

Your World First



# Real Estate Deal Point Study 2014

March 2014

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# Contents

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Introduction	3
Methodology	4
Summary	4
Dynamic transaction market	6
Asset classes	7
Contract partners	9
Purchase price	10
Purchase price adjustment	10
Payment protection	11
Warranty and guarantees	12
Warranty provisions	12
Reference date for warranties	12
Limitation periods	14
Security for warranty claims	15
Limits on liability	16
<i>De minimis clauses</i>	16
Basket clauses	18
Liability caps	20
Exclusion of liability in the event of knowledge	22
MAC clauses	23
Contact information	26

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## Introduction

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We are pleased to present the CMS Real Estate Deal Point Study 2014. This is the fourth annual study in which we have systematically assessed and evaluated contract clauses in transaction agreements relating to the German real estate market.

Having bounced back after the end of the global financial and economic crisis, the transaction market continued to recover in 2012/2013. The latest results highlight clear market trends in the categories examined: asset classes, purchase price financing, warranties and guarantees, and limits on liability.

The study provides an overview of current best practice in property purchase agreements, in relation to both asset and share deals. It reflects the behaviour of strategic buyers and sellers as well as private equity investors and private investors with regard to the inclusion of specific contractual conditions.

The trend index charts provide an at-a-glance overview of changes to individual deal points.

The data used in this study is not in the public domain and is based on transactions where CMS Hasche Sigle advised the buyer, the seller or the finance partner.

We hope this study will assist you when preparing for contract negotiations. We would very much welcome any comments you may have on the study or the current state of the property market, and look forward to sharing experiences with you.



Dr Volker Zerr, MRICS

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## Methodology

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Drawing on data from 358 real estate transactions advised on by CMS Hasche Sigle from the start of 2007 to the end of 2013, we used a standard evaluation form to capture, categorise and systematically analyse the individual contract clauses (deal points). The study covered asset and share deals as well as sale-and-leaseback transactions,

with both individual and portfolio transactions being analysed. Transactions from all real estate segments were included, in particular office, retail, residential, and logistics. Unless stated otherwise, the percentages (%) refer to the proportion of deals in the relevant year.

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## Summary

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Looking at the period from 2007 to 2013, we can see that the German transaction market has recovered from the global financial and economic crisis and returned to the standards that prevailed pre-2008, i.e. more seller-friendly provisions. Demand for real estate investment remained high in 2013. Given the stable performance of the transaction market in recent years, the good overall economic situation and the improvement in financing terms, it is likely that real estate investment will remain very attractive in 2014. High capital inflows into the German real estate market are to be expected. Looking at developments in 2012/2013, the following conclusions can be drawn:

- The **number of deals** has risen steadily since the slump in the transaction market in 2008 and 2009, doubling up to the end of 2013.
- Thanks to the post-crisis economic recovery, it has become significantly easier to obtain external funding. Although the proportion of **transactions financed by borrowing** dropped to about one third during the crisis, it increased significantly again in subsequent years and exceeded 70% in 2011. Recent years have also seen **a high level of interest from equity-rich investors** (institutional investors, closed-end funds and family offices).

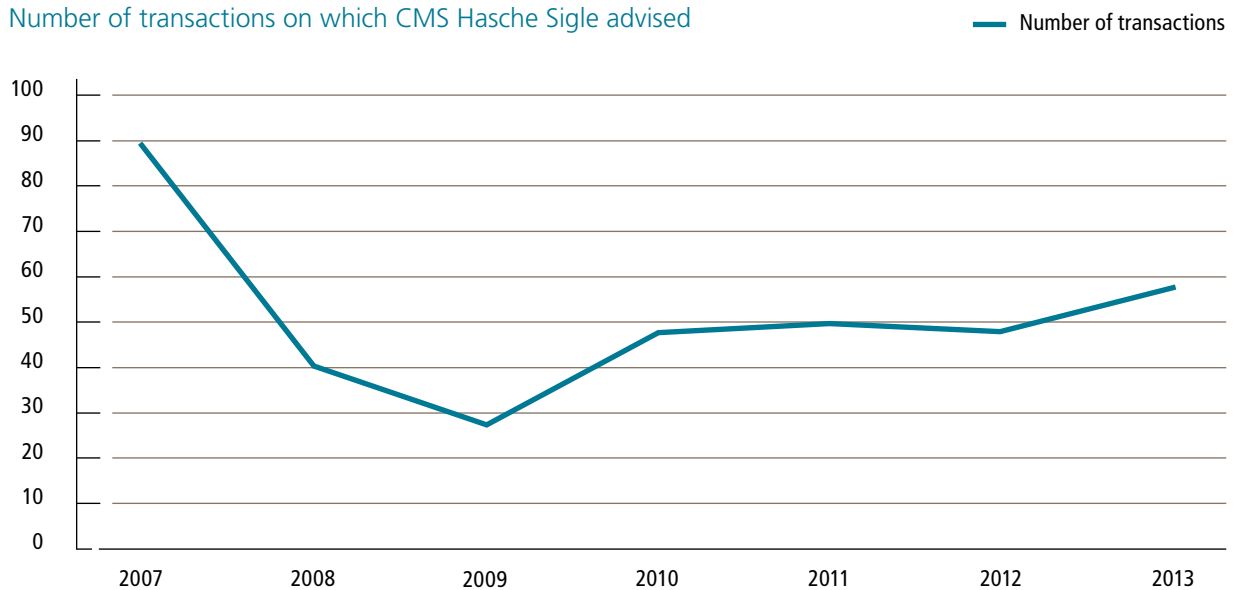
- The **proportion of individual property transactions** has risen in the past few years. After standing at 54% in 2010, it climbed to more than 70% in 2013. One reason for this increase is demand for core properties, which has been growing since 2010. These have been frequently sold individually – even when they formed part of a property portfolio.
- **Office properties** have been the dominant commercial asset class in recent years. Between 2009 and 2012 the proportion of office transactions rose steadily from 30% (2009) to 50% (2012). In 2013, more than a third of all deals (34%) involved **office properties**. An increase in **residential transactions** was recorded. The share of these transactions has almost doubled since 2011, from 14% to 26%. **Logistics properties** are also becoming increasingly important, with the proportion of transactions rising constantly since 2009 and averaging 8% in 2013. The number of **retail transactions** has declined somewhat, falling to around a fifth.
- The proportion of transactions with seller-friendly **de minimis clauses** and **basket clauses** (i.e. clauses that provide for a minimum limit or threshold for guarantee claims by the buyer) is now significantly above the 2009 level. While only 8% of all transaction agreements evaluated contained a *de minimis* clause in 2009, this type of provision was agreed in 32% of all transactions in 2013. A basket clause was agreed in only 10% of transactions in 2009. In 2013, however, the proportion of deals with a basket clause was 27% and thus far above the pre-crisis level.
- **Liability caps** are now also agreed much more often than during the financial and economic crisis. While the proportion of transactions with a liability cap was less than 30% in the period 2007 to 2009, the percentage has risen steadily in subsequent years, reflecting a more seller-friendly market. In 2010 a cap was agreed in 53% of transactions, rising to over two thirds (73%) of all transactions in 2012. Although the share of deals with a cap has fallen back to 59% since then, the percentage is now still twice as high as in the years 2007 to 2009.
- In the past four years the proportion of transactions with relatively long contractual **limitation periods for warranty claims** of more than 18 months has remained at a constantly high level. A limitation period of more than 18 months was agreed in about two thirds of the transactions examined on average. Over the same period there has been a fall in the proportion of transactions in which no limit on the statutory limitation period was agreed. The proportion of transactions with limitation periods of 12 to 18 months has remained at roughly the same level over the past four years, averaging 16%. In contrast, the proportion of deals with a short limitation period not exceeding 12 months has now fallen from 14% (2012) to 7% (2013).

