Table of contents

Introduction 3
Executive summary 4
Purchase price adjustment 6
Earn-out 9
De minimis 11
Basket 12
Liability caps 14
Warranty & Indemnity insurance 16
Limitation period for warranty claims 17
Security for warranty claims 18
Closing conditions 19
MAC clauses 21
Non-compete 22
Arbitration 24
Tax 26
Methodology 27
Key contacts 29

Disclaimer

The results of the Study and/or this report and the conclusions presented in the Study and/or this report do not necessarily reflect the views of any member of CMS, the lawyers or the support staff who assisted with preparation of the Study and/or this report. The Study and/or this report evaluated 1,700 M&A transactions. Inevitably, there were many differences between the underlying agreements, and the vast majority of them were negotiated. In order to compare the results, individual provisions were categorised. When categorising the individual provisions, a degree of subjective judgment was necessary. Although certain trends can be deduced from the Study and/or this report, each transaction has individual features which are not recorded in the Study and/or this report and to which no reference is made. As a result, the conclusions presented in the Study and/or in this report may be subject to important qualifications that are not expressly articulated in the Study and/or in this report.

Anyone relying on the Study and/or this report does so at their own risk, and CMS and its members expressly exclude any liability, which may arise from such reliance.

CMS Legal Services EEIG (‘CMS EEIG’) owns the copyright for the Study and/or this report. Written consent from CMS EEIG is required to forward or publish the Study and/or this report. The Study and/or this report are/is protected by copyright and may only be used for personal purposes. The prior written consent of CMS EEIG is required for any reproduction, dissemination or other use (e.g. on the internet) of the Study and/or this report in whole or in part. When using the results of the Study and/or this report with the prior written consent of CMS EEIG, CMS must be cited as author.

The use and distribution of the Study and/or this report shall be governed by German Law. Place of jurisdiction is Frankfurt, Germany.
Introduction

We are delighted to present the CMS European M&A Study 2013 (the ‘Study’). This is our fifth annual study which means that we have now reviewed 1,700 deals for the six-year period of 2007–2012, a period of prosperity, financial crisis, slow recovery and significant geopolitical changes.

The CMS European M&A Study 2013 provides insight into the legal provisions of mergers & acquisitions (M&A) agreements, makes comparisons across Europe and with the US and identifies market trends. It evaluates private M&A agreements used for 1,700 transactions relating to both non-listed public and private companies in Europe for the six-year period 2007–2012. Of the 1,700 transactions we analyse in the Study, 342 relate to 2012.

Particular highlights in our Study are the CMS Trend Index and Sector Focus described below:

— **CMS Trend Index** – for each of the aspects we report on, we provide a CMS Trend Index to illustrate a current fact or trend.

— **Sector Focus** – CMS has adopted for a number of years a sectoral approach and now we present risk allocation statistics within specific sectors. We provide 2012 sector statistics for a number of areas we report on, namely locked box deals, earn-outs, liability caps, limitation periods and MAC clauses.

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 one of the few legal service providers with the capability to provide a European study of this kind due to its presence and market penetration in a wide range of jurisdictions across Europe.

We do hope that this Study helps you in your day-to-day M&A life. We are of course very interested in any suggestions, and would be more than happy to discuss and share any experiences you may have.

Thomas Meyding
Head of CMS Corporate Group
CMS Legal Services EEIG is a European Economic Interest Grouping that coordinates an organisation of independent member firms. CMS Legal Services EEIG provides no client services. Such services are solely provided by the member firms in their respective jurisdictions. In certain circumstances, CMS is used as a brand or business name of, or to refer to, some or all of the member firms or their offices. CMS Legal Services EEIG and its member firms are legally distinct and separate entities. They do not have, and nothing contained herein shall be construed to place these entities in, the relationship of parents, subsidiaries, agents, partners or joint ventures. No member firm has any authority (actual, apparent, implied or otherwise) to bind CMS Legal Services EEIG or any other member firm in any manner whatsoever.

CMS member firms are:
CMS Adonnino Ascoli & Cavasola Scamoni (Italy);
CMS Albiñana & Suárez de Lezo (Spain);
CMS Bureau Francis Lefebvre S.É. L.A. F.A. (France);
CMS Cameron McKenna LLP (UK);
CMS DeBacker SCRL/CVBA (Belgium);
CMS Derks Star Buzmann N.V. (The Netherlands);
CMS von Erlach Henrici Ltd (Switzerland);
CMS Hasche Sigle, Partnerschaft von Rechtsanwälten und Steuerberatern (Germany);
CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH (Austria) and
CMS Rui Pena, Arnaut & Associados RL (Portugal).

CMS offices and associated offices:

www.cmslegal.com