

# CMS European M&A Study 2024

Sixteenth Edition



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The results of the Study, the contents of this report and the conclusions which they present do not necessarily reflect the views of any member of CMS, the lawyers or the support staff who assisted with their preparation. Over 6,500 M&A transactions have been analysed over the history of the Study, the vast majority of which were negotiated. There were many differences between the underlying agreements we analysed. In order to compare the results, individual provisions were categorised, a process which required a degree of subjective judgement. Although certain trends can be deduced from the Study, each transaction has individual features which are not recorded in the Study and to which no reference is made. As a result, the conclusions presented in the Study may be subject to important qualifications that are not expressly articulated in them.

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# Introduction

We are delighted to bring you the CMS European M&A Study for 2024, reflecting transactions on which CMS advised in 2023. It was a challenging year for M&A, with sustained inflationary pressures, higher interest rates, slow growth and geopolitical tension (including the conflicts in the Middle East and Ukraine), which added up to a difficult macroeconomic environment. However, by Q4 2023, deal flows increased, indicating a good pipeline for 2024, likely to be buoyed by a fall in inflation and interest rates, leading to more confidence in the debt markets.

The 2024 Study covers 559 deals on which CMS advised in 2023. This is another record number of deals, demonstrating the depth, scope and strength of our corporate offering and our ability to assist our clients to take opportunities whatever the market provides.

This year is the 16th consecutive year that we have produced the Study and it continues to represent valuable insight into market trends in deal points, and how they have changed over that period. The size of deal sample and range of countries reflected means the Study is a valuable resource for M&A practitioners across Europe and further afield.

The fall in 2023 deals involving both earn-outs and purchase price adjustments indicates greater confidence in underlying valuations, as businesses demonstrate more stable financial performance than during the pandemic and the immediate aftermath. There has also been a fall in the number of transactions requiring a form of security for claims and MAC clauses – are sellers gaining the upper hand in negotiations?

We are optimistic about deal activity in Europe for 2024. At this point, early in 2024, some of the adverse economic and political factors that have historically impacted on M&A growth are still evident, but there is growing confidence in the debt markets, inflation is falling, and there is plenty of dry powder and pent up demand from institutional capital. The fact that half the globe is expected to have general elections in 2024 might itself prompt deal activity.

This year CMS welcomed the Swedish firm Wistrand as a member firm. CMS Wistrand is a full-service law firm with 51 partners and around 210 employees and with offices in Stockholm and Gothenburg. Following CMS Kluge in Norway joining in 2021, CMS is increasingly well placed to develop a strong Nordic platform. Going forward, we aim to report on Nordic M&A market practice and make comparisons with the other territories covered by the Study.

We hope that this 2024 version of the CMS European M&A Study will provide you with useful food for thought in your corporate endeavours.



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# Executive summary

This Study covers 559 share and asset deals on which CMS advised during 2023. This is a tremendous record-breaking result given the macroeconomic uncertainties that have impacted the M&A market generally.

We highlight where there have been significant changes in deal points over the last 13 years in particular, we note this year modest falls generally in the use of purchase price adjustments, locked box structures and earn-outs, which perhaps indicates more confidence in the price being fixed at completion; a seller-friendly development that reverses the trend from last year.

Other deal metrics, such as financial limitations, the use of W&I insurance, the length of limitation periods, the continued scarcity of MAC clauses and deal-related security for claims, appear largely in line with the previous years.

## Highlights / Key Messages

- The data from 2023 demonstrates some changes in deal points relating to pricing – highlights are reductions in the number of deals involving purchase price reductions and locked box structures, a fall in earn-outs and an increase in the use of Turnover/Revenue as the metric on which to calculate earn-outs. This marks a reversal of the trends from the last two years.
- Despite the high focus on ESG in the media and in the legal and sector press, our data continues to indicate that ESG aspects have yet to become a fundamental component of M&A transactions. We do, nevertheless, note an increase in the number of deals involving specific ESG due diligence (up to 47% from 33% last year), although the amount of specific ESG provisions in long form documents remains low (35%). We shall continue to monitor whether ESG begins to play a greater role in the M&A process.
- Risk allocation metrics have not deviated from earlier trends. Most transactions have a limitation period between 12 and 24 months, which is in line with the average in previous years. Liability caps of less than 50% of the purchase price are seen on a majority of deals, again in line with the rolling average. The proportion of transactions with a cap of less than 10% of the purchase price also remained the same. Higher caps on liability are seen most often on small deals.
- The use of W&I insurance in European transactions remained at the same level as in 2022. The UK remains the jurisdiction in which parties are most likely to purchase W&I insurance which occurs in just under one-third of deals – use elsewhere in Europe is more inconsistent. Our data continues to indicate that W&I insurance remains less economically justifiable on small deals (used in just 4% of cases) but is reasonably standard on medium sized and large deals (38% and 47% respectively).
- Strategic investors were more active in 2023, both as sellers (44%) and buyers (77%), than in 2022. At the same time, Finance investors were less active buyers (17% of deals, down 5% on 2022 and the previous rolling average). There were fewer sales by individuals in 2023 (down 6% at 31%) but with a general election due to occur in the UK in 2024 it will be interesting to see whether concerns as to potential changes to the capital gains tax regime will prompt more individuals to sell.

## 2023 results at a glance

### CMS Trend Index

	2010–2022	2022	2023
DEALS WITH PURCHASE PRICE ADJUSTMENT	45%	48%	44%
DEALS WITH A LOCKED BOX (WHERE NO PURCHASE PRICE ADJUSTMENT)	50%	62%	56%
EARN-OUTS	20%	27%	23%
— SHORT EARN-OUTS (12 MONTHS OR LESS)	25%	20%	17%
— LONG EARN-OUTS (36 MONTHS OR MORE)	21%	18%	19%
— EBIT/EBITDA-BASED EARN-OUTS	44%	54%	36%
— TURNOVER-BASED EARN-OUTS	30%	24%	30%
<i>DE MINIMIS</i>	71%	72%	70%
BASKET	67%	69%	64%
— LOWER BASKET (LESS THAN 1% OF PRICE)	58%	63%	60%
— HIGHER BASKETS (MORE THAN 1.5% OF PRICE)	25%	19%	23%
— FIRST DOLLAR RECOVERY	79%	81%	86%
LIABILITY CAPS			
— NO CAPS	13%	11%	11%
— LESS THAN 50% OF PRICE	54%	56%	56%
— LESS THAN 10% OF PRICE	14%	14%	14%
LIMITATION PERIODS			
— 12–18 MONTHS	32%	32%	31%
— 18–24 MONTHS	33%	33%	34%
— MORE THAN 24 MONTHS	23%	28%	25%
SECURITY FOR WARRANTY CLAIMS	31%	28%	23%
— RETENTION FROM PRICE	31%	44%	37%
— ESCROW ACCOUNT	54%	38%	44%
MAC CLAUSE	15%	13%	10%
ARBITRATION CLAUSE	33%	34%	37%
— APPLICABILITY OF INTERNATIONAL RULES RATHER THAN NATIONAL RULES	38%	32%	31%

## Key conclusions

### Purchase price adjustments –

In 2023 there was a decrease in the use of purchase price adjustment (PPA) clauses, down to 44% in 2023 from 48% in 2022. This decrease sees PPA clauses drop to levels last seen between 2018 to 2020, but they remain typical in all M&A transactions.

### Locked box Transactions –

In 2023, the increase in the use of locked box provisions from previous years was reversed, with the 2022 figure of 62% dropping to 56% in 2023. Locked box arrangements, where used, continue to occur more frequently in medium-sized transactions (69%) and large transactions (63%) than in small transactions (52%). This is consistent with the results from 2022 and is continued evidence that the use of locked box provisions is more widely accepted on higher value transactions. It also points to more price uncertainty in small value transactions than in prior years.

**Earn-outs –** The growth in the popularity of earn-outs experienced in 2021 and 2022 ceased, with their use falling by 4% to 23%. EBIT/EBITDA remained the most popular metric on which to determine an earn-out, but with a rather drastic fall in frequency from 54% last year to 36% in 2023. There has been stability in earn-out duration as compared to 2022, with periods between 12–24 months being the most frequently seen (up 4% to 42%).

### Warranty & Indemnity insurance –

The trends relating to W&I insurance in 2023 were consistent with those demonstrated in 2022 in terms of overall popularity across Europe (16%), and the use of W&I insurance was highest on transactions with values over EUR 100m (almost half of deals). It appears the amount of coverage being sought is increasing.

**De minimis** – This year's results show a small drop in transactions with a *de minimis* limitation to 70%, which is broadly consistent with a small gradual downward trend over recent years. Most *de minimis* levels are from EUR 1 to 0.25% of the purchase price (54% of transactions) although the number of transactions without any *de minimis* provision continues to increase (to 30% in 2023 from 28% in 2022).

**Baskets** – Baskets were used in 64% of European transactions in 2023, which is a 5% drop from 2022 and the lowest percentage since 2012. As in previous years, most baskets in 2023 (60%) were from EUR 1 up to 1% of the purchase price and the remainder were at more than 1% of the purchase price. Most basket provisions (86%) are on a 'first dollar' basis, representing a 5% increase on 2022, with buyers on risk up to the relevant level but not once exceeded.

**Liability caps** – For the second year running, more than half (56%) of all deals had a liability cap of less than 50% of the purchase price. For larger deals, a significant proportion, 35%, had a liability cap of less than 10% of the purchase price, while for small deals this proportion was only 7%. By contrast, small and medium sized deals were more likely to have a liability cap equal to the purchase price or no liability cap at all, demonstrating a significant divergence across deal sizes.

**Limitation periods** – The trend towards longer limitation periods which started in 2019 reached its peak in 2022 with 28%. This year's data indicates a decrease of limitation periods longer than 24 months and an increase of limitations periods shorter than 12 months. These figures confirm the development towards a more seller-friendly market with regard to limitation periods. However, for medium-sized deals, limitation periods of 18 to 24 months still seem to be most common.

**Security for warranty claims** – The market remains seller-friendly: in only 23% of the deals were buyers able to demand a form of security for claims. This is probably related to the prominence of W&I insurance. While a retention of part of the purchase price was often used for small deals (41%), escrow accounts are again proving to be the most popular type of security for warranty claims. These were used in 44% of all transactions involving a form of security for claims.

**MAC clauses** – The use of MAC clauses further decreased from 13% in 2022 to 10% in 2023, representing a decline of 5% when compared to the average from 2010–2022. This development is relatively surprising considering the economic environment, with the geopolitical tensions in Ukraine, and now also the Middle East, high inflation, and supply chain bottlenecks. Nevertheless, this downward trend is in line with previous years and could indicate that sellers are increasingly gaining the upper hand in negotiations. The disparity between Europe (10%) and the US (97%) regarding the use of MAC clauses is significant.

**Arbitration** – In recent years there has been a steady increase in the use of arbitration as a dispute resolution mechanism. More than one-third of M&A deals included arbitration clauses in 2023 (37%). However, regional differences remain apparent: arbitration clauses are less popular in the UK, France and Benelux but very popular in CEE, the Nordics, German-speaking and Southern European countries.

**Tax** – In 2023 there was a decline in the inclusion of a tax indemnity compared both to 2022 and the average from 2010–2022 (down 5% from 59% to 54%). We also noted a 9% fall (when compared to 2022 and the historic rolling average) in transactions where the seller was granted a right to participate in a future tax audit (37% down from 46%).

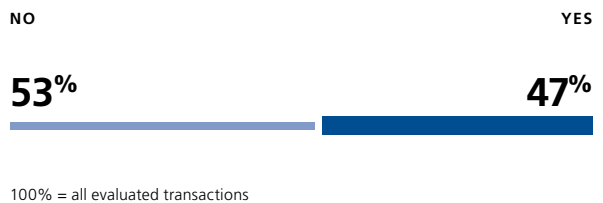


## Environmental, Social and Governance (ESG)

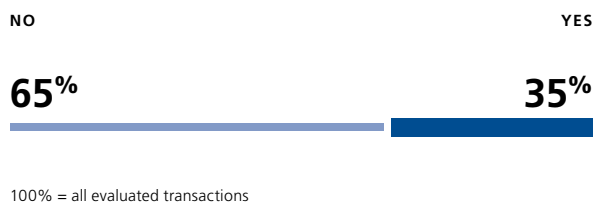
While ESG factors in M&A are important, this year's Study shows a notable 10% drop in deals where there were specific ESG provisions in the SPA. There was, however, a 14% increase in the number of deals where ESG due diligence was carried out.

The increase in ESG due diligence suggests that buyers, in particular investors, continue to carry out ESG investigations to uphold their own governance standards across industries and sectors. By contrast, the decrease in the number of deals with ESG provisions in the SPA suggests there is not yet enough confidence amongst buyers that sellers will accept the transfer of ESG risk onto them. The results of this year's Study indicate that it may take longer for ESG-specific provisions to become integral in transaction documentation than it will take for ESG due diligence to become a key part of transaction due diligence.

### Specific ESG Due Diligence



### Specific ESG Provisions in the SPA



We consider ESG will continue to be an increasingly important aspect of M&A, regardless of whether or not ESG protection is included in transaction documents. The ESG demands on all businesses from a regulatory and governance perspective, coupled with demands by third parties to adhere to certain ESG requirements, will mean that ESG considerations are likely to become a critical factor in dealmaking activity.

## Deal drivers

### Main deal drivers 2018–2023

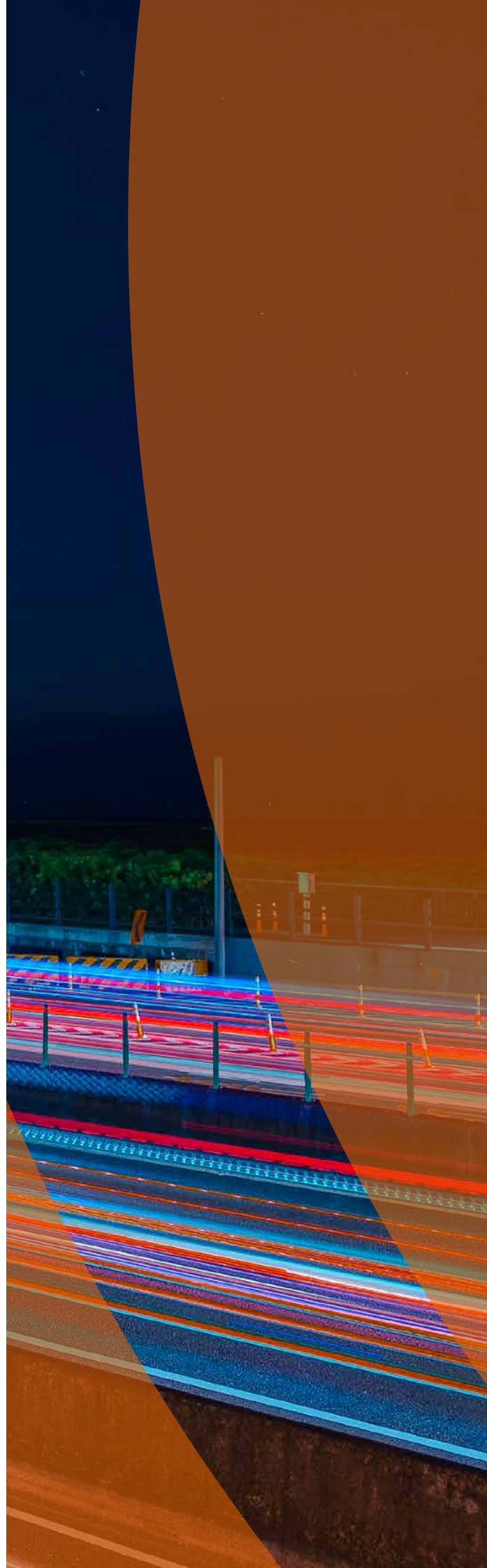
	2018–2022	2022	2023
ENTRY INTO NEW MARKETS	43%	39%	36%
ACQUISITION OF KNOW-HOW (WITHOUT ACQUI-HIRE TRANSACTIONS)	21%	22%	16%
ACQUISITION OF A TEAM OF EMPLOYEES (I.E. ACQUI-HIRE TRANSACTIONS)	15%	14%	9%
ACQUISITION OF A COMPETITOR	26%	28%	27%
ACQUISITION OF A SUPPLIER	6%	6%	8%
DIGITALISATION	2%	2%	1%
OTHER	22%	21%	30%

We have analysed the underlying rationale for each of the deals covered by the Study as indicated in this chart. The year-on-year decline in deals involving a buyer seeking to enter a new market continues from previous years (down to 36%), with those deals undertaken to acquire a competitor staying broadly flat (27%).

The headline details for 2023 were as follows:

- 36% of the deals represented the entry into a new market by the buyer;
- 25% of all deals were either the acquisition of know-how or acqui-hire transactions;
- 27% of the deals were the acquisition of a competitor.

There was also a decrease in transactions in respect of know-how and digitalisation. It will be interesting to see whether this trend reverses in coming years, with the new technologies, in particular those utilising artificial intelligence, coming to market. It is noteworthy that there was a significant 9% increase in transactions with “other” deal drivers, continuing to demonstrate the wide variety of underlying reasons for entering into M&A transactions.



## CMS European/US risk allocation comparison

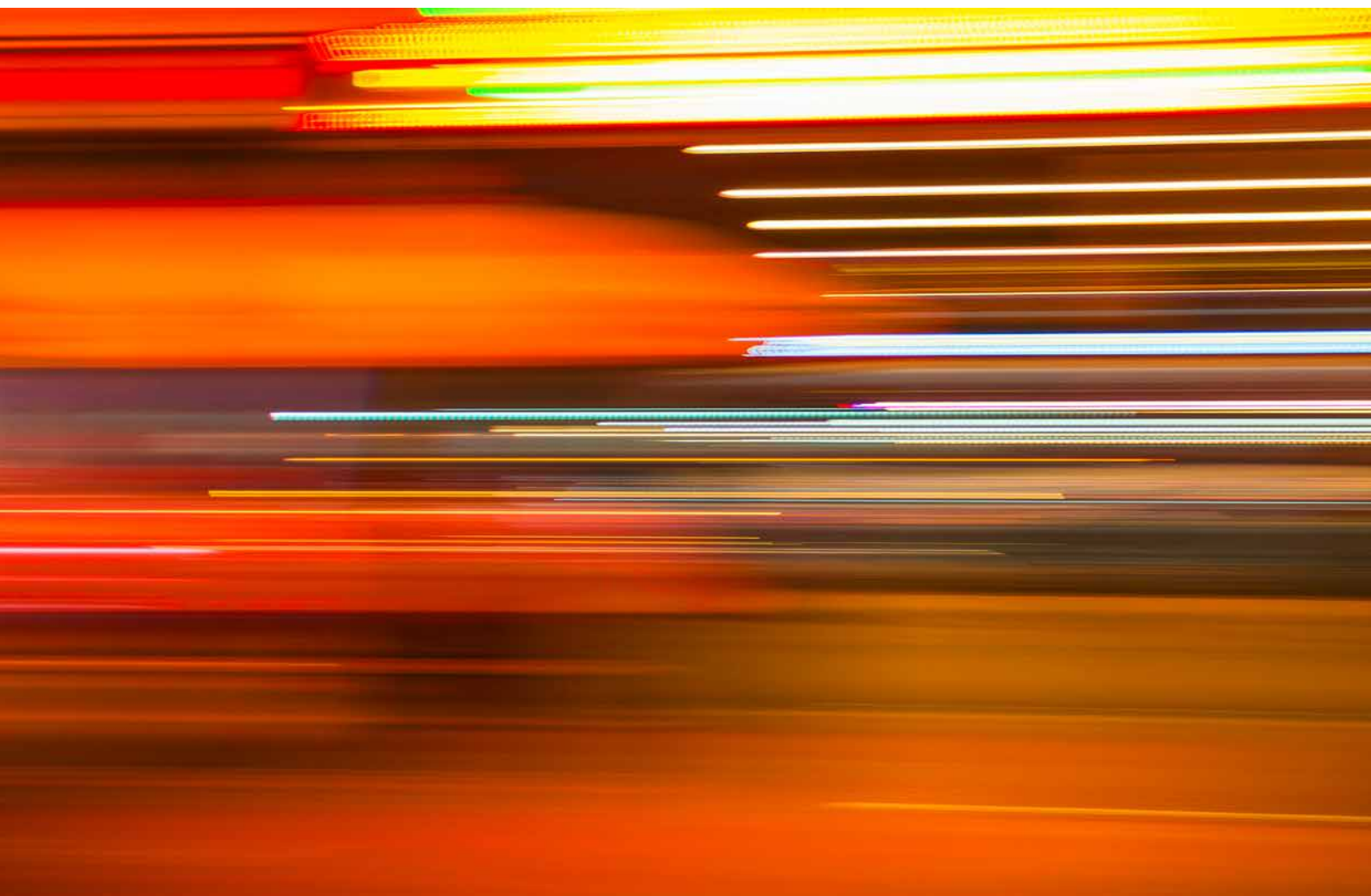
To undertake our annual European/US comparison we compared the European data with the equivalent statistics in the SRS Acquiom Report ("**SRS Report**"), which was published in May 2023. SRS Acquiom is a transfer/paying agent and the SRS Report for 2023 analysed more than 400 deals completed in 2022.

Overall, whilst the percentages set out in the table below show some changes in respect of individual deal points, the same differences in market practice remain that have been recognised consistently over the years of this Study between US and Europe.

**Earn-outs** – The popularity of earn-outs in Europe fell in 2023 (down 4% to 23%) but remains marginally higher than the equivalent in the US (21%), which increased by 3%. A point to note, however, is that SRS Report's section on earn-outs does not cover life sciences deals and our experience in Europe is that earn-outs are common in the life sciences sector. The SRS Report highlights an increased use of earnings or EBITDA metrics and longer earn-out periods.

**PPA** – Market practice in Europe relating to purchase price adjustments has remained consistent at around 45% over the past decade, whilst in the US a PPA features in almost all deals (94%). Working capital adjustments remain the most frequently used component of a PPA in the US (87% of deals involving a PPA). In Europe the position is more varied. Working capital adjustments have gained popularity in the last three years (to around 50% of deals with a PPA) but it remains much lower than the equivalent in the US. In Europe cash & debt adjustments are most popular, at 60% of deals involving a PPA, albeit this is typically in conjunction with a working capital adjustment as well.

**Security** – Statistics in respect of security for claims remained largely the same as last year in the US but there has been a 5% decrease across Europe adopting a form of security. This remains comfortably more common in the US than in Europe despite the prevalence of W&I insurance.



**Liability caps/W&I insurance** – The growth in W&I insurance and the consistent US approach to having low liability caps accounts for approximately 93% of US deals having seller’s liability capped at under 25% of the purchase price. Only 38% of European deals with liability cap provisions have caps of liability at up to 25% of the consideration. The SRS Report notes that approximately 40% of US deals now involve W&I insurance compared to 16% across Europe as a whole. However, as noted elsewhere in this Study, W&I insurance (i) is not popular on lower value transactions in Europe and (ii) has varied application in different European territories – for example, the relevant data in the UK and for higher value deals is more consistent with data in the US.

**De minimis/Basket** – The use of a *de minimis* became less frequent in both Europe and the US, whilst the figures for a basket were largely the same. We believe the popularity of (i) ‘excess only’ baskets and (ii) W&I insurance in the US negates the need for a *de minimis*. The basis for recovery pursuant to the basket limitation clause was different. The use of ‘excess only’ baskets was significantly higher in the US. In Europe ‘first dollar’ baskets were more common. In the US approximately 90% of analysed deals have a basket equal to 1% or less of the purchase price. In Europe there was more variety, with deals involving baskets at 1% or less falling to 59% in 2022.

The table below sets out a quick reference of the differences described above and also a comparison to the data from 2022.

