very different take on the fiduciary out provision (or the ability of the target board to change its recommendation). There are great variations among jurisdictions in this region with respect to fiduciary out provisions. In a few jurisdictions, such as Australia, the target board usually negotiates a fiduciary out in a scheme of arrangement, while the buyer usually negotiates a notification right, a matching right, and a termination fee if the target accepts a competing bid. At the other end of the spectrum are jurisdictions where a fiduciary out provision is generally not legally permitted without obtaining shareholder approval.

Go-shop provisions remain a relatively unused concept in the region. Go-shop provisions have been rare in all jurisdictions in the region, even in more mature markets such as Australia. None of the surveyed deals in 2013, 2012, or 2011 had go-shop provisions. In transactions effected through a scheme of arrangement (which typically involve direct agreements with the target company), targets usually agree to a no-shop or similar provision.

Financing-out provisions are unusual in going private transactions in this region. In most jurisdictions in the region, if the transaction proceeds by way of a cash offer, then, at the time the offer is launched, the buyer must have certainty of funding (sometimes the buyer must obtain an unconditional confirmation from its financial adviser or a bank). If the transaction proceeds by way of a scheme of arrangement, then a financing condition can sometimes be included in the scheme agreement (and the buyer may be required to pay a reverse termination fee if it cannot successfully obtain financing), but all conditions to closing must be satisfied before the scheme can be sanctioned by a court. In some jurisdictions, it is possible to structure the transaction as a pre-conditional offer, so that the offer is formally launched only after the financing condition is met. Sometimes such a pre-launch “financing out” requires pre-clearance from the relevant regulatory authority.

MAE-out provisions are common in transactions in this region. It is common to have an MAE-out in transactions in many jurisdictions in this region, though an MAE-out is typically not permitted in mandatory offers (which normally can be subject to only one condition, the voting threshold). In some jurisdictions, an MAE-out has to be sufficiently objective and its fulfilment cannot depend on the subjective interpretation or judgment by a transacting party, while in other jurisdictions it is possible to have a broader, more subjective MAE-out. Sometimes an MAE-out requires pre-clearance from the relevant regulatory authority.

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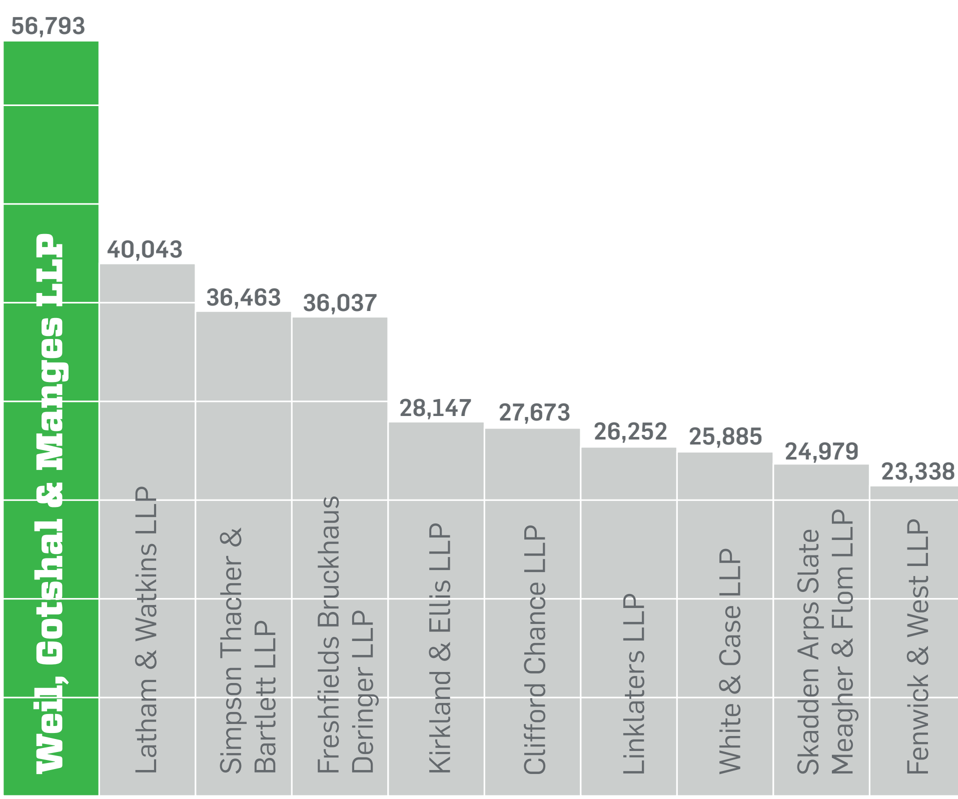

Global Private Equity Announced Deals 1H 2014
Volume in US$ millions

Source: Bloomberg Global M&A Legal Advisory Rankings 1H 2014 weil.com

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