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CMS European M&A Study 2023

Fifteenth Edition

Introduction

Welcome to the annual CMS European M&A Study 2023. It has been a challenging year for M&A in light of rising inflation and interest rates, slowing growth and increased geopolitical tension, which have added up to a difficult macroeconomic environment. However, the fact that our study covers a record number of 509 M&A transactions on which CMS advised in 2022 shows that there have been plenty of deal opportunities. In a difficult M&A market, we are pleased with this result, which reflects the strength of our corporate offering throughout Europe.

In terms of highlights, despite some market commentary to the contrary, the European position on MAC clauses has remained consistent with previous years. MACs are certainly not back in Europe. However, the frequency of earn-outs is increasing; almost one-third of medium sized deals on which we advised included an earn-out, a sign of buyers requiring sellers to demonstrate full value before paying the full (increased) purchase price. Also, locked box mechanisms are becoming ever more popular with almost four in every five medium sized non-PPA deals using a locked box. Environmental, Social and Governance (ESG) issues are higher on the agenda of dealmakers in M&A transactions, and this year's Study shows that ESG aspects are beginning to appear specifically as part of the due diligence process and in transaction documents.

We remain cautiously optimistic about deal activity in Europe in 2023, notwithstanding that many of the adverse economic and political factors that have historically impacted on M&A growth are still evident. The more interventionist regulatory approach on anti-trust issues and to foreign investments will add complications but we anticipate there will continue to be opportunities, boosted by M&A transactions arising out of distress or turnaround situations or as a result of a need to diversify.

This year's Study marks the 15th consecutive year for the Study and accordingly it represents a major chronicle of market trends over that period. The size of deal sample and range of countries means it remains a valuable resource for M&A practitioners across Europe. As always, we hope it provides a helpful insight on market practice to assist in preparing for any contemplated transaction.

We hope that this provides you with useful food for thought in your corporate endeavours and we would be delighted to discuss the findings with you.

Louise Wallace
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Executive summary

This Study covers 509 share and asset deals on which CMS advised during 2022. This is a record number of deals for the annual Study, which is a good result given the macroeconomic uncertainties which have impacted the M&A market generally. Overall, we found that there was little movement in most of the deal metrics from previous years, representing a continuation of standard seller and buyer positions. The challenging background to M&A activity has not impacted in this respect.

The recent trend in the increase in the use of the locked box has continued as has, perhaps counter intuitively, the use of purchase price adjustment provisions. Similarly, we saw a continued increase in the use of earn-outs determined by reference to EBIT / EBITDA, calculated over a period of two or more years. This seems to show that buyers remain cautious. Other deal metrics, such as basket and *de minimis* provisions and liability caps, have been consistently applied over recent years. The use of W&I insurance, particularly for larger deals, remains common.

Highlights

- MAC clauses remain unpopular on European deals, with only 13% of deals having them. They are used even less on medium to large deals. This is in stark contrast to the US, where MAC clauses are still incredibly common and were used on 98% of deals.

- The use of earn-outs has continued to increase but not as significantly as in previous years. In 2022 they were used in approximately 27% of deals. The increase in their use was reflected throughout Europe and runs counter to the experience documented for the US market. There was also a big increase in choosing EBIT/EBITDA as the earn-out criterion. Earn-outs are now generally measured over a period of up to 24 months.

- Transactions containing purchase price adjustment (PPA) provisions increased slightly, suggesting that a greater proportion of buyers are once again able to insist post-closing adjustments to the price. The use of a locked box structure in non-PPA transactions increased significantly by 11% in the past two years, particularly for medium sized transactions up to EUR 100m, where 79% of the transactions were locked box. This perhaps reflects the development of market practice notwithstanding the uncertainties in the economic environment.

- This year's Study indicates that ESG aspects are only just beginning to appear specifically as part of the due diligence process and in transaction documents. It seems likely that in the future these factors will become increasingly relevant and dealmakers are likely to incorporate ESG aspects into their M&A strategy.

- Most transactions have a limitation period of 12 to 24 months, which is in line with the historic rolling average. Liability caps of less than 50% of the purchase price are seen on a majority of deals, again in line with the rolling average. The proportion of transactions with a cap of less than 10% of the purchase price dropped significantly but only back to the historic rolling average. For small deals, the purchase price is still most likely to be the liability cap.

- The use of W&I insurance in European transactions has stabilised. In the UK, W&I insurance has levelled off to apply in about one-third of transactions. More than half of large transactions now have W&I cover as standard. The take up of W&I insurance cover across the remainder of Europe remains inconsistent. It may be that an increase in premiums payable and a reduction in cover are adversely impacting the attraction of W&I insurance.

- The challenging market environment does not appear to have resulted in any significant change during 2022 in the negotiation positions of the relevant parties and so the familiar patterns in the deal metrics that we measure have continued to apply. The Study reflects a standard approach to risk-sharing that we have seen over the longer term.

2022 results at a glance

CMS Trend Index

	2010 – 2021	2021	2022
DEALS WITH PURCHASE PRICE ADJUSTMENT	45%	47%	48%
DEALS WITH A LOCKED BOX (WHERE NO PURCHASE PRICE ADJUSTMENT)	51%	59%	62%
EARN-OUTS	20%	26%	27%
— SHORT EARN-OUTS (12 MONTHS OR LESS)	25%	34%	20%
— LONG EARN-OUTS (36 MONTHS OR MORE)	21%	15%	18%
— EBIT / EBITDA-BASED EARN-OUTS	42%	48%	54%
— TURNOVER-BASED EARN-OUTS	30%	21%	24%
DE MINIMIS	71%*	74%	72%
BASKET	66%	67%	69%
— LOWER BASKET (LESS THAN 1% OF PRICE)	58%*	67%	63%
— HIGHER BASKETS (MORE THAN 1.5% OF PRICE)	26%*	16%	19%
— FIRST DOLLAR RECOVERY	79%	84%	81%
LIABILITY CAPS			
— NO CAPS	13%	9%	11%
— LESS THAN 50% OF PRICE	54%	57%	56%
— LESS THAN 10% OF PRICE	14%	22%	14%
LIMITATION PERIODS			
— 12 – 18 MONTHS	32%	29%	32%
— 12 – 24 MONTHS	65%	66%	65%
— MORE THAN 24 MONTHS	22%	25%	28%
SECURITY FOR WARRANTY CLAIMS	31%	28%	28%
— RETENTION FROM PRICE	30%	41%	44%
— ESCROW ACCOUNT	56%	43%	38%
MAC CLAUSE	15%	16%	13%
ARBITRATION CLAUSE	33%	33%	34%
— APPLICABILITY OF INTERNATIONAL RULES RATHER THAN NATIONAL RULES	39%	32%	32%

* Data only available for 2011 – 2020

Key conclusions

Purchase price adjustments – In 2022 there was a small increase in the use of purchase price adjustment (PPA) clauses (48% in 2022 compared with 47% for 2021). This now represents a significant minority such that it is fair to say that such clauses are increasingly standard.

Locked box Transactions – For 2022, there was a more significant increase in the application of locked box arrangements for non-PPA transactions (62% in 2022 compared with 51% in 2020). The increase is even higher for medium sized deals, where 79% of the deals were locked box transactions. This increase is even more marked when compared against the average usage of 51% for the period 2010 to 2021. In our view this reflects a wider acceptance of locked box provisions for non-PPA transactions, particularly for larger deals. Note also a finding from the CMS Private Equity Study that PE deals show a marked preference (85%) for locked box structures.

Earn-outs – The frequency of earn-outs has continued to rise, now applying in 27% of deals as compared to 14% in 2010 when we first analysed the use of earn-outs. This is coupled with a rise in the use of EBIT or EBITDA as the relevant measure for calculating an earn-out, applying in 54% of such transactions. This trend applies across the board in Europe and runs counter to the experience in the US market. Earn-outs are seen most commonly in small and medium sized deals.

Warranty & Indemnity insurance – The popularity of W&I insurance has grown significantly over the last five years, particularly in the UK, albeit there its application stabilised in 2022 at 32%. W&I cover is purchased primarily on large deals with values over EUR 100m, with W&I cover being obtained for 58% of those deals. The level of cover purchased varies, although a significant proportion of deals (nearly 40%) had cover of an amount equivalent to more than 30% of the purchase price.

***De minimis* –** This year shows a continuation in the flattening of the number of transactions with a *de minimis,* at 72%, which is broadly consistent with the trend over recent years albeit a slight drop from the level of 74% in 2021. Most *de minimis* levels are from EUR 1 to 0.25% of the purchase price (58% of transactions) although 28% of transactions do not have a *de minimis* provision and this is likely to be due to the increased use of W&I insurance.