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# Dynamic transaction market

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Number of transactions on which CMS Hasche Sigle advised

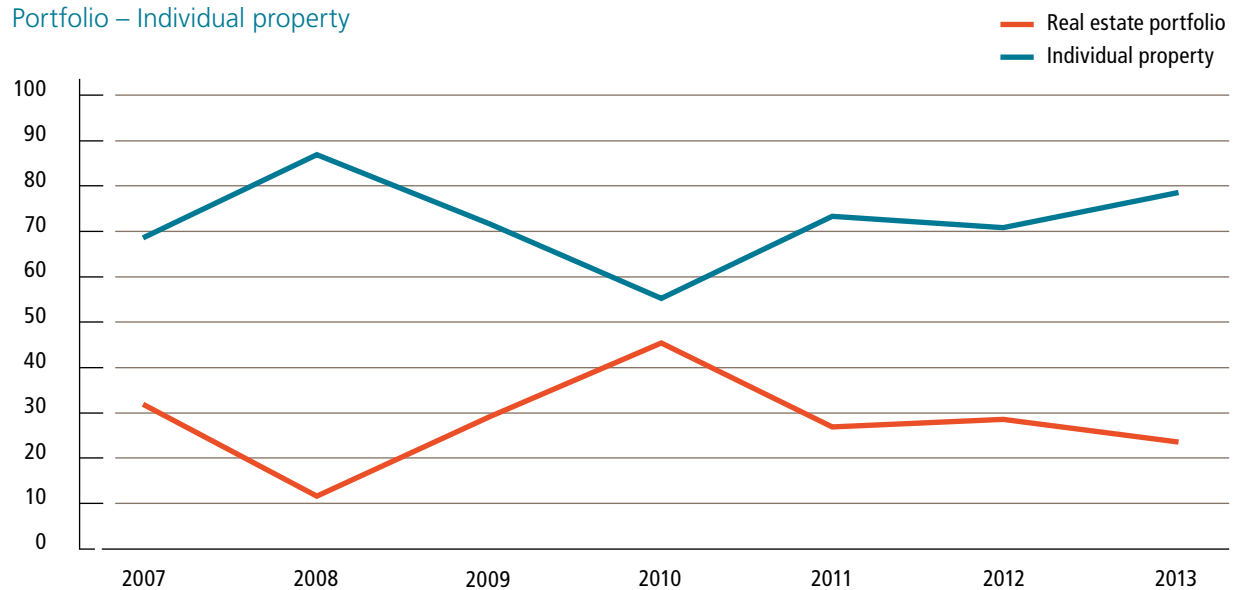


The chart shows that the real estate market has recovered since the slump in the transaction market in 2008 and 2009. The number of transactions on which CMS Hasche Sigle advised has risen steadily since 2009, doubling by the end of 2013. Given the stable performance of the transaction market in

recent years, the good overall economic situation and the improvement in financing terms, it is likely that real estate investment will remain very attractive in 2014. High capital inflows into the German real estate market are to be expected.

# Asset classes

Portfolio – Individual property

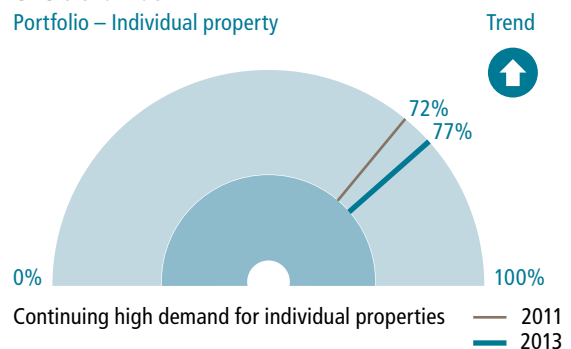


Total number of transactions evaluated in each year = 100%

While there was a significant drop in individual property transactions in the period 2008 to 2010 (from 87% in 2008 to 54% in 2010), considerably more transactions involving individual properties have been recorded since 2010. The proportion of individual property transactions rose to more than 70% in 2013. One reason for this increase is demand for core properties, which has been growing since 2010. These have been frequently sold individually – even when they formed part of a property portfolio.