## Europe/US differences

	2022 EUROPE	2023 EUROPE	2022 US	2023 US
PURCHASE PRICE ADJUSTMENT	48%	44%	92%	94%
WORKING CAPITAL ADJUSTMENT	51%	49%	88%	87%
EARN-OUT DEALS	27%	23%	18%	21%
DE MINIMIS	72%	70%	25%	18%
BASKET	69%	64%	84%	81%
BASKET THRESHOLD (1% OR LESS)	63%	59%	94%	89%
‘EXCESS ONLY’ RECOVERY (BASKET)	19%	14%	45%	42%
‘FIRST DOLLAR’ RECOVERY (BASKET)	81%	86%	37%	38%
SUB-25% LIABILITY CAPS	39%	38%	91%	93%
MAC CLAUSES	13%	10%	98%	97%
SECURITY FOR CLAIMS	28%	23%	65%	66%
W&I INSURANCE USED	16%	16%	44%	40%

## CMS deal size analysis

The Study describes deals as ‘small’, ‘medium sized’ and ‘large’ depending on the values involved and highlights differences in deal terms between them.

The deal sizes we use are as follows:

- Deals of up to EUR 25m are small deals;
- Deals of between EUR 25m and EUR 100m are medium sized deals; and
- Deals over EUR 100m are large deals.

The table below shows the highlights for 2023.

We identify below (i) some changes since last year and (ii) the main differences, in each case, when comparing between deal sizes.

**PPA/Locked Box** – A decrease in number of both (i) PPA deals and (ii) locked boxes in non-PPA transactions was seen across all deal sizes, albeit in broad terms the frequency between the three deal sizes was consistent with 2022.

**Earn-outs** – Consistently with prior years, earn-outs were most frequently used on small deals (below EUR 25m), but in 2023 were least popular on medium sized deals. Overall earn-outs were less common in 2023, but that trend was not experienced on large deals where their use rose from 9% to 22%. EBIT/EBITDA remained the most popular basis on which to measure earn-outs on all deal sizes, albeit the disparity with Turnover/Revenue decreased. There was a reversal in trends in respect of earn-out durations on large deals, with longer earn-outs rising to 31% from zero in 2022.

**Liability Caps** – We continue to see lower liability caps being adopted on medium sized and large transactions. There were some individual differences between 2022 and 2023 – 5% more medium sized deals had liability caps of less than 10% (roughly a quarter of these deals) and the number of large deals with liability caps of less than 10% and less than 25% dropped by 7% and 4% respectively, reversing the trend seen last year.

## 2023 results at a glance

### Deal size comparison

	< EUR 25M	EUR 25M – 100M	> EUR 100M
PURCHASE PRICE ADJUSTMENT (PPA)	40%	52%	52%
LOCKED BOX (NO PPA)	52%	69%	63%
EARN-OUTS	25%	17%	22%
— SHORT EARN-OUTS (12 MONTHS OR LESS)	18%	8%	23%
— LONG EARN-OUTS (MORE THAN 36 MONTHS)	18%	15%	31%
— EBIT/EBITDA-BASED EARN-OUTS	33%	40%	50%
— TURNOVER-BASED EARN-OUTS	28%	40%	29%
LIABILITY CAP (LESS THAN 10% OF PRICE)	7%	24%	35%
LIABILITY CAP (LESS THAN 25% OF PRICE)	27%	44%	51%
W&I INSURANCE USAGE	4%	38%	47%
LIMITATION PERIOD (OF MORE THAN 24 MONTHS)	27%	20%	23%
SECURITY FOR WARRANTY CLAIMS	21%	32%	14%
ESCROW ACCOUNT (IF SECURITY FOR WARRANTY CLAIMS IS AGREED)	33%	58%	78%
MAC CLAUSE	8%	13%	14%
ARBITRATION	33%	44%	48%
TAX INDEMNITY CLAUSE	49%	64%	65%

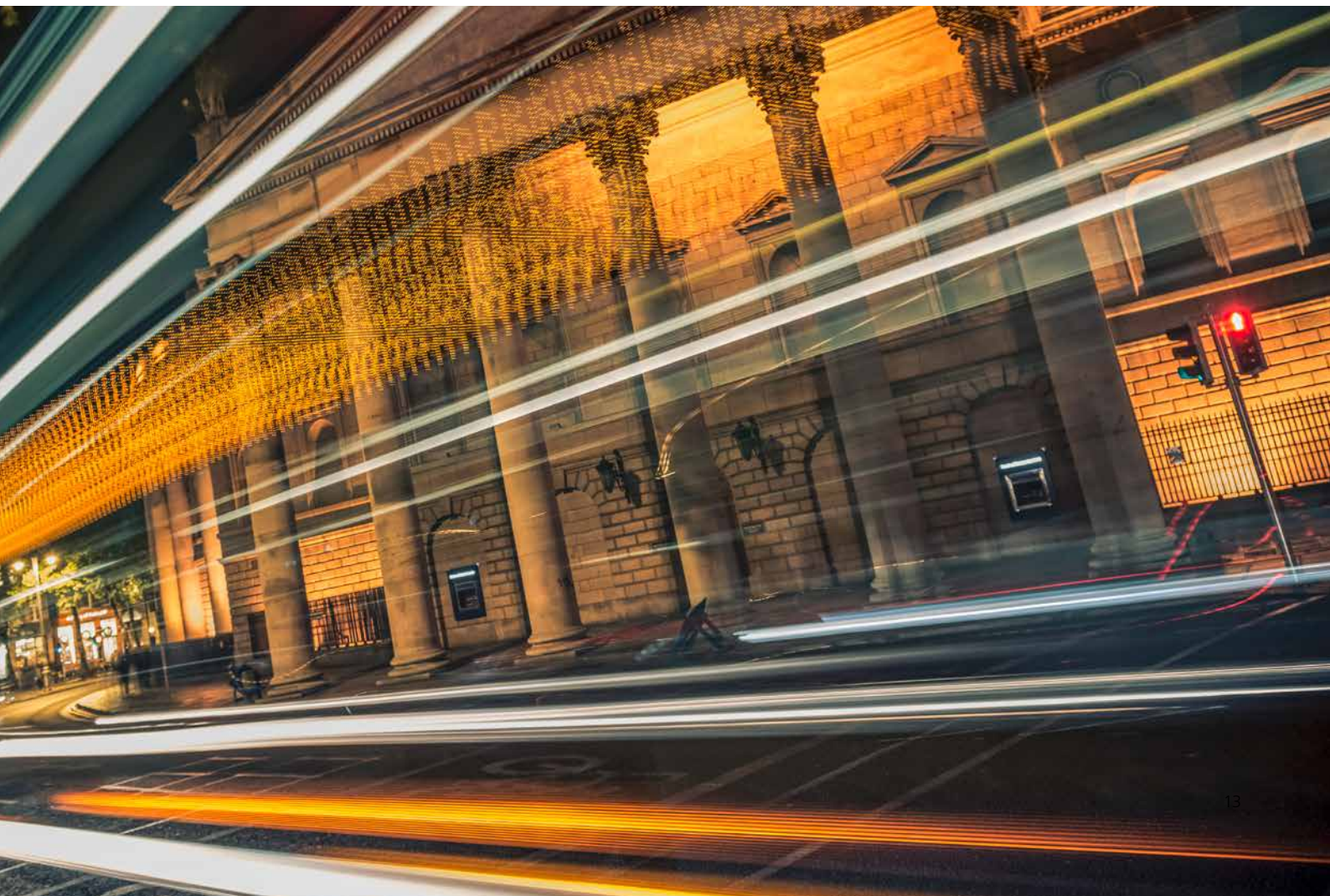
**W&I insurance** – 2023 showed the continuing trend that W&I insurance was more likely to be adopted on deals with larger values. W&I insurance was purchased on nearly half of deals with a purchase price exceeding EUR 100m (a reduction from 2022 figures). There was, though, a corresponding 11% increase in usage to 38% on deals with values between EUR 25m and EUR 100m, whilst W&I insurance remained unusual on the small deals (sub EUR 25m at 4%), possibly because the cost of the premium for a policy was unwarranted.

**Limitation Periods** – 2023 saw a reversal in the ‘buyer friendly’ trend towards longer limitation periods, with a 3% decrease in the number of limitation periods longer than 24 months seen in all three deal size categories. A contrast to this was the increase in limitation periods of between 18–24 months for large deals (up 6% to 32%) and medium sized deals (up 10% to 44%).

**Security** – The overall reduction in the use of a form of security for warranty claims in 2023 was seen both on small deals (21%, down 9%) and large deals (14%, down 12%). Surprisingly, this trend was not seen for medium sized deals, where the number increased from 23% to 32%. We also saw a significant increase in the number of times an escrow was the preferred form of security on medium sized and large deals – probably because the transaction values can justify the higher costs and burden of dealing with third party escrow agents.

**MAC** – Whilst the use of MAC clauses overall continued to fall in Europe, 2023 did see an 8% increase (to 14%) in the use of MAC clauses in large transactions.

**Tax** – The trend between 2022 and 2023 in the use of a tax indemnity was firmly maintained for deals with a value in excess of EUR 25m. On the other hand, for deals worth less than EUR 25m, there was a slight decline in the use of this type of clause.



## CMS European regional differences

As we have seen in previous editions of the Study, we continue to see sizable differences in market practice on certain deal metrics across European regions, with the highlights as follows:

- The majority of deals have liability caps of less than 50% of the purchase price but it is noticeable that this continues to be in the minority in the UK and CEE.
- In 2023, 'first dollar' baskets were almost universally used on all deals in Benelux, the Nordics and the UK.
- The take up of W&I insurance continues to be most prevalent in the UK but has shown a 2% annual drop to 30% of deals. The use of W&I insurance has dropped by 9% in France since 2022.
- Limitation periods for warranty claims are generally for 24 months or less but it is notable that the majority of deals in CEE and France have limitation periods of more than 24 months.
- The use of MAC clauses varies significantly across Europe, with the highest number of deals with MAC clauses being in CEE at 25% of deals. MAC clauses are rarely used in Benelux, the UK, France or the German speaking countries.

We have set out below some continued trends and variations concerning the relevant metrics across Europe:

**PPA/Locked Box** – PPA clauses are most popular in the Southern European countries (63%) and the UK (52%), but there was a big decrease in Benelux from 55% in 2022 to 46% in 2023. The number of deals in CEE with PPA clauses dropped by 6% from 2022 to 40%. PPAs continue to be less popular in France (38%), the German-speaking countries (40%) and the Nordic region (13%), although the figures for France and German-speaking countries have increased since 2022. For non-PPA transactions, locked boxes are most common in Benelux (74%), France (75%) and the Nordics (88%) compared to the average of 56%. The UK is below the average, having 45% of deals with locked box transactions, with the Southern European countries (33%) and CEE (29%) bottom of the list of those countries where locked box transactions occurred.

**Earn-outs** – As compared with the average of 23%, Benelux (33%) and the Nordic region (28%) stand out as being above average. The other regions, however, are all within 5% of the average, with CEE at 18%, France at 22%, German-speaking countries at 28%, the Southern European countries at 18% and the UK at 20%. There has been a big increase in the use of earn-outs in CEE (up 7% from 2022) and a big decrease (down 11% from 2022) in German-speaking countries.

**Financial Limitations** – The consistency across Europe in the application of some form of *de minimis* and basket financial limitation in the majority of deals continues from previous years, although there has been a huge 22% drop in the use of *de minimis* provisions in France since 2022. We have also seen 10% decreases in the use of a *de minimis* in both the German-speaking countries and the Southern European countries, together with a 9% drop since 2022 in the Nordic regions. The UK shows the greatest increase, up to 74% from 66% in 2022.

The use of basket provisions is consistent across Europe at around 60% of deals, save for Benelux where their use is significantly higher at 82% of deals.

Market practice in the use of liability caps at more than 50% of the purchase price continues to vary greatly between regions and countries, with CEE (69%) and the UK (52%) at one end of the scale with Benelux (23%) and France (31%) at the other end. Noticeable changes since 2022 include a 13% drop in the Southern European countries and a huge jump of 36% (from 5% in 2022 to 41% in 2023) in the Nordic region.

**W&I insurance** – As we have previously mentioned in this Study, W&I insurance remains most popular in the UK, whereas the uptake in other countries is proving slower, as brokers and insurers establish a presence. The UK remains the stand-out country, albeit the use of W&I insurance has dropped by 2% from 2022. The second highest region is now the Southern European countries (14%), with France showing the most significant change, with a 9% drop in the number of deals with W&I insurance since 2022. The use of W&I insurance has shown a small increase in both the German-speaking countries and the Nordic region, whereas Benelux has remained flat, with CEE showing a 4% decline (down to 10% in 2023) since 2022.



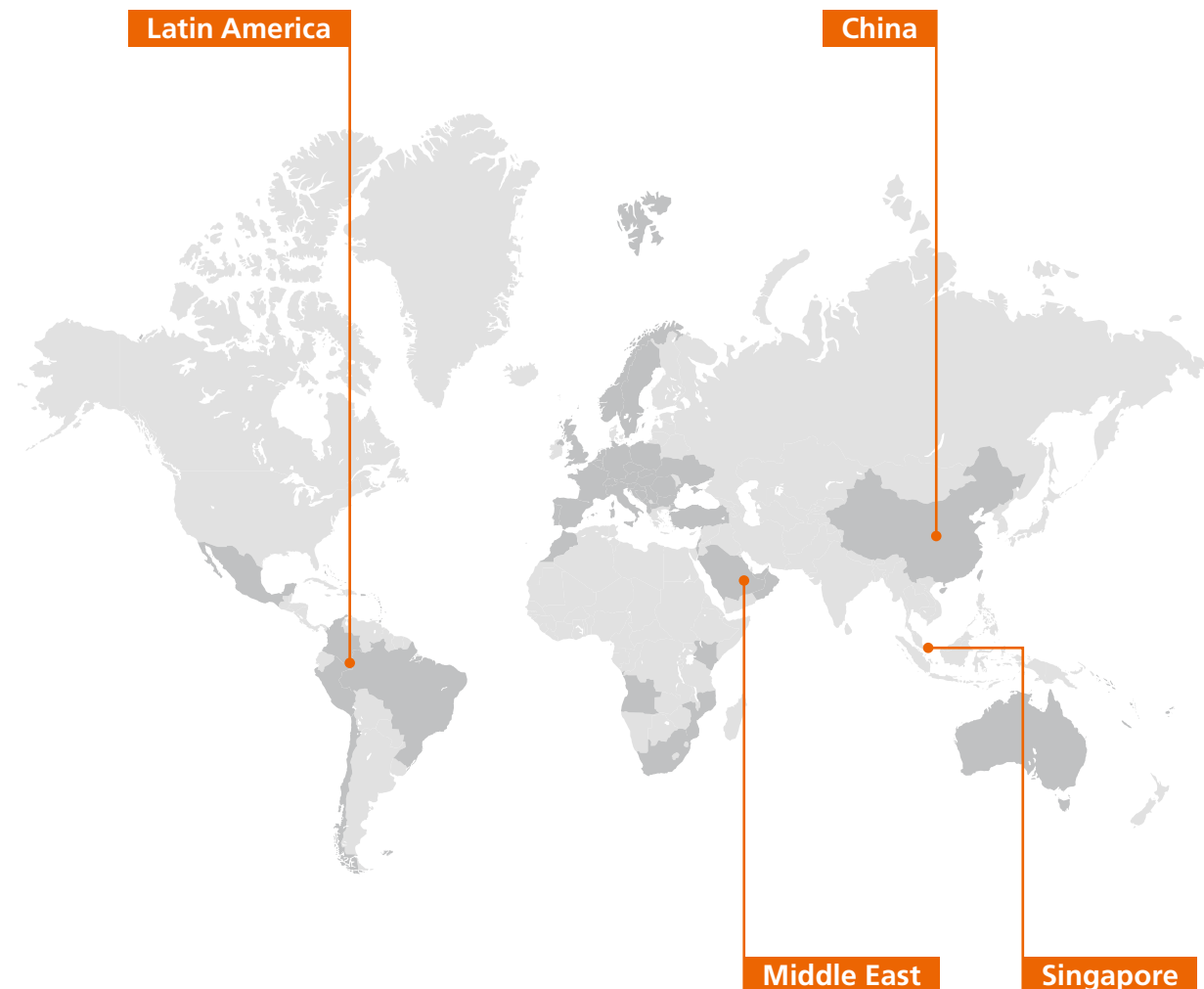
**Limitation Periods** – As identified in more detail in this Study, and consistently with previous editions, most warranty limitation periods within Europe are for 24 months or less. In countries where there is an exception to this, CEE (56%) and France (64%) have shown increases in deals with limitation periods of more than 24 months since 2022. There was an enormous 29% drop in deals with limitation periods in excess of 24 months in the Southern European countries. The UK continues to have very few deals with limitation periods greater than 24 months, and indeed there has been a 5% reduction (down to 12%) since 2022. By contrast, German-speaking countries have seen an increase of 13% to 25%.

**MAC clauses** – There was a drop in the use of MAC clauses to a European average of just 10% in 2023, which reflects a further drop from the 2022 average of 13%. Benelux (5%), France (6%), the German-speaking countries (7%) and the UK (7%) are at the low end of deals with MAC clauses, with these results beginning to show consistency across certain European regions. On the higher end, are CEE (25%) and the Southern countries (14%), with the Southern European countries showing a huge 13% drop since 2022.

**Arbitration** – This Study has always seen a wide range in the use of arbitration provisions as compared with resolution through the local court systems, and this continued in 2023. The European average was 37% of deals. Those countries that have consistently applied arbitration continued to have a high percentage of deals that used these clauses – predominantly CEE (which saw a 4% increase, to 76%, since 2022). There was a significant rise in the use of arbitration provisions in the Nordic region (an enormous 51% increase to 74% on the 2022 results) with smaller, but still significant, increases in the Southern European countries (an increase of 8%), France (an increase of 9%) and the UK (an increase of 4%). The use of arbitration in German-speaking countries dropped to 41% from 49% in 2022.

# CMS markets outside Europe

Our colleagues in CMS offices in China, Latin America, Middle East and Singapore have commented on specific differences in market practice on the M&A transactions on which they advised as follows:



## China



In China, working capital adjustments and earn-out clauses are becoming more popular and we see the rise of their use in M&A deals. W&I insurance remains pretty much unknown.

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## Latin America



The dynamic economic landscape across LATAM countries is marked by fluctuations that directly influence the performance and valuation of companies. Against this backdrop, the implementation of purchase price adjustment mechanisms has become increasingly prevalent in M&A transactions, serving as a safeguard for buyers. Additionally, the incorporation of earn-out payments remains a common strategy, empowering sellers to capitalise on post-sale growth within the company's operations.

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## Middle East



Overall the Middle East saw significantly fewer deals in 2023 compared with 2022, with a notable reduction in inbound deals from Europe; however, those deals that did complete were generally larger in value, with a continued strong flow of outbound deals. This size and profile of deal supported the increased use of W&I insurance, which is now also being used on some smaller and mid-cap transactions, while the softer UK/European markets have made W&I insurance more affordable for Middle Eastern deals. Tax structuring remains a strong feature of regional transactions and is expected to continue to feature as BEPS Pillar 2 comes into force, while the development of regulations around AML, data privacy and consumer protection, and a revamp in the UAE of labour laws and the approach to "End of Service Gratuity" towards a more pensions-oriented approach, are resulting in increased legal and commercial/technical diligence across those areas and warranty/indemnity protections in SPAs.

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## Singapore



With the pendulum swinging back towards more buyer-favourable deal conditions in Southeast Asia in the last year and coupled with a more uncertain macro-economic environment, we have seen considerably more material adverse change (MAC) clauses being included in cross-border deals. MAC clauses have (despite general receding use post-COVID) also been included in regulated deals where historically these were seldom accepted by sellers. We expect this trend to continue in the coming year even with deal flows expected to pick up pace.

As the role and responsibilities of directors and nominee directors of Singapore companies have faced increased scrutiny in recent times, transaction documents in Singapore M&A have seen greater emphasis and/or considerations around liability and indemnification for directors and officers. Principals in M&A transactions may require tail-end or new D&O insurance to be put in place in the context of a transaction or require a separate indemnification agreement by a target company or its shareholders in favour of investor directors.



# Purchase price adjustment (PPA)/Locked box

Purchase Price Adjustment (PPA) clauses are designed to ensure the correct purchase price is ultimately payable by the buyer for the target business. Adjustments can arise by reference to the target company's debt and cash position or to its working capital or overall net asset position at completion. The parties to the sale and purchase agreement thereby achieve certainty that the final purchase price reflects the actual debt, cash, working capital or net asset position.

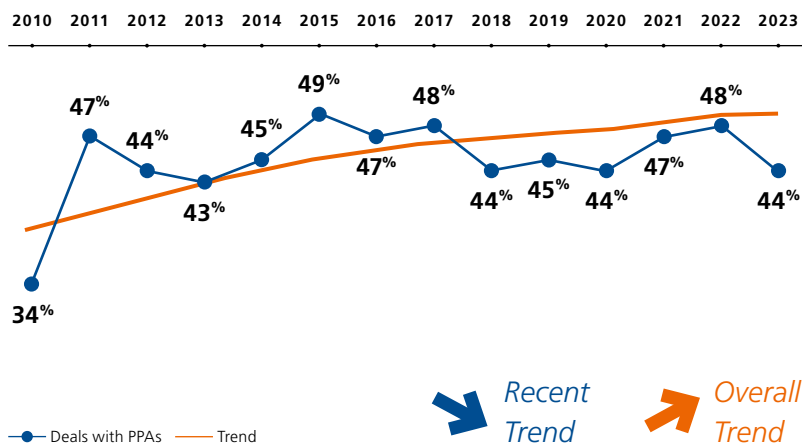
PPA provisions can mean there is uncertainty as to the final purchase price at the time of completion. A significant period of time may elapse before the price is agreed or determined. Parties may feel this as unhelpful or impractical and therefore include 'locked box' provisions to avoid post-completion price adjustment. In such cases, an agreed balance sheet is warranted by the sellers and the SPA includes undertakings that no unpermitted payments (called 'leakage') (e.g. dividends and management charges) will be made by the target. There is normally an agreed list of specific items that qualify as 'permitted leakage' for greater certainty.

# General Overview

In 2023 there was a decrease in the use of purchase price adjustment clauses in M&A agreements (44% compared with 48% for 2022). This is the first fall in this figure for four years and wipes out the increases from 2021 and 2022. This figure still remains a significant minority and PPA clauses can be considered to be increasingly standard. It suggests that a significant proportion of buyers are able to insist on PPA provisions. There was, however, a large 6% decrease in the use of locked box arrangements for non-PPA transactions (56% in 2023 compared with 62% in 2022), dropping closer to the average usage of 50% for the period 2010 to 2023.

