

PRESS RELEASE

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23 March 2022 – 2021 saw European M&A booming, with a confident return to pre-pandemic levels and normal deal behaviour resuming in the majority of transactions, according to the latest annual M&A study by global law firm CMS.

The multi-year analysis of the key legal provisions within M&A agreements is the most comprehensive of its kind and is based on a proprietary database comprising more than 5,000 deals. In its 14th consecutive year, this edition adds almost 500 deals that CMS advised on in Europe in 2021 – a record number of deals for one year and reflective of the current M&A boom.

CMS observed that ‘normal’ deal metrics applied in most transactions, with increased earn-outs, a retreat from the “buyer friendly approach” observed in 2020, and a return to the more standard approach to risk sharing that was observed before the pandemic.

The *CMS European M&A Study* reveals that the primary deal driver for transactions continues to be buyers entering a new market (43%). Over a third (36%) of deals were the acquisition of know-how or acqui-hire acquisitions. There was also a notable increase in deals involving the acquisition of a competitor (32%), up 10% on 2020 (22%).

Louise Wallace, Head of the CMS Corporate/M&A Group, said: “As a firm, we reported on 90 more deals as compared to 2020 – an unprecedented 22% increase in deal activity year on year.”

“Our findings suggest that there is good reason to be optimistic about future deal activity in Europe. In many ways, ‘normal’ service resumed in 2021, with more familiar patterns in deal metrics and growing business and investor confidence, but we wait to see how robustly M&A activity will continue in 2022 in the light of the invasion of Ukraine.”

Stefan Brunnschweiler, Co-Head of the CMS Corporate/M&A Group, added: “This study covers a tumultuous year for M&A, where the market has bounced back spectacularly from the drop off experienced in the early stages of the COVID-19 pandemic. Clearly, there are still

risks and uncertainties, particularly in the current political climate, but we are hopeful M&A activity will continue at pace and accelerate global business growth”.

Signs of a return to the pre-pandemic status quo include:

- **Significant increase in earn-out structures** – the use of these structures jumped from 21% in 2020 by 5% to 26% in 2021, indicating a general move to ensure that the price paid for a business is measured over a longer period than purely by reference of the financial years dominated by the pandemic
- **PPA provisions return to pre-pandemic levels** – the number of transactions featuring purchase price adjustment provisions returned to 47%, just above the 2010-2020 average of 45%, suggesting that a greater proportion of buyers are able to insist on PPA provisions
- **Shorter limitation periods** – two-thirds of transactions now have a limitation period of 12-24 months, marking a change from 2021’s findings that limitation periods had increased
- **De minimis and basket sizes return to market norm** – applying in the majority of transactions (74% and 67% respectively)
- **Liability caps** – the level of liability caps at less than 50% of the purchase price increased significantly in 2021. Deals where the cap was equal to the purchase price remained constant at 30%, but those with a cap of less than 10% increased significantly to 22%, from 16% in 2020
- **Use of locked box transactions** – a large increase in non-PPA deals (59% in 2021 vs 51% in 2020)

Other key findings include:

- **Steady use of Warranty & Indemnity (W&I) insurance** – the popularity of W&I insurance saw a marginal increase, from 17% in 2020 to 19% in 2021
- **Arbitration as a dispute resolution mechanism** – the continued use of arbitration, seen in 33% of deals, up from 32% in 2020

Regional differences

The study also revealed significant differences in market practice between the European regions:

- PPA provisions and locked boxes in non-PPA transactions have reverted to pre-pandemic levels across Europe, with significant increases in Southern Europe and in the UK
- The use of ‘first dollar’ baskets across the European region is beginning to converge, with significant increases in France and Southern Europe

- The overall increase in deals with liability caps of less than 50% of the purchase price was reflected in a drop off of higher caps in the UK and Southern Europe
- Limitation periods for warranty claims of more than 24 months are prevalent in CEE, France and Southern Europe
- The take-up of W&I insurance cover has increased significantly in Benelux, German-speaking countries and the UK, but remains low in France and across Southern Europe
- Data room disclosure remains of limited application in France and Southern Europe
- The use of MAC clauses is low in the UK, German-speaking countries and the Benelux region, but remains high in CEE, Nordic and Southern European countries

CMS has also analysed differences between Europe and the US, with similar differences in market practice remaining, including the presence of PPA at higher volumes in US deals, with the notable exception of earn-outs, which were more popular in Europe (26% of deals) than in the US (20%).

About the Report:

The CMS European M & A Study 2022 ('the Study') provides insight into the legal provisions of merger & acquisition (M & A) agreements, makes comparisons across Europe and with the US, and identifies market trends. CMS analysed private M & A agreements relating to both non-listed public and private companies in Europe for the 14-year period 2007 – 2021. Of the 5,506 CMS transactions we analysed, 489 relate to 2021 and 5,017 relate to the period 2010 – 2020.