CMS trend index

Portfolio – Individual property

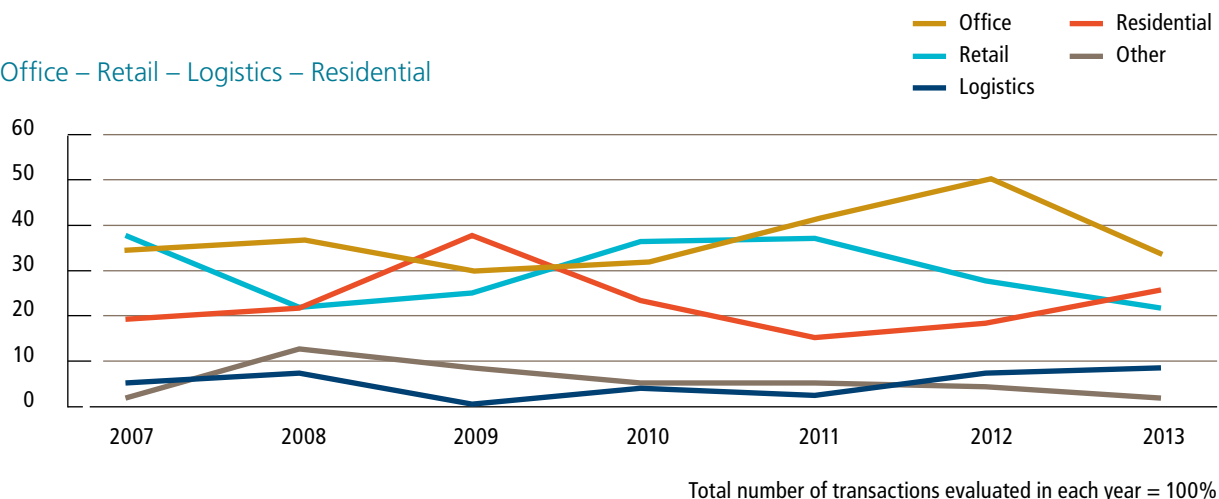


Continuing high demand for individual properties

— 2011  
— 2013

# Asset classes

Office – Retail – Logistics – Residential



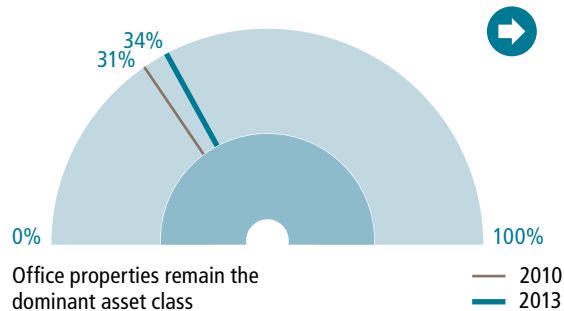
Office properties have been the dominant commercial asset class in recent years. Between 2009 and 2012 the proportion of office transactions rose steadily from 30% (2009) to 50% (2012). In 2013, more than a third (34%) of all deals involved office properties. An increase in residential transactions was recorded. The share of these transactions has almost doubled since 2011, from 14% to 26%, following declines in previous years (from 37% in 2009 to 14% in 2011).

Logistics properties are also becoming increasingly important, with the proportion of transactions rising constantly since 2009 and averaging 8% in 2013. By contrast, a decline in retail transactions has been apparent in recent years. Following a rise in the period 2009 to 2011 (from 24% to 37% in 2010 and 38% in 2011), the proportion of deals fell again by 2013 to about the 2009 figure, i.e. 21%.

## CMS trend index

Office – Retail – Logistics – Residential

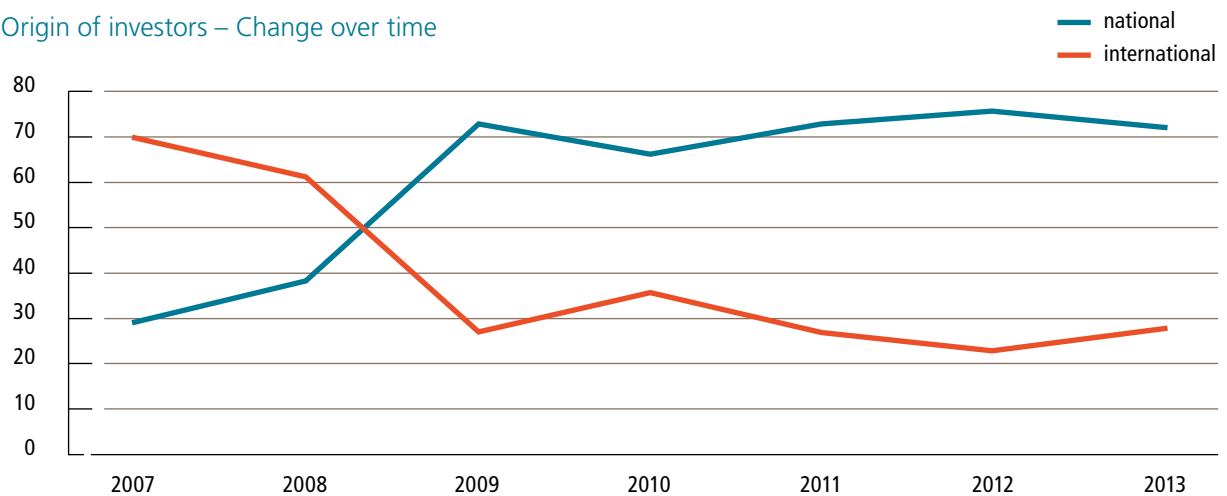
Trend





# Contract partners

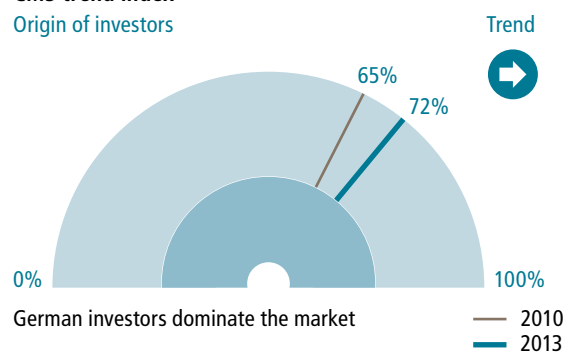
Origin of investors – Change over time



The proportion of international investors has fallen substantially in the wake of the financial and economic crisis. While foreign buyers accounted for 61% of the total in 2008, the figure declined to just 28% in 2009. Since then, German investors have dominated the market. Their proportion remained constant at about 70% in the years 2010 to 2013, with the proportion of international buyers being around 30%.

## CMS trend index

Origin of investors

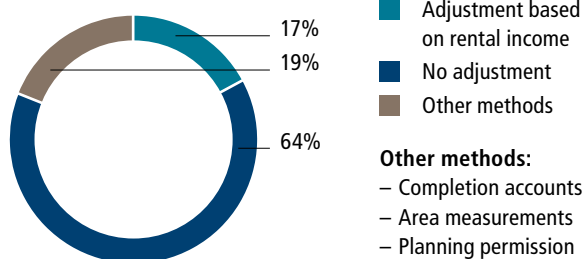


# Purchase price

## Purchase price adjustment

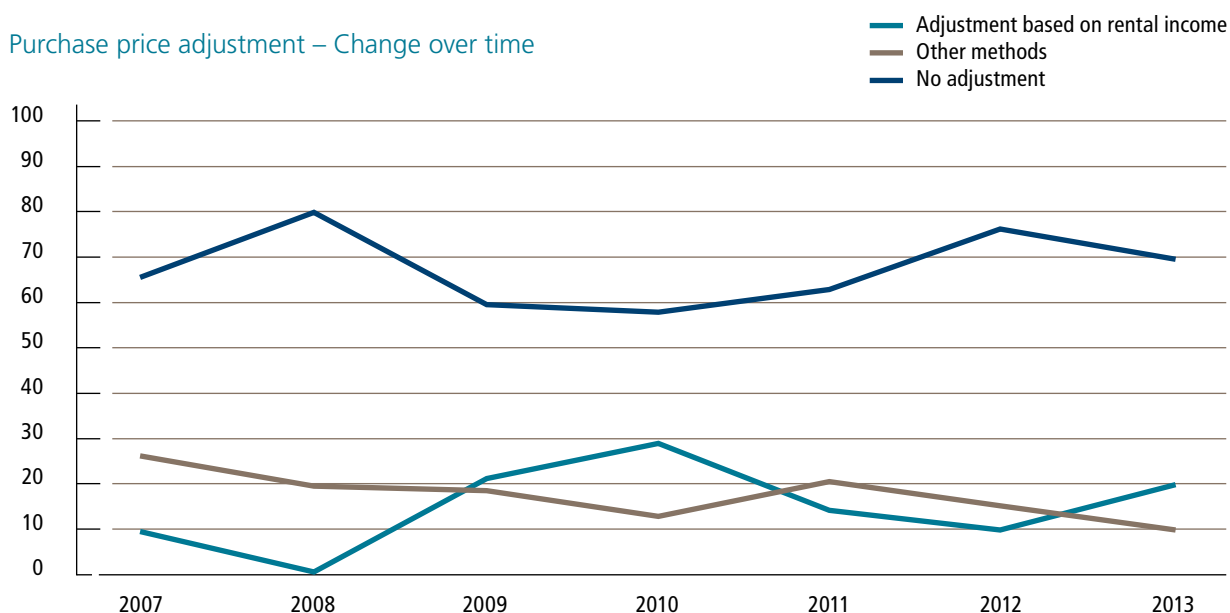
The contracting parties may agree either a fixed price or a variable price, i.e. one linked to specific economic developments. In development projects, the purchase price is usually determined by the development of rental income, which is an unknown quantity when the contract is signed. In more than a third (36%) of all transactions evaluated, the parties agreed a purchase price adjustment mechanism. In 17% of transactions, the mechanism was linked to rental income, while other methods were used in 19% (completion accounts, area measurements, planning permission, etc.).