Baskets – Baskets were applied in 69% of transactions in 2022, which is consistent with the average since 2010. Baskets at the level of EUR 1 to 0.5% of the purchase price returned to the recent average of 28% of transactions. As in previous years most baskets in 2022 (63%) were equal in value to up to 1% of the purchase price and the remainder (37%) were at more than 1% of the purchase price. Similarly, most basket provisions (81%) were on a 'first dollar' basis thereby requiring buyers to be on risk up to the relevant level but not once it is exceeded. France and the Southern European countries are an exception in this respect.

Liability caps – More than half (56%) of all deals have a liability cap of less than 50% of the purchase price. For large deals, a significant proportion (42%) have a liability cap of less than 10% of the purchase price. By contrast, for most small and medium sized deals the liability cap is equal to the purchase price, demonstrating a clear difference across deal sizes.

Limitation periods – The trend towards longer limitation periods which started in 2019 continued in 2022. 28% of the deals in 2022 had limitation periods longer than 24 months. These figures confirm the development away from a seller-friendly approach to limitation periods. In contrast to previous years, deal size does not appear to have been a driving factor on limitation periods.

Security for warranty claims – The market remains seller-friendly: in only 28% of the deals were buyers able to demand a form of security for claims. This may be related to the greater use of W&I insurance. In the past an escrow account was the form of security of choice but in 2022 a retention or holdback was more popular (44% vs 38%), especially for deals with values up to EUR 25m.

MAC clauses – The use of MAC clauses decreased from 16% in 2021 to 13% in 2022. Compared to the average from 2010–2021 this is a decline of 2%. This development is relatively surprising considering the macroeconomic environment. The disparity between Europe (13%) and the US (98%) with regard to the use of MAC clauses is significant.

Arbitration – An arbitration clause was agreed in approximately one-third of the deals in 2022 (34%). In recent years we have observed a steady increase in the use of arbitration as a dispute resolution mechanism. Arbitration clauses are less popular in the UK, France and Benelux but very popular in CEE, German-speaking and Southern European countries.

Tax – Tax indemnities were agreed in 59% of deals in 2022, consistent with the historic rolling average. Where a tax indemnity was agreed, most limitation periods were absolute (58%), which is a seller friendly approach. However, compared to 2021 (64%), this has decreased by 6%. 46% of the deals assessed contained a provision granting the seller the right to participate in a future tax audit.

Environmental, Social and Governance (ESG)

ESG factors in M&A are becoming more relevant and important. Investors are facing pressures to uphold higher governance standards across all industries and geographic regions. It also seems likely that dealmakers want to capitalise on attractive ESG value creation opportunities. This year's Study indicates that ESG aspects are only just beginning to appear specifically as part of due diligence and in transaction documents.

Specific ESG Due Diligence

NO	YES
67%	33%

100% = all evaluated transactions

Specific ESG Provisions in the SPA

NO	YES
55%	45%

100% = all evaluated transactions

In our view ESG is increasingly a tangible concept for M&A practitioners, and reflects the fact that all businesses are subject to demands by third parties to adhere to certain ESG requirements. In relation to due diligence, an increasing focus will be placed on ESG in the material contracts review, ESG policies and initiatives, and on the assessment of compliance models. ESG considerations may also be included in warranty coverage confirming compliance with appropriate standards.

Deal drivers

Main deal drivers 2018–2022

	2018–2021	2021	2022
ENTRY INTO NEW MARKETS	45%	43%	39%
ACQUISITION OF KNOW-HOW (WITHOUT ACQUI-HIRE TRANSACTIONS)	21%	22%	22%
ACQUISITION OF A TEAM OF EMPLOYEES (I.E. ACQUI-HIRE TRANSACTIONS)	15%	14%	14%
ACQUISITION OF A COMPETITOR	26%	32%	28%
ACQUISITION OF A SUPPLIER	6%	7%	6%
DIGITALISATION	2%	4%	2%
OTHER	22%	19%	21%

We have analysed the underlying rationale for each of the deals covered by the Study as indicated in the chart above. We saw a year on year decline in deals seeing a buyer seeking to enter a new market (from 43% to 39%) and those in respect of the acquisition of a competitor (from 32% to 28%). This may reflect a step back from acquisitions seeking a post-pandemic consolidation of revenues and costs to a more usual range of factors applying to transactions.

The headline details for 2022 were as follows:

- 39% of the deals represented the entry into a new market by the buyer
- 36% of all deals were either the acquisition of know-how or acqui-hire transactions
- 28% of the deals were the acquisition of a competitor

We have not seen the much-heralded increase in transactions reflecting aspirations in respect of digitalisation. It still remains of note that 21% of this year's deals had a range of "other" deal drivers, once again demonstrating the variety of underlying reasons for entering into M&A transactions.

Warranty coverage

In this year's Study we repeated our enquiries as to the overall nature of the warranty cover. As before, we found that warranties regarding the target's most recent financial statements, post balance sheet conduct of the business, compliance and operations are very common and apply in up to (or even more than) 75% of all agreements. Specific warranties about the target's profitability and its pensions position are however much less usual (49% and 56%) and very few agreements contain only title and capacity warranties (8%).

Warranties/Limitations of liability
Warranties Used 2022

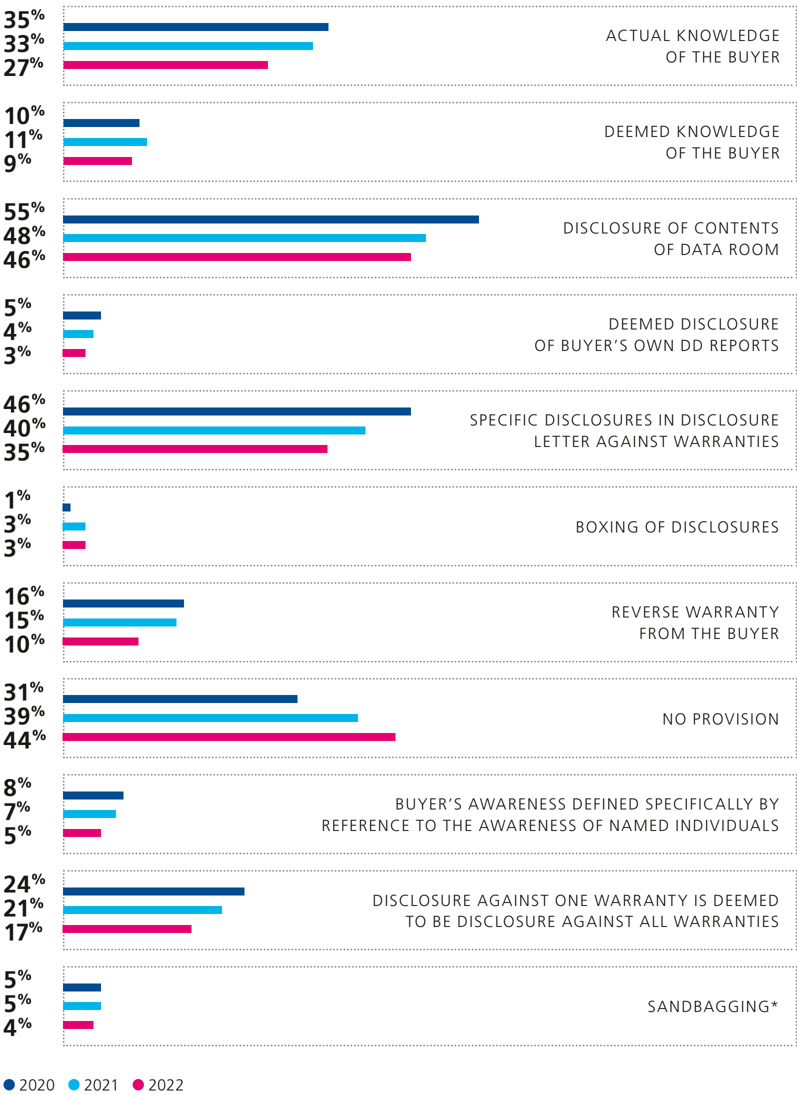
	2022
ONLY TITLE AND CAPACITY WARRANTIES	8%
WARRANTIES REGARDING THE TARGET'S FINANCIAL STATEMENTS	81%
COMPLIANCE WARRANTY	81%
OPERATIONAL WARRANTIES	73%
WARRANTIES WITH REGARD TO CONDUCT OF BUSINESS	70%
WARRANTIES WITH REGARD TO PENSION SCHEMES	57%
WARRANTY REGARDING THE TARGET'S FINANCIAL SITUATION	49%

100% = all evaluated transactions with warranties included in the agreement
Multiple warranties may apply

As a corollary to the warranty cover reflected in the M&A documents the Study also reflects the nature and extent of exclusions from warranty liability. As indicated above, there seems to be a general downward trend in respect of such exclusions – for example, a provision allowing disclosure of the contents of the data room appears only in 46% of transaction agreements compared with 55% in 2020. Exclusions relating to the knowledge of the buyer, including a reverse warranty, were also down on previous years.

