

# press release

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### **5th European M&A Study sees balance of power firmly with the sellers in M&A**

In a review of 1,700 deals done between 2007-2012, CMS' fifth annual M&A Study shows that, despite difficult economic times, sellers have been able to limit their liability significantly in the transactions analysed for the report.

"Now in its fifth year, the M&A study is fascinating reading for businesses looking to do deals across borders and understand the norms in other countries" said Cornelius Brandi, Executive Chairman of CMS. "It exemplifies the value that CMS delivers to clients in providing both multi-national expertise and a deep understanding of the issues that drive businesses today."

Thomas Meyding, Head of CMS Corporate Group, comments, "2012 was another uncertain year in which global M&A activity flatlined – with total deal value almost exactly the same as in 2011. Despite the challenges of finding potential purchasers in today's market, once sellers have done so, they tend to get a good deal in terms of risk allocation."

For example, 2012 saw an increase in the number of locked box deals – particularly across Europe – where the rise was most noticeable in jurisdictions such as the UK, Benelux and CEE. One possible explanation is that there were more financial or private equity sellers in 2012 who traditionally favour this type of mechanism.

It is also apparent that liability caps are still moving downwards, with 54% of deals now having a liability cap of less than half the purchase price. General warranty limitation periods are becoming more standardised around the 12–24 month period. There is also a significant reduction in the number of deals with a seller non-compete covenant.

The main buyer-friendly trend is the relative success of more purchasers in obtaining security for warranty claims.

The key conclusions of the CMS European M&A Study 2013 are as follows:

- Earn-out – unlike in the US, there remains little appetite overall for earn-out deals in Europe (only 16% in 2012).
- *De minimis* and baskets – the use of these provisions is increasingly commonplace throughout Europe. However, unlike in the US, the standard basis of recovery remains ‘first dollar’ and this trend strengthened during 2012.
- Liability caps – caps are still much higher than in the US.
- Limitation periods – after fluctuations during the 2007–2010 period, the limitation period of 18–24 months has 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 – 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 – whilst in 2011 more than half of the deals had non-compete provisions (53%), for the first time since 2007, the pendulum swung in the opposite direction in 2012, with only 46% of deals containing a seller non-compete covenant.

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