Purchase price adjustment



Total number of transactions evaluated = 100%

Purchase price adjustment – Change over time

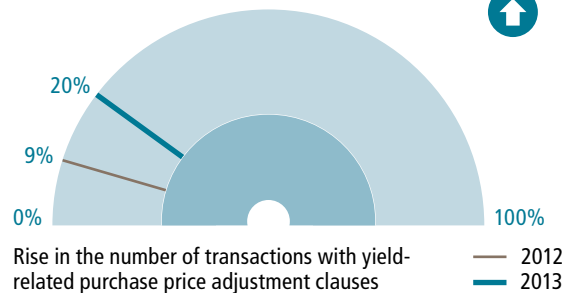


Between the start of 2007 and the end of 2008, the proportion of transactions with a purchase price adjustment mechanism fell sharply from 34% to 20%. A possible explanation is that there were many distressed transactions during the crisis, resulting in lower, albeit fixed, purchase prices. In 2009 and 2010, purchase price adjustment was agreed more often, i.e. for some 41% of transactions on average. Since the start of 2011, the proportion of transactions with a purchase price adjustment mechanism has again declined overall, falling to 30% in 2013. Nevertheless, the proportion of transactions in which the parties agreed an adjustment of the purchase price to reflect changes in rental income rose from 9% in 2012 to 20% in 2013. One reason for this increase is that the number of development projects – where the parties customarily agree on yield-related purchase price adjustment – was higher in 2013 than in 2012.

#### CMS trend index

##### Purchase price adjustment

Trend

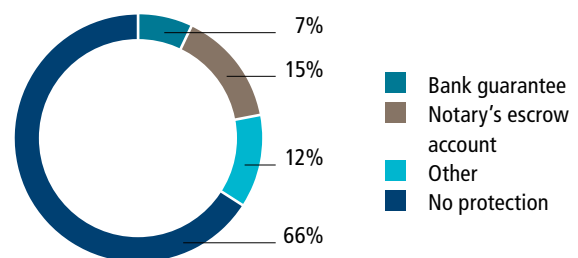


## Payment protection

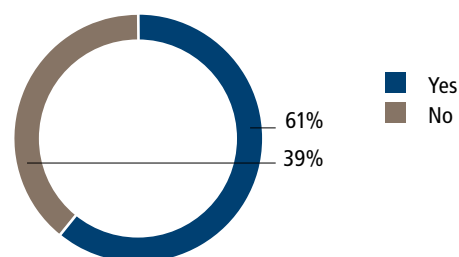
It is in the seller's economic interest to take steps to ensure that the buyer meets its financial obligations. Although this primarily applies to payment of the purchase price, it also involves the buyer's obligation to pay notary and land register expenses and property transfer tax, for which the seller bears joint and several liability. No purchase price protection was agreed in two thirds of all transactions evaluated. Where the parties did agree to safeguard payment of the purchase price, the most common form of protection was use of a notary's escrow account (15%), followed by a bank guarantee (7%). A different form of protection was chosen in 12% of the transactions evaluated (e.g. a guarantee provided by a third party).

In order to encourage buyers to meet the agreed payment obligations promptly, sellers often seek buyer submission to direct enforcement in order to avoid any delays in the event of a default. In 61% of the transactions evaluated, buyers submitted to direct enforcement against all their assets in relation to the obligation to pay the purchase price. If only asset deals are considered, the percentage proportion is higher since there is usually no submission to direct enforcement in the share deals examined.

#### Payment price protection



#### Submission to direct enforcement



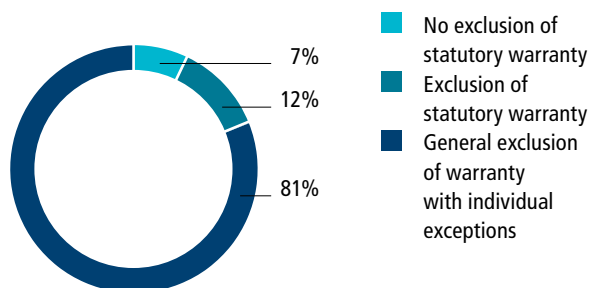
Total number of transactions evaluated = 100%

# Warranty and guarantees

## Warranty provisions

It is common practice in real estate transactions for the seller's liability to be stipulated in the contract by means of warranty provisions (in particular independent guarantees and/or agreements relating to the condition of the property), together with an exclusion of liability in all other respects. In 81% of the transactions evaluated, the parties reached individual agreements on seller liability, excluding statutory warranty provisions. The statutory warranty for material defects was completely excluded in 12% of all transactions analysed, while no exclusion of statutory warranty claims was agreed in 7% of deals.

Warranty provisions

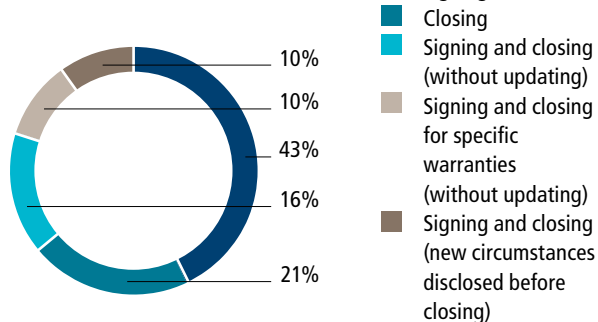


Total number of transactions evaluated = 100%

## Reference date for warranties

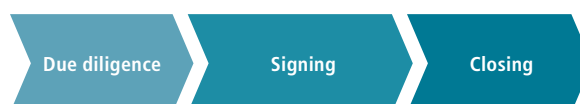
With real estate transactions, the signing and closing dates are typically different. The question therefore arises as to whether warranties apply with reference to the date of signing, to the date of closing or to both dates. In other words, who bears the risk of incorrect warranties after signing? In some cases, the seller bears the risk via a „bring down“ of the warranties to closing, i.e. the warranties given at signing are repeated at closing. In other cases, the seller may only be required to bring down specific warranties and/or be entitled to update the disclosures made at signing to cover events that occurred after signing.