Limitation of liability for warranty claims

Exclusion of Warranty Claims 2020–2022



100% = all evaluated transactions – more than one nomination possible

* Sandbagging is a practice where buyers claim a breach of a seller representation or warranty (a "rep or warranty") and seek indemnification post closing from the seller, in spite of the buyer having known about the breach

CMS European/US risk allocation comparison

There was no new edition of the Private Target Mergers & Acquisitions Deal Points Study **("ABA Study")** in 2022 and so to undertake our annual European/US comparison this year we primarily compared the European data with the equivalent statistics in the SRS Acquiom Report **("SRS Report")**, which was published in May 2022 and, where appropriate, we also look back at the figures in the 2020/2021 ABA Study.

SRS Acquiom is a transfer/paying agent and the SRS Report for 2022 analysed more than 500 deals which closed in 2021. Whilst the deals in the SRS Report are self-selected, arguably it is prepared from a broader set of deals than that covered by the ABA Study, where the sample size was smaller.

Overall, whilst the percentages set out in the table below show some changes in respect of individual deal points, the same differences in market practice that have been recognised consistently over the years of this Study between US and European practice remain.

PPA – Market practice in Europe in respect of purchase price adjustments has remained consistent at around 45% of deals over the past decade whilst in the US a PPA features in almost all deals (92%). Working capital adjustments remain the most frequently used component of a PPA in the US (88% of deals involving a PPA). In Europe the position is more varied. Working capital adjustments gained popularity again (up 5% to 49%, which is an 11% rise in the last two years) but it remains much lower than the equivalent in the US. In Europe cash & debt adjustments are most popular, at 56% of deals involving a PPA.

Earn-outs – The popularity of earn-outs in Europe remained consistent in 2022 (at 27% of deals) and remain higher than the equivalent in the US (18%), which showed another slight drop, by one percentage point. Two points to note, however (i) the ABA Study's value range starts at USD 30m and, as reported in the Deal Size Comparison section of this Study, it is clear in Europe that earn-outs are more popular on smaller deals (i.e. sub EUR 25m) and (ii) the SRS Report's section on earn-outs does not cover life sciences deals. Our experience in Europe is that earn-outs are common in the life sciences sector.

***De minimis*/Basket –** There is little change in the data relating to *de minimis* financial limitations – seen in almost three-quarters of European deals but only 25% of US deals. We have previously noted that the popularity of (i) 'excess only' baskets and (ii) W&I insurance in the US negates the need for a *de minimis*. The basis for recovery pursuant to the basket limitation clause is different. Whilst there is a discrepancy between the stats in the ABA Study and the SRS Report, in both US reports the use of 'excess only' baskets are significantly higher in the US. In Europe 'first dollar' baskets are more common. In the US over 90% of analysed deals have a basket equal to 1% or less of the purchase price. In Europe there is more variety, with deals involving baskets at 1% or less falling to 63% in 2022.

Liability caps/W&I insurance – The growth in W&I insurance and the consistent US approach to having low liability caps sees approximately 90% of US deals having the seller's liability capped at under 25% of the purchase price. Only 39% of European deals that have liability cap provisions have caps on liability at up to 25% of the consideration. The W&I insurance statistics in the two US reports show some differences between them albeit both reports show much higher use than the overall figure for Europe. However, as noted elsewhere in this Study, W&I Insurance (i) is not popular on small deals in Europe and (ii) has varied application in different European territories and so the relevant data – for instance, in the UK and for large deals – are more consistent with those seen in the US.

Brian Hendry, Head of Mergers & Acquisitions at W&I Insurance broker Paragon International Insurance notes that:

"Due to the higher premium rates and larger deal volumes the US Reps & Warranties insurance (RWI) market has seen far higher fluctuations in pricing. Historically RWI rates were between 2.75% – 3.5%, and this moved up to 3.5% to 4.5% in 2021 with a further increase to 4.5% – 6% at the start of 2022. Rates have now steadily dropped back and are now trending towards 2.5%. Of the M&A transactions in the US market that are being negotiated it would appear that an increasing number of them are looking to use RWI and / or Tax and / or Contingent risk insurance."

MAC – A MAC clause is almost always a feature on a US deal (98%). It is far less common in European deals (only 13%).

Security – Statistics in respect of security for claims remained largely the same as last year. The feature remains comfortably more common in the US than in Europe. In the US it may well be that there is less call for a form of security if W&I insurance is involved. In Europe the costs and compliance involved (for instance in establishing escrow accounts) is making security arrangements unpopular.

The table below sets out a quick reference of the differences described above and also a comparison with the data from 2021.

Europe / US differences

	2021 EUROPE	2022 EUROPE	2020 / 2021 US ABA	2021 US SRS	2022 US SRS
PURCHASE PRICE ADJUSTMENT	47%	48%	93%	91%	92%
WORKING CAPITAL ADJUSTMENT	44%	49%	87%	87%	88%
EARN-OUT DEALS	26%	27%	20%	19%	18%
DE MINIMIS	74%	72%	38%	28%	25%
BASKET	67%	69%	90%	85%	84%
BASKET THRESHOLD (1% OR LESS)	67%	63%	96%	91%	94%
'EXCESS ONLY' RECOVERY (BASKET)	16%	19%	75%	54%	54%
'FIRST DOLLAR' RECOVERY (BASKET)	84%	81%	13%	45%	44%
SUB-25% LIABILITY CAPS	41%	39%	99%	90%	97%
MAC CLAUSES	16%	13%	96%	98%	98%
SECURITY FOR CLAIMS	28%	28%	63%	68%	65%
W&I INSURANCE USED	19%	16%	65%	N/A	44%

CMS deal size analysis

The Study describes deals as ‘small’, ‘medium sized’ and ‘large’ depending on the values involved and highlights differences in deal terms between them. The deal sizes we use are as follows:

- Deals with values of up to EUR 25m are the small deals;
- Deals with values of between EUR 25m and EUR 100m we call medium sized deals; and
- Deals with values over EUR 100m are the large deals.

The table below shows the highlights for 2022.

We identify below (i) some changes since last year and (ii) the main differences, in each case, when comparing between deal sizes:

PPA/Locked Box – The increase of locked boxes in non-PPA transactions was seen across all deal sizes, with this being most marked for medium sized deals, where 79% were locked box transactions (up from 62% in 2021). Whilst overall there was only a small change in statistics for use of PPAs, there is some variety between deal sizes, with the 6% increase in application on large deals being contrasted by the same percentage fall on medium sized deals.

Earn-outs – Consistent with prior years, earn-outs were most frequently used on small deals and least popular on large deals. The percentage use of earn-outs on deals up to EUR 100m has grown to approximately 30%. EBIT/EBITDA is the most popular basis on which to measure earn-outs on all deal sizes (with a fall in the use of turnover metrics on medium sized and large deals in 2022). There was a return to normality with earn-out durations on large deals, all being between 6–24 months.

2022 results at a glance

Deal size comparison

	< EUR 25M	EUR 25M – 100M	> EUR 100M
PURCHASE PRICE ADJUSTMENT (PPA)	44%	52%	56%
LOCKED BOX (NO PPA)	56%	79%	67%
EARN-OUTS	30%	29%	9%
— SHORT EARN-OUTS (12 MONTHS OR LESS)	22%	15%	33%
— LONG EARN-OUTS (MORE THAN 36 MONTHS)	15%	26%	0%
— EBIT/EBITDA-BASED EARN-OUTS	48%	68%	60%
— TURNOVER-BASED EARN-OUTS	29%	13%	40%
LIABILITY CAP (LESS THAN 10% OF PRICE)	7%	19%	42%
LIABILITY CAP (LESS THAN 25% OF PRICE)	28%	45%	55%
W&I INSURANCE USAGE	5%	27%	58%
LIMITATION PERIOD (OF MORE THAN 24 MONTHS)	30%	23%	26%
SECURITY FOR WARRANTY CLAIMS	30%	23%	26%
ESCROW ACCOUNT (IF SECURITY FOR WARRANTY CLAIMS IS AGREED)	34%	40%	57%
MAC CLAUSE	14%	12%	6%
ARBITRATION	27%	47%	46%
TAX INDEMNITY CLAUSE	56%	64%	65%

Liability Caps – Liability caps for large deals are decreasing. For 42% of large deals and 19% of medium sized deals the liability cap is less than 10% of the purchase price, whereas for small deals such a liability cap applies only 7% of the time. For small deals the purchase price or no cap at all is most likely to be the agreed position and applies in 40% of those deals.

