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Real Estate Deal Point Study 2010

CMS Hasche Sigle sees growing stability in German property market

Berlin – The German real estate market is returning to stability, with the first indications of a shift from a buyer's market to a seller's market emerging. That is the key finding of the Real Estate Deal Point Study 2010, which CMS Hasche Sigle will be presenting shortly.

This study is the first time that contract clauses in transaction agreements relating to the German property market have been systematically examined. Drawing on data from some 170 real estate transactions (asset and share deals as well as sale-and-leaseback transactions) handled by the firm between January 2007 and August 2010, CMS Hasche Sigle categorised and analysed the individual contract clauses (deal points).

CMS Hasche Sigle has been advising for some years now on representative and increasingly large German property deals, ensuring that the results have real practical relevance. Accordingly, the findings provide both buyers and sellers with valuable insights into real estate activity in Germany.

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The international CMS organisation of law firms released a similar study of the European M&A market in spring 2010, with CMS Hasche Sigle cases playing a key role. The CMS European M&A Study 2010 attracted considerable interest in boardrooms across Europe.

The results of the new Real Estate Deal Point Study 2010 highlight clear trends in the categories examined: asset classes, purchase price, warranties and guarantees, plus restrictions on liability.

The study illustrates how sellers were able to use negotiations to transfer a range of transaction risks to the buyer in 2007 (the boom period prior to the subprime crisis in the US). In the wake of the mushrooming crisis in the financial markets, which peaked in autumn 2008 after the collapse of Lehman Brothers, transaction risk shifted increasingly to the seller. Clear signs of a recovery have become evident since the start of 2010, with buyers increasingly willing to accept more risk.

Real estate law expert Dr Volker Zerr, partner at CMS Hasche Sigle and project leader for the study, comments that the findings provide "an ideal overview of current best practice in property purchase agreements, in relation to both asset and share deals". It came as no surprise that the economic downturn and upturn had a significant impact on deal terms.

Other key findings of the Real Estate Deal Point Study 2010:

- There has been a considerable rise in **transaction volumes** since the end of 2009/start of 2010, following a sharp fall in the **number of transactions** in 2008 and 2009. The proportion of transactions worth in excess of EUR 50 million more than quadrupled in the first half of 2010 compared to the previous six months (rising from 14% in the second half of 2009 to 60% in the first half of 2010).

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- The **proportion of portfolio transactions** has risen sharply compared with the start of 2008, from 13% in 2008 to 55% in the first half of 2010.
- During the same period, the proportion of **retail transactions** doubled (from 21% in 2008 to 42% in the first half of 2010), while the proportion of **office transactions** fell by a third (from 37% in 2008 to 25% in the first half of 2010).
- Compared to the start of 2009, there has been a general increase in the **debt element of the purchase price**. While the proportion of the purchase price financed by borrowing was only 18% in the second half of 2008, it averaged 43% in 2009 and in the first half of 2010.
- There has been a **shift from a buyer's market to a seller's market**. Long **limitation periods** for warranty and guarantee claims of more than 24 months were agreed in the first half of 2008 in 58% of the transactions examined. In contrast, this applied to only 30% of deals in the first half of 2010.
- Since mid-2009, transaction agreements are also more likely to include seller-friendly **de minimis and basket clauses** (i.e. a threshold or minimum limit for guarantee claims by the buyer) and rules on **liability caps**. While only just under 10% of all transaction agreements examined contained a *de minimis* clause in the first half of 2009, this type of provision was agreed in 52% of all transactions in the first half of 2010. Although basket clauses hardly played any role in the first half of 2009, they were used in 21% of all transactions in the first half of 2010. The proportion of transactions with a liability cap was 24% in the first six months of 2009 and 62% in the first half of 2010.

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CMS Hasche Sigle's Real Estate Deal Point Study 2010 "is an ideal aid when preparing for contract negotiations because it clearly flags up the expectations of buyers and sellers and reflects events on the ground in today's markets," sums up Zerr.

The results of the study will be presented to invited clients in a roadshow to be held at six key business locations in Germany, starting on 26 October in Berlin.

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