Reference date for warranties



Total number of transactions evaluated = 100%

In 64% of all transactions evaluated, warranties were issued solely with reference to signing or to closing. The number of transactions with signing as the reference date (43%) was significantly higher than those with closing (21%). In contrast, 36% of the transactions evaluated provided for both signing and closing as the reference date for the correctness of warranties. Typically, warranties given with reference to signing and closing did not include the option of updating disclosures at the time of closing (26%).

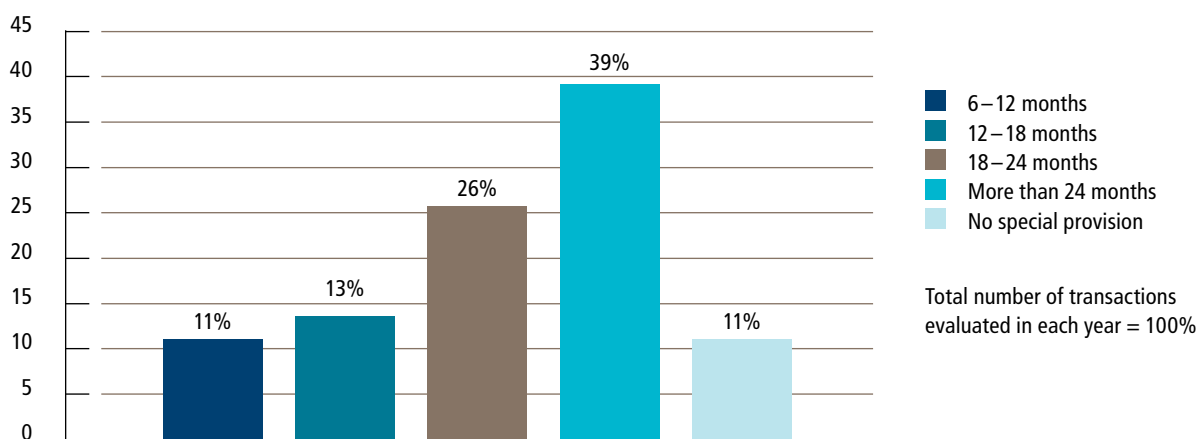




# Warranty and guarantees

## Limitation periods

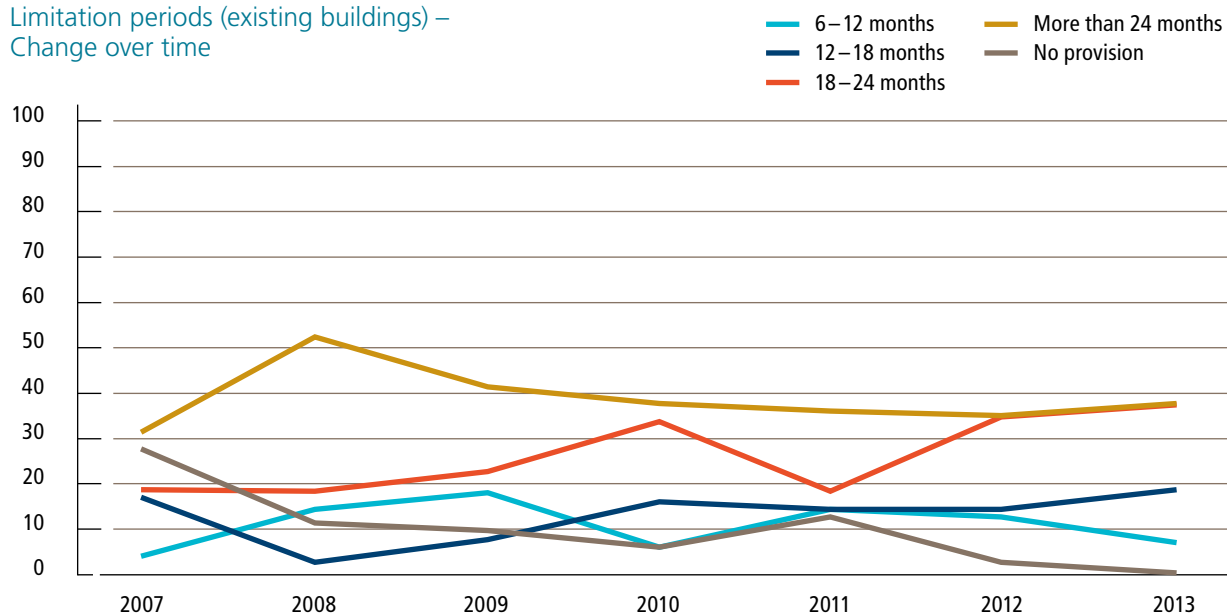
### Limitation periods (existing buildings)



It is a feature of real estate transactions that the contract usually defines a limitation period for warranty claims that diverges from the statutory limitation period. Individual analysis revealed that 11% of all transactions included a short limitation period for warranty claims on the part of the buyer of between 6 and 12 months, while in the

remaining cases the period was either 12 to 18 months (13%), 18 to 24 months (26%), or more than 24 months (39%). No provision was made in only 11% of transactions, i.e. the statutory limitation period (generally 2 or 5 years) applied.

### Limitation periods (existing buildings) – Change over time

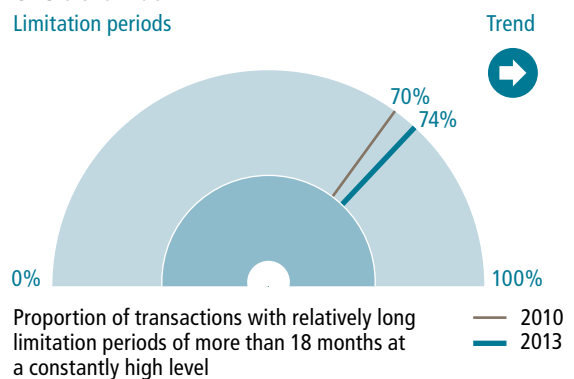




In the past four years the proportion of transactions with relatively long contractual limitation periods for warranty claims of more than 18 months has remained at a constantly high level. A limitation period of more than 18 months was agreed in around two thirds of transactions on average. Over the same period there has been a fall in the proportion of transactions in which no limit on the statutory limitation period was agreed. The proportion of transactions with limitation periods of 12 to 18 months has stayed approximately the same over the past four years, averaging 16%. In contrast, the proportion of deals with a short limitation period not exceeding 12 months has now fallen from 14% (2012) to 7% (2013).