W&I insurance – 2022 again showed the continuing trend that W&I insurance is most likely used on large deals. W&I insurance was purchased on 58% of deals with a purchase price exceeding EUR 100m, reflecting an 11% increase from 2021 figures. There was however a corresponding 6% fall in usage to 27% on medium sized deals whilst W&I insurance remains relatively uncommon on small deals (at 5%), where it may be argued that the cost of the premium is not justified.

Limitation Periods – The 'buyer-friendly' trend for longer limitation periods was demonstrated this year across all deal sizes, with increases of 2% on small deals and 4% on both medium sized and large deals.

Security – There was a variety of results across deal sizes in terms of the overall use of security arrangements – with increased levels on small and large deals but a 6% fall on medium sized deals. Where security arrangements were adopted, there was a notable fall in the use of escrow accounts on medium sized deals.

MAC – Whilst there was little overall change in market practice as to the use of MAC clauses in European deals, it appears in 2022 that such provisions became even less prevalent on both medium sized and large deals.

Arbitration – 2022 saw little change in the overall percentage use of arbitration across all deals but significant increases in its use on medium sized and large deals.

CMS European regional differences

As with previous years of the Study we continue to see marked differences in market practice on certain deal metrics between European regions, with the highlights as follows:

- For the first time, the use of 'first dollar' baskets across the European region is beginning to diverge, with the Southern European countries and France well behind the European average.
- The majority of European deals have liability caps of less than 50% of the purchase price but it is noticeable that this is in the minority in the UK and CEE countries.
- The take up of W&I insurance continues to be most prevalent in the UK but has stabilised at 32% of deals. By contrast, in the German-speaking countries, use of W&I insurance dropped to 10% of deals.
- Limitation periods for warranty claims are generally for 24 months or less but it is noteworthy that the majority of deals in France and the Southern European countries have periods of more than 24 months.
- The use of MAC clauses varies significantly across Europe, with the UK and Nordics at the low end, with just 4% and 5% of deals including a MAC clause compared to France and the Southern European countries at 29% and 27%.

In a change of approach this year we have set out below some continued trends and variations concerning the relevant metrics we cover in this Study within the European region as follows:

PPA/Locked Box – PPA clauses are most popular in Benelux (55%), the Southern European countries (64%) and the UK (59%) as compared with the European average of 48%. There was a big swing in respect of Benelux from 34% in 2021. PPAs are less popular in France (32%), the German-speaking countries (38%) and Nordics (19%). For non-PPA transactions the trend is the opposite and locked boxes are most common in the German-speaking countries (79%) and Nordics (71%) compared to the average of 62%. At the other end of the scale are the Southern European countries (30%) and CEE (45%).

Earn-outs – There is a wide disparity across Europe in the application of earn-out provisions. As compared with the average of 27%, Nordics (42%), the German-speaking countries and Benelux (both 36%) stand out as being ahead whereas CEE is much lower, with just 11% of transactions. There was a big swing upwards in respect of Benelux and the German-speaking countries from 20% and 30% respectively in 2021 to 36% in 2022.

***De minimis*/Basket –** There is greater consistency across Europe in the application of *de minimis* and basket protections. In respect of basket provisions, the European average application of 69% broadly applies, with the exception of Nordics (91%) and Benelux (89%), which are substantially ahead of other regions or countries. There is however much greater disparity in the use of 'first dollar' baskets, which are much rarer in France (53%) and the Southern countries (47%) as compared with the European average of 81%.

Liability Caps – The European average for deals with a liability cap of more than 50% was 44% of all deals in 2022, which is consistent with the historic rolling average. There were significant drops for Benelux and the German-speaking countries to 26% and 28% respectively of deals with a liability cap of 50%, as compared with a large jump for the UK to 61%. As can be seen, market practice in this respect continues to vary significantly between European regions and countries.

W&I insurance – As we have previously mentioned in this Study the application of W&I insurance has grown significantly in the UK over the last five years whereas the uptake in other countries is slower as brokers and insurers begin to establish a presence. The UK remains the stand-out country albeit the use of W&I insurance has stabilised at 32% for 2022. This compares with the next highest country, France, at 18%, itself a massive step up from 4% in 2021. By contrast in the German-speaking countries use of W&I insurance dropped to 10% in 2022 from 17% in the previous year.

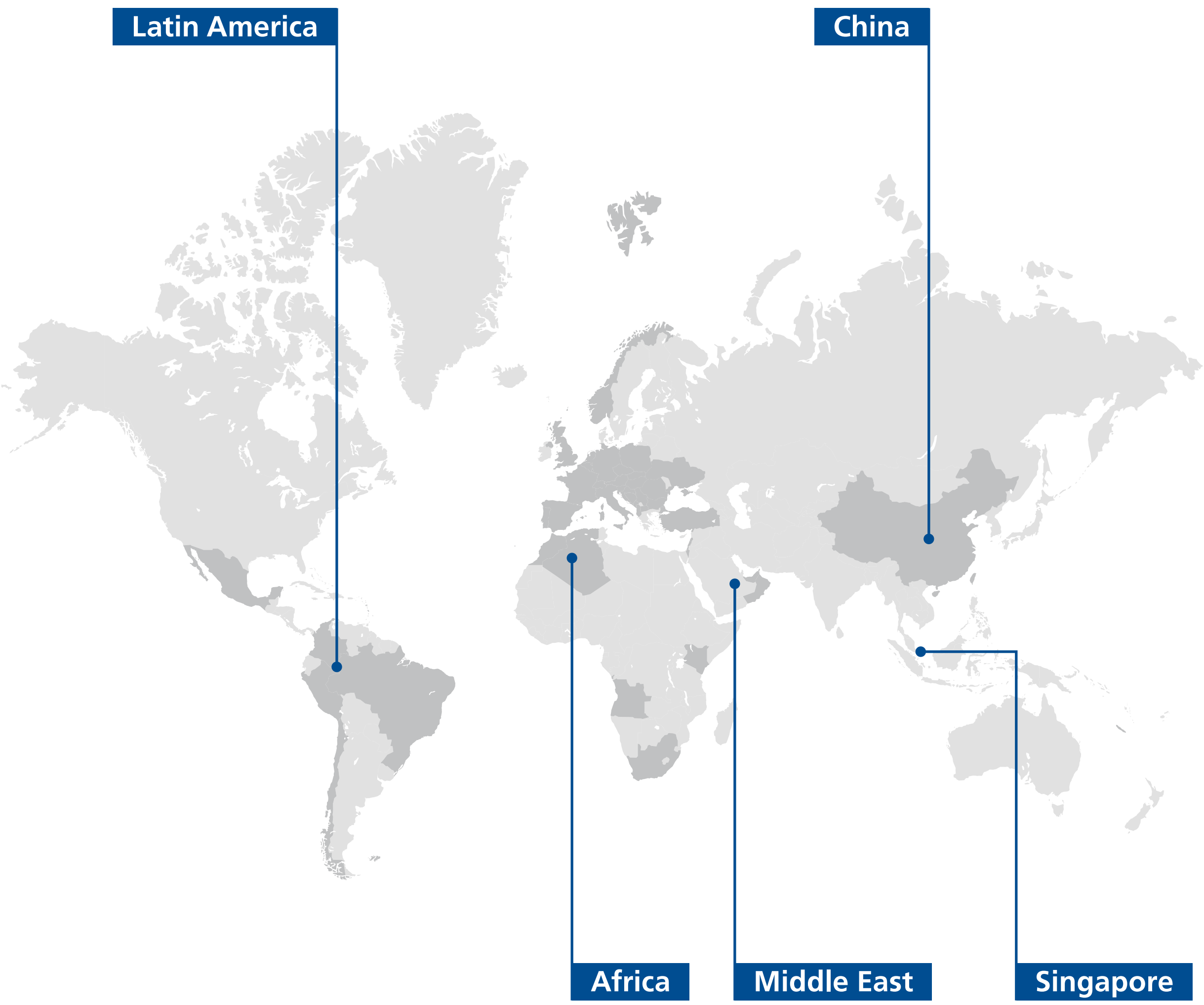
Limitation Periods – As identified further in this Study most warranty limitations periods within Europe are for 24 months or less, as reflected in 65% of all transactions, which is a consistent trend equal to the historic rolling average. The exceptions (having limitation periods of more than 24 months) are the Southern European countries (59%), CEE (54%) and France (50%). The UK and German-speaking countries had very few deals with limitation periods longer than 24 months (17% and 12% respectively).