## CMS Trend Index

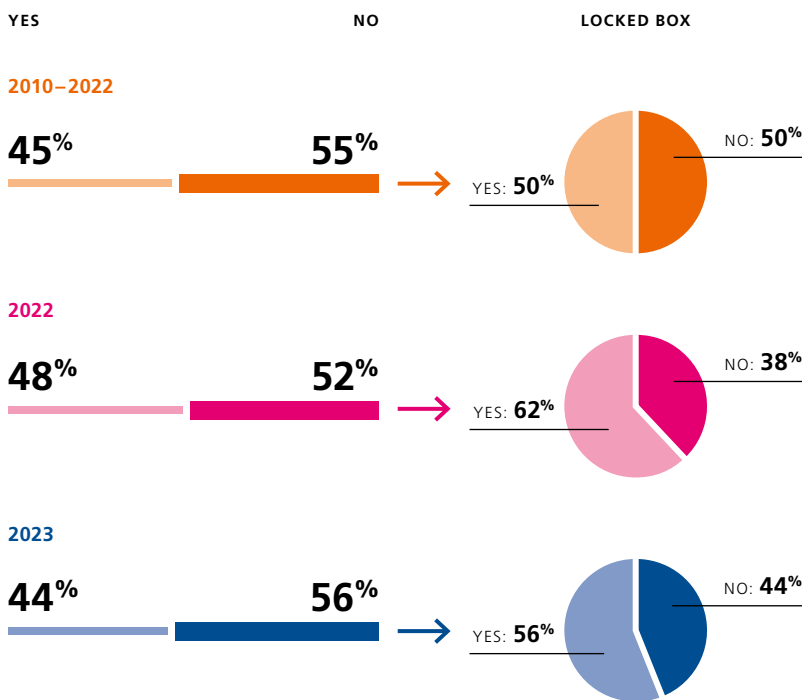
Purchase Price Adjustment



Recent Trend (blue arrow pointing down) Overall Trend (orange arrow pointing up)

## Locked Box 2010–2023

Purchase Price Adjustment



PPA provisions remain prevalent on deals, being included in a significant minority of transactions, suggesting buyers are often able to insist on such adjustments

PPA Ratio 2023

56% ↘

100% = all evaluated transactions

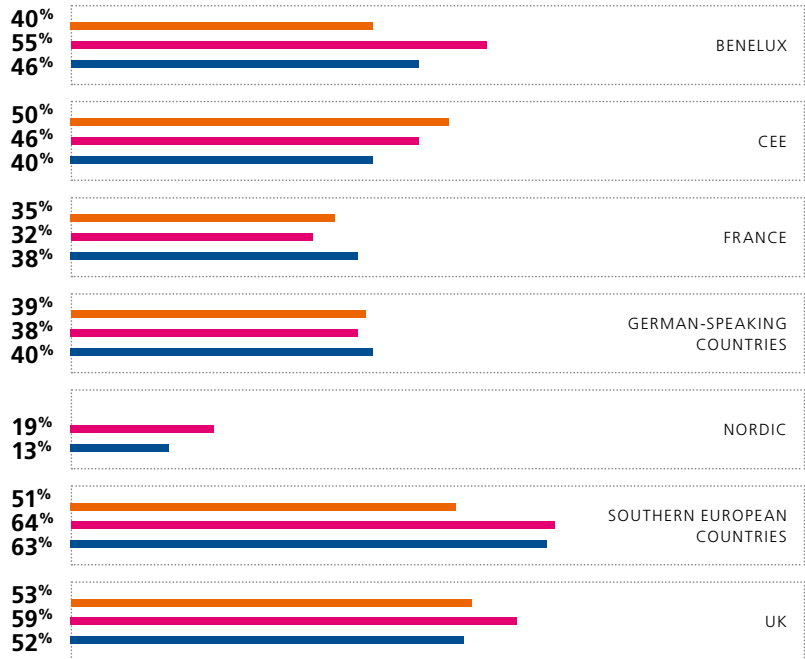
# Specific Issues

## Regional Differences

The use of PPAs continues to vary in application across the European jurisdictions. There were large decreases for Benelux, CEE, the UK and the Nordics down to 46%, 40%, 52% and 13% respectively. In contrast, France showed a notable increase to 38% of deals using PPAs. For the German-speaking countries and the Southern European countries the proportions of deals with PPA provisions remained broadly constant.

## Time Trend Europe

Purchase Price Adjustment



● 2010-2022 ● 2022 ● 2023  
 100% = all evaluated transactions  
 No data for Nordics before 2022 available

*The use of a locked box structure in non-PPA transactions decreased significantly*

*PPA Usage in the UK*

**52%** ➔

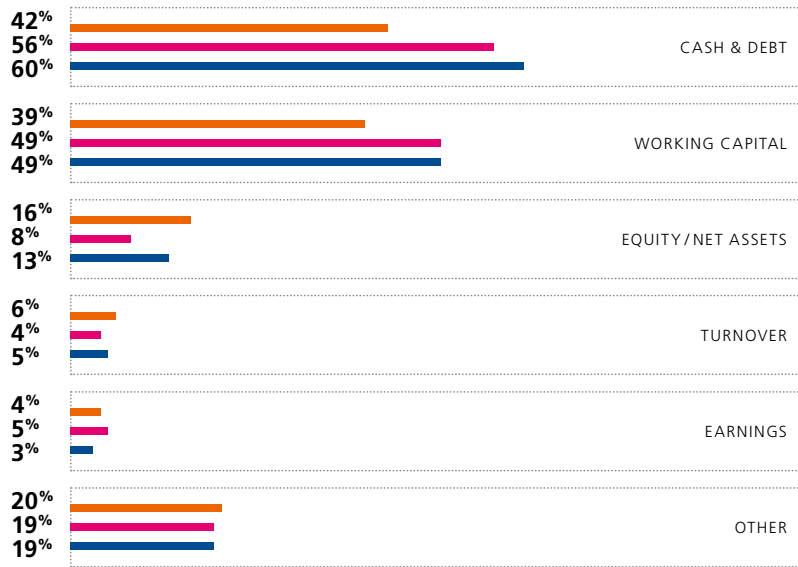


## Net Debt/Working Capital Adjustments

Net cash and working capital are by far the predominant elements in calculating PPAs. The application of cash/debt as the adjustment factor in a PPA transaction has increased to 60% compared to 56% of those deals, which is also a significant uplift on the 42% rate for the period 2010 to 2022. The use of working capital as an adjustment factor remained constant at 49%, representing an increase on the 2010 to 2022 average of 39%. The statistics suggest that working capital price adjustments, combined with a calculation of the cash/debt position of the target, represent a normal position for European transactions.

## Chosen Criteria

Purchase Price Adjustment



● 2010–2022 ● 2022 ● 2023

Cash & debt does not include 'cash only' and 'debt only'

100% = all transactions including a purchase price adjustment – multiple criteria may apply

*Net cash and working capital are the predominant elements in calculating PPAs*

## Sector Differences

The average application of locked boxes in 56% of non-PPA transactions broadly applied across all the sectors except for the higher proportion in Hotels & Leisure, Life Sciences & Healthcare, Industry and Business (at 62%, 71%, 69% and 70% respectively). However, very noticeable was the sharp decline in respect of transactions in Infrastructure & Projects, Banking & Finance, Hotels & Leisure and Real Estate (at 50%, 53%, 62% and 30% respectively). It is difficult to draw any firm conclusions, given the relatively wide variation in locked box use between sectors and the year-on-year changes, except to note that the 2023 average is a decrease down to a figure closer to the 2010–2022 average.

## Frequency of Locked Box Mechanism

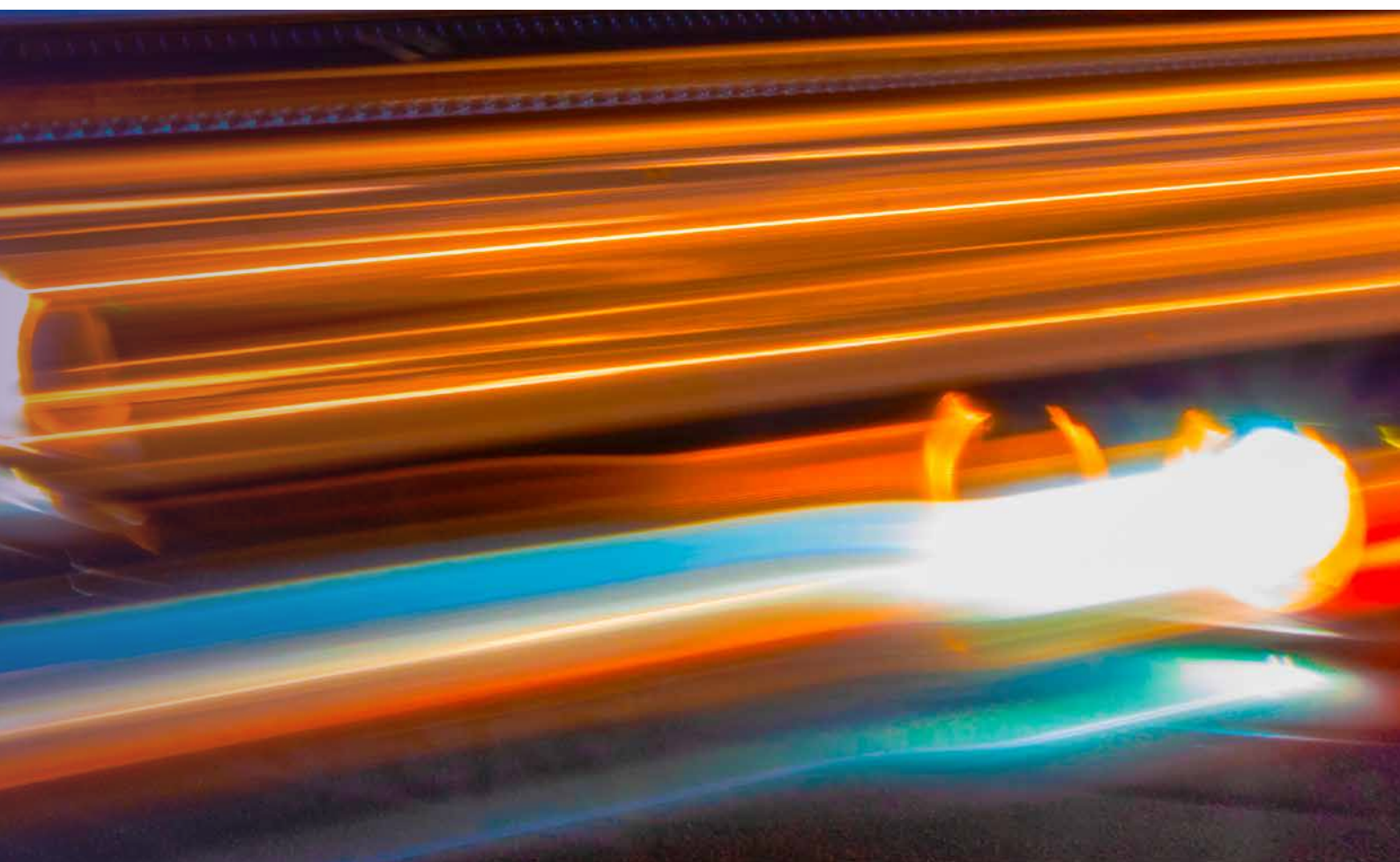
Non PPA Transactions

SECTOR	2010 – 2022	2022	2023
BANKING & FINANCE	51%	86%	53%
HOTELS & LEISURE	46%	78%	62%
ENERGY & CLIMATE CHANGE	49%	49%	35%
CONSUMER PRODUCTS	58%	57%	55%
TECHNOLOGY, MEDIA & COMMUNICATIONS	53%	60%	63%
INFRASTRUCTURE & PROJECTS	33%	100%	50%
LIFE SCIENCES & HEALTHCARE	55%	56%	71%
REAL ESTATE	35%	63%	30%
INDUSTRY	56%	70%	69%
BUSINESS (OTHER SERVICES)	50%	76%	70%
<b>CMS AVERAGE</b>	<b>50%</b>	<b>62%</b>	<b>56%</b>

100% = transactions with no purchase price adjustment mechanism in the respective sector

*Locked Box Usage in the Lifesciences & Healthcare sector*

**71%** ➔



### European/US Differences

As indicated above, the use of PPA provisions in deals remains in a significant minority (at 44% in 2023) across all European jurisdictions, and is far behind US practice, where PPAs apply in nearly all deals (at 94%). Most US deals will include an adjustment in respect of the target's working capital as determined at completion of the transaction. It seems likely that the US regards a PPA as standard. In European deals there continues to be more scope for negotiation as to the preferred approach to PPA provisions.

### Europe/US

Purchase Price Adjustment

NO

YES

EUROPE

56%

44%

US

6%

94%

100% = all evaluated transactions



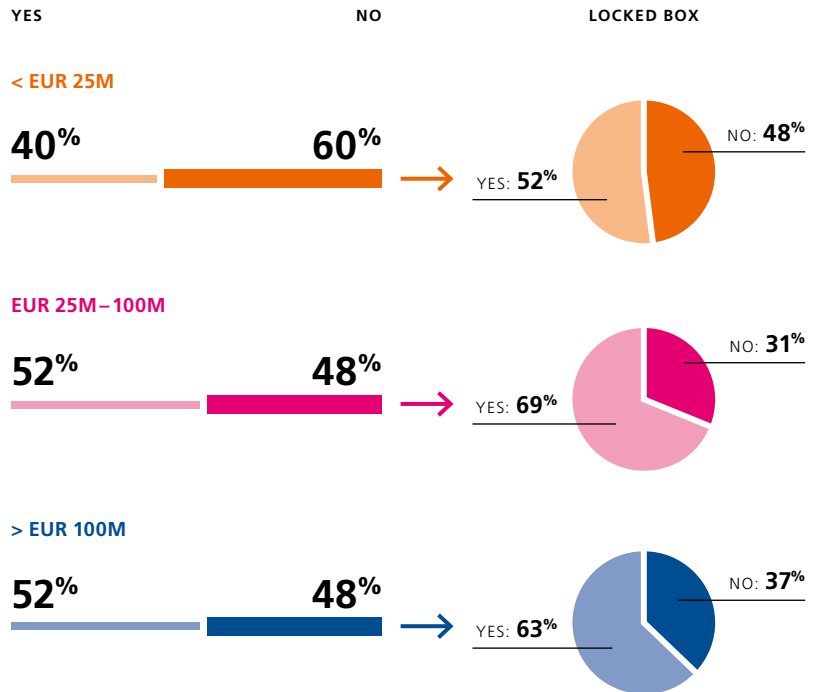
# Analysis by Deal Size

The decrease in the use of locked boxes in non-PPA transactions was seen across all deal sizes, with the decreases since 2022 being most marked in medium sized deals (between EUR 25m–100m), where 69% were locked box transactions (down from 79% in 2022). For small deals (below EUR 25m), locked boxes in non-PPA transactions dropped to 52% (from 56% in 2022) and in large deals (above EUR 100m), locked box usage in non-PPA transactions dropped to 63% (from 67% in 2022).

*The decrease of locked boxes in non-PPA transactions was most significant in medium sized deals*

## Deals Size 2023

### Purchase Price Adjustment



100% = all evaluated transactions  
 100% = transactions with no purchase price adjustment mechanism  
 (deals containing purchase price adjustment and locked box at the same time are not included)



# Earn-out

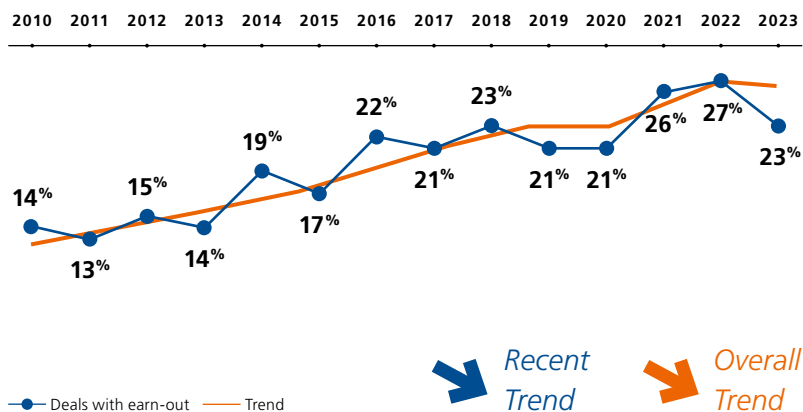
Earn-outs involve the buyer making additional payment after completion, usually depending on the financial performance of the acquired business over a defined period. A seller can receive a higher price than on a deal where all the proceeds are paid on completion but may be required to remain with the business and wait to receive the additional consideration. Buyers seek to ensure the final price is linked both to historic and present financial performance and often insist on key sellers remaining employed for the period.

# General Overview

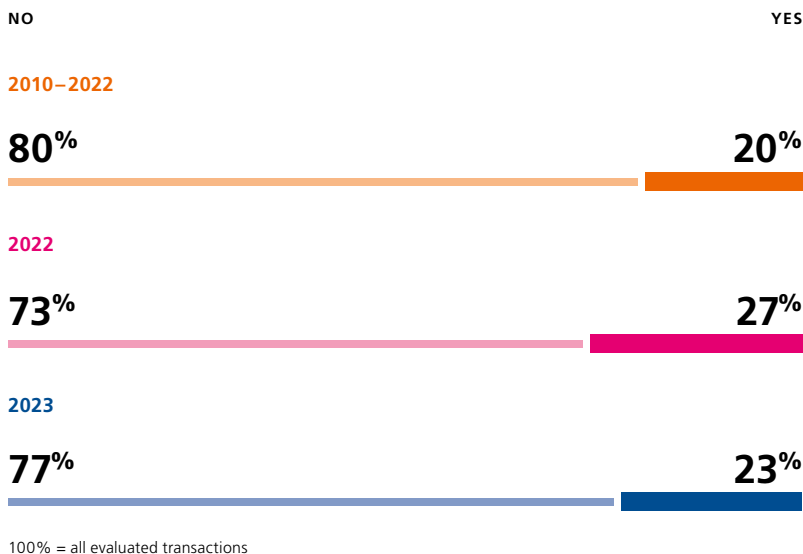
The growth in popularity in earn-outs experienced in 2021 and 2022 ceased, with their use falling by 4% to 23%. Whilst this is a reverse in the trend seen in the last two years, the figure still constitutes the 3rd highest level in earn-outs since 2010 and remains higher than the rolling average (20%). As the financial performance of businesses stabilises post-pandemic, earn-outs might be expected to become more prevalent, especially in sectors such as Life Sciences & Healthcare where they have traditionally been popular.

## CMS Trend Index

Earn-Outs



## Earn-out 2010–2023



Earn-out popularity ➡

## Specific Issues

### Sector Differences

As mentioned above, as earn-out figures have generally fallen we note a return to the position of earn-outs being more often adopted in 'people-led' or creative sectors – notably Life Sciences & Healthcare, Technology, Media & Communications and Consumer Products, with a corresponding reduction in popularity in Real Estate and Infrastructure & Projects. This marks a return to pre-pandemic norms.

### Frequency of Earn-out Mechanism

Earn-Outs

SECTOR	2010–2022	2022	2023
BANKING & FINANCE	17%	35%	25%
HOTELS & LEISURE	11%	18%	17%
ENERGY & CLIMATE CHANGE	17%	19%	14%
CONSUMER PRODUCTS	19%	26%	24%
TECHNOLOGY, MEDIA & COMMUNICATIONS	27%	29%	29%
INFRASTRUCTURE & PROJECTS	11%	67%	14%
LIFE SCIENCES & HEALTHCARE	36%	54%	33%
REAL ESTATE	13%	21%	11%
INDUSTRY	18%	19%	24%
BUSINESS (OTHER SERVICES)	22%	18%	31%
<b>CMS AVERAGE</b>	<b>20%</b>	<b>27%</b>	<b>23%</b>

100% = all evaluated transactions of the respective sector

*Return to normal: Technology, Media & Communications and Lifesciences & Healthcare most popular sectors for earn-outs*

### Earn-out Determination

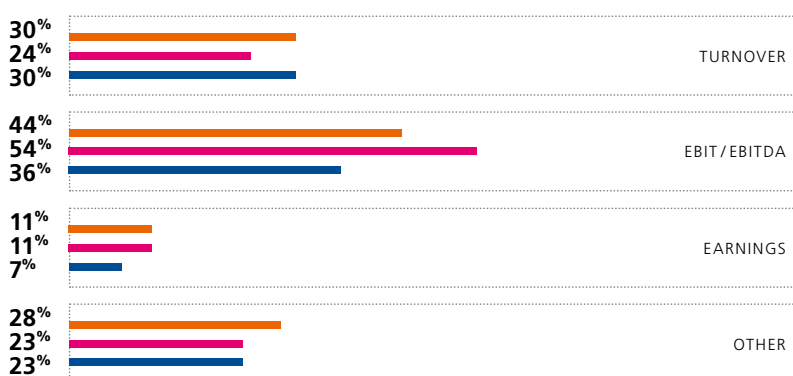
EBIT/EBITDA keeps its position as the most popular metric on which to determine an earn-out but with a rather drastic fall in frequency from 54% in 2022 to 36% in 2023. Correspondingly, there was a material increase (by 6%) in the use of Turnover/Revenue as the criterion to measure an earn-out. As Turnover/Revenue is a less subjective measure, this might be considered a seller-friendly change.

*EBIT/EBITDA-based earn-outs*

**36%** ➔

### Time Trend

Earn-Outs



● 2010–2022 ● 2022 ● 2023

100% = all transactions including an earn-out clause – multiple criteria may apply

### Earn-out Duration

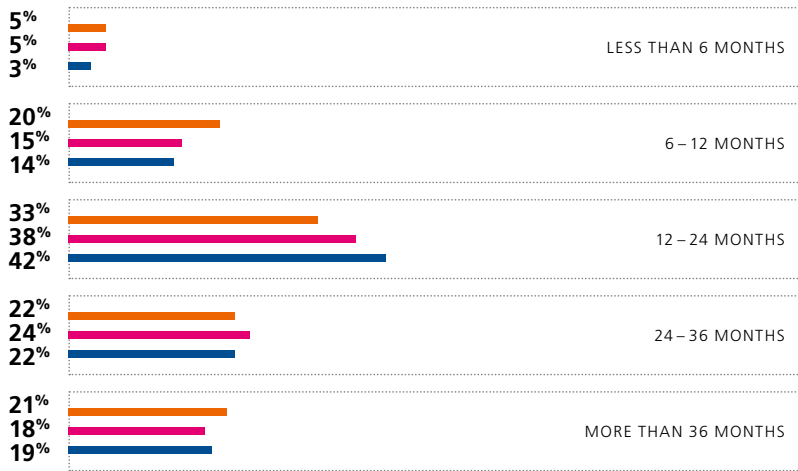
Data for 2023 shows stability in earn-out duration as compared to 2022. Short earn-out periods (12 months or shorter) dropped slightly in popularity again (down 3% in aggregate). Those between 12–24 months continued to be the most frequently seen (up another 4% to 42%). Longer earn-out periods (two years and longer) remained static.

Earn-out periods of 12 to 24 months

42% ➔

### Duration of Time Periods Relevant for Assessment

#### Earn-Outs



● 2010–2020 ● 2020 ● 2022  
100% = all transactions including an earn-out clause

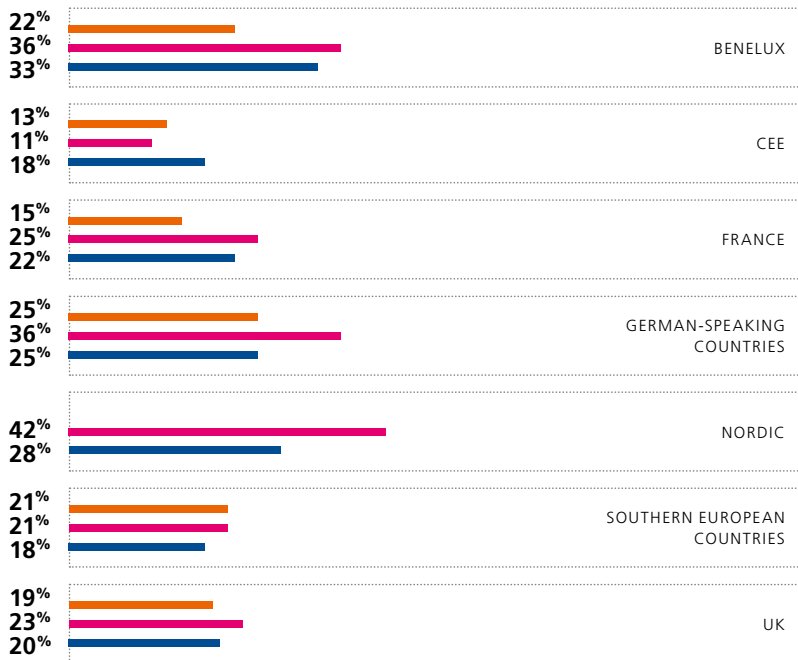
Earn-out durations of 12 to 24 months remain most popular

### Regional Differences

The overall fall in earn-outs was seen in all European territories other than in CEE, which experienced a 7% increase in earn-out popularity. The data for Benelux and France shows that, despite the drop in 2023, overall earn-out use was higher than over the previous ten years.