#### CMS trend index

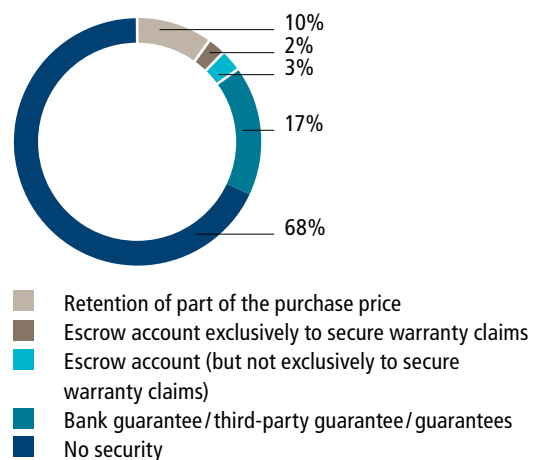
##### Limitation periods



## Security for warranty claims

Buyers are keen to have security with regard to possible warranty claims, with the most common form of security in the transactions evaluated being a bank guarantee or third-party guarantee (17%). Part of the purchase price was retained in 10% of all cases, while in 5% of transactions it was paid into a joint escrow account. Here, the amount paid in was available solely to secure guarantee and warranty claims in 2% of cases, while in 3% of all deals evaluated it was also used to secure other claims on the part of the buyer (e.g. indemnity claims). No security mechanisms for the buyer's guarantee or warranty claims were agreed in more than two thirds (68%) of the transactions evaluated.

#### Security for warranty claims



Total number of transactions evaluated = 100%

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# Limits on liability

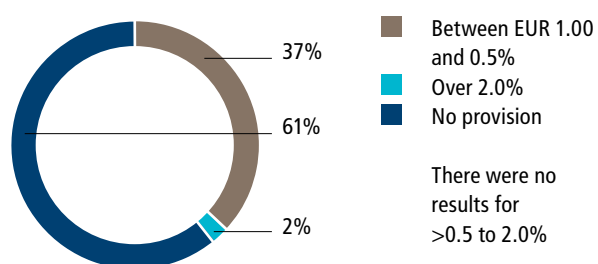
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## De minimis clauses

In a *de minimis* clause, an individual warranty claim by the buyer against the seller is only considered if it exceeds a certain minimum amount. This is a seller-friendly clause which establishes a minimum claims limit or threshold below which the buyer cannot assert a claim.

*De minimis* clauses were agreed in more than a third (39%) of the transactions evaluated. The minimum claims limit was between 1 euro and 0.5% of the purchase price in 37% of the deals analysed, and more than 2% of the purchase price in 2% of the transactions evaluated.

### De minimis clauses – What is the minimum amount for asserting an individual claim?

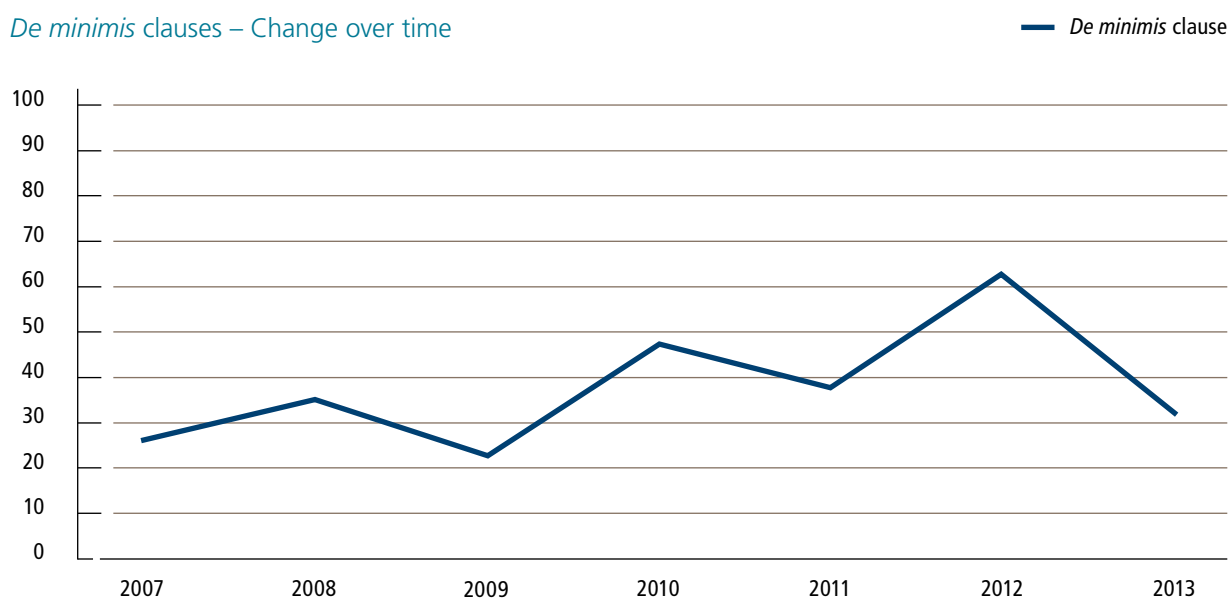


Total number of transactions evaluated = 100%

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### De minimis clauses – Change over time

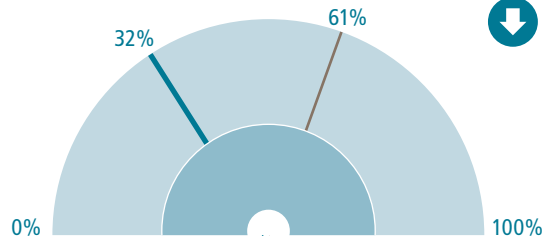


Following a decline in 2008 and 2009 in the proportion of transactions in which a *de minimis* clause was agreed, namely from 36% to 22%, the proportion of transaction agreements including a seller-friendly *de minimis* provision subsequently rose again, reaching 61% in 2012. Since then, the proportion of transactions with a *de minimis* provision has moved back down, this being a buyer-friendly trend in what is essentially a seller-friendly market. At 32%, the proportion of transactions with a *de minimis* provision was nonetheless still at pre-crisis levels in 2013.

#### CMS trend index

De minimis clauses

Trend



Fall in number of transactions with *de minimis* clauses

— 2012  
— 2013

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# Limits on liability

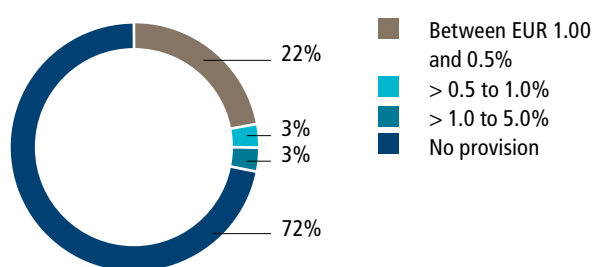
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## Basket clauses

Basket clauses are closely connected to *de minimis* clauses. They are often linked to a minimum claims limit and stipulate that the buyer can only assert a warranty claim if the aggregate of individual claims that exceed the *de minimis* threshold exceeds the basket threshold. A basket clause is consequently a seller-friendly provision.

28% of the transactions evaluated included a basket clause. The basket threshold was between 1 euro and 0.5% in 22% of the deals analysed, and between 0.5% and 5% of the purchase price in 6% of the transactions evaluated.