MAC clauses – There was a drop in the application of MAC clauses to a European average of just 13% in 2022. As with many of the Study's metrics there was a wide disparity across Europe, with the UK and Nordics at the low end with just 4% and 5% respectively of their deals including a MAC clause, and at the high end France and the Southern European countries, with a significant 29% and 27% respectively. The swing in France was enormous, rising from just 4% in 2021.

Arbitration – The Study has always seen a wide range in the use of arbitration provisions as compared with resolution through the local court systems. The European average for deals with arbitration provisions is 34%. Arbitration is consistently popular in the CEE region and in 2022 the inclusion of arbitration provisions remained high, at 72%, followed relatively closely by the German-speaking countries, where the inclusion of arbitration provisions increased to 49%. By comparison, in France and the UK, arbitration provisions are relatively rare or non-existent, with equivalent percentages of 0% and 4% respectively.

CMS markets outside Europe

Our colleagues in CMS offices in Africa, China, Latin America, Middle East and Singapore have commented as regards specific differences in market practice on M&A transactions on which they advise in their jurisdictions as follows:



Africa

W&I Insurance has become increasingly popular in various jurisdictions in Africa, most notably South Africa and Kenya, over the last decade. This is due to an increasing understanding of the product, its benefits and its application. Concerns as to insurers' capacity, increased due diligence requirements and premium costs do need to be understood and overcome. Despite W&I insurance becoming more readily available in South Africa, it can be challenging to source and implement it in some other African jurisdictions as a result of insurers' risk appetite, that country's risk profile and stability, and the nature of the transaction in relation to insurers' requirements.

China

In comparison to Europe and the US, arbitration is the standard method of dispute resolution for both domestic and cross-border transactions in the PRC. This is due to the fact that arbitration institutions are often more trusted than local courts and because court judgments of many foreign jurisdictions are not recognised or enforceable in the PRC. Further, probably as a consequence of the COVID-19 pandemic and increasing economic and political uncertainties, we have seen a trend in 2022 for longer and more comprehensive MoUs or LoIs before implementing a transaction.

Latin America

In Latin America, we have seen an increase in the use of buy-side W&I insurance in M&A deals relative to prior years. While this insurance is more often used when there are local companies or assets acquired under acquisition agreements governed by English law or New York law, we have also seen W&I insurance in contracts governed by local laws. We expect this trend will continue.

Middle East

The Middle East has moved away from traditional completion accounts mechanisms towards locked box structures. The gap in pricing expectations between sellers and buyers remains challenging, but to bridge that gap, it is increasingly common to see elements of earn-outs and contingent consideration in regional deals. In light of increasing tax and transparency laws adopted across the Middle East, pre-completion restructuring work is increasingly common, while W&I insurance is also becoming more prevalent, particularly on outbound transactions and deals involving Private Equity and Sovereign Wealth Funds investors.

Singapore

In view of the current and ongoing challenging macro economic conditions, in the past year we have noticed a significant shift towards investor-friendly deal terms, including but not limited to (a) greater controls (including financial and reserved matter controls) being conceded, (b) fewer data room disclosures being accepted, and (c) more stringent 'exit event' timelines and obligations being implemented (with remedies available to the investors for failing to meet such exit timelines). Lower (in some cases 'down round') valuations are also being negotiated by investors to hedge against the risk of lower valuations being offered to subsequent investors, given economic uncertainties.

Key messages

This Study covers 509 share and asset deals on which CMS advised during 2022. This is a record number of deals for the annual Study, which is a good result given the macroeconomic uncertainties which have impacted the M&A market generally.

This year's Study indicates that ESG aspects are only just beginning to appear specifically as part of due diligence and in transaction documents. It seems likely that ESG factors in M&A will become increasingly relevant.

The use of earn-out structures has continued to increase but not as significantly as in previous years. The increase in their use to 27% of deals was reflected throughout Europe and runs counter to the experience seen in the US market.

Transactions containing purchase price adjustment (PPA) provisions increased slightly, suggesting that a greater proportion of buyers are once again able to insist on such adjustments. The use of a locked box structure in non-PPA transactions increased significantly.

Most transactions continue to have a warranty limitation period of 12 to 24 months, which is in line with the historic rolling average. The proportion of transactions with basket and *de minimis* provisions has remained broadly static over recent years.

Most transactions also have liability caps of less than 50% of the purchase price, again in line with the historic rolling average. For small deals, the purchase price is still most likely to be the agreed liability cap and for large deals the liability cap is very often less than 10% of the purchase price.

W&I insurance in European transactions has stabilised. In the UK W&I insurance has levelled off to apply in 32% of transactions. More than half of large deals now have W&I insurance cover as standard.

Despite the challenging background to M&A activity, deal metrics show a continuity in standard buyer and seller positions with more benign years.

The data used in the Study is not publicly available and is based on privately negotiated transactions in which CMS acted as an adviser to either the buyer or the seller. CMS is 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.

Purchase price adjustment (PPA)/Locked box

Purchase Price Adjustment (PPA) clauses are designed to ensure the correct amount is finally payable by the buyer for the target business. Adjustments can arise by reference to the target company's debt and cash position or to its working capital or overall net asset position at closing. The parties thereby provide that the final purchase price reflects the actual debt, cash, working capital or net asset position.

PPA provisions may however mean there is uncertainty as to the final purchase price at the time of signing. Several months may elapse before the price is agreed or determined. Some may feel this as unhelpful or impractical and therefore include 'locked box' provisions to avoid post-signing price adjustments. In such cases, an agreed balance sheet is warranted and the SPA includes covenants prohibiting certain payments by the target (often called 'leakage'), such as dividends and management charges.

General Overview

In 2022 there was a small increase in the use of purchase price adjustment clauses in M&A agreements (48% compared with 47% for 2021). This broadly reflects the overall average for recent years and a gradual increase over the last 12 years. This now represents a significant minority such that it is fair to say that such clauses are increasingly standard. It suggests that a large proportion of buyers are able to insist on PPA provisions. There was however a big increase in the application of locked box arrangements for non-PPA transactions (62% in 2021 compared with 59% in 2020). This increase is even more marked when compared against the average usage of 49% for the period 2010 to 2021. Locked-box mechanics are notably preferred in private equity deals (85% according to the CMS European Private Equity Study 2022).

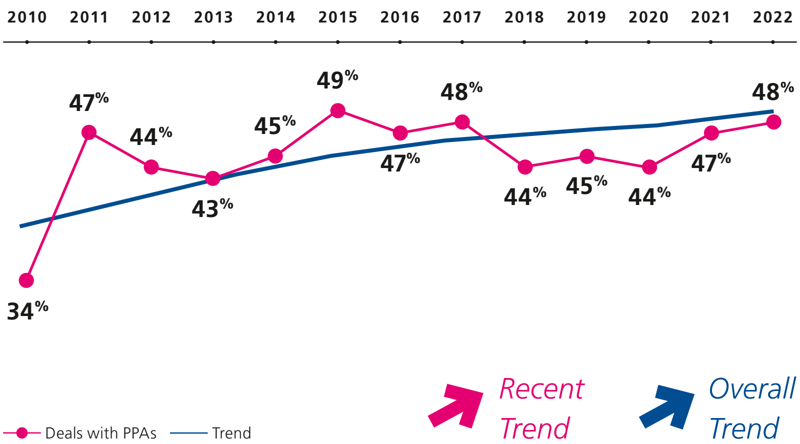
The increase in PPA provisions suggests that a greater proportion of buyers are able to insist on such adjustments

