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## **Findings of CMS European M&A Study 2011: the pendulum is swinging back Shift from buyer's market to seller's market for transactions**

Frankfurt am Main – The findings of the latest review of the European transactions market, presented today in the form of the CMS European M&A Study 2011, indicate a shift from a buyer's market to a seller's market. The study suggests that while risk allocation has not reverted to 2007 norms, there are clear signs that greater competition on the buyer side is leading buyers to accept more risk.

That is the assessment by the corporate law experts responsible for the study, Dr Thomas Meyding and Dr Maximilian Grub, both partners at CMS Hasche Sigle. "During 2010, we saw something of a return to normal in the M&A market," said Dr Meyding. "That is most apparent in the increased number of transactions. However, there are also increasing signs that the distribution of contractual risks is evening out, with a swing toward a seller's market," added the head of the international CMS Corporate/M&A Practice Group, who sees clear indications that the pace of activity in corporate acquisitions and disposals will accelerate further in 2011.

2010 was a recovery year for M&A. Much of the prior year was dominated by the market's reaction to the financial crisis of 2008, leaving many buy-side players with a cautious approach to acquisitions. There were many deals with an element of distress, motivated by anxious creditors or shareholders on the selling side. Risk allocation became distorted due to the state of the market. Buyers picked up some good bargains and it was plainly a buyer's market.

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The buyer's market during and immediately after the financial crisis was characterised by the following:

- The proportion of deals with high liability caps imposed on the seller rose.
- There was a high proportion of transactions with very short time limitation periods for general warranties and a high proportion with long warranty periods for general warranties.
- Earn-out deals were slightly more popular than in the past.
- Price adjustment clauses linked to working capital were more often required by buyers.

In contrast, the current survey by the M&A experts identified the following trends:

- The proportion of deals with high liability caps is falling.
- Limitation periods for general warranties are getting shorter.
- The return to action of financial investors in 2010 has also quickened the pace of the M&A market.

Dr Thomas Meyding commented: "These changes indicate a return to normal in the M&A market and a trend back to more seller-friendly contract provisions."

### **Overview of key conclusions of the CMS European M&A Study 2011:**

- Purchase price adjustments – there were fewer purchase price adjustment clauses in 2010, 35% compared with 48% in 2009.
- Locked box mechanisms – the greater activity of financial sellers heralded much greater use of locked box mechanisms in Continental Europe, particularly in the German-speaking countries.
- Earn-outs – earn-out periods became shorter, as demonstrated by 65% of such earn-outs being payable within 24 months, compared with 51% in 2009.
- Timing of warranties – a higher percentage of deals featured repetition of all warranties on closing, 67% compared with 60%.
- De minimis and baskets – slightly fewer deals had *de minimis* provisions. More deals had basket threshold provisions and still more deals featured recovery on

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an "excess only" basis, revealing perhaps a gradual movement towards US deal norms.

- Liability caps – the proportion of transactions where the liability cap imposed on the seller for warranty breaches exceeded 50% of the purchase price has declined when measured against the peak of the last two quarters of 2009.
- Limitation periods – the proportion of deals with general warranty limitation periods exceeding 24 months has generally flatlined at around 27% since its peak in the second quarter of 2009, and declined notably in the last quarter of 2010.
- Arbitration – there has been a decline in the use of arbitration as the dispute resolution mechanism instead of public courts, with just 32% of 2010 deals featuring an arbitration clause as against 40% in 2009.

The study breaks down its analysis into four European regions:

- **Benelux** (Belgium and the Netherlands)
- **Central and Eastern Europe** (Bulgaria, Croatia, Czech Republic, Hungary, Poland, Romania, Russia, Slovakia, Ukraine)
- **German-speaking countries** (Austria, Germany, Switzerland)
- **Southern Europe** (Italy and Spain).

**France** and the **United Kingdom** are presented as individual categories. The study also includes comparisons with **US M&A data**, derived from a review produced by the Business Law section of the American Bar Association, namely the 2009 Private Target Mergers & Acquisitions Deal Points Study.

CMS transacted approximately 300 deals in 2010, a 25% increase compared with 2009, bringing the number of CMS deals analysed between 2007 and 2010 to more

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than 1,000. The M&A experts examined and analysed the individual contract clauses as the basis for the CMS European M&A Study 2011.

The data used in the study is not publicly available and is based on privately negotiated transactions in which CMS acted as an advisor to either the buyer or the seller.

CMS is the leading M&A law firm in Europe in terms of the number of transactions advised on. After various top placements in 2009 and 2010, CMS Hasche Sigle again took two first places in the German M&A rankings by mergermarket and Bloomberg for the first quarter of 2010.

The results of the study are unique and representative, since only the CMS organisation has access to this wealth of data in Europe. This is due not only to the expertise and market leadership of CMS, but also to its extensive footprint in Europe, which allows CMS to produce this study – the only one of its kind in Europe.

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