### Time Trend Europe

#### Earn-Outs



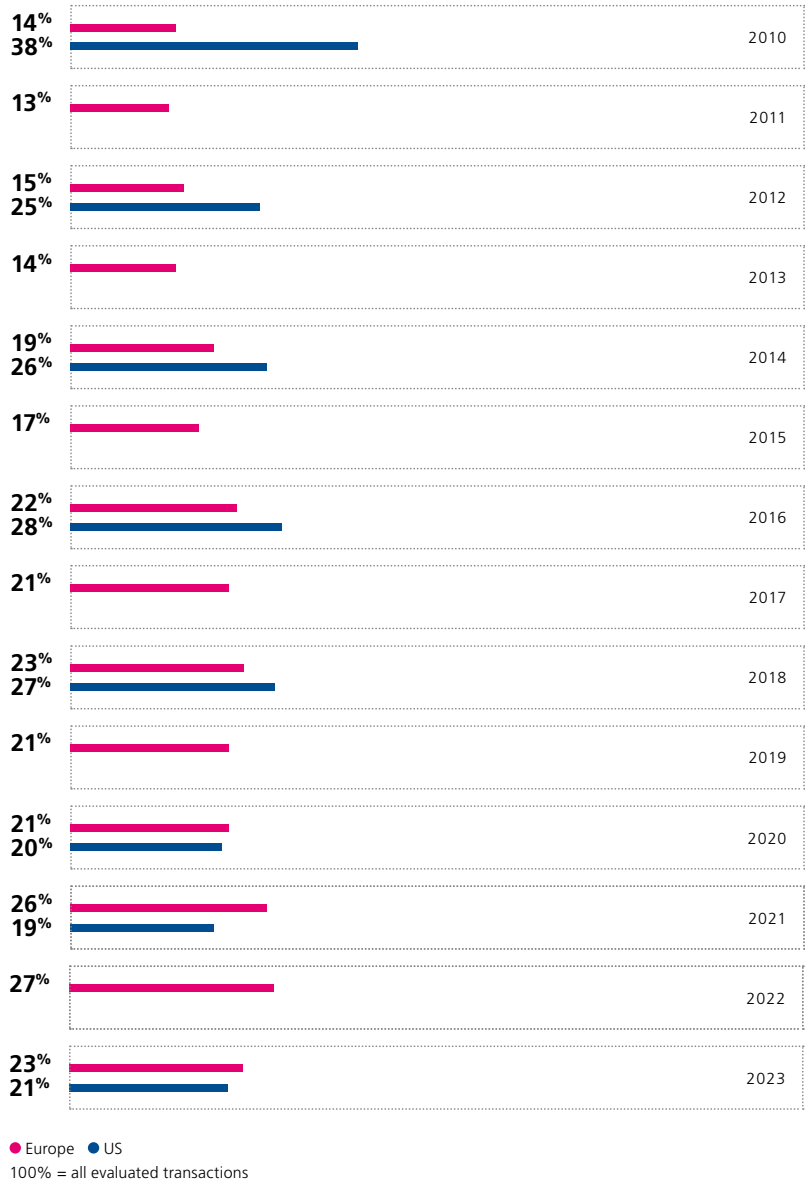
● 2010–2020 ● 2020 ● 2022  
100% = all evaluated transactions  
No data for Nordics before 2022 available

## European/US Differences

Earn-outs remained more common in Europe than in the US in 2023 albeit the gap narrowed (23% vs 21%) as earn-out numbers in the US increased by 2% to 21%. Over the last decade there has been an upward trend in Europe whilst popularity in the US has levelled off (after a stark decrease between 2010 and 2012). 2023 again demonstrated the notable divergence between European and US market practice in terms of earn-out metrics, with EBITDA/EBIT being more popular in Europe but Revenue most commonly used in the US.

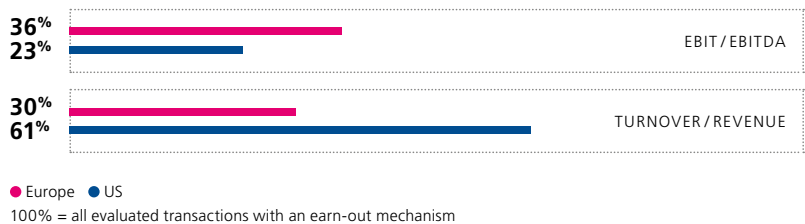
## Europe/US

Earn-Outs



## Earn-out Europe/US

Earn-out criteria



# Analysis by Deal Size

These three graphs highlight certain differences in the earn-out data depending on transaction value. Whilst earn-outs continue to be most frequently used on small deals (below EUR 25m), the divergence between deal sizes has narrowed such that the data for deals below EUR 100m (23%) and above EUR 100m (22%) is almost the same. EBIT/EBITDA is the most popular basis on which to measure earn-outs on all deal sizes (most notably so on large deals). The range of earn-out durations was widest on large deals.

## Deal Size

Earn-Outs

NO

YES

< EUR 100M

77%

23%

> EUR 100M

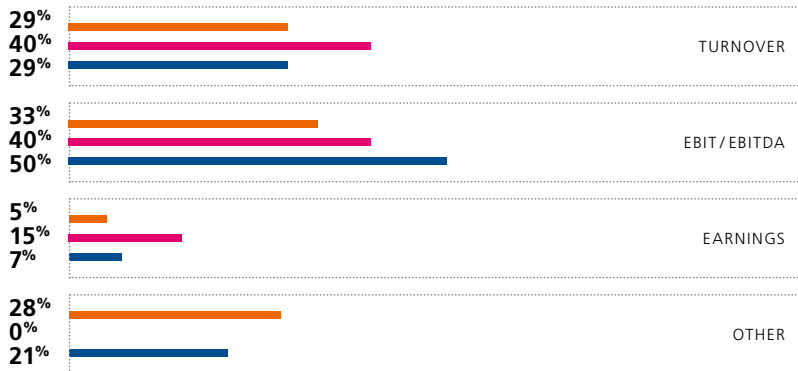
78%

22%

100% = all evaluated transactions

## Comparison of criteria

Earn-Outs by Purchase Price 2023



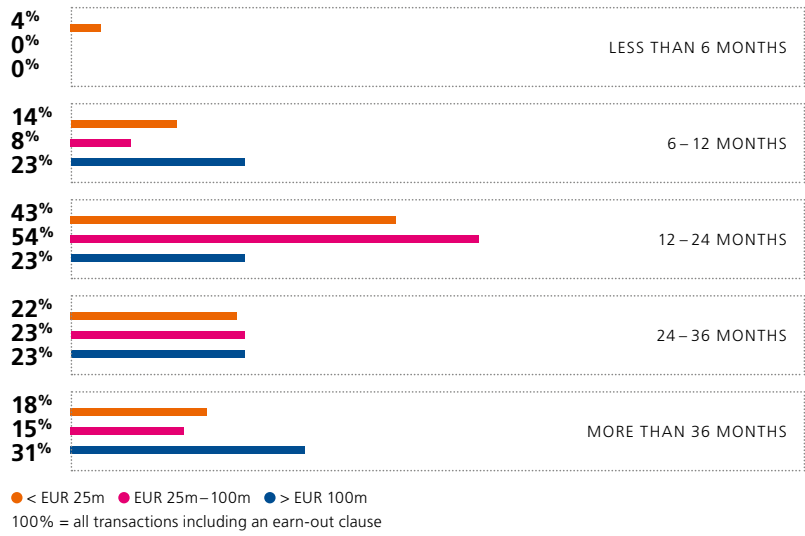
● < EUR 25m ● EUR 25m-100m ● > EUR 100m

100% = all transactions including an earn-out clause

*Earn-outs equally common on deals > EUR 100m as below*

## Duration of Time Periods Relevant for Assessment

### Earn-Outs





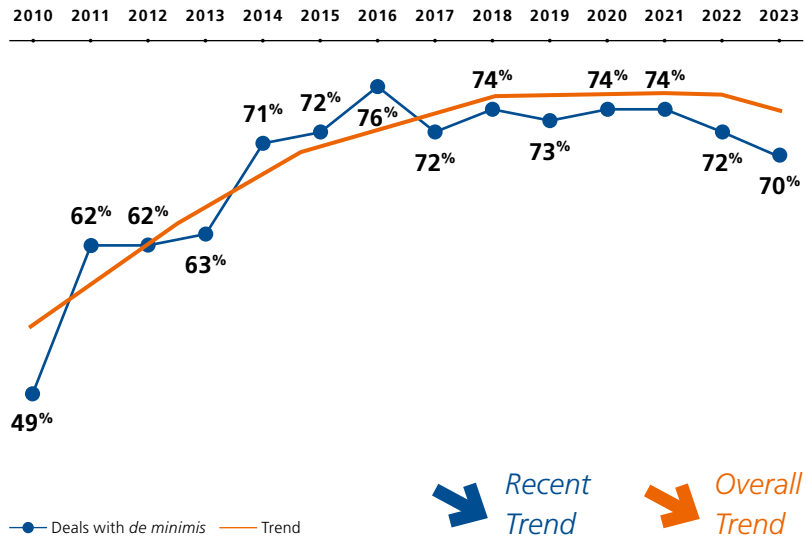
# *De minimis*

Most M&A agreements provide that the buyer cannot bring certain warranty claims below an agreed minimum amount, often referred to as the *de minimis*. If a warranty claim is less, then the claim is automatically excluded. The seller is thereby protected from potential liability for small claims. However, the *de minimis* arrangement may not be appropriate for deals with full W&I insurance cover, as this is reflected in the W&I insurance policy itself.

# General Overview

This year's Study shows a slight decrease in the number of transactions with a *de minimis* clause at 70%, which is the lowest this figure has been since 2013. This demonstrates that, while a *de minimis* is now the market norm across most European jurisdictions, there may be room for negotiation to remove the *de minimis* threshold in certain deals (e.g. involving W&I insurance) and there is evidence for this in the slight increase in the number of deals with no *de minimis*.

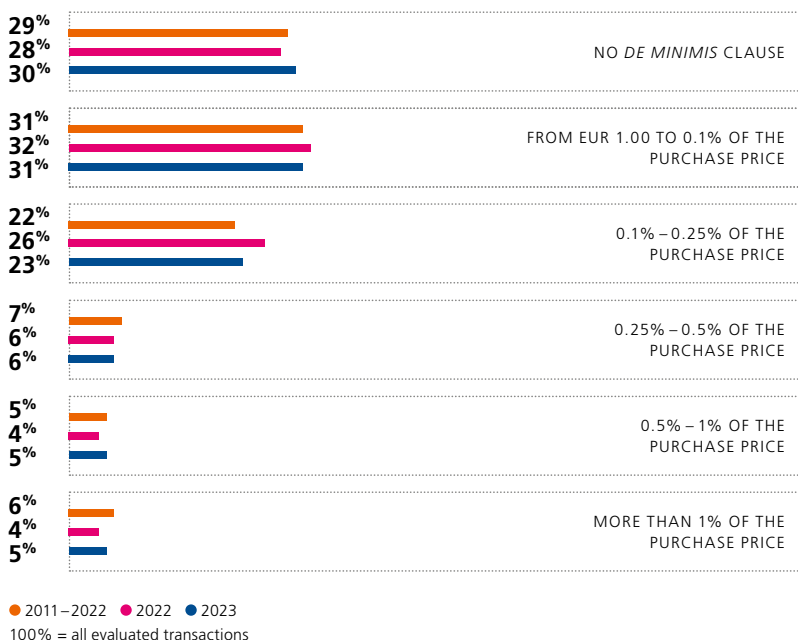
**CMS Trend Index**  
*De Minimis*



## De minimis levels

Most *de minimis* levels are from EUR 1 to 0.25% of the purchase price (54% of transactions) although the 30% of transactions without any *de minimis* provisions represents a 2% increase from 2022 and may reflect the use of W&I insurance. In 2023 *de minimis* levels at less than 0.1% of the purchase price remained broadly stable at 31%, which is consistent with the 2011–2022 average. The use of a *de minimis* at 0.1 to 0.25% of the purchase price dropped to 23% compared to 26% in 2022.

**Levels 2011–2023**  
*De Minimis*



No De minimis

30% ↗

*De minimis* levels of EUR 1 to 0.25% of the purchase price were most common

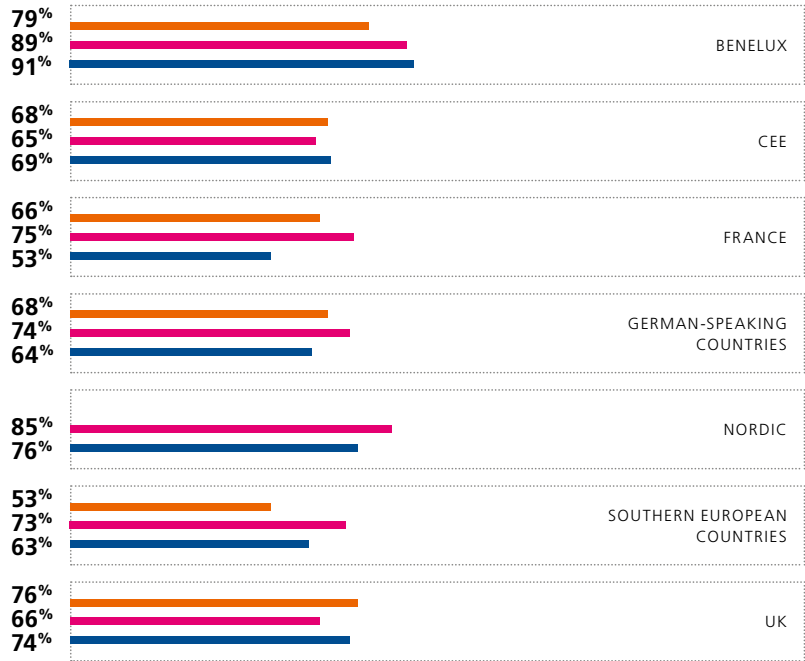
# Specific Issues

## Regional Differences

The use of *de minimis* clauses across Europe appears to be converging. The gap between countries is shrinking, but there is still a significant range variance between highest and lowest, from 91% for Benelux transactions to 53% for France. France had the most significant drop (of 22%) since 2022, followed by the German-speaking countries (down 10% from 74%), Southern European countries (down 10% from 73%) and the Nordics (down 9% to 76%). The UK (74%) showed the biggest increase in 2023, up 8% from 66%.

## Time Trend Europe

### De Minimis



● 2010-2022    ● 2022    ● 2023  
 100% = all evaluated transactions  
 No data for Nordics before 2022 available





# Basket

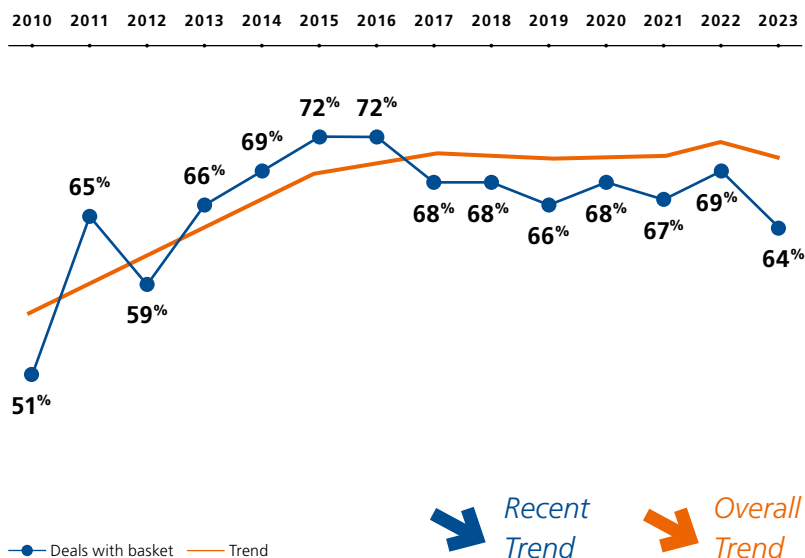
Most M&A agreements have a basket provision, which prevents warranty claims from being made where the total amount claimed in respect of all warranties is less than an agreed 'basket' amount. This is often agreed as a percentage of the purchase price. With a 'first dollar' basket, the buyer can recover the whole amount of a successful claim if the claim exceeds the basket amount. In contrast, an 'excess only' basket provides that the buyer is entitled to recover only the part of the claim that exceeds the basket amount. For deals with full W&I insurance cover a basket provision may not be required as this is reflected in the W&I insurance policy itself.

# General Overview

There was a 5% decrease in the application of baskets in European transactions at 64% for 2023 compared with 69% for 2022, which is the lowest this figure has been since 2012. This level most likely reflects the use of W&I insurance, particularly in the UK, where the basket may not be as relevant if the equivalent liability is assumed by the W&I insurer.

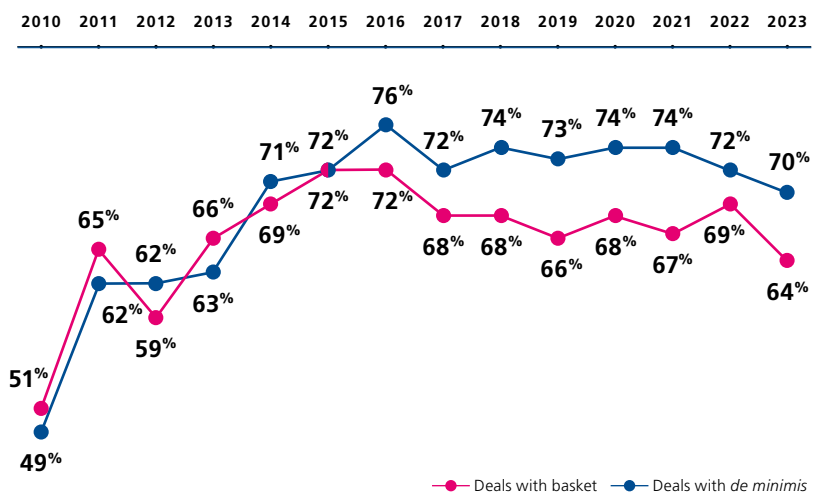
## CMS Trend Index

Baskets



The trends for the application of a basket provision and a *de minimis* provision both decreased in 2023, though the 5% decrease in the use of basket provisions was more than double the 2% decrease in the use of *de minimis* provisions.

## Comparison: Existence of *De Minimis* and Basket



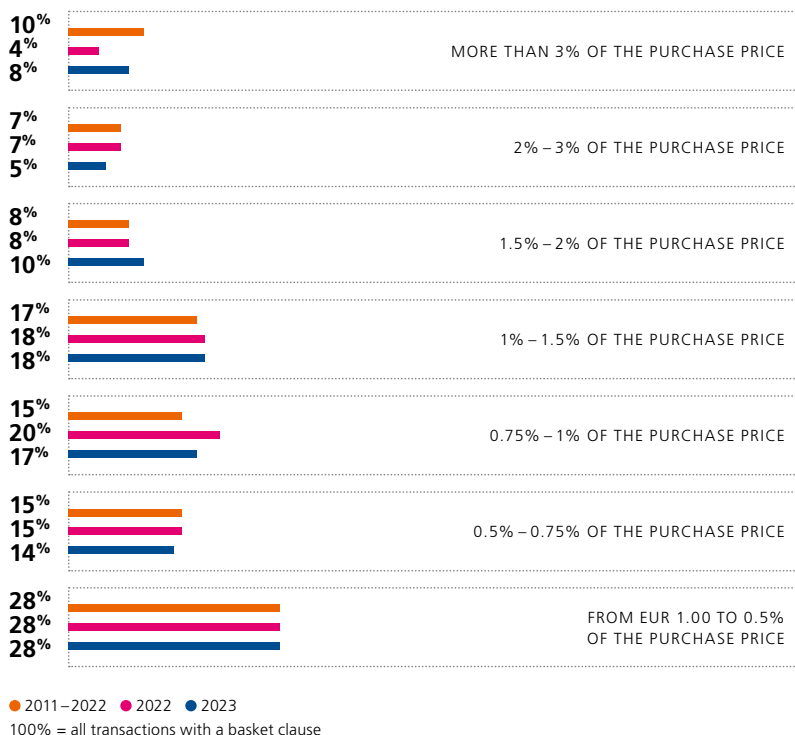
## Specific Issues

### Size of Baskets

Baskets at the lowest level, from EUR 1 to 0.5% of the purchase price (29%), remain broadly at the 2011–2022 average. As in previous years, most baskets in 2023 (60%) were of up to 1% of the purchase price and the remainder were at more than 1% of the purchase price. Similarly, most basket provisions (86%) were on a 'first dollar' basis, up by 5% on 2022, thereby requiring buyers to be on risk up to the relevant level but not once exceeded. A 'first dollar' basket is usually larger than an 'excess only' basket. The percentage of transactions with baskets above 2% of the purchase price increased slightly from 11% to 13% and, while we do not think this indicates any trend to higher basket mounts, it is the second year in a row there has been an increase in baskets above 2% of the purchase price. However, most are still less than 1.5% (78% of all transactions).

### Time Trend

Baskets



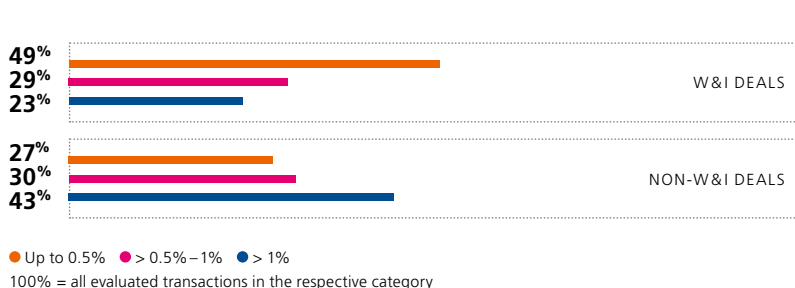
*Basket sizes increased, with most at 1.5% of the purchase price or less*

### Impact of W&I Insurance

The comparative statistics continue to show the advantage for sellers where W&I insurance applies and suggest there is scope to increase basket levels on non-W&I insured deals. Most striking is that, where the basket is up to 0.5% of the purchase price, this is achieved in 49% of W&I insured deals compared with 27% for non-W&I insured deals.

### Basket Thresholds for 2023

W&I insured deals + non-W&I insured deals



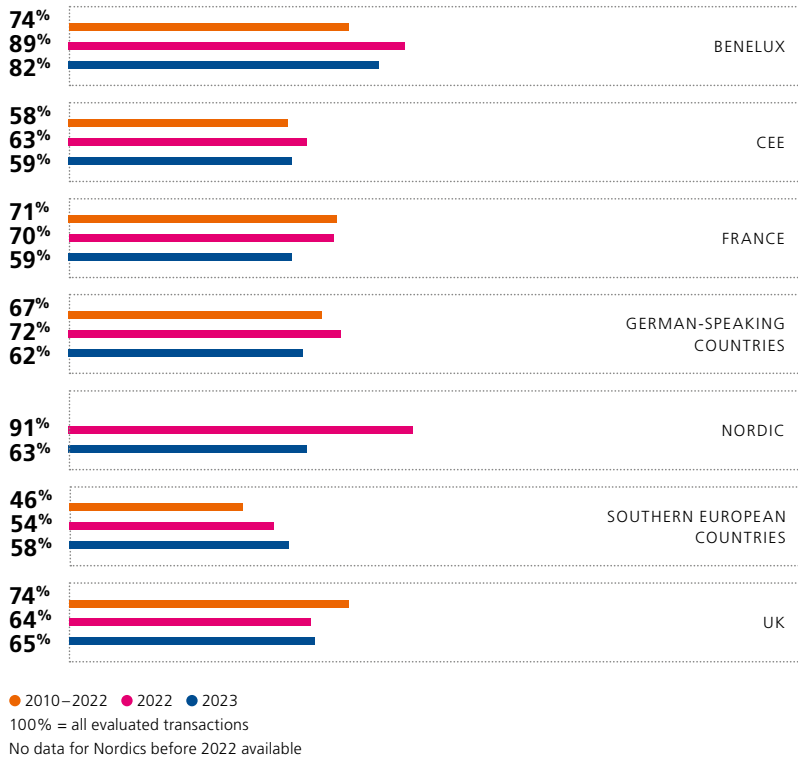
*Basket levels reduce significantly if W&I insurance applies*

### Regional Differences

There was a more of a common pattern in the use of baskets across European transactions in 2023, with the exception of the Benelux countries, which remained high at 82% application. There was a huge drop for the Nordics, down by 28%: baskets were used in only 63% of their transactions, bringing them more in line with the other European countries other than Benelux.