Locked Box

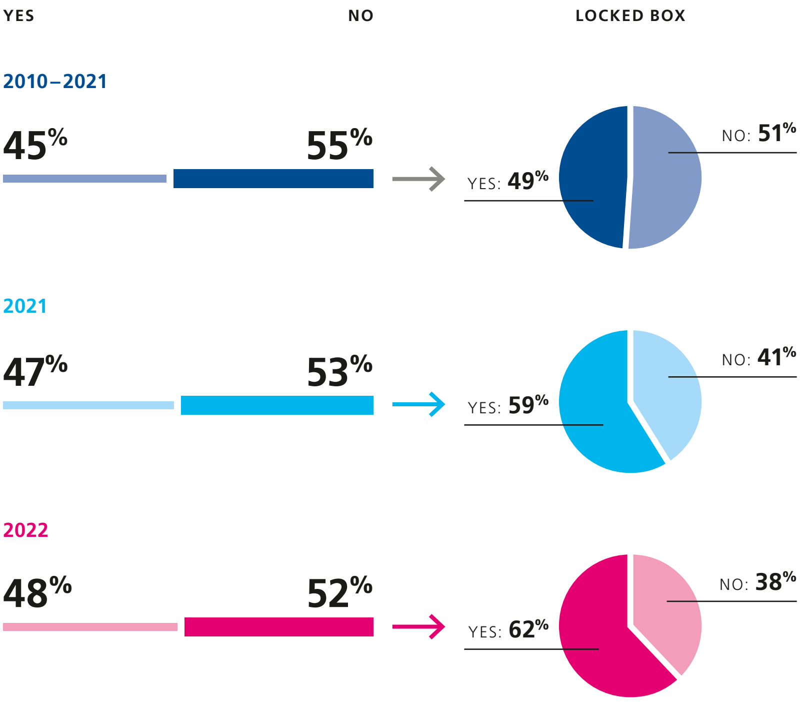
62%

The use of a locked box structure in non-PPA transactions increased significantly

CMS Trend Index



Locked Box 2010–2022



100% = all evaluated transactions

Specific Issues

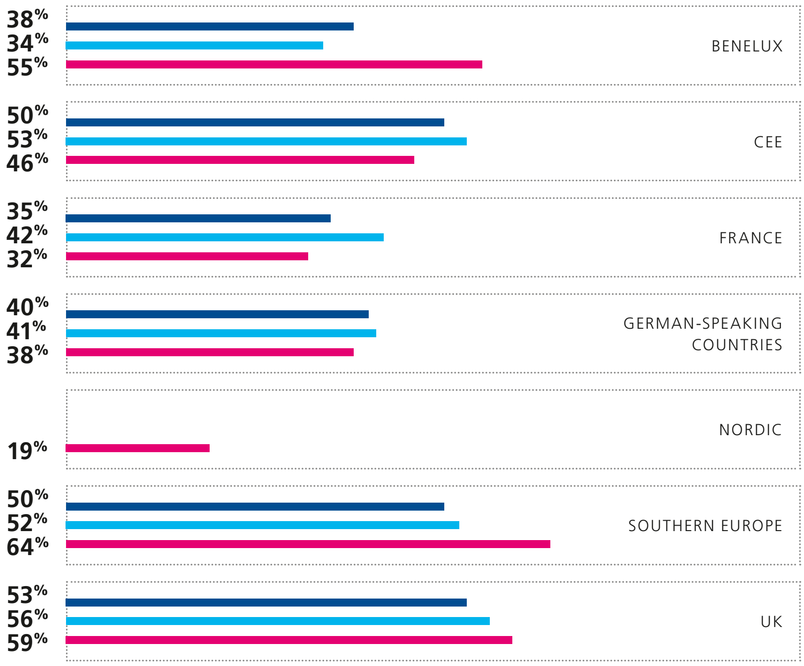
Regional Differences

The use of PPAs continues to vary in application across European jurisdictions. There were dramatic increases for Benelux and the Southern European countries, where PPAs featured in 55% and 64% of transactions respectively. The UK sits just between those regions, at 59% of transactions. For CEE, France and the German-speaking countries the proportion of deals with PPA provisions remained broadly constant. The increase in the application of PPA clauses across Europe over the period from 2010 to 2021 has otherwise been relatively gradual.

Locked box usage in Southern Europe

64%

Time Trend Europe

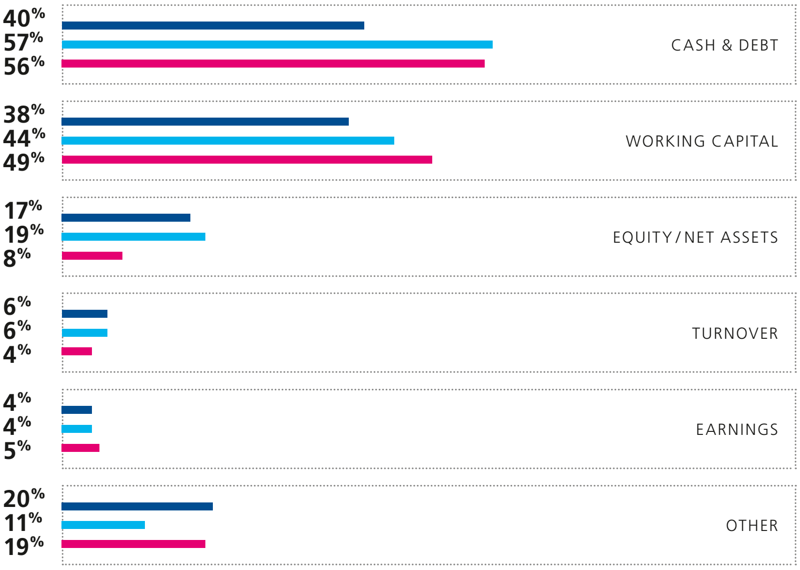


● 2010–2021 ● 2021 ● 2022
100% = all evaluated transactions
No data for region Nordic before 2022 available

Net Debt/Working Capital Adjustments

Net debt and working capital are by far the predominant elements in calculating PPAs. The application of cash/debt as the adjustment factor in a PPA transaction has dropped very slightly to 56% compared to 57% of those deals, albeit a significant uplift on the 40% rate for the period 2010 to 2021. The use of working capital as an adjustment factor increased once again from 44% for 2021 to 49% for 2022, which is an increase on the 38% average compared with the historic rolling average. The statistics seem to suggest that working capital price adjustments combined with a calculation of the cash/debt position of the target are beginning to represent a normal position for European transactions.

