

press release

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objet Fourth annual CMS European M&A Study

The fourth annual CMS European M&A Study shows that 2011, like 2010, was a seller's market, evening out the balance of power between buyers and sellers.

- The 2012 edition of CMS's study of mergers and acquisitions in Europe, prepared every year by CMS corporate teams since 2008, is now available. It analyses the legal and tax aspects of M&A deals advised by CMS member law firms in Europe, totalling more than 1,350 transactions over the four years and 350 in 2011 alone. It also compares European practices by major region and industry, as well as against US practices. In this way, it offers a comprehensive panorama of European M&A trends, making it an invaluable reference for cross-jurisdiction deals.
- **On the sell side, a return to more seller-friendly SPA warranties**

The Study shows that the onus of risk clearly shifted from sellers to buyers in 2011.

According to Jacques Isnard, CMS partner in France, "the good news for sellers is that the trend is in their favour. The growing number of buyers, especially private equity firms looking to invest, means that sellers can demand greater safeguards."

Dr Thomas Meyding, CMS partner in Germany and head of the European Corporate Practice Group, added: "our deal analysis revealed an enduring return to pre-2008 practices, particularly as concerns certain seller-friendly contract stipulations, such as lower liability caps, shorter warranty limitation

periods, and reasonably more generous basket and *de minimis* provisions. In addition, the growing use of the locked-box mechanisms and warranty and indemnity insurance provide even greater downside risk protection than before 2008.

- **On the buy-side, an increasing number of contracts with seller non-compete clauses and a growing reliance on seller's warranty insurance**

While certain trends have tended to favour sellers, others have been more to the buyer's advantage, thereby evening out the balance of power between the two.

Mr Isnard added that "2011 saw a significant increase in seller non-compete clauses and a concern for ensuring that sellers could meet their obligations in the event of any warranty claims. However, buyers mostly wanted to get a better picture of their risk exposure and focused on performing in-depth due diligence rather than aggressively negotiating certain issues, such as seller's warranty limitation periods."

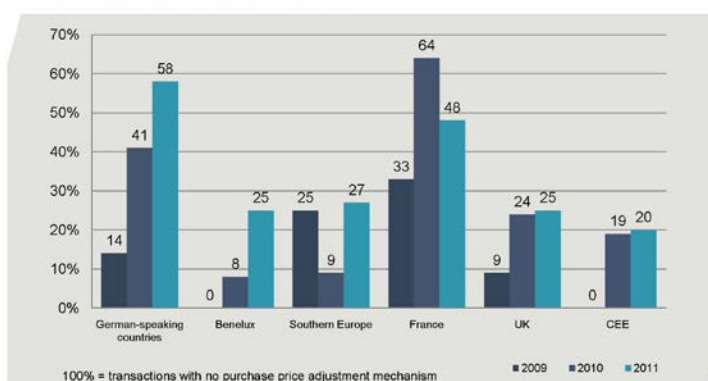
Note as well that buyers are increasingly taking out warranty and indemnity insurance to offset the lack of sufficient warranties in the SPA.

Other highlights

- **Locked-box deals**

Post-completion purchase price adjustments are less common in Europe than in the United States, particularly in the French M&A market. This is due in no small measure to the growing tendency, noted in 2010 and still operative in 2011, to use a locked-box mechanism to price the deal. This type of mechanism is appreciated by buyers for its simplicity (it avoids the need to prepare completion accounts) and because it adds price certainty, thereby avoiding legal wrangling and the risk of post-completion disputes.

Locked Box 2009 - 2011



*Source: CMS European M&A Study 2012

- **The importance of due diligence**

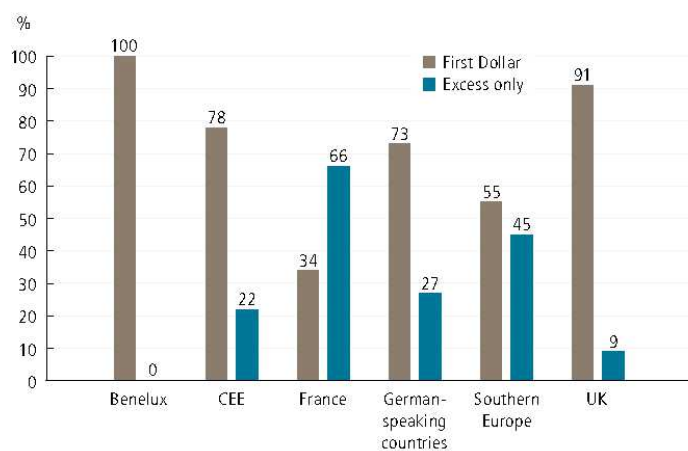
“The use of locked-box mechanisms undoubtedly explains the growing importance of due diligence procedures, as already noted by Dr Meyding. These include on-site visits and meetings with management, whether by the buyer or by the seller’s advisors,” continued Mr Isnard.

