PRESS RELEASE

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CMS European M&A Study 2013: Sellers at Clear Advantage in M&A Transactions

Sellers in the market for company transactions can increasingly assert their wants and considerably limit their liabilities despite difficult economic times. This is the central conclusion of the fifth CMS European M&A Study, which was presented by CMS Reich-Rohrwig Hainz at the event "Inside M&A" on 25 April 2013. Following the presentation, a high-profile panel debated the question to what extent risks in M&A transactions can be curtailed.

"The Study is perfect for companies planning cross-border transactions as it provides a comprehensive picture of the standards in the most important European M&A markets", says M&A expert Peter Huber, partner and head of the transactions team at CMS Reich-Rohrwig Hainz, who was among the presenters of the Study. "The analysis continuously provides insights into legal stipulations concerning merger and takeover contracts, compares the situation in Europe and the US and identifies relevant developments on the market."

Among other things, the results indicate that risk allocation in company acquisition contracts point to a seller-friendly environment: "2012 was another uncertain year in which global M&A activity flatlined – with total deal value almost exactly the same as in 2011", Huber explains. "Despite the challenges companies faced in finding potential purchasers, sellers mostly managed to get a good deal in terms of risk allocation once they had found a buyer." For example, 2012 saw an increase in the number of essentially seller-friendly locked box deals (agreement on a fixed purchase price not to be adjusted after the completion of the transaction), particularly across Europe. The rise was most noticeable in the UK and in CEE. "One possible explanation is that in 2012, more private equity sellers, who traditionally favour this type of mechanism, were active on the market and that such contracts are increasingly used in non-private equity transactions as well", Huber says.

It is also apparent that liability caps are still moving downwards. In 54% of all deals, the liability cap was less than half the purchase price. General warranty limitation periods are becoming more standardised around the 12-24-month period. There has also been a significant reduction in the number of deals with a seller non-compete covenant. But there are also buyer-friendly trends. Purchasers are now more successful in obtaining security for warranty claims than in the last years.

Further key conclusions of the CMS European M&A Study 2013:

• Earn-out (part of the purchase price is contingent on the future development of the target company): unlike in the US, there remains little appetite overall for earn-out deals in Europe (only 16% in 2012).

• De minimis and basket clauses (caps to rule out buyers seeking indemnification from sellers for minor claims): the use of these provisions has become increasingly commonplace throughout Europe. However, unlike in the US, the standard basis of recovery of warranty claims remains "first dollar" (full coverage once the threshold is reached) and this trend strengthened in 2012.

• Liability caps for warranty claims: liability caps are still much higher than in the US.

• Limitation periods for warranty claims: after fluctuations during the 2007–2010 period, the limitation period of 18–24 months 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 (Material Adverse Change; permit buyers to cancel an acquisition if a significant event laid down in the contract occurs that may negatively affect the target company): 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 for buyers: while in 2011, more than half of the deals had non-compete provisions (53%), the pendulum swung in the opposite direction in 2012 for the first time since 2007, with only 46% of deals containing a seller non-compete covenant.

Lifely panel discussion on risks of M&A transactions

An audience of about 70 attended the presentation of the Study CMS hosted on its premises. The presentation was followed by a high-profile panel discussion: Rudolf Kemler, CEO Österreichische Industrieholding AG, Peter Nachtnebel, Director Advent International, Peter Püspök, Deputy Chairman of the Supervisory Board at Verbund, Karl-Heinz Strauss, CEO Porr, and host Peter Huber debated the risks of M&A transactions. The discussion was moderated by Franz Schellhorn of Agenda Austria.

Among other issues, the panellists discussed why M&A transactions frequently failed to produce added value. They were unanimous as far as two issues were concerned: in many cases, the takeover does not match the company's strategy or core business. While many efforts go into the preparation of deals, especially when professional private equity funds are involved, the post-merger integration is often still being neglected. In the end, the success of an M&A transaction depends on how the management and staff of the respective companies treat each other after the transaction has been completed. If a comprehensive plan covering all departments is not drawn up at an early stage, people can be lost for good. Especially service companies have a high risk of staff moving on if the integration process is not

properly prepared. Concerning legal transaction risks, liability for compliance violations has gained considerable importance in the past years against the backdrop of tightening national and international rules in this field.

Pictures of the presentation and the panel are available for free download at http://sites.cms-rrh.com/downloads/events/130425/presse/index.html

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About CMS Reich-Rohrwig Hainz

CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH was founded in Vienna in 1970 and has since emerged as one of the leading specialists in all areas of commercial and labour law. Highly-specialized teams consisting of internationally experienced lawyers primarily provide services in the following fields of law: M&A, banking and finance, real estate, taxes, labour laws, IP and IT laws, and public procurement. The company operates offices in Vienna, Belgrade, Bratislava, Brussels, Kiev, Ljubljana, Sarajevo, Sofia and Zagreb. All CMS offices together offer clients a team of more than 600 experienced specialists in 14 offices across the CEE/SEE region. www.cms-rrh.com

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