Executive summary

CMS European M&A Study 2013

2012 was another uncertain year in which global M&A flatlined with, remarkably, exactly the same deal value as 2011 (USD 2,246bn, source: mergermarket). Europe accounted for approximately 30% of global M&A, but was 5% down on 2011.

Concerns about the Euro were ever present during 2012. In addition, many other things contributed to a "not just now" attitude for many potential acquirers. These included the ground breaking political changes brought about by the Arab Spring, the US presidential election, the threat of the fiscal cliff, slowdown in the Chinese economy and wider unrest in the Middle East.

There are, however, good reasons for optimism in 2013. Many corporates have strong balance sheets and access to cash. Private equity owners always need to realise investments at certain stages of their life cycle and many are nearing the end of their investment holding period. Many US corporations are increasingly ready to make acquisitions, including European acquisitions, as they benefit from US energy self-sufficiency and lower energy costs. Chinese and Russian acquirers are increasingly active in Europe, and finally, although the underlying issues around the Euro have not changed, there is increasingly a sense that if there was going to have been a Euro meltdown, it would have happened in 2012.

Risk allocation as between buyer and seller in M&A sale and purchase agreements – which is what this Study looks to analyse – remained stable in 2012 and largely consistent with 2011. There was less volatility year on year than shown in our previous Studies. Norms are being re-established; and most of them favour sellers. A classic example is the prevalence of locked box deals. Although overall the number of deals with locked box mechanisms across Europe showed an increase, the most noticeable feature was that, where applicable, their use doubled in jurisdictions such as the UK, Benelux and CEE. This may in part be explained by the higher number of sales in 2012 by financial or private equity sellers who have traditionally favoured locked box deals.

It is also apparent that liability caps are still going lower, and that general warranty limitation periods are becoming more standardised around the 12–24 month period. MAC clauses are still the exception rather than the rule in Europe. There was a significant reduction in the number of deals with a seller non-compete covenant. The main buyer-friendly trend is the relative success in buyer's obtaining security for warranty claims to a greater extent. Apart from that, sellers tend to get a good deal in terms of risk allocation when they find a buyer.

Key conclusions

The key conclusions of the CMS European M&A Study 2013 are as follows:

— Locked box – the popularity of locked box mechanisms has now spread through most of Europe; in particular, their use doubled, where applicable, in the UK, Benelux and CEE.
— Earn-out – unlike in the US, there remains little appetite overall for earn-out deals in Europe (only 16% in 2012).
— *De minimis* and baskets – use of *de minimis* and basket provisions is increasingly commonplace throughout Europe, but unlike in the US, the standard basis of recovery remains 'first dollar' and this trend strengthened during 2012.
— Liability caps – there continues to be good news for sellers as general liability caps continue to trend downwards with 54% of deals now having a liability cap of less than half the purchase price, although caps are still much higher than in the US.
— Warranty & Indemnity insurance – W&I insurance (considered in 8% of the deals in 2011/2012) remains an important option for solving the warranty gap when sellers (e.g. financial sellers) refuse or cannot give warranties.
— Limitation periods – after fluctuations during the 2007–2010 period, the limitation period of 18–24 months has remained the most popular throughout 2011 and 2012 at a constant 32% of deals.
— Security for warranty claims – as in 2011, buyers remained cautious, looking to obtain some form of security (whether it be use of an escrow account, retention or bank guarantee) in 42% of deals in 2012.
— MAC clauses – these remain relatively rare being a feature in only 14% of deals in Europe, which is a significant contrast to the US where the overwhelming majority (93%) of deals have MAC clauses.
— Non-compete covenants – whilst in 2011 more than half of the deals had non-compete provisions (53%), for the first time since 2007, the pendulum swung in the opposite direction in 2012, with only 46% of deals containing a seller non-compete covenant.
— Arbitration – M&A deals with an arbitration clause decreased from 40% (2011) to 33% (2012).