- **Similarities and differences in French and German practices**

The use of locked-box mechanisms, which was particularly prevalent in 2010 in France, was also observed in Germany in 2011. In the same way, warranty limitation periods for tax claims were similar in France and Germany, and most often based on the local tax statute of limitations. On the other hand, this type of provision is rarely found in other European countries, and notably in the United Kingdom, where limitation periods are almost always until a fixed date. These examples illustrate the strong convergence between French and German practices, albeit with a few notable exceptions:

- The Study shows that the seller’s liability cap in the SPA is much lower in France (25% of the selling price) than in Germany (50%).
- As well, it shows that practices differ in the two countries concerning the basket – i.e. the aggregate amount of buyer losses above which the buyer is entitled to make a claim against the seller’s warranty. In France, this amount is most often “excess only” (the seller will only settle the portion of the claim in excess of the basket), whereas in Germany, as in the rest of Europe, the seller must settle the entire claim “from the first euro”.

Baskets 2011



100% = all transactions with a basket provision

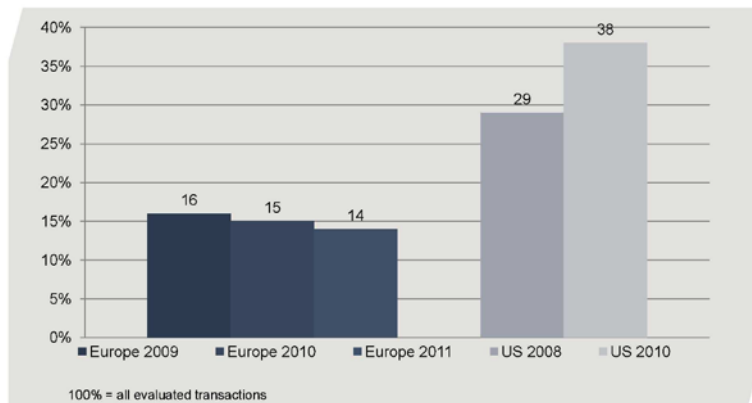
*Source: CMS European M&A Study 2012

Close-Up: A United States/Europe Comparison

- Compared with the United States, investor interest in earn-out deals is fairly limited in Europe (only 14% of transactions in 2011), except in the TMT industry.

Earn-out Europe / US

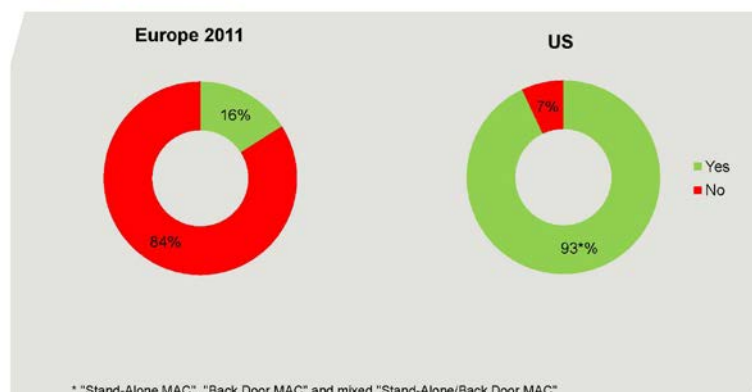
Frequency of Earn-out provisions Europe / US



*Source: CMS European M&A Study 2012

- Interestingly, US liability caps tend to be much lower, because buyers are able to take more risk and they perform more extensive due diligence before signing anything.
- The Study shows that in the United States, as in France but unlike in the rest of Europe, the basket most often represents a deductible, in the sense that the seller undertakes to indemnify the buyer only in excess of the basket amount.
- For their part, sellers have managed to resist the inclusion of major adverse change causes (MACs), which were found in only 16% of European deals, in sharp contrast with the 93% observed in the United States. One reason for the difference is probably that in many European jurisdictions, most SPAs include a purchase price adjustment mechanism.

MAC Clauses



*Source: CMS European M&A Study 2012

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