Chosen Criteria

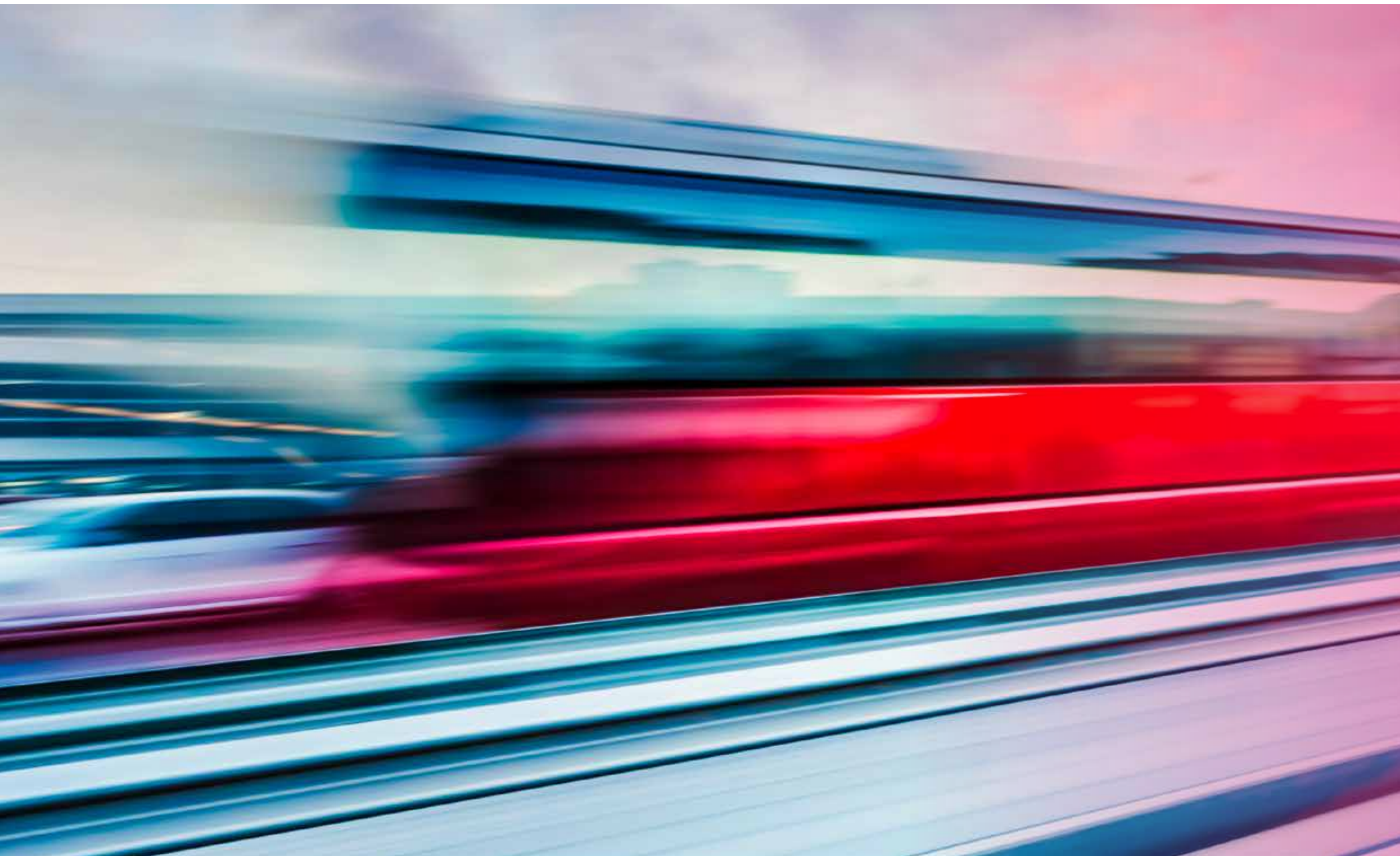


● 2010–2021 ● 2021 ● 2022

Cash & debt does not include 'cash only' and 'debt only'

100% = all transactions including a purchase price adjustment – multiple criteria may apply

Net debt and working capital are the predominant elements in calculating PPAs



Sector Differences

The application of locked boxes in 62% of non-PPA transactions broadly applied across all the sectors except for the higher proportion in Banking & Finance, Hotels & Leisure, Infrastructure & Projects and Industry sectors (at 86%, 78%, an extraordinary 100% and 70% respectively). However, there was a sharp decline in respect of transactions in the Energy & Climate Change and Consumer Products sectors at 49% and 57% (from 62% and 66% in 2021). The use of locked boxes in the Real Estate sector also jumped significantly to 63% (from 36%). It is difficult to draw any significant conclusions given the relatively wide variation in locked box use between sectors and the changes year on year except that this reflects the overall increase across the broad range of sectors.

Frequency of Locked Box Mechanism

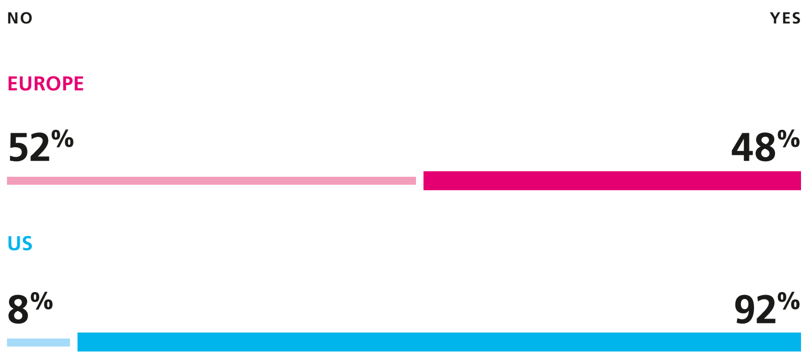
SECTOR	2010 – 2021	2021	2022
BANKING & FINANCE	50%	44%	86%
HOTELS & LEISURE	44%	33%	78%
ENERGY & CLIMATE CHANGE	49%	62%	49%
CONSUMER PRODUCTS	58%	66%	57%
TECHNOLOGY, MEDIA & COMMUNICATIONS	52%	68%	60%
INFRASTRUCTURE & PROJECTS	31%	50%	100%
LIFE SCIENCES & HEALTHCARE	55%	67%	56%
REAL ESTATE	32%	36%	63%
INDUSTRY	55%	68%	70%
BUSINESS (OTHER SERVICES)	48%	55%	76%
CMS AVERAGE	49%	59%	62%

100% = transactions with no purchase price adjustment mechanism in the respective sector

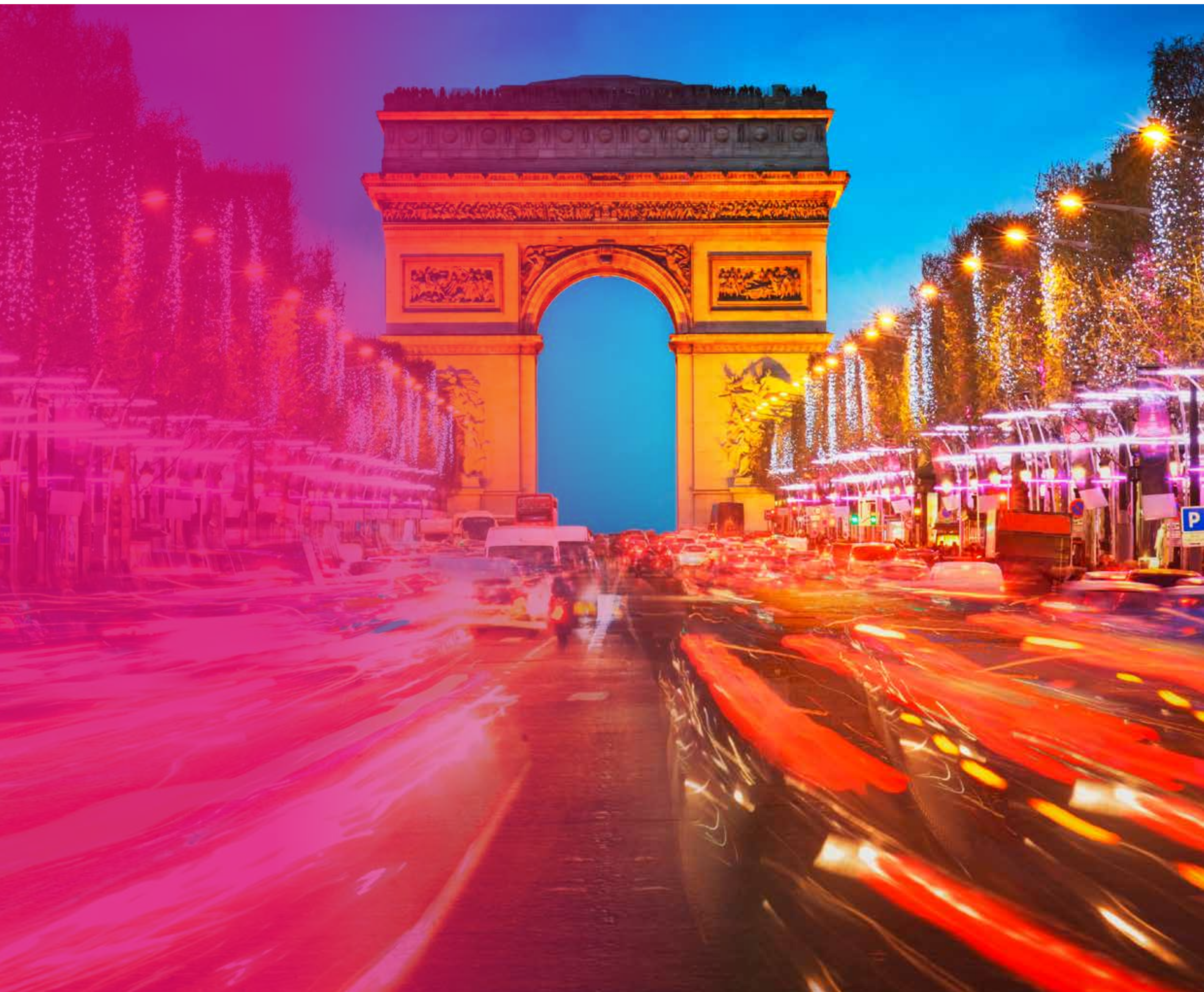
European/US Differences

Although, as indicated above, the application of PPA provisions continues to increase (to 48% in 2022) across all European jurisdictions, it remains some way behind the US, where PPAs apply in nearly all deals (at 92%). Most US deals will include an adjustment in respect of the target's working capital as determined at completion of the transaction. It seems likely that the US regards a PPA as standard. In European deals there continues to be more scope for negotiation as to the preferred approach to PPA provisions.