### Time Trend Europe

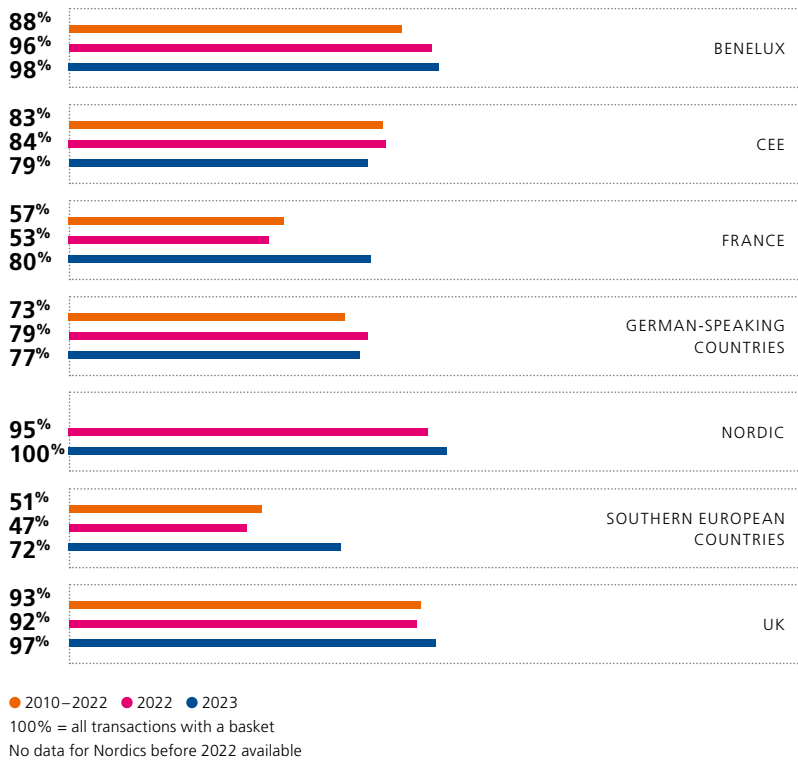
Basket application



A marked variance in the use of 'first dollar' baskets across the different jurisdictions continued, with their being in an extraordinary 98%, 100% and 97% of Benelux, Nordic and UK transactions. It is notable that the application of 'first dollar' baskets was above 70% for all European countries in 2023, although there was still a wide variation in market practice between the European jurisdictions in this respect.

### Time Trend Europe

First dollar



'First dollar' recovery in the Nordics

100% ➔

### European/US Differences

We have previously noted that the US market applies a basket in a significant majority of its transactions (81%). The US market uses 'excess only' baskets in 50% of transactions, whereas such baskets do not apply in most of the European countries, with just 14% of deals covered. There is also a disparity in the amount of the basket, with just 11% of US transactions applying a basket of more than 1% of the purchase price as compared with 41% for European transactions.

### Frequency

Baskets

NO

YES

EUROPE

36%

64%

FIRST DOLLAR:

86%

EXCESS ONLY:

14%

US

19%

81%

COMBINATION:

5%

EXCESS ONLY:

50%

FIRST DOLLAR:

45%

100% = all evaluated transactions





# Liability caps

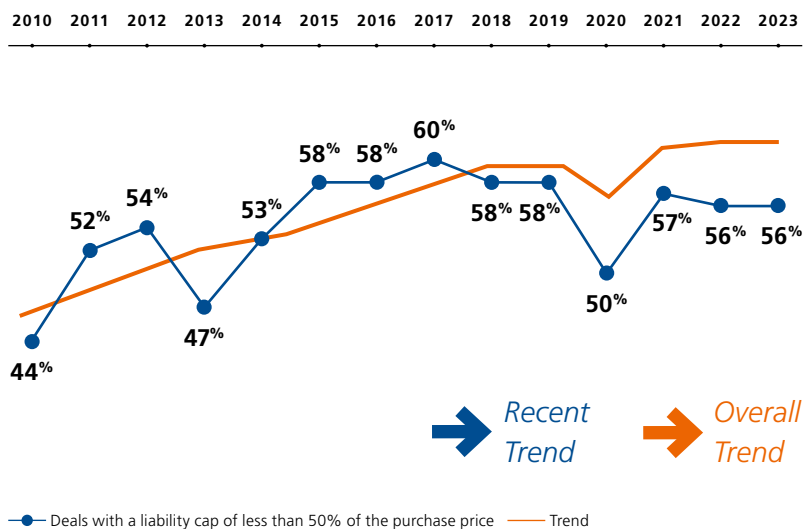
In most M&A transactions it is usually accepted that the seller will cap its liability in respect of warranty claims. This capped amount may simply be the purchase price, so the buyer cannot recover from the seller any more than it has paid. However, there is often extensive debate as to the level of a liability cap, which can vary significantly from deal to deal, particularly for large deals. For deals with W&I insurance the liability cap is often a nominal amount, as the W&I insurer assumes the risk in respect of the warranties in place of the seller.

# General Overview

In 2023 there was a continuation in the trend that the majority of deals had a liability cap of less than 50% of the purchase price. The proportion of deals with liability caps equal to the purchase price dropped slightly by 4% to 24% but those with a cap of less than 10% of the purchase price remained consistent with 2022 at 14%, in line with the 2010–2022 average. The use of W&I insurance on deals has a significant impact.

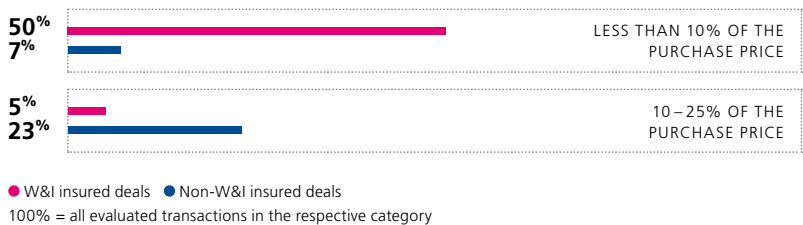
## CMS Trend Index

Liability caps (less than 50% of purchase price)



## Liability Caps for 2023

W&I insured deals + non-W&I insured deals



Liability cap less than 50% of purchase price

56% →

The number of deals with liability caps of less than 50% of the purchase price has remained stable

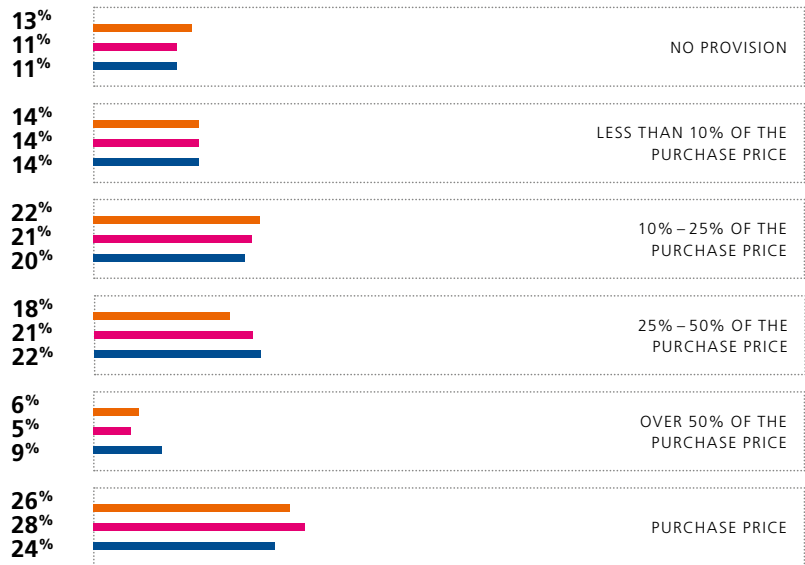
This year's Study shows deals with a liability cap of less than 10% of the purchase price (at 14%) remaining stable since 2022. The proportion of deals with liability caps equal to 10–25% and 25–50% of the purchase price remained broadly constant at 20% and 22% in each case. The proportion of deals with a liability cap equal to the purchase price also dropped by 4% to 24%. A small minority of 11% of the transactions did not have a liability cap at all.

*Deals without liability caps*

**11%** →

### Amount

#### Liability Caps



● 2010–2022 ● 2022 ● 2023  
100% = all evaluated transactions

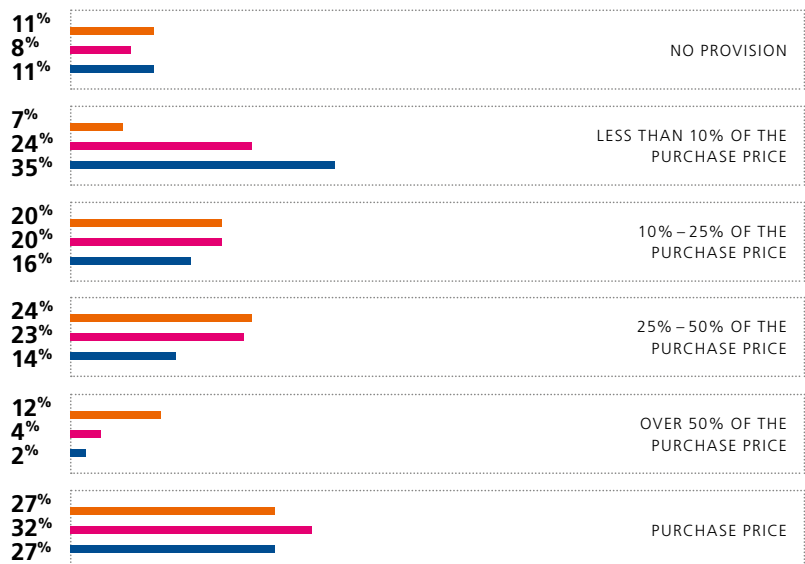
## Analysis by Deal Size

Liability caps for large transactions decreased and fewer of these transactions had caps of less than the purchase price. For 35% of large deals (i.e. greater than EUR 100m) and 24% of medium-sized deals (i.e. between EUR 25m and EUR 100m) the liability cap was less than 10% of the purchase price, whereas for small deals (i.e. less than EUR 25m) such a liability cap applied only in 7% of such deals. The 2023 results suggest that for small deals, while the cap is most likely to equal the purchase price (25%), there has been a wider variety of caps above 10% of the purchase price up to the purchase price.

*For small deals the purchase price or no cap is most likely to be the agreed position*

### Amount by Deal Size

#### Liability Caps



● < EUR 25m ● EUR 25m–100m ● > EUR 100m  
100% = all evaluated transactions

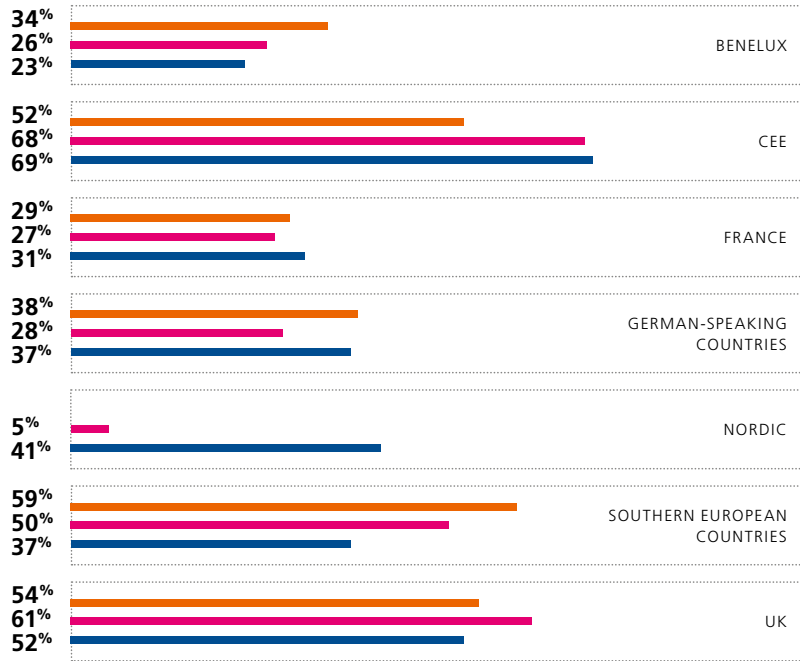
# Specific Issues

## Regional Differences

The European average for deals with a liability cap of more than 50% was 44% of all deals in 2023, which is consistent with the historic rolling average. The most noticeable increase was seen in CEE, at 68%. There were significant drops for Benelux and the German-speaking countries to, respectively, 26% and 28% of deals with a liability cap of more than 50%, as compared with a large jump for the UK to 61%. As can be seen, market practice in this respect continues to vary significantly between European regions and countries.

## Time Trend Europe

Liability Caps of more than 50%



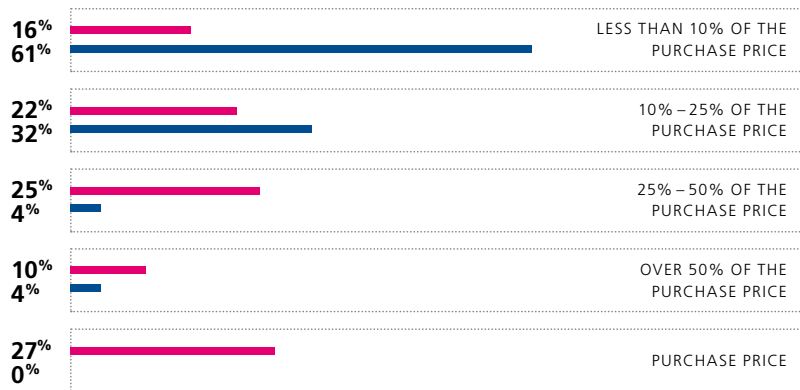
● 2010–2022 ● 2022 ● 2023  
 100% = all evaluated transactions  
 No data for Nordics before 2022 available

## European/US Differences

The US market has a more consistent and less varied range of liability caps in that the vast majority (93%) of deals in the US have a cap of 25% or less of the purchase price. Indeed a majority of US deals (61%) have a cap of less than 10% of the purchase price. In our European sample only 16% of deals in 2023 had a cap of less than 10% of the purchase price and most European deals (27%) had a liability cap equal to the purchase price.

## Liability Caps

Liability Caps of more than 50%



● Europe ● US  
 100% = all transactions with a general liability cap  
 US data refers to 'transaction value'

## Sector Differences

As indicated above, 34% of all our European deals had caps of up to 25% of the purchase price, which is broadly consistent with 2022 and in line with the 2010–2022 average. The exceptions to the overall average were in the Banking & Finance and Industry sectors, where 50% and 43% of such transactions had caps at this level; and just 13% of deals in the Infrastructure & Projects sector had a liability cap at this level. The variations year on year in respect of particular sectors are quite significant in some instances, so we continue to assume that deal size and geography, rather than sector, are the major determining factors in settling on an agreed level of a liability cap.

## Frequency

Liability Caps up to 25%

SECTOR	2010–2022	2022	2023
BANKING & FINANCE	30%	44%	50%
HOTELS & LEISURE	43%	43%	36%
ENERGY & CLIMATE CHANGE	27%	27%	32%
CONSUMER PRODUCTS	39%	51%	25%
TECHNOLOGY, MEDIA & COMMUNICATIONS	34%	36%	36%
INFRASTRUCTURE & PROJECTS	24%	75%	13%
LIFE SCIENCES & HEALTHCARE	35%	23%	37%
REAL ESTATE	48%	26%	37%
INDUSTRY	41%	41%	43%
BUSINESS (OTHER SERVICES)	34%	43%	25%
<b>CMS AVERAGE</b>	<b>36%</b>	<b>35%</b>	<b>34%</b>

100% = all evaluated transactions of the respective sector





# Warranty & Indemnity insurance

W&I insurance has become an established solution to situations where (i) there is no obvious or willing warrantor to stand behind the warranties (e.g. where there are private equity sellers) or (ii) there is an insufficient amount of coverage provided by the warrantors.

# General Overview

The levelling off in the overall use of W&I insurance at 16% was repeated in 2023, possibly reflecting a flat trajectory in M&A volumes and also, perhaps, that transaction values have been lower and to date W&I insurance has proved less cost effective at lower deal values. As mentioned last year, new W&I insurers have entered the market who focus on SME deals and offer lower minimum premiums but, as we note below, this does not appear to have translated into more W&I insurance policies being purchased on small deals.

## Time Trend

W&I Insurance

NO

YES

2011–2022

87%

13%

2022

84%

16%

2023

84%

16%

100% = all evaluated transactions

## The market this year

Brian Hendry, Head of Mergers & Acquisitions at W&I Insurance broker Paragon International Insurance, notes that:

*“Last year was a challenging one for the W&I insurance market for a multitude of reasons – primarily the reduction in deal volumes for the well-known issues of inflation, interest rates and geopolitical tensions. The reduction of deal flow into the W&I insurance space plus greater numbers of underwriters competing for the transactions not only drove lower pricing but pushed policy retentions down and led to far broader scopes of coverage and a lighter touch underwriting processes. This was not only a feature of UK and European markets but also the US and APAC.*

*We see 2024 as an excellent time to be a buyer of W&I insurance as supply far outweighs demand, and with the expectation of additional capacity providers we can only see competition for deals getting stronger. From a pricing perspective the base rates for most European transactions will be less than 1% of the policy limit. In the US, despite insurers’ regular comments that the current rates are too low to be sustainable, we understand that they are now moving towards 2.25% or even lower on some deals. Policy retentions (excesses) in UK/Europe are regularly 0.3% of enterprise value (and can be lower), with options for tipping and dropping being seen as normal. US retentions have moved below 1% and are regularly at 0.75% and can be lower for the right deals.*

*W&I insurance/RWI markets continue to evolve and add expertise to focus on ‘new’ areas such as secondaries and the lower SME space. The specialist tax and contingent risks markets have been growing to take account of increased appetite for risk transfer and a more competitive pricing landscape.”*

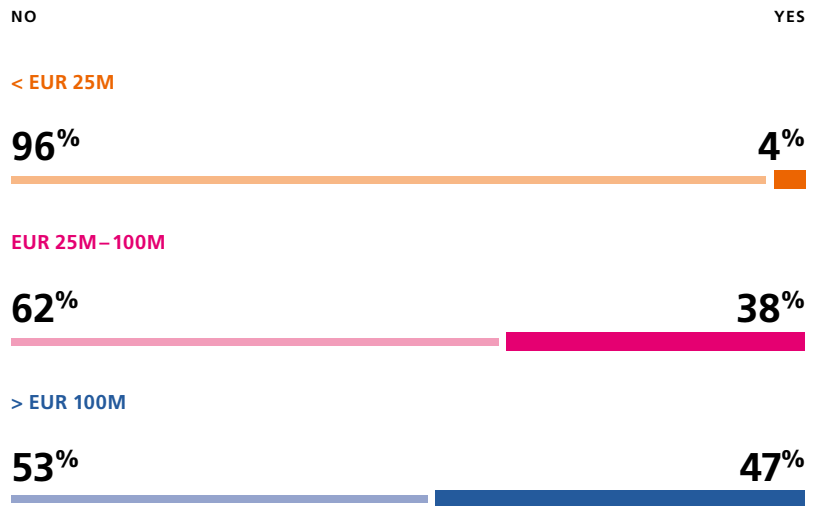
## Analysis by Deal Size

2023 again showed the continuing trend that W&I insurance is more likely to be adopted on large deals. W&I insurance was purchased on nearly half of deals with a purchase price exceeding EUR 100m (a reduction from 2022). There was, however, a corresponding 11% increase in usage to 38% on deals with values between EUR 25m and EUR 100m, whilst W&I insurance remains rare on small deals (sub EUR 25m at 4%), where perhaps the cost of the premium for a policy is not justified.

*W&I insurance most used on deals with larger values*

### W&I Insurance 2023

By purchase price (Europe-wide)



100% = all evaluated transactions



# Specific Issues

## Sector Differences

Whilst there is a consistent trend when comparing W&I insurance use against deal size, the same cannot necessarily be said when analysing the sector data. 2023 saw Technology, Media & Communications being the sector that adopted W&I insurance the most. The data shows significant variances across sectors. There were surprising falls in W&I insurance policies being purchased on Hotels & Leisure and Real Estate deals, which appears to contradict the consensus in the market that W&I insurance is standard on such deals.

## Frequency

W&I Insurance

SECTOR	2011 – 2022	2022	2023
BANKING & FINANCE	3%	6%	5%
HOTELS & LEISURE	12%	13%	7%
ENERGY & CLIMATE CHANGE	13%	23%	14%
CONSUMER PRODUCTS	9%	8%	15%
TECHNOLOGY, MEDIA & COMMUNICATIONS	15%	16%	18%
INFRASTRUCTURE & PROJECTS	1%	1%	7%
LIFE SCIENCES & HEALTHCARE	6%	8%	9%
REAL ESTATE	22%	15%	10%
INDUSTRY	11%	8%	8%
BUSINESS (OTHER SERVICES)	8%	3%	7%
<b>CMS AVERAGE</b>	<b>13%</b>	<b>16%</b>	<b>16%</b>

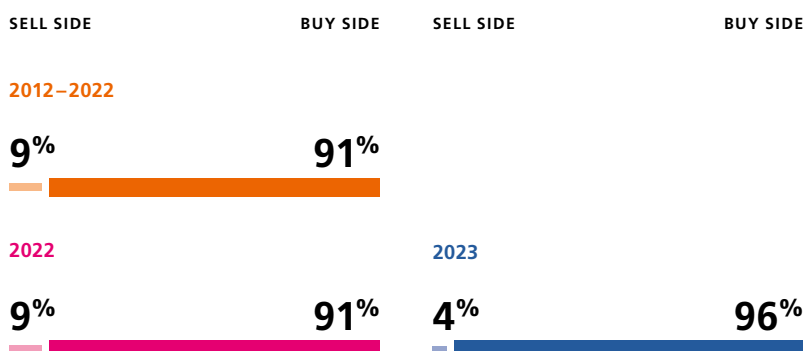
100% = all evaluated transactions of the respective sector

## Type of Policy and Costs

A W&I insurance policy will almost always be a buy-side policy (96%). Despite sell-side policies being rare, sellers increasingly agree to pay some or all the premium payable for the relevant policy (e.g. by accepting a reduction in purchase price as means of contribution), with the premium being paid by the seller on 11% of deals with W&I insurance (up 3%); and we note also that the non-purchasing party bore a proportion of the W&I insurance costs 35% of the time and when doing so the proportion of the costs it agreed to bear typically was between 25–50%.

