

PRESS RELEASE

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Subject	CMS presents ninth edition of European M&A Study

Ninth edition of pan-European M&A study by CMS: Buyers becoming more cautious in M&A transactions

Frankfurt/Main – Risk allocation in the M&A market has shifted significantly towards sellers. Despite the number of transactions remaining constant in the 2016 M&A year, buyers are becoming increasingly cautious and sellers are under pressure to sell. That is the conclusion of the ninth CMS European M&A Study, in which CMS provides insight into the legal provisions of mergers & acquisitions agreements and identifies market trends. "The results reflect the political uncertainty triggered by Brexit and surrounding the outcome of the upcoming elections in France, the Netherlands and in Germany, which is a key market. Although the number of transactions remained very high in 2016, buyers are growing increasingly cautious in an uncertain environment – overall, they are taking fewer risks. On the seller side, meanwhile, succession scenarios, reorganisations and other distressed situations are piling on the pressure," said Stefan Brunnschweiler, partner at CMS in Zurich and head of the worldwide CMS Corporate/M&A Group.

For the study, CMS evaluated more than 3,200 non-listed public and private company deals on which it advised in Europe. The focus was on 443 CMS transactions from 2016, which were compared with 2,045 CMS deals from the period 2010 to 2015. The analysis shows that the trend towards lower liability caps for sellers in the event of warranty breaches has stabilised. In the German-speaking countries, the proportion of deals with a liability cap of more than 50% was 38%. On the other hand, limitation periods have lengthened, with a fifth of all transactions having a limitation period of more than two years. 2016 was a record year in Germany, Austria and Switzerland for the use of earn-out* clauses, in which part of the purchase price is dependent on the future performance of the target business. Compared with

the previous year, earn-out periods were longer and there were more turnover-based earn-outs than before.

"We see a slight trend towards a more buyer-friendly market. Buyers are finding it easier to negotiate terms that are favourable to them. This is evidenced in particular by longer limitation periods and more frequent use of earn-out clauses. These enable buyers to defer payment of part of the purchase price, which is made dependent on future developments. It is completely possible that this trend will continue in 2017, given growing economic and geopolitical uncertainty," said Dr Maximilian Grub, partner and head of the Corporate practice at CMS Germany.

M&A agreements continue to show considerable regional variation. France still has low liability caps but long warranty periods, for example. In the CEE countries, arbitration is chosen more often as the dispute resolution mechanism than in any other region. The UK remains wedded to de minimis* and basket* provisions, although interestingly, sellers' liability caps in the UK seem to be higher than in other regions. Apart from these differences, we continue to see similar trends in all or most of the European regions.

The study also reveals significant cultural and regulatory differences between Europe and the US, especially with regard to the prevalence of purchase price adjustment clauses: they feature in 86% of deals in the US, but only 47% in Europe.

Other key findings of the CMS European M&A Study 2017:

- The proportion of deals with a MAC* clause remains low in Europe, at 15%. By contrast, 91% of transactions in the US include a MAC clause.
- Locked-box* clauses, in which the purchase price is typically based on the most recent audited financial statements, were included in 23% of transactions.
- The decline in liability caps has come to a halt, at least for now. The proportion of deals with a liability cap of less than 50% of the purchase price remained unchanged in 2016 compared to the previous year, at 58%.
- Earn-out* provisions, whereby part of the purchase price is dependent on the future performance of the target company, were very popular in 2016. The proportion of deals with an earn-out component reached a new peak of 22%.
- De minimis* provisions, which stipulate an amount below which the buyer cannot assert warranty claims, are now standard, being included in 76% of agreements. The average over the previous six years was 66%.
- The proportion of basket* stipulations, which protect the seller against minor claims above and beyond the de minimis* thresholds, continues to rise compared to the average of the previous six years. In 2016, they were agreed in 72% of cases; in the six-year period 2010–2015 this was only the case in 64% of deals.
- The proportion of buyers who were able to get some kind of security for warranty claims, such as through purchase price retention or payment of part of the amount into an escrow account, fell from 34% in the previous year to 29% in 2016. Retention of part of the purchase price is increasingly hard to negotiate.

The complete study is available to journalists on request.

* See glossary provided as an attachment to the press release

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