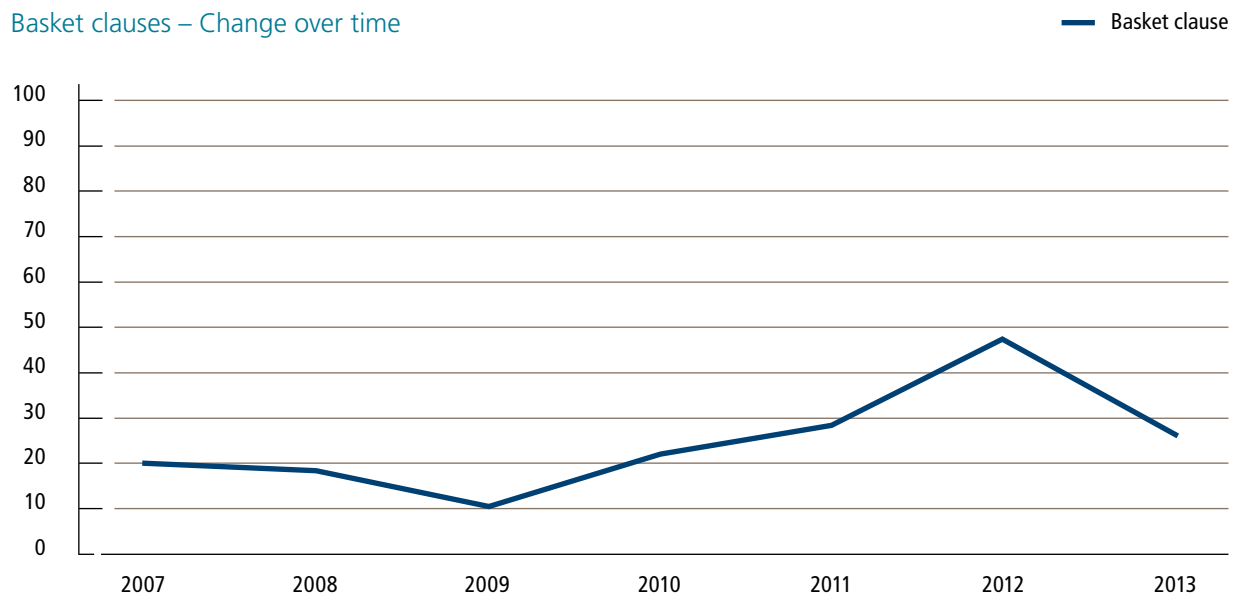
Basket clauses



Total number of transactions evaluated = 100%

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## Basket clauses – Change over time

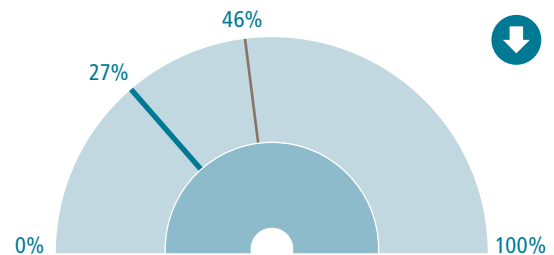


While the proportion of transactions that included a seller-friendly basket clause was 20% in 2007, that figure had fallen to 10% by 2009. In the subsequent three years the proportion of transactions with a basket clause rose significantly, reaching 21% in 2010 and 29% in 2011. In 2012, the proportion of deals with a basket clause soared to 46%. Although the proportion of transactions with a basket clause has now fallen to 27%, it still remains above the pre-crisis level.

### CMS trend index

#### Basket clauses

Trend



Fall in number of transactions with basket clauses

— 2012  
— 2013

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# Limits on liability

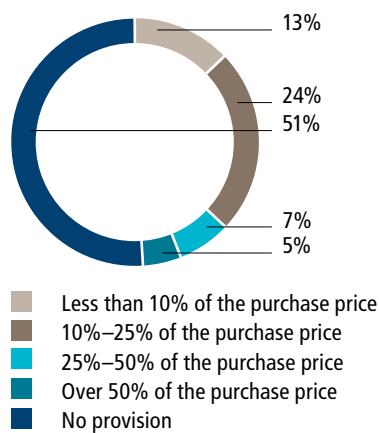
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## Liability caps

Agreeing a liability cap for the seller is extremely important when dealing with warranties in transaction agreements. The cap specifies the seller's contractually-agreed maximum liability for the warranties given.

In 51% of all transactions evaluated, the seller's liability to the buyer was unlimited, while in 49% of the deals evaluated a liability cap was agreed. The proportion of transactions with a low liability cap of less than 10% of the purchase price was 13%, while in 24% of deals a cap of between 10% and 25% of the purchase price was agreed. A liability cap of between 25% and 50% of the purchase price was agreed in 7% of the transactions evaluated. The proportion of transactions with a high liability cap of more than 50% was 5%.

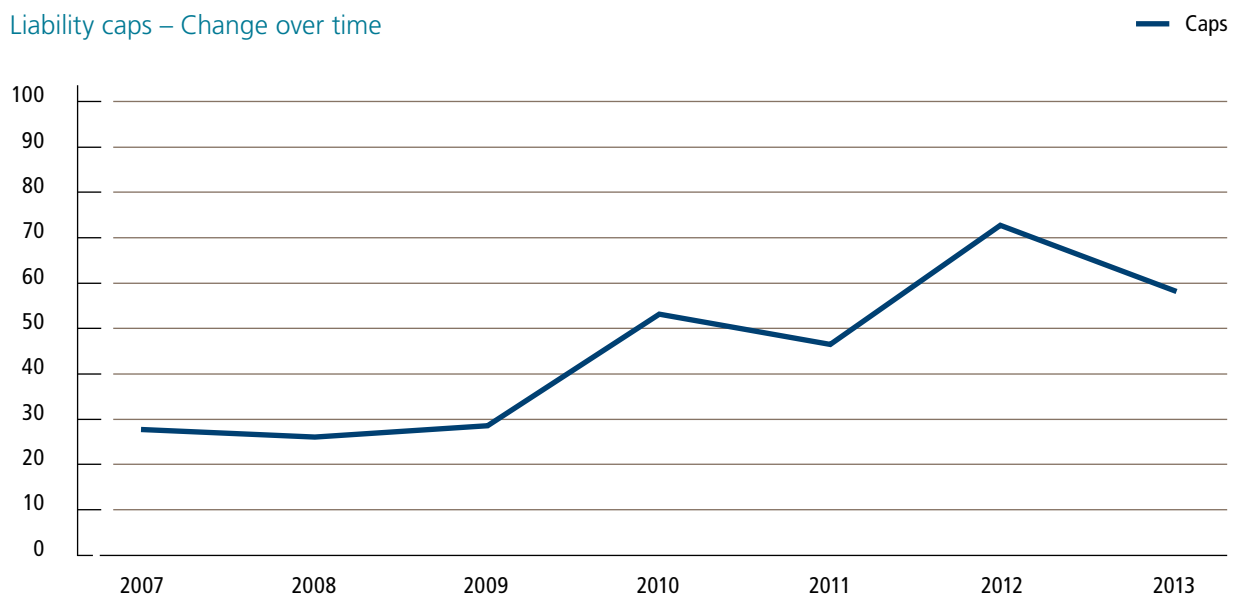
Liability caps



Total number of transactions evaluated = 100%

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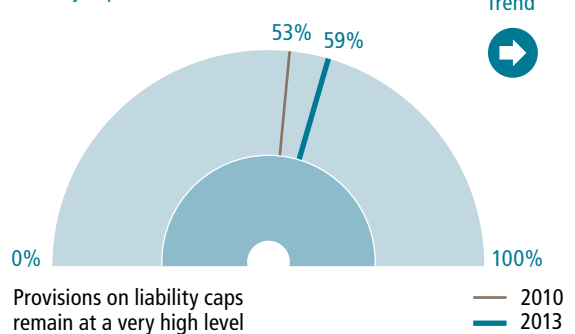
## Liability caps – Change over time



