

PRESS RELEASE

CMS Belgium
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Subject	CMS: European M&A bounced back to pre-pandemic levels, with a return to more standard seller and buyer positions	

CMS: European M&A bounced back to pre-pandemic levels, with a return to more standard seller and buyer positions

- *Multi-year analysis by CMS reveals that 'normal service' had resumed in European dealmaking as familiar patterns in deal metrics return*
- *Primary deal driver for transactions is buyers entering a new market (43%), with a notable increase in deals seeing the acquisition of a competitor (32%)*

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 Brunschweiler, 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

Europe

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.

Benelux

Vincent Dirckx, Partner and Head of the CMS Corporate/M&A practice in Belgium, notes the following differences in market practice within the Benelux:

- **W&I insurance:** There was a significant increase in the application of W&I insurance in the Benelux countries with 17% of transactions being covered in 2021 compared to the average of 9% for the period 2010 to 2020.
- **Data room disclosure:** There was a significant decrease in the acceptance of general disclosure of the data room for transactions in Benelux, with this concept applying in 40% of such transactions compared with 69% in 2020.
- **De minimis clauses:** The application of *de minimis* clauses across Europe continues to vary. The range varies from 91% for Benelux transactions to 59% for Southern European countries.
- **Application of baskets:** There was a drop-off in application in respect of Benelux and CEE at 63% and 51% application from 74% and 71% respectively.
- **Liability cap:** In 2021, there were significant regional movements in respect of Benelux and the Southern European countries where liability caps applied to 38% and 60% of their transactions, representing an increase from 30% for Benelux.
- **Deals with longer limitation periods:** In Benelux, there has been an increase in deals with longer limitation periods (i.e. more than 24 months) and a corresponding decrease in the number of deals with shorter limitation periods (six to 12 months) for warranty claims.
- **Escrow accounts:** The use of escrow accounts is especially popular in Southern European countries and Benelux, applying to 47% of deals with a security for warranty

claims. However, this is a much lower figure when compared with the figure for Benelux in 2020 (71%).

- **Arbitration clauses:** In comparison to 2020, arbitration is again slightly more popular in Benelux, featuring on 23% of deals in 2021 (20% in 2020).

Vincent Dirckx, Partner and Head of the CMS Corporate/M&A practice in Belgium, highlights the following elements:

“There is an important increase in the application of W&I insurance in the Benelux countries and a significant decrease in the acceptance of general disclosure of the data room.”

“The application of de minimis clauses across Europe continues to vary, with a range from 91% for Benelux transactions to 59% for Southern European countries.”

“With the return to pre-pandemic levels and normal deal behaviour, deals with longer limitation periods are now increasing.”

“Also, there is a noticeable decrease in the use of escrow accounts in comparison with the figure in 2020.”

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%).

For more information: <https://cms.law/en/bel/publication/cms-european-m-a-study-2022>

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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.

About CMS

Founded in 1999, CMS is an integrated, multi-jurisdictional organisation that offers full-service legal and tax advice. With more than 70 offices in over 40 countries across the world and more



than 4,800 lawyers, CMS has long-standing expertise both in advising in its local jurisdictions and across borders.

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