## W&I Insurance

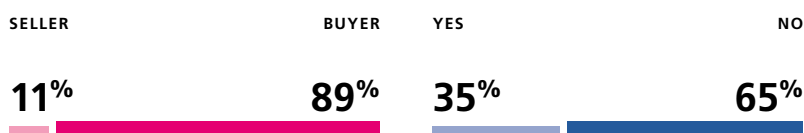
By purchase price



100% = deals in which W&I insurance was actually used

Premium paid by

The non-purchasing party bore proportion of costs

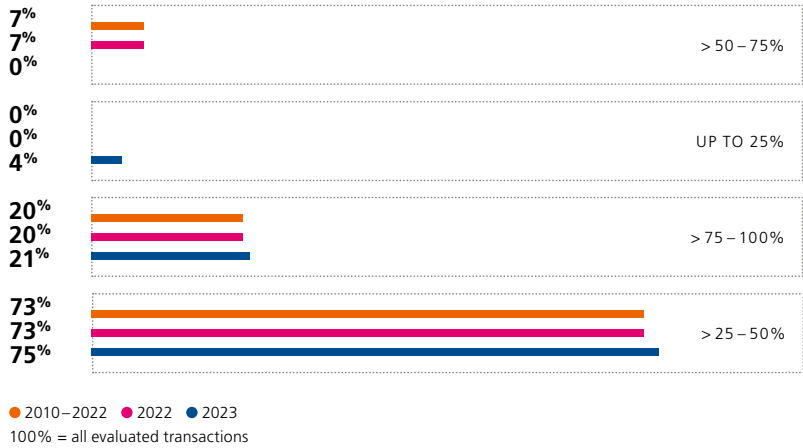


100% = all evaluated transactions

*A W&I insurance policy is almost always a 'buy-side' policy but sellers often make a contribution to the costs*

### W&I Insurance

Proportion of costs that the non-buyer party bore

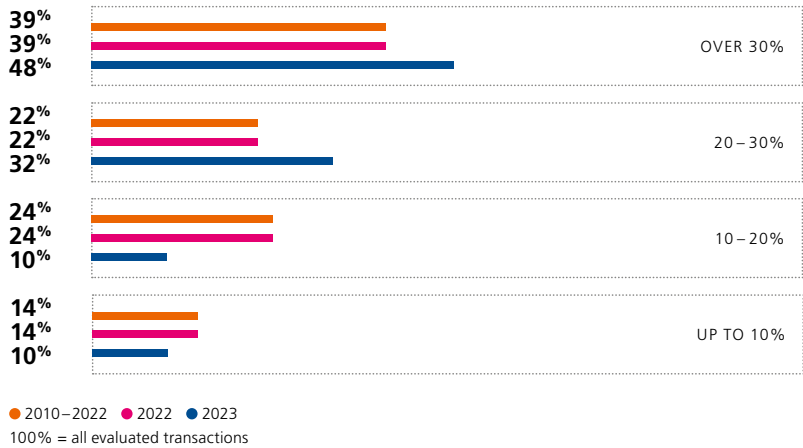


### Level of coverage

Last year we reported for the first time on the level of cover purchased via W&I insurance. The 2023 data appears to indicate a greater level of coverage is being sought in the market. It will be interesting to measure this over time and compare it with the experiences of W&I insurance brokers.

### W&I Insurance

Level of coverage

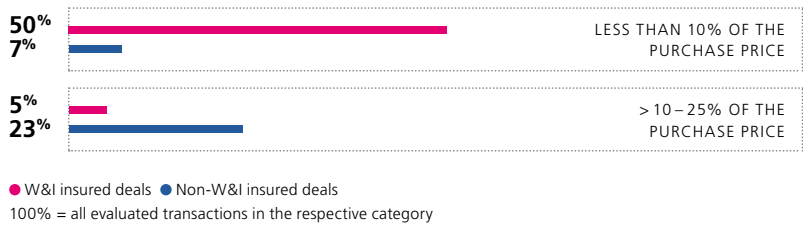


### Liability Caps

Deals with W&I insurance are more likely to see the seller being able to achieve lower liability caps. This may be a nominal amount with the buyer able then to purchase a W&I insurance policy either to top up its warranty coverage or, as is common, to be its sole recourse. In 2023, 50% of deals (down 3%) involving W&I insurance had liability caps that were less than 10% of the purchase price compared to only 7% of non-W&I insured deals.

### Liability Caps for 2023

W&I insured deals + non-W&I insured deals

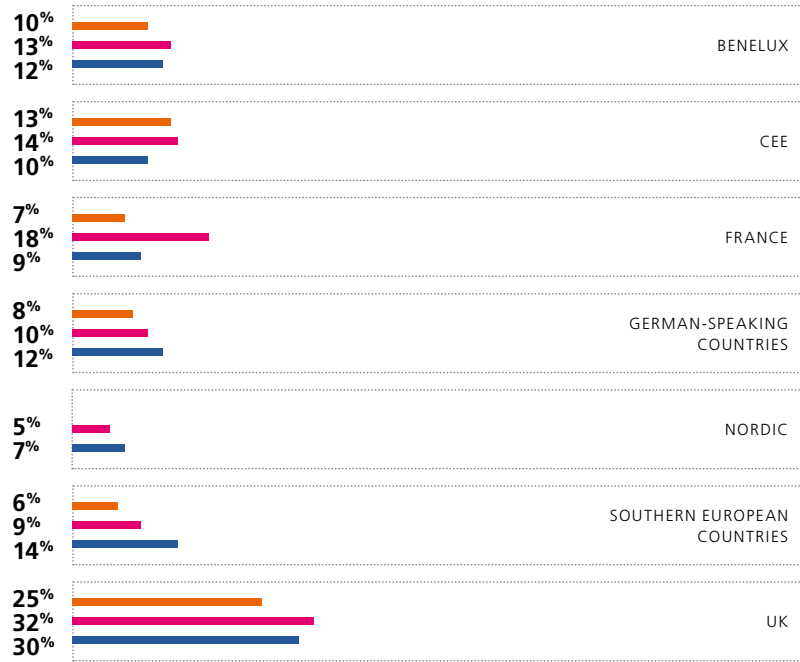


## Regional Differences

Regional disparities in the popularity of W&I insurance appeared again in 2023. The UK remains the market most comfortable with W&I insurance albeit its use levelled off at 30% of deals (5% higher than the average). German-speaking countries and the Southern European countries saw a rise in use, whilst there were falls in Benelux, CEE and most notably in France. W&I insurance remains more popular in the US than in Europe, as the SRS Report indicates that RWI insurance (as it is known in the US) was purchased on approximately 40% of deals.

## Time Trend Europe

W&I Insurance

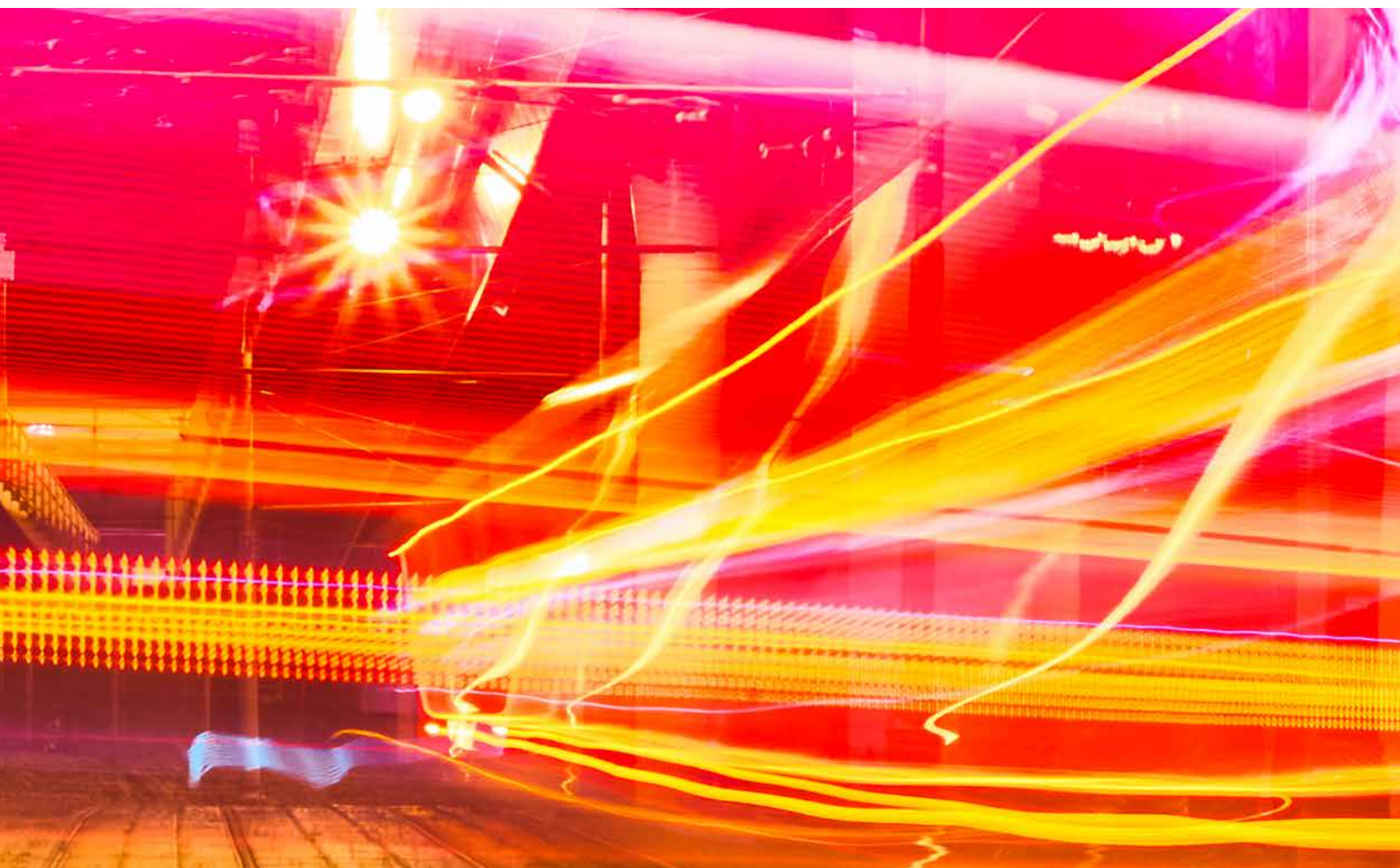


● 2010–2022 ● 2022 ● 2023  
100% = all evaluated transactions  
No data for Nordics before 2022 available



## Claims Notifications

Specialist W&I insurance broker HWF has published its HWF European W&I Claims Study (<https://www.hwfpartners.com/wp-content/uploads/2023/10/HWF-Partners-Claims-Report-2023.pdf>), which provides invaluable insight on, among other topics, claims notifications and claims paid in respect of W&I insurance policies placed in Europe since 2016. Key takeaways include that claims notifications were made on average in 11.32% of policies and claims were paid on 5.48% of policies (or 63.78% of notifications). Across the seven year period covered by the HWF study, 43.75% of notifications related to breaches flowing from seller fraud, non-disclosure and third-party claims, being matters which could not in the ordinary course be discovered through due diligence.





# Limitation period for warranty claims

When negotiating a sale and purchase agreement it is in the seller's interest to negotiate shorter limitation periods for warranty claims than the periods which would apply under the relevant statute. Short limitation periods mean less time for the buyer to bring claims. While last year's data seemed to indicate a shift from a 'seller-friendly' trend from shorter periods towards longer periods, the trend in 2023 appeared to be moving back in the direction of shorter periods. This might be an indication of a stronger bargaining position for sellers.

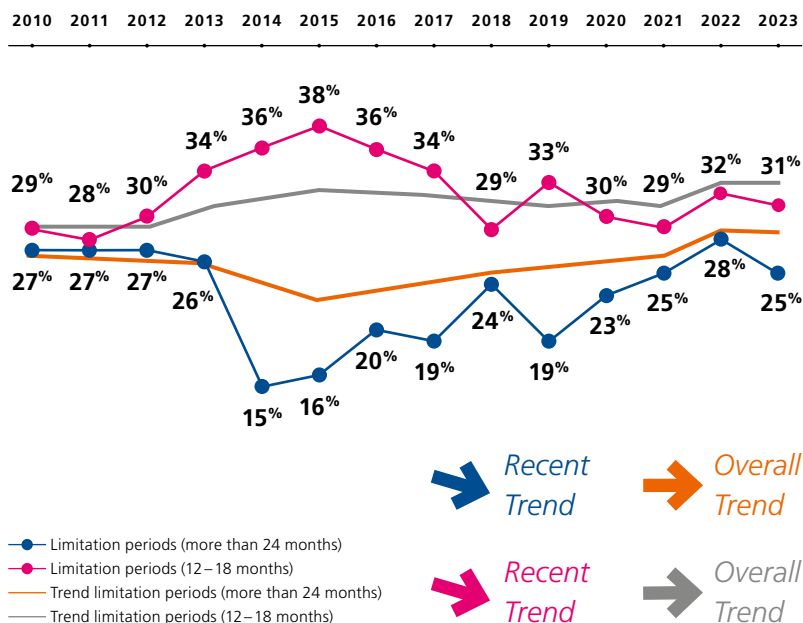
# General Overview

While the trend in recent years has been towards limitation periods of more than 24 months (at its peak as high as 28% in 2022), the figures for 2023 show a decline to 25%. This development is more in line with the average figures for limitation periods of more than 24 months since 2010 (23%). The fluctuations in the use of limitation periods of more than 24 months are also evident in the country comparison which, compared to last year's overall increase of longer limitation periods, is more diverse in 2023.

*Trend back to short limitation periods?*

## CMS Trend Index

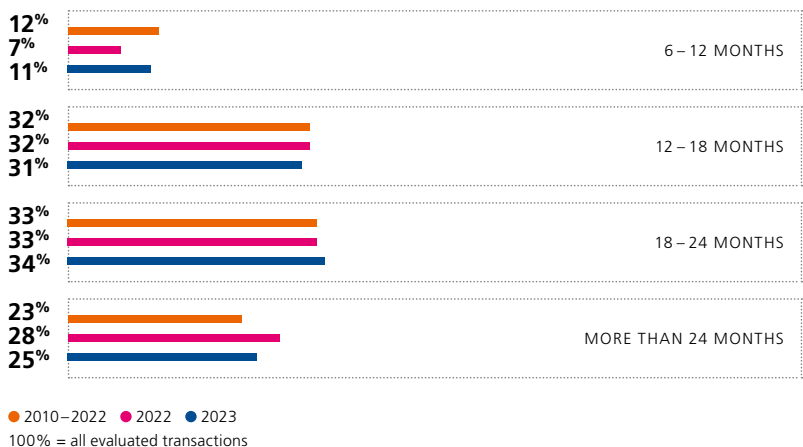
Limitation Periods



In line with the above, the use of short limitation periods (from six to 12 months), increased from 7% in 2022 to 11% in 2023. While there are only minimal fluctuations of 1% for limitation periods of 12 to 24 months compared to 2022, the trend towards short periods of up to 12 months and long periods of more than 24 months could indicate the start of a turnaround.

## Time Trend

Limitation Periods



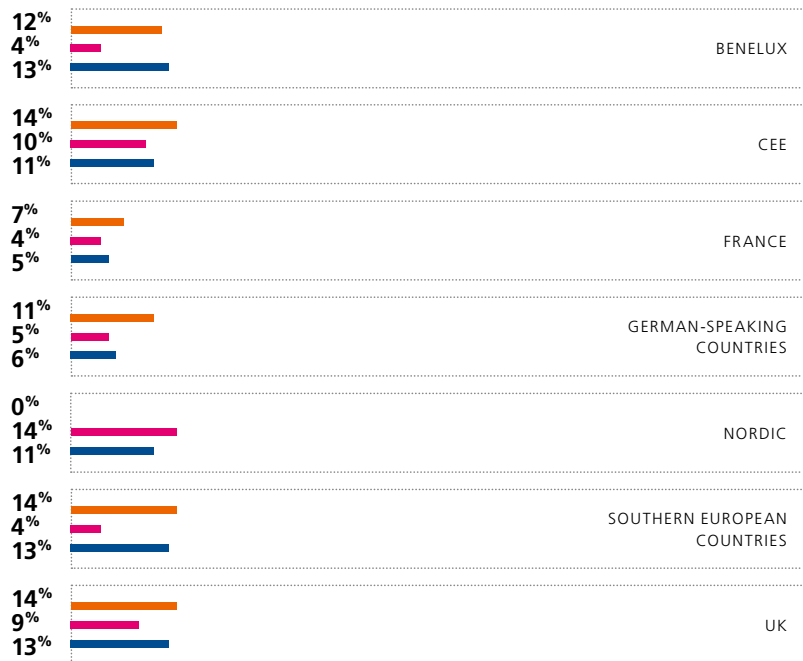
# Specific Issues

## Regional Differences

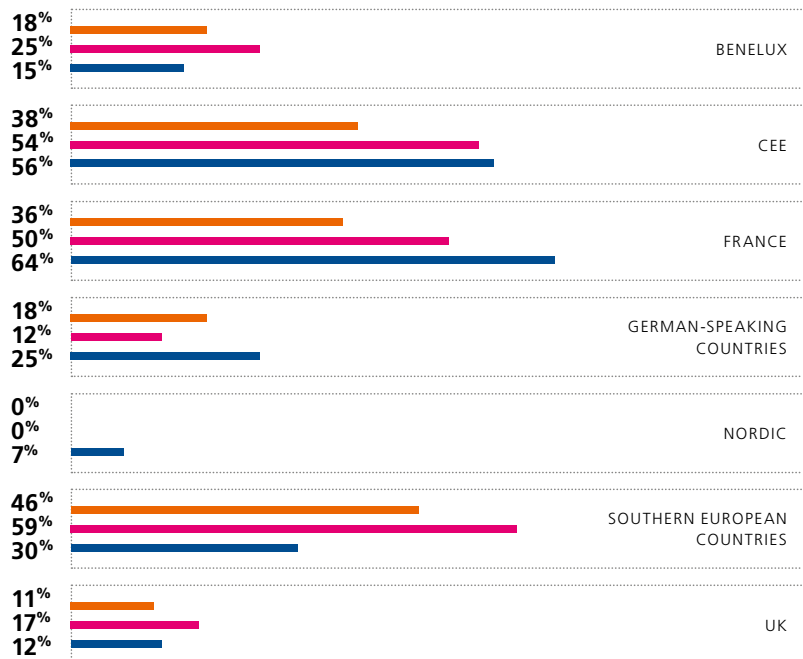
The 2022 trend towards a decrease in deals with short limitation periods (below 12 months) in almost all territories has not continued in 2023. The number of deals with short limitation periods of between six to 12 months is – compared to previous years since 2010 – still low in France and in the German-speaking countries. However, in Benelux, Southern European countries and the UK, a decline in limitation periods of more than 24 months and an increase in short limitation periods of less than 12 months is evident.

## Time Trend Europe

6 to 12 months



More than 24 months



● 2010-2022 ● 2022 ● 2023  
 100% = all evaluated transactions  
 No data for Nordics before 2022 available

### CMS Sector Analysis

In 2023 longer limitation periods (i.e. those exceeding 24 months) were most likely in the Infrastructure & Projects sector as well as the Industry sector (36% and 33% of deals respectively). With respect to the Infrastructure & Projects sector, this is a notable increase as in 2021 and 2022 no deals in that sector involved a limitation period exceeding 24 months. However, this increase is not totally unexpected as a significant number of deals with a limitation period of 18 to 24 months were identified in this sector last year (50% in 2022).

However, as the overall average of all sectors also indicates, the frequency of limitation periods of more than 24 months dropped from 28% in 2022 to 25% in 2023. This is in line with the figures of e.g. the Banking & Finance sector as well as the Hotel & Leisure sector (decline by 24% and 50% respectively). This is not surprising, since there was an increase in deals with limitation periods of between 18 and 24 months.

### Limitation Periods

More than 24 months

SECTOR	2010 – 2022	2022	2023
BANKING & FINANCE	19%	40%	16%
HOTELS & LEISURE	29%	59%	9%
ENERGY & CLIMATE CHANGE	24%	32%	19%
CONSUMER PRODUCTS	25%	16%	27%
TECHNOLOGY, MEDIA & COMMUNICATIONS	18%	23%	32%
INFRASTRUCTURE & PROJECTS	14%	0%	36%
LIFE SCIENCES & HEALTHCARE	25%	25%	24%
REAL ESTATE	24%	15%	33%
INDUSTRY	21%	26%	33%
BUSINESS (OTHER SERVICES)	26%	44%	16%
<b>CMS AVERAGE</b>	<b>23%</b>	<b>28%</b>	<b>25%</b>

100% = all evaluated transactions of the respective sector

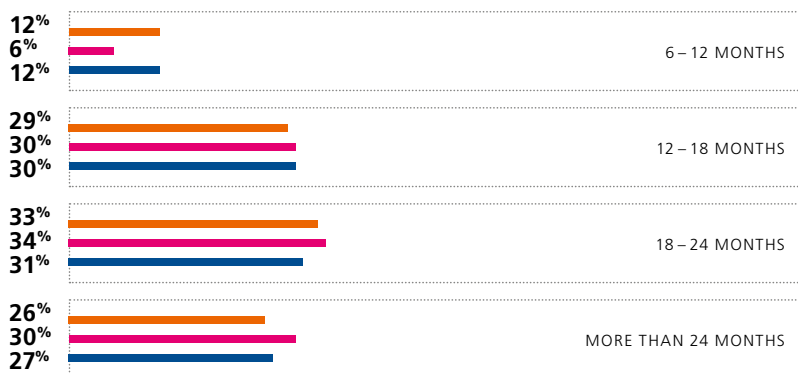
*Longest limitation periods in the Infrastructure & Projects sectors as well as the Industry sector*

## Analysis by Deal Size

In contrast to previous years, but in line with last year’s Study, deal size was not a main factor for limitation periods. However, while we saw in 2023 an increase in limitation periods of more than 24 months regardless of the amount of the purchase price, there was a decline of 3%, irrespective of the deal size, for each purchase price category. In turn, there were more limitation periods of less than 12 months for small and large deals but not in the case of medium-sized deals, which dropped to 3% compared to 8% in 2022.

### Time Trend

By purchase price less than EUR 25m

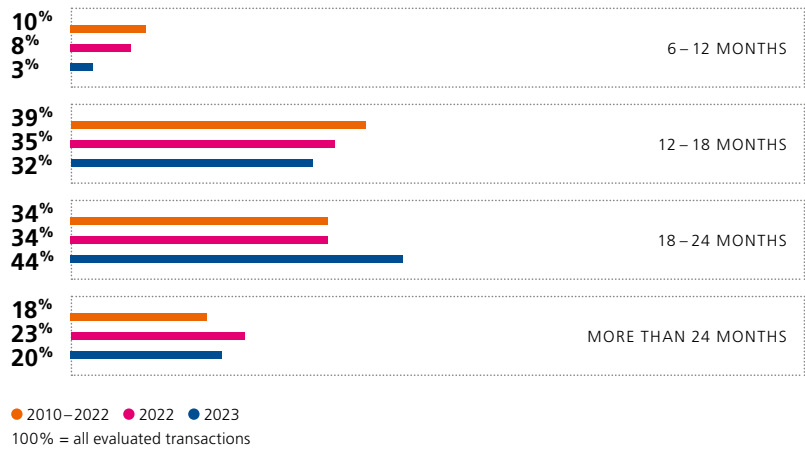


● 2010 – 2022 ● 2022 ● 2023  
100% = all evaluated transactions

For medium-sized deals, limitation periods of 18 to 24 months are the most common at 44% in 2023. This is an increase of 10% compared to 2022 and also compared to the average of 34% over the period between 2010 and 2022.

### Time Trend

By purchase price EUR 25m – 100m

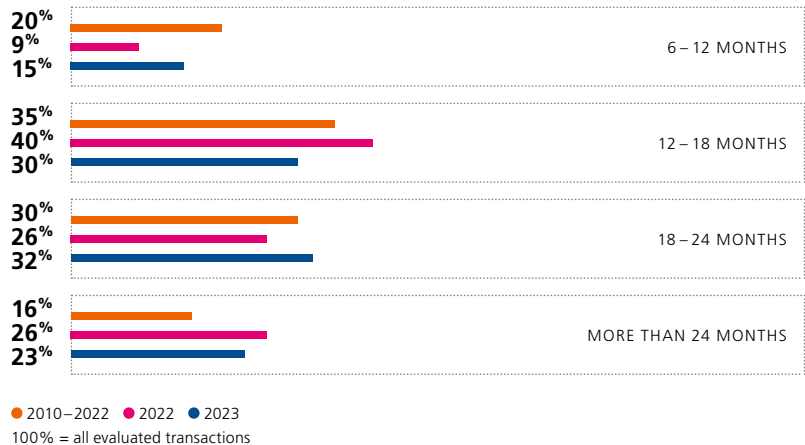


*Limitation periods of more than 24 months slightly decreased irrespective of deal size; in 2023 limitation periods between 18 to 24 months seemed to be the preferred period for deals with purchase prices above EUR 25m*

This is in line with the development for large deals, where there was an increase of limitation periods from 18 to 24 months from 26% in 2022 to 32% in 2023.

