

Executive Summary

ABOUT THE STUDY

The CMS European M&A Study 2011 evaluates M&A agreements for 1005 transactions of both public and private companies in Europe in 2007–2010.

The data used in the Study is not publicly available and is based on transactions in which a member of the CMS organisation acted as an advisor to either the buyer or the seller. CMS is an organisation of independent European law and tax firms and therefore one of the few legal service providers with the capability to provide a European study of this kind due to its presence and market penetration in a wide range of jurisdictions across Europe.

The data has been divided for comparative purposes into six European regions as follows:

- United Kingdom
- German speaking countries: Austria, Germany and Switzerland
- France
- Benelux: The Netherlands and Belgium
- CEE: Bulgaria, Croatia, Czech Republic, Hungary, Poland, Romania, Russia, Slovakia and Ukraine
- Southern Europe: Italy and Spain

Transactions included in the Study cover all business sectors, including:

- Finance and Insurance
- Hotels & Leisure
- Energy & Utilities
- Consumer Products
- TMT
- Infrastructure & Projects
- Lifesciences
- Real Estate & Construction

KEY CONCLUSIONS

2010 was a recovery year for M&A. As 2010 progressed, some normality returned. This was reflected most clearly in the higher number of deals. However, we can also detect – in relation to contractual risk allocation – growing signs that the trends supporting a buyer's market are either increasing only marginally or more likely have evened out or are moving back in favour of sellers.

The following points (among others) support this notion:

- Purchase price adjustments – there were less purchase price adjustment clauses in 2010, 35% compared with 48% in 2009.
- Liability caps – the proportion of transactions where the liability cap exceeded 50% of the purchase price has declined when measured against the peak of the last two quarters of 2009.
- Limitation periods – the proportion of deals with general warranty limitation periods exceeding 24 months has generally flatlined at around 27% since its peak in the second quarter of 2009, and declined notably in the last quarter of 2010.

KEY FINDINGS

The Study reveals significant differences in M&A customs and market practices within Europe, including for example:

- It is very rare not to see a liability cap and generally UK deals have the shortest general warranty limitation period with just 17% having a limitation period exceeding 24 months.
- In German speaking countries, there was a notable increase of liability caps of up to 25% of the purchase price (42% in 2010 compared with 35% previously). This was accompanied by a decrease of liability caps of more than 50% of the purchase price.
- In CEE, arbitration remains the main dispute resolution process (76% vs. 33% in Europe in 2010).
- In France, earn-out deals were more frequently used than in other regions, with one third of deals having an earn-out component.
- In Southern Europe, deals were the least likely within Europe to have *de minimis* and basket provisions.
- In Benelux, a buyer financing condition (only 4%) was very rare.

Compared to the US (according to data published by the ABA), there are also notable differences in European M&A deals:

- MAC clauses are much more popular in the US than in Europe. MAC clauses were used in 80% of the deals in the US compared to just 16% of deals in Europe.
- Not only are baskets much more prevalent in the US, but the basis of recovery is different. In the US, there is 59% 'excess only' recovery as opposed to 'first dollar' recovery vs. 34% in Europe in 2010.

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