After the end of the financial and economic crisis, the proportion of transactions with a liability cap rose sharply, reflecting a seller-friendly market. In 2010, a liability cap was agreed in 53% of transactions, rising to more than two thirds (73%) of all transactions in 2012. Although the share of transactions with a cap has fallen back to 59% in the meantime, the percentage was still twice as high as in the years 2007 to 2009. A reason for the current decline is that sellers now enjoy a very strong negotiating position and are more often able to limit their liability to a few low-risk guarantees which they can give without a cap.

### CMS trend index

#### Liability caps

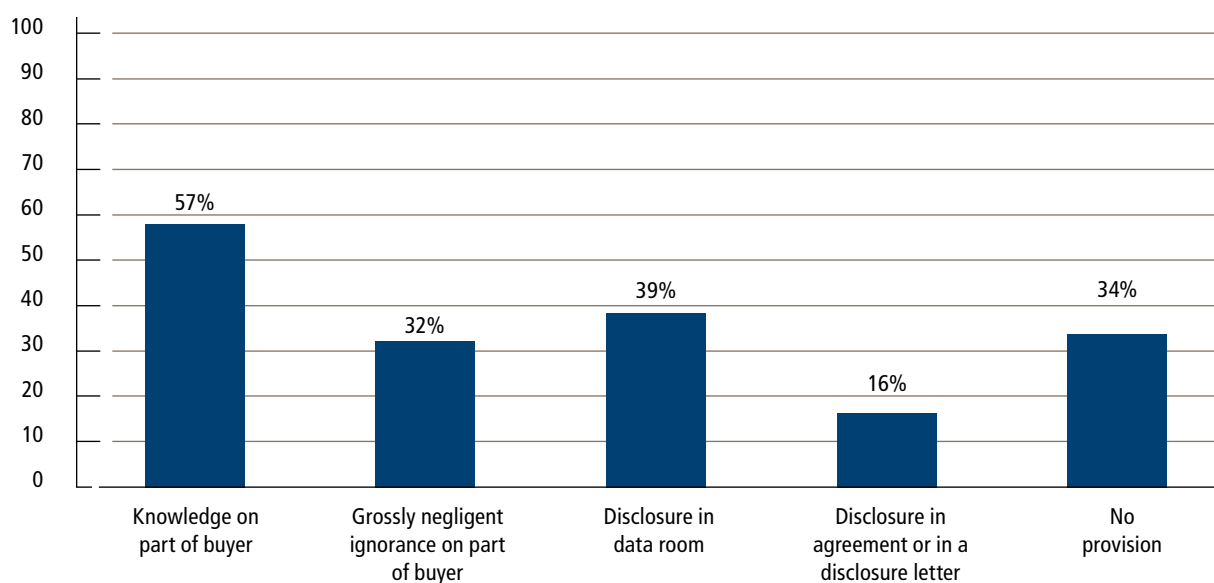


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## Exclusion of liability in the event of knowledge

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Exclusion of buyer's claims in the event of:



In more than half (55%) of the transactions evaluated, the parties agreed that the seller is not liable if the relevant circumstances were disclosed in the data room (39%), in the purchase agreement or in a disclosure letter (16%). In about the same percentage of transactions (57%), claims against the seller were precluded if the

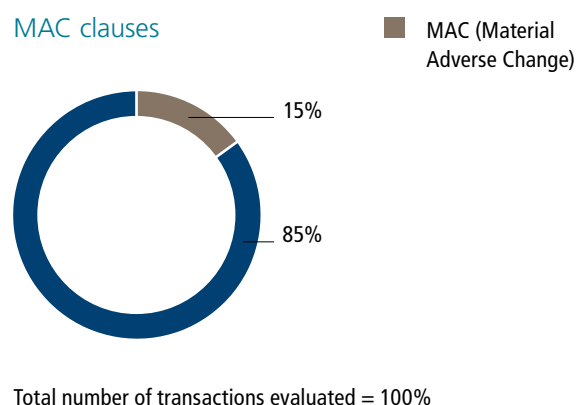
buyer had positive knowledge of the relevant circumstance when the agreement was signed, while in 32% of deals the purchase agreement included a provision under which the buyer had no claim against the seller for liability in the event of grossly negligent ignorance of facts on the buyer's part.

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# MAC clauses

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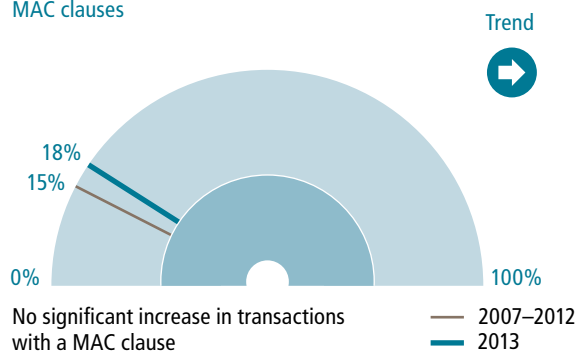
MAC (Material Adverse Change) clauses give a contracting party a contractual right to rescind the agreement if between signing and closing there is a detrimental change in the circumstances of the other contracting party or affecting the general basis of the agreement (e.g. significant deterioration of the net assets, financial position and earnings of the target company in a share deal; substantial damage or destruction of the property in an asset deal). In 2013, 18% of transactions included a MAC clause. The proportion of transactions with a MAC clause in 2013 was thus not significantly above the average seen in previous years (15%).



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## CMS trend index

### MAC clauses



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## Disclaimer

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The results of the study and/or this report and the conclusions presented therein do not necessarily reflect the views of the lawyers or employees of CMS Hasche Sigle involved in preparing the study and/or this report. A total of 358 real estate transactions were evaluated for the study and/or this report. There are inevitably many differences between the individual agreements and the clauses they contain. Individual provisions were categorised in order to allow the results to be compared, a process that required a degree of subjective discretion. Although certain trends can be identified in the study and/or this report, each transaction exhibits individual features that have not been included or referred to in the study and/or this report. As a result, the conclusions of the study and/or this report are subject to a number of important reservations that are not expressly disclosed in the study and/or this report.

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