### Time Trend

By purchase price more than EUR 100m





# Security for warranty claims

In some M&A deals, the buyer is concerned about the seller's ability to pay claims. Therefore, the parties may include a form of security for warranty claims. The type and the value of the security depends on many factors, such as the likelihood of a claim occurring, the strength of the seller's covenant and the cost, administration and time needed to obtain a particular type of security.

# General Overview

The 'seller-friendly' trend in recent years, which permitted sellers to avoid having to provide security for warranty claims, continued last year. In 2023, only 23% of the deals contained security for warranty claims, which is less than in 2022 (28%). We noted in 2022 that this trend is prompted by an increasing use of W&I insurance, which means that buyers need less direct recourse to the seller. Whereas we noted that there was a trend in 2022 for parties opting for security to choose a buyer-friendly form of security, such as a retention of the purchase price, in 2023 the use of escrow accounts appears to have regained ground (44% compared to 37% of the deals with a retention). Compared to 2022, there was an increase of 6% in deals with escrow accounts and is slowly moving towards the average of 54% over the last 13 years. This reinforces the assumption that sellers are regaining more power in negotiations.

## Time Trend

Security

NO

YES

2010–2022

69%

31%

2022

72%

28%

2023

77%

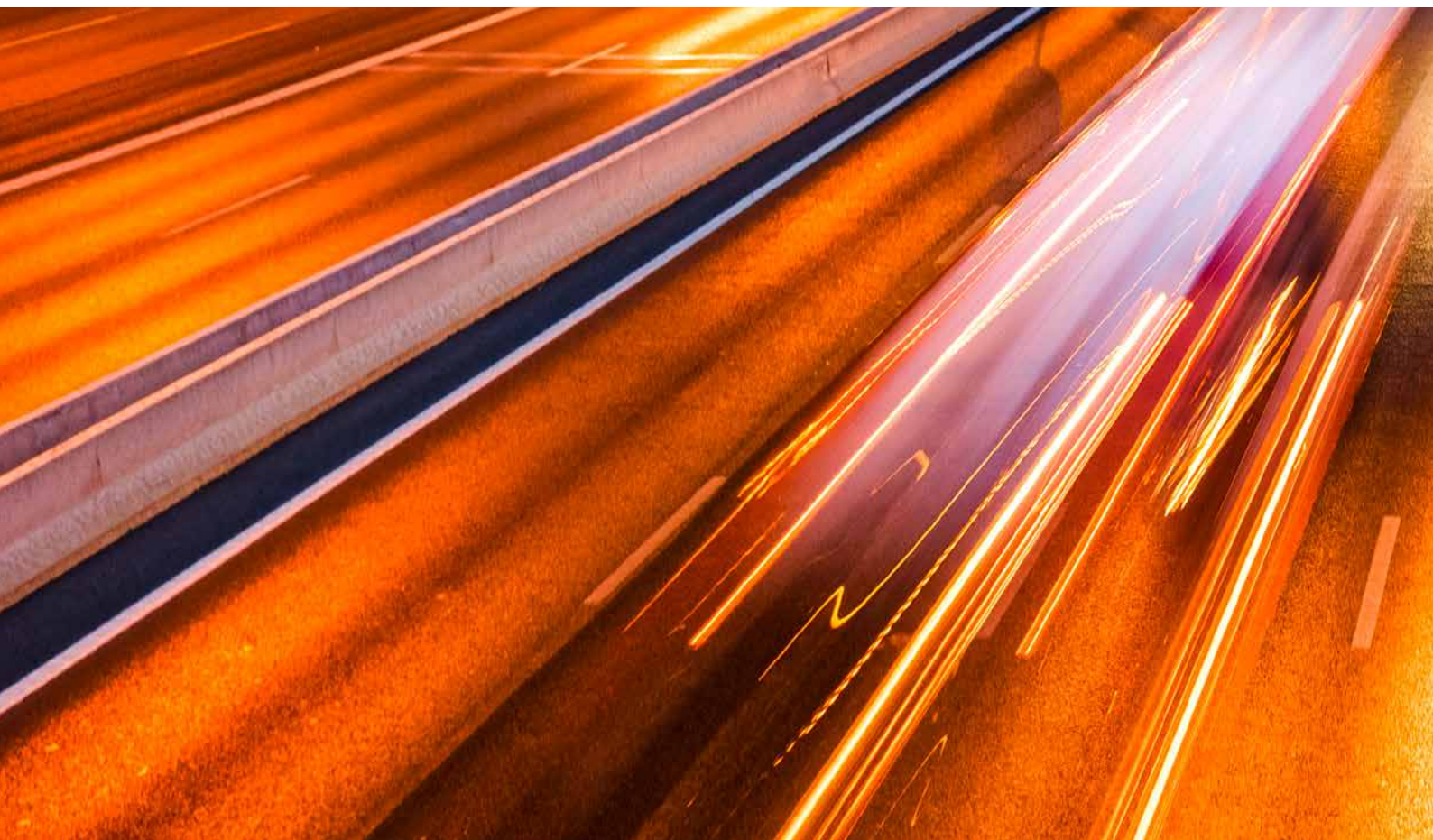
23%

100% = all evaluated transactions

Frequency of security

23% ↘

Sellers able to avoid providing security



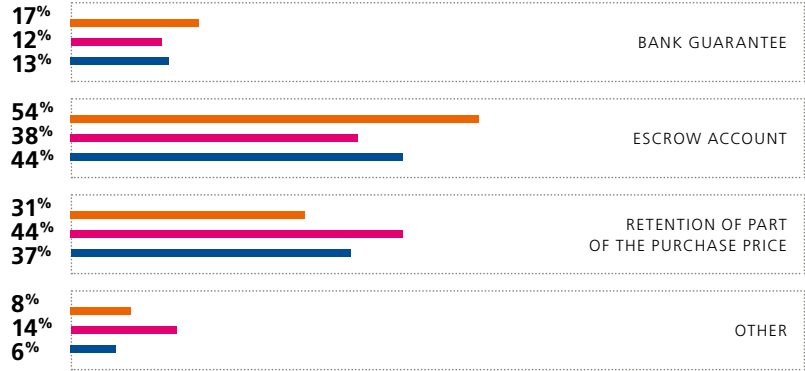
# Specific Issues

## Type of Security

Between 2010 and 2022, escrow accounts were the most prevalent form of security, being used on average in 54% of transactions where the security was based on delayed receipt of part of the purchase price. Although it seemed as if the trend was shifting in 2022 with retentions being used more than escrow accounts (44% compared to 38%), the more 'seller-friendly' type of security regained the upper hand in 2023: 44% of transactions used escrow accounts compared to 37% of the deals with a retention.

## Time Trend

Security



● 2010-2022 ● 2022 ● 2023

100% = transactions with safeguarding mechanism – more than one type of security possible

Use of escrow accounts

The use of escrow accounts was the most popular form of security

44% ➔

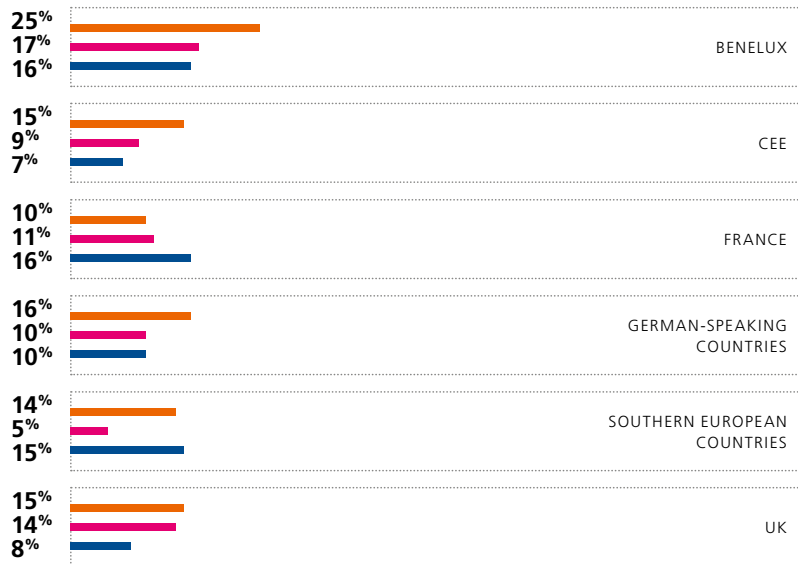


## Regional Differences

The use of escrow accounts used to be especially popular in Benelux, being used in 25% of deals over the last 13 years, but this continuing to decrease, being used in 17% of all transactions in 2022 and 16% in 2023. This trend can also be noted in the CEE region as well as in the German-speaking countries and the UK: the usage decreased in all three regions by 6–8% compared to the average for 2010–2022. A contrasting development in the use of escrow accounts can be observed in France and Southern European countries: in France their use increased to 16% compared to the average over the last 13 years of 10%; and in Southern European countries their use in 2023 was slightly higher (15%) than the average over the last 13 years (14%).

## Time Trend Europe

Use of escrow accounts



● 2010–2022 ● 2022 ● 2023  
100% = all evaluated transactions

*Even though the use of escrow accounts has once again become the most popular form of security, a decrease in use can be noted in two-thirds of the regions*

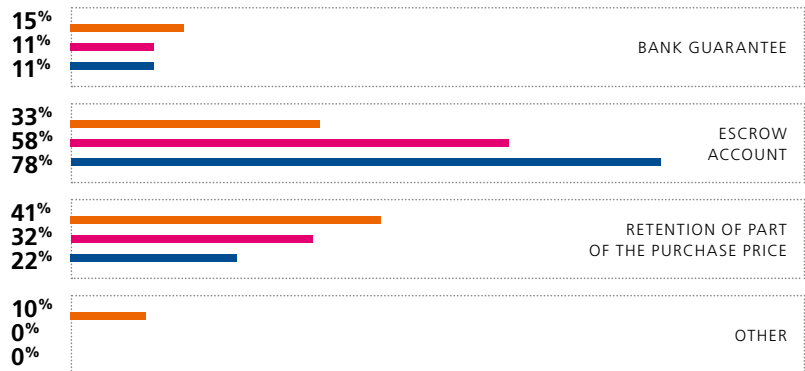


# Analysis by Deal Size

The use of a retention was more common (41%) in small deals than in medium-sized deals (32%) or large deals (22%). This is similar to the use of W&I insurance, where the lower deal value does not justify the costs, complexity, administration, etc. required to set up an escrow account. The opposite was the case for medium-sized and large deals, where escrow accounts were used in 58% and 78% respectively of deals involving a form of security, suggesting that parties favour the independent security an escrow provider offers. In 2023 escrow accounts were used as security in medium-sized deals significantly more often than in 2022 (58% in 2023 compared to 40% in 2022).

## Security for warranty claims

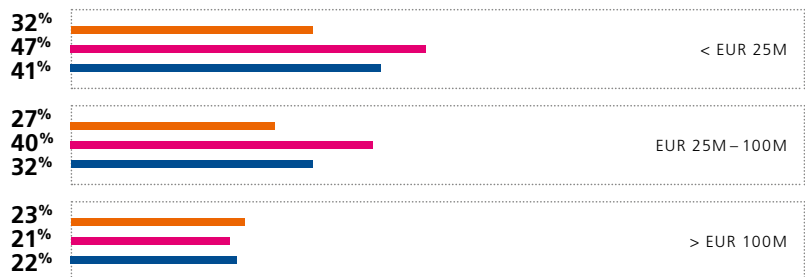
By purchase price 2023



● < EUR 25m ● EUR 25m-100m ● > EUR 100m  
100% = transactions with safeguarding mechanism – more than one nomination possible

## Retention of part of the purchase price

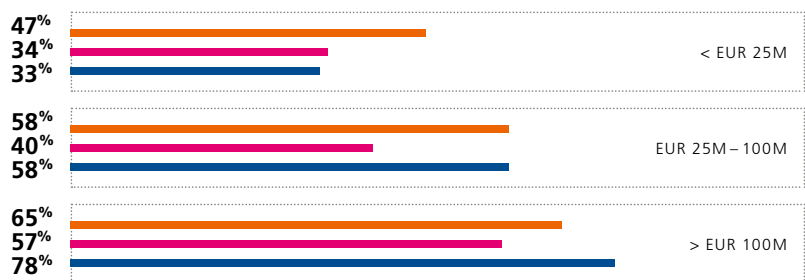
By purchase price 2010-2023



● 2010-2022 ● 2022 ● 2023  
100% = transactions with safeguarding mechanism – more than one nomination possible

## Escrow accounts

By purchase price 2010-2023



● 2010-2022 ● 2022 ● 2023  
100% = transactions with safeguarding mechanism – more than one nomination possible



# MAC clause

Where signing and completion do not occur simultaneously, it is in the interest of the buyer to prevent fundamental changes occurring between the two dates. Material adverse change clauses (MAC clauses) can be negotiated for this purpose in order to allocate the risk of such changes. MAC clauses entitle the buyer to terminate the agreement if a specific event materialises before completion. Such events are expressly defined in the agreement and are often subject to extensive and detailed negotiations. The seller will usually try to exclude specific unavoidable events from triggering the MAC clause so that the risk of any fundamental change is borne by the buyer.

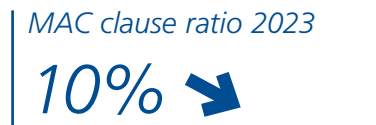
# General Overview

The trend towards a declining use of MAC clauses is continuing. In 2023 MAC clauses were only used in 10% of deals. This represents a slight decrease when compared to 2022 (13%) and to the previous 13-year average (15%). This is in line with our observation that sellers have been more successful in resisting MAC clauses because of their strong commercial position. In last year's Study, it was mentioned that the decrease is surprising, considering the economic environment resulting from the COVID-19 pandemic, the invasion of Ukraine, inflation, and supply chain bottlenecks. Since the use of MAC clauses is further declining despite the fact that the geopolitical tensions in Ukraine, and now also the Middle East, are still ongoing and inflation is still at a high level, it seems as if the political crises are so far having no or at least a decreasing impact on the use of MAC clauses.

## Time Trend MAC Clauses

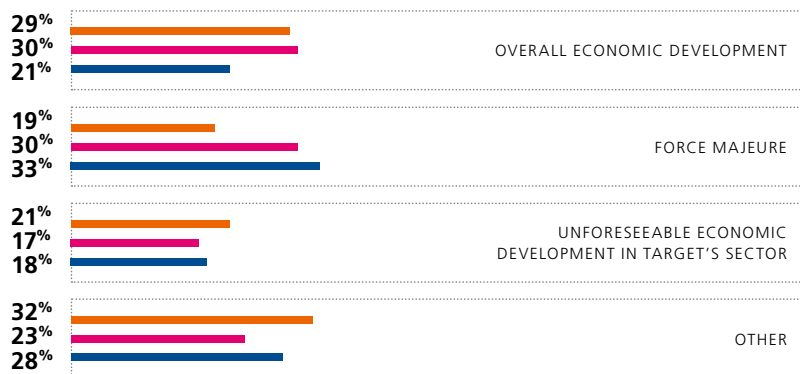


100% = all evaluated transactions



If a seller does agree to a MAC clause, it is in its interest to narrow down the scope of the provision as far as possible. This can be ensured by negotiating exemptions/carve-outs for fundamental changes which are beyond the seller's control: the exemption based on sector-specific economic development gained in significance slightly in 2023 compared to the previous year (up from 17% in 2022 to 18% in 2023) and exemptions for force majeure increased by 30% to 33%. Exemptions based on 'overall economic development' have largely lost significance, having declined by 9% (down from 30% in 2022 to 21% in 2023).

## Exemptions MAC Clauses

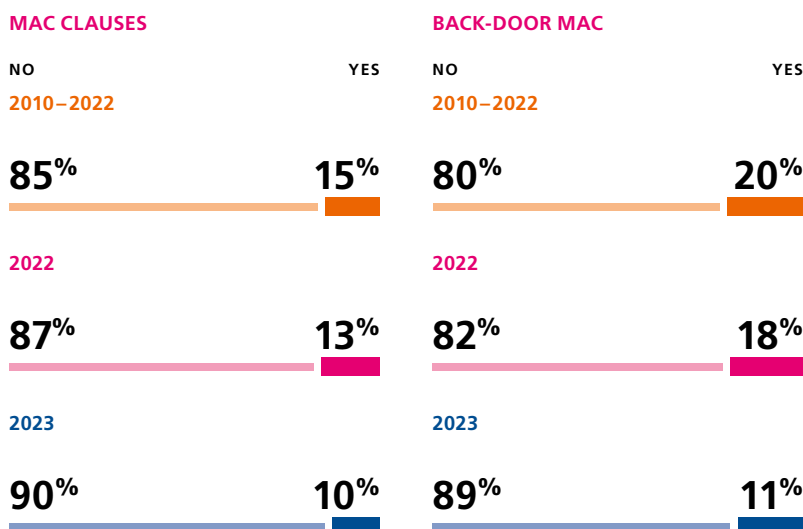


● 2010–2022 ● 2022 ● 2023  
100% = all transactions including a MAC clause – more than one exemption possible

The frequency of back-door MAC clauses in transactions (i.e. a right of the buyer to rescind or terminate the SPA in the event that warranties given as of signing are not true and accurate after signing or at completion) significantly decreased in 2023, with 11% of deals including such a clause compared to 18% in 2022 and compared to the 13-year average of 20% for 2010 to 2022. This is in line with the overall trend in the use of such clauses.

### Back-Door

MAC Clauses 2010–2023



## Specific Issues

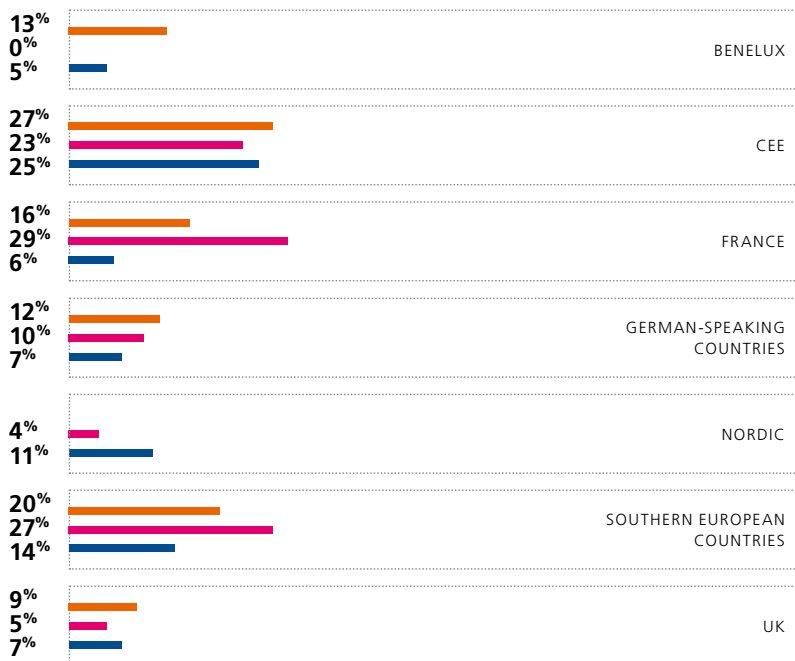
### Regional Differences

There continue to be stark regional differences in the use of MAC clauses. Compared to 2022, MAC clause usage in 2023 (slightly) increased in Benelux (from 0% to 5%), CEE (from 23% to 25%) and the UK (from 5% to 7%). In Southern European countries use decreased notably from 27% to 14%. A significant change in MAC clause usage can be noted in France: in 2022 almost one-third of all deals (29%) included MAC clauses, while in 2023 only 6% of all deals included such a clause. This is a decrease by 23%. MAC clause usage also decreased further in German-speaking countries (slight decrease from 10% to 7%).

*Use of MAC clauses is further declining in many countries. The largest decreases can be noted in France and Southern European countries*

### Time Trend Europe

MAC Clauses



● 2010–2022 ● 2022 ● 2023  
 100% = all evaluated transactions  
 No data for Nordics before 2022 available

### Sector Differences

In 2023 MAC clauses were most frequently used in the Technology, Media & Communications sector (19%) and the Consumer Products sector (15%). In both sectors slightly more MAC clauses were seen than on average since 2010 (12% in the Technology, Media & Communications sector and 13% in the Consumer Products sector). The frequency of MAC clauses dropped significantly compared to the 13-year trend in sectors such as Banking & Finance (18% compared to 7%), Real Estate (15% compared to 3%) and Energy & Climate Change (15% compared to 5%).

### Frequency

MAC Clauses

SECTOR	2010 – 2022	2022	2023
BANKING & FINANCE	18%	6%	7%
HOTELS & LEISURE	14%	11%	14%
ENERGY & CLIMATE CHANGE	15%	19%	5%
CONSUMER PRODUCTS	13%	14%	15%
TECHNOLOGY, MEDIA & COMMUNICATIONS	12%	6%	19%
INFRASTRUCTURE & PROJECTS	10%	0%	9%
LIFE SCIENCES & HEALTHCARE	17%	14%	12%
REAL ESTATE	15%	9%	3%
INDUSTRY	16%	18%	7%
BUSINESS (OTHER SERVICES)	14%	16%	6%
<b>CMS AVERAGE</b>	<b>15%</b>	<b>13%</b>	<b>10%</b>

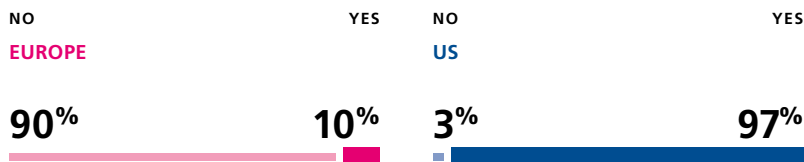
100% = all evaluated transactions of the respective sector

### European/US Differences

While in Europe MAC clauses are becoming less and less unpopular (only 10% in 2023 compared to 13% in 2022), figures in the US are more stable but reflect the complete opposite. In contrast to Europe, MAC clauses are used in 97% of US deals according to the most recent US statistics for 2023. This remarkable disparity further underlines the theory that the negotiating power of sellers is growing and sellers are being more and more successful in demanding deal certainty in Europe. However, it is important to bear in mind that in certain European jurisdictions a larger number of transactions sign and close simultaneously. In such cases, there is, of course, no need for MAC clauses in the first place.

### Europe/US 2023

MAC Clauses



100% = all evaluated transactions

Disparity between Europe (10%) and the US (97%) increases

MAC clause frequency US 97%

## Analysis by Deal Size

When MAC clauses were actually included in agreements in 2023, this was more the case in large and medium-sized deals than in small deals. In medium-sized deals the use of MAC clauses remained relatively stable (up from 12% in 2022 to 13% in 2023). Whereas last year we observed that MAC clauses were used less often the larger the deal volume was, in 2023 use increased by 8% in the case of large deals (6% in 2022 compared to 14% in 2023). In small deals, a decrease from 14% in 2022 to 8% in 2023 can be noted. Nevertheless, the use of MAC clauses in all purchase price categories decreased notably compared to the average between 2010 and 2022.

### MAC Clauses 2010–2023

By purchase price

#### < EUR 25M

NO YES  
2010–2022



2022



2023



#### EUR 25M–100M

NO YES  
2010–2022



2022



2023



#### > EUR 100M

NO YES  
2010–2022



2022



2023



100% = all evaluated transactions

*Compared to the average of the last 13 years, MAC clauses are being used less frequently in all deal size categories*



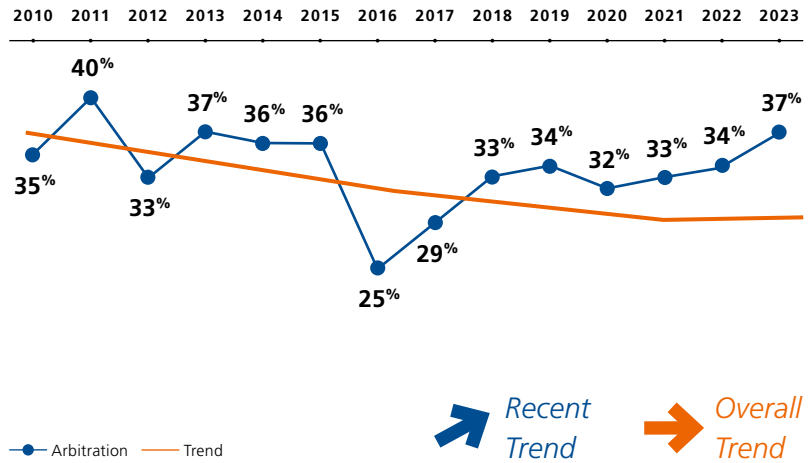
# Arbitration

When negotiating an M&A deal, the question usually arises as to whether or not the parties will resolve disputes before a public court or a private tribunal. Reasons for agreeing arbitration include the desire to avoid courts in jurisdictions where proceedings are time-consuming and the outcome is highly unpredictable, as well as a desire to prevent public proceedings. There are also perceived downsides, such as the relatively high costs of arbitration and the concerns that potential increases in efficiency will not actually be achieved in practice. However, since it may still be difficult to enforce foreign judgments in some jurisdictions, the need to obtain an award that can be enforced in multiple jurisdictions is probably the strongest driving force for choosing arbitration.

# General Overview

The number of deals with dispute resolution mechanisms further increased from 34% in 2022 to 37% in 2023. Since 2016 arbitration clauses have gained in popularity with a growth of 12%. The increasing popularity of arbitration as a dispute resolution mechanism is consistent with the statistics over the previous 13 years (2010 to 2022) where the use of arbitration averaged 33%.

**CMS Trend Index**  
Arbitration



Arbitration clause ratio 2023  
**37%** ➔

Arbitration clauses are slowly but steadily gaining importance in certain countries



In 2023, the use of national rules to govern arbitration (69%) further continued to be more popular than the use of international rules when compared to the 13-year average of 62% (2010–2022).

### Time Trend

Arbitration

NO

YES

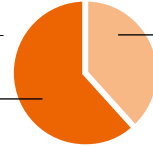
2010–2022

67%

33%

NATIONAL RULES: 62%

INTERNATIONAL RULES: 38%



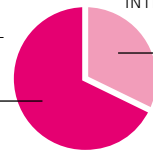
2022

66%

34%

NATIONAL RULES: 68%

INTERNATIONAL RULES: 32%



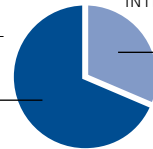
2023

63%

37%

NATIONAL RULES: 69%

INTERNATIONAL RULES: 31%



100% = all evaluated transactions

National rules

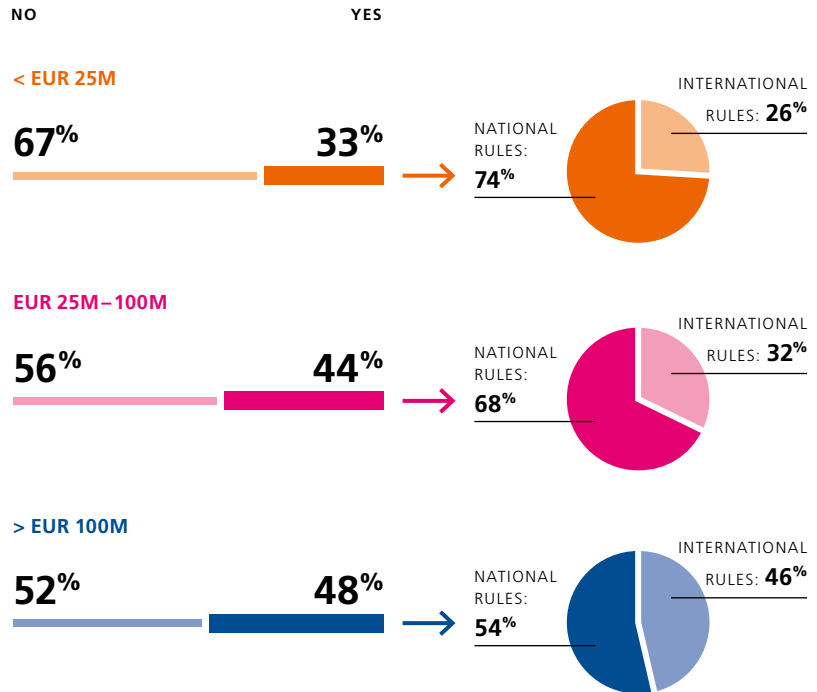
69% →



# Analysis by Deal Size

In 2023 arbitration clauses became popular for large deals, with almost every second deal including such a clause. The overall trend shows that arbitration was less popular in certain regions (the UK, France and Benelux) than others (the Nordic region, CEE, German-speaking and Southern European countries).

## Use of Arbitration By Purchase Price 2023



*Arbitration clauses were used in almost every second deal with a purchase price above EUR 100m*

100% = all evaluated transactions with an arbitration clause



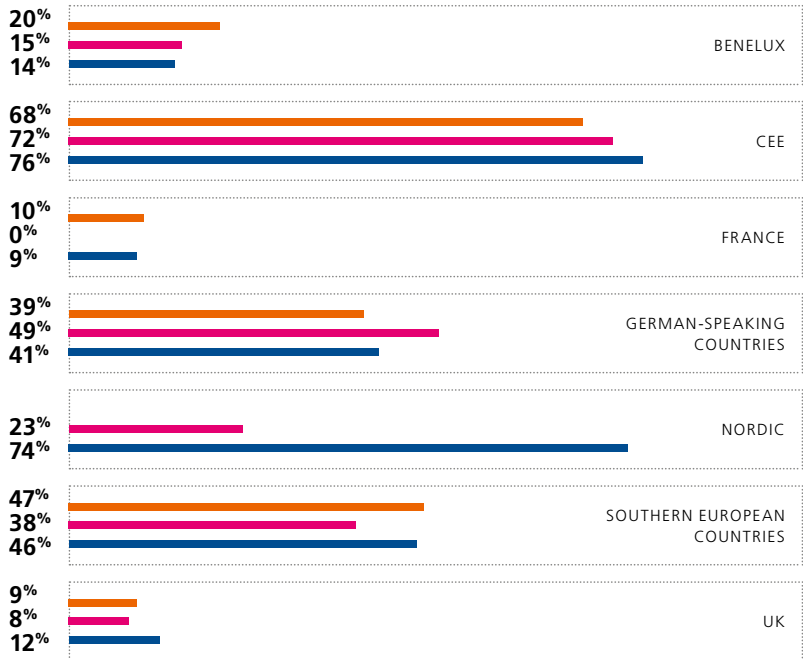
# Specific Issues

## Regional Differences

In 2023 arbitration clauses remained relatively uncommon in the UK at 12%, although this is a slight increase compared to 2022 (8%) and the average of the past 13 years (9%). In France and Benelux they were also quite rare, being used only in 9% of deals in France and 14% of deals in Benelux. Arbitration clauses are still very popular in German-speaking countries (41%) and Southern European countries (46%), where they are used in almost every second deal. Even higher use can be noted in the Nordic countries (74%), where there was a significant increase of 51% compared to 2022 and also in the CEE region (76%).

## Time Trend Europe

Arbitration



● 2010-2022 ● 2022 ● 2023  
 100% = all evaluated transactions  
 No data for Nordics before 2022 available

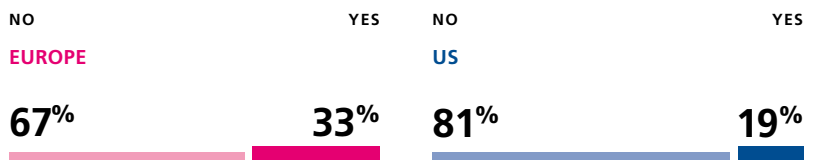
*Arbitration clauses are used in CEE and the Nordic countries in three out of four deals*

## European/US Differences

The use of arbitration clauses was much more popular in Europe (33%) than in the US (19%). However, we saw the US catching up (plus 12%) compared to last year.

## Europe/US

Arbitration Clauses



100% = all evaluated transactions



# Tax

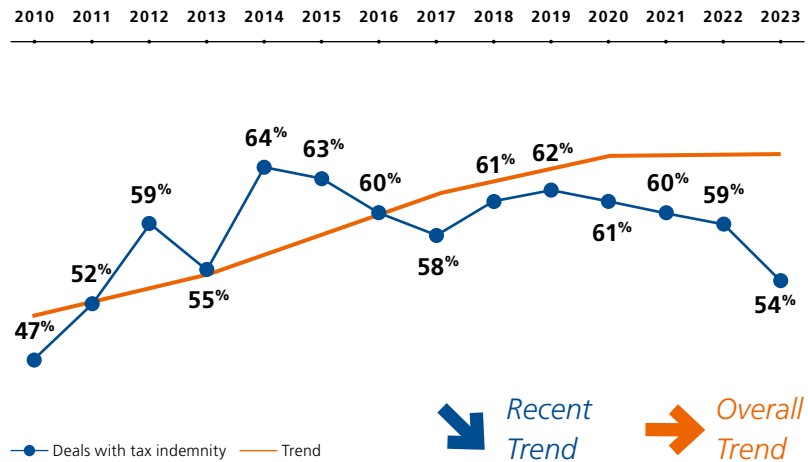
The rationale behind a tax indemnification provision is that the buyer wants to be held harmless for pre-completion tax risks. Tax indemnities often include specific caps and time limitation periods. There are different types of limitation periods for tax indemnity claims, namely 'absolute' limitation periods and 'relative' limitation periods. An 'absolute' limitation period bars tax claims by the buyer after a fixed date. A 'relative' limitation period is directly related to a decision by the relevant tax authority. In these cases, the limitation period (which is usually very short) does not start until a relevant decision has been made by a tax authority.

# General Overview

In 2023, there was a 5% decline in the number of transactions involving a tax indemnity (at 54%). This is also 5% lower than the average from 2010–2022 and would appear to demonstrate a more marked shift in favour of sellers. The percentage use of tax indemnities has been slowly falling since 2019.

## CMS Trend Index

Tax indemnity agreed



## Participation right at a future tax audit

In 2023, only 37% of deals contained a clause granting the seller the right to participate in a future tax audit. This represents a significant drop in the granting of this right to the seller compared to a rolling average which had previously been reasonably consistent (46%). This would appear to be a buyer-friendly trend that is inconsistent with the overall decline in the inclusion of tax indemnities in deals referred to above.

## Participation Right in Future Tax Audit



100% = all evaluated transactions

Seller's participation right

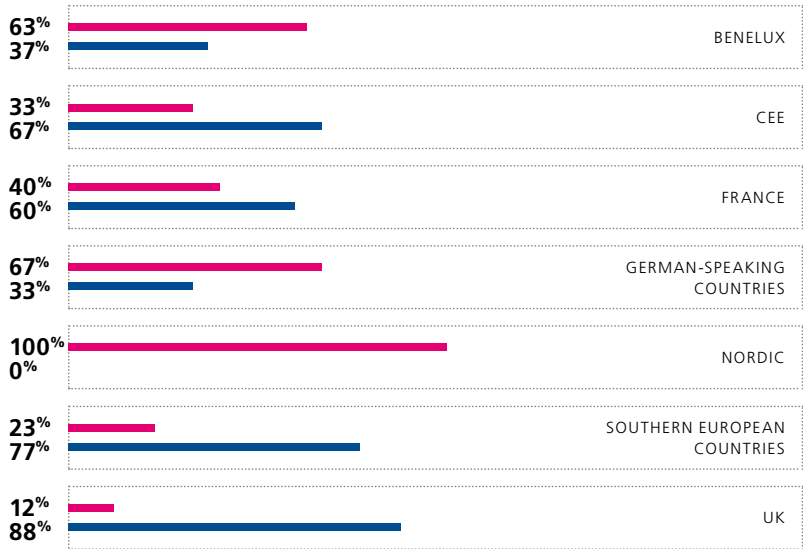
37% →

# Specific Issues

## Regional Differences

In 2023, strong regional differences in the use of absolute and relative limitation periods continued. Relative limitation periods dominated in the Nordic countries (100%), German-speaking countries (67%) and Benelux (63%). There was the opposite trend in the UK, France and CEE in recent years. Absolute limitation periods remained the norm in the UK (88%), Southern European countries (77%), CEE (67%) and France (60%), confirming the trend we highlighted in 2022.

## Absolute and Relative Limitation Period 2023



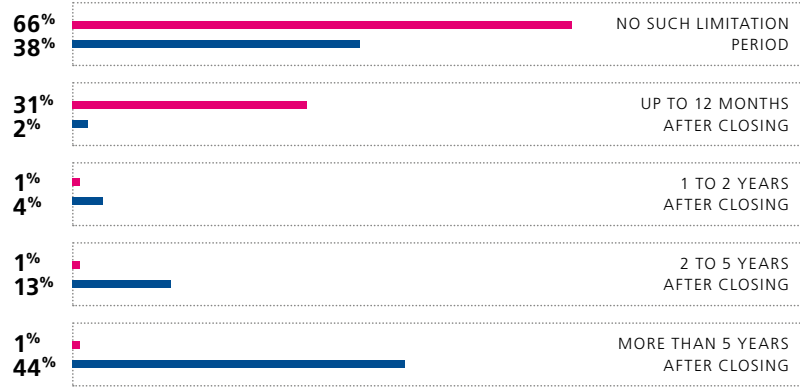
● Relative ● Absolute  
100% = all transactions with tax indemnity clause  
No data for Nordics before 2022 available



### Duration of limitation periods

Parties who agreed on an absolute limitation period for tax indemnities tended to choose periods of longer than five years after completion (2023: 44%; 2022: 47%). If the parties agreed on a relative limitation period, the majority chose a period of up to 12 months after the decision by the tax authority (2023: 31%; 2022: 40%).

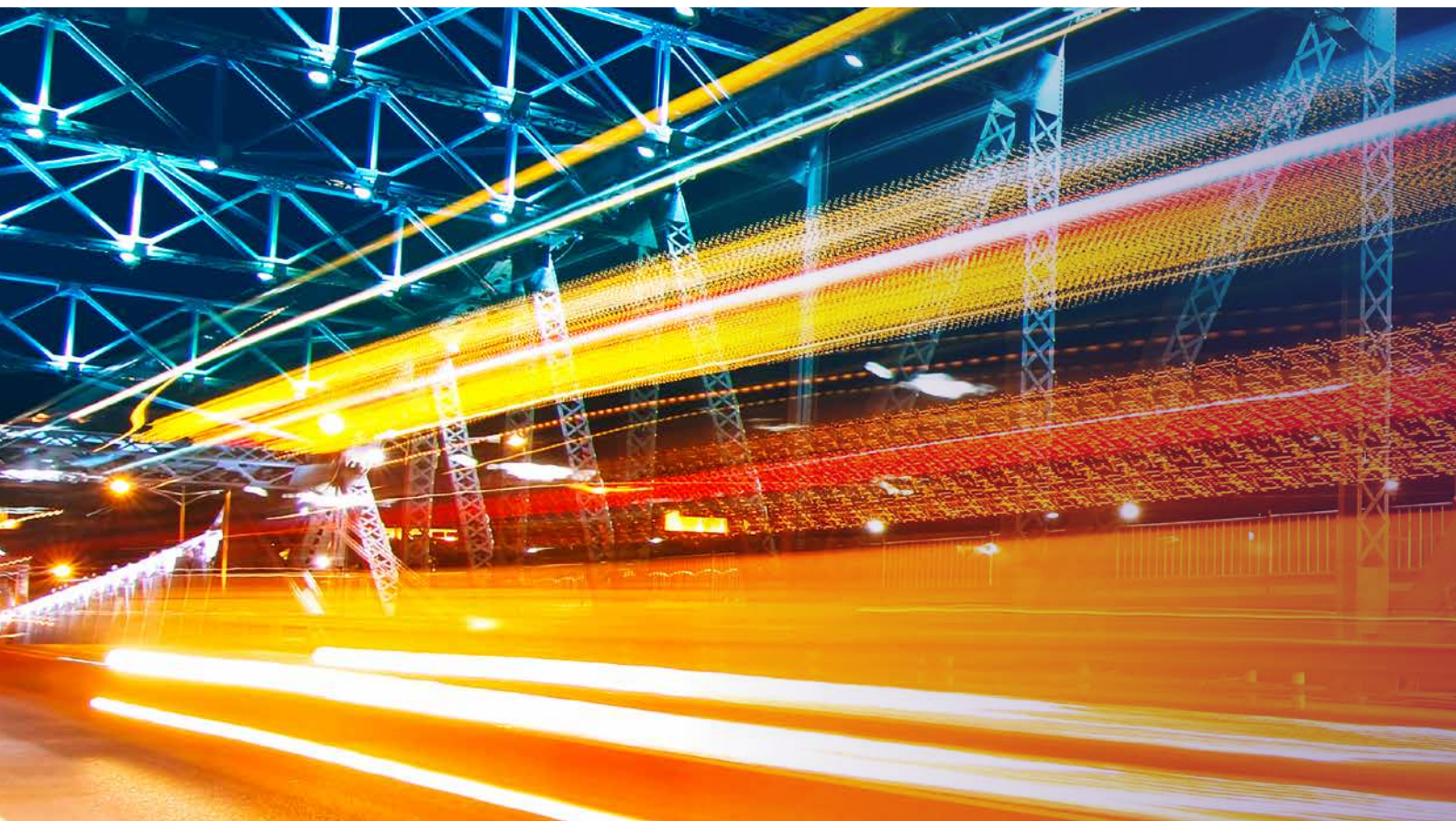
### Absolute and Relative Limitation Period 2023



● Relative ● Absolute

100% = all evaluated transactions with a tax indemnity clause

Due to rounding, totals do not correspond with the sum of the separate figures.



## Analysis by Deal Size

As in previous years, the data shows that tax indemnities were more frequently included on large deals (65%) and medium-sized transactions (64%). In fact the data for 2023 is the same as in 2022 for large and medium-sized transactions, with the overall decline referred to in the introduction above predominantly occurring on small deals.

### Tax Indemnity Agreed

By purchase price

2022

NO

YES

< EUR 25M

44%

56%

2023

NO

YES

< EUR 25M

51%

49%

EUR 25M–100M

36%

64%

EUR 25M–100M

36%

64%

> EUR 100M

35%

65%

> EUR 100M

35%

65%

100% = all evaluated transactions

*Tax indemnities are marginally more common in high value transactions*



# Global reach, local knowledge



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# Our latest CMS Corporate / M&A headline deals

## Accenture

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CMS advised Accenture on the acquisition of UK-based Objectivity, a digital engineering firm with operations across the UK, Poland, Germany and Mauritius.

## Ahold Delhaize

---

CMS advised Ahold Delhaize on the landmark acquisition of leading Romanian grocery retailer Profi Rom Food S.R.L. from MidEuropa, in a transaction worth approximately EUR 1.3bn.

## B2 Holding AS

---

CMS advised the Norwegian listed financial services group on an international restructuring across 11 countries, which was one of Europe's most complex financial services/restructuring projects of the year.

## Brookfield

---

CMS advised Brookfield on the acquisition of a 100% stake in Spanish renewable energy firm X-Elio from KKR.

## Carl Zeiss Meditec AG

---

CMS advised Carl Zeiss Meditec AG, listed on the MDAX and TecDAX of the German stock exchange and one of the world's leading medical technology companies, on its agreement to acquire all shares in the capital of D.O.R.C. Dutch Ophthalmic Research Center (International) B.V. (D.O.R.C.) from the investment firm Eurazeo SE for an enterprise value of approximately EUR 985m.

## Deutsche Telekom

---

CMS advised Deutsche Telekom on Austrian law aspects of the sale of their Tower portfolio in Germany and Austria for an aggregate value EUR 17.5bn.

## EBRD

---

CMS advised the European Bank for Reconstruction and Development on its acquisition of 35% of the shares in the Lviv M10 industrial park project in Western Ukraine.

## Equinor

---

CMS advised Norwegian energy business Equinor on the acquisition of the entire issued share capital of Suncor Energy UK for USD 850m.

## InstaDeep

---

CMS advised global AI company InstaDeep on its sale to BioNTech for GBP 562m across eight jurisdictions (UK, Germany, France, UAE, USA, Nigeria, Tunisia, South Africa).

## J Sainsbury plc

---

CMS advised on the UK FTSE 100 supermarket on the buy-out of the balance of its GBP1.1bn reversion portfolio from, among others, Supermarket Income REIT plc.

## Royal Unibrew

---

CMS advised on the multinational beverage company on its acquisition of Vrumona, the second largest soft drinks player in the Dutch market, from Heineken for a consideration of EUR 300m.

## STEAG GmbH

---

CMS advised on STEAG, one of Germany's largest energy suppliers, on acquisition by a Spanish infrastructure investor Asterion industrial partners. The transaction value was EUR 2.6bn.

## Webasto

---

CMS advised on automotive supplier Webasto on the sale of its charging business to US private equity firm Transom Capital. Our advice covered three continents: Europe, Asia and North America.

## JILITI

---

CMS advised on Jiliti, a portfolio company of the French private equity fund Chequers Capital, on the acquisition of StorTrec AG, a major player in IT infrastructure present in ten countries and headquartered in Germany.

## London Metric

---

CMS advised on longstanding client and FTSE 250 listed REIT, LondonMetric, on its recommended GBP 1.9bn all-share acquisition by way of a scheme of arrangement of closed-ended real estate investment company, LXi REIT.

## Siemens Gamesa

---

CMS advised on the listed renewable energy multinational on the EUR 600m sale of a major portfolio of wind farms located across Spain, France, Italy and Greece.

## Volkswagen

---

CMS advised on Volkswagen on a joint venture with Belgian materials technology group Umicore to produce cathode material for battery cells. The total investment was around EUR 3bn.

# Methodology

The Study includes deals which were structured either as a share sale or an asset sale, including transactions where a seller held less than 100% of the target company's share capital, provided this represented the seller's entire shareholding in the target company. The Study also includes property transactions provided they involved the sale or acquisition of an operating enterprise such as a hotel, hospital, shopping centre or comparable business, and not merely a piece of land. Internal group transactions were not included in the Study. The data has been divided for comparative purposes into four European regions. The countries included in each of these regions are as follows:

- Benelux:  
Belgium, The Netherlands and Luxembourg
- Central and Eastern Europe (CEE):  
Bulgaria, Croatia, Czech Republic, Hungary, Poland, Romania, Slovakia, Slovenia, Serbia and Ukraine
- German-speaking countries:  
Austria, Germany and Switzerland
- Nordics:  
Norway and Sweden
- Southern European countries:  
Italy, Spain and Portugal

France and the United Kingdom are presented as individual categories. The Norway deals are covered in the overall numbers and reported separately, as relevant.

Transactions included in the Study cover the following sectors:

- Banking & Finance
- Hotels & Leisure
- Energy & Climate Change
- Consumer Products
- Technology, Media & Communications
- Infrastructure & Projects
- Life Sciences & Healthcare (pharmaceutical, medicinal and biotechnical products)
- Real Estate
- Industry
- Business (Other Services)

Some comparative data from the US was derived from "SRS Acquiom 2023 M&A Deal Terms Study" produced by SRS Acquiom Inc. Due to rounding, some totals may not correspond with the sum of the separate figures.

# Global leaders in complex, cross border transactions.

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- #1** Europe
- #1** CEE, DACH, Germany, Switzerland and UK
- #2** Benelux and Nordics

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\*2023, deal volume, Bloomberg, Mergermarket, LSEG, Factset

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