Purchase Price Adjustment Europe/US



100% = all evaluated transactions

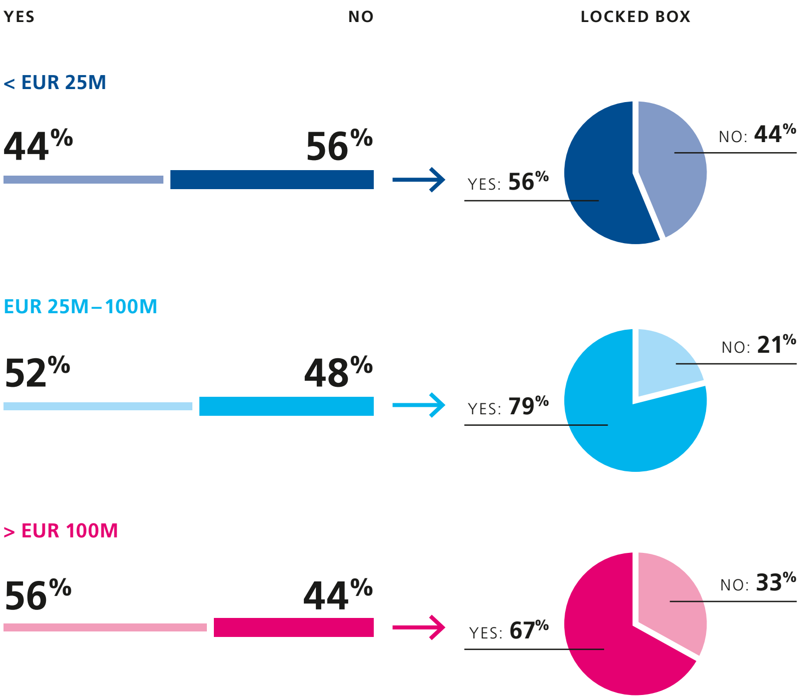


Analysis by Deal Size

The increase of locked boxes in non-PPA transactions was of relevance in relation to all deal sizes and was most marked for medium sized deals, where 79% were locked box transactions (up from 62% in 2021). For small deals, locked boxes in non-PPA transactions remained at 56%, and in large deals locked box usage in non-PPA transactions dropped slightly to 67%.

The increase of locked boxes in non-PPA transactions was most significant in medium sized deals

Purchase Price Adjustment 2022



100% = all evaluated transactions
100% = transactions with no purchase price adjustment mechanism
(deals containing purchase price adjustment and locked box at the same time are not included)

Earn-out

Earn-outs provide for additional amounts of purchase price to be paid after closing, usually by reference to the financial performance of the acquired business during a specified period after closing. This allows the seller and buyer to share any potential upside in performance following closing. A seller can receive a higher price than on a deal where all the proceeds are paid on closing but is likely to be required to remain engaged with the business and must wait to receive the additional consideration. Buyers seek to ensure the final price is linked both to historic and present financial performance.

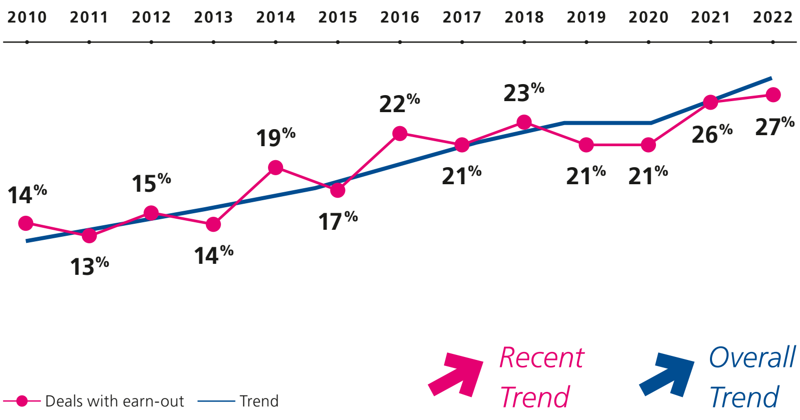
General Overview

The popularity of earn-outs experienced in 2021 was maintained in 2022, with their use modestly increasing by 1% to 27% – another high point in the history of this Study. Given the sustained period of economic uncertainty, buyers are likely to use earn-out mechanisms in order to ensure that the price paid is measured over an extended period rather than by reference to financial years impacted by volatile economic conditions (e.g. inflation, interest rates, war-fuelled energy price rises etc).

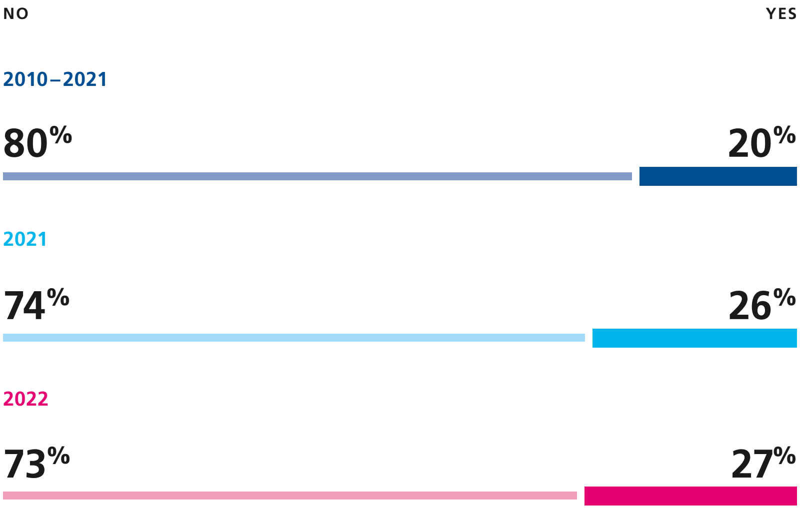
Earn-out popularity

The popularity of earn-outs remained at its highest level

CMS Trend Index



Earn-out 2010–2022



100% = all evaluated transactions

Specific Issues

Sector Differences

The table appears to indicate a dramatic outcome in that Infrastructure & Projects has become the most popular sector for earn-outs. However, the statistics for 2022 are rather misleading, as the percentage for Infrastructure & Projects derives from a relatively small deal sample size, so the earn-out deals have given rise to a disproportionate trend compared with the historic rolling average. Our view is that, in reality, as in previous years, Lifesciences & Healthcare and Technology, Media & Communications are the sectors where earn-outs are most likely to be adopted.

Frequency of Earn-out Mechanism

SECTOR	2010 – 2021	2021	2022
BANKING & FINANCE	15%	21%	35%
HOTELS & LEISURE	11%	16%	18%
ENERGY & CLIMATE CHANGE	17%	29%	19%
CONSUMER PRODUCTS	18%	23%	26%
TECHNOLOGY, MEDIA & COMMUNICATIONS	26%	34%	29%
INFRASTRUCTURE & PROJECTS	8%	0%	67%
LIFE SCIENCES & HEALTHCARE	33%	44%	54%
REAL ESTATE	12%	7%	21%
INDUSTRY	17%	22%	19%
BUSINESS (OTHER SERVICES)	23%	29%	18%
CMS AVERAGE	19%	26%	27%

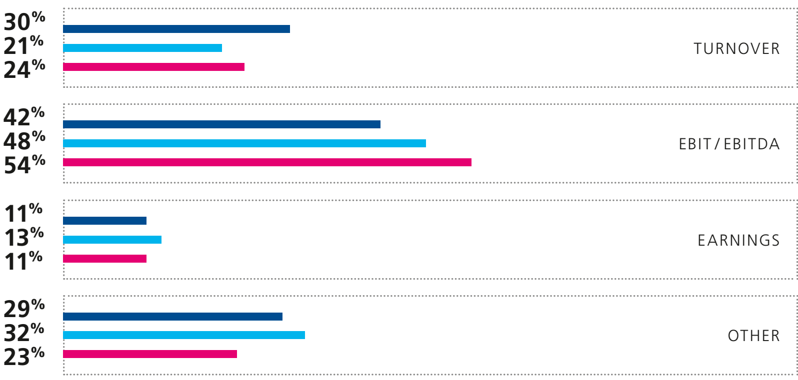
100% = all evaluated transactions of the respective sector

Earn-out popularity varies by sector

Earn-out Determination

EBIT / EBITDA keeps its position as the most popular metric on which to determine an earn-out, with a significant 6% rise to 54% of deals with an earn-out, and is now 12% higher than the historic rolling average. There were only modest changes in the statistics for use of Turnover and Earnings as criteria on which to base an earn-out, with other metrics falling considerably (down 9%).

Time Trend



● 2010 – 2021 ● 2021 ● 2022
100% = all transactions including an earn-out clause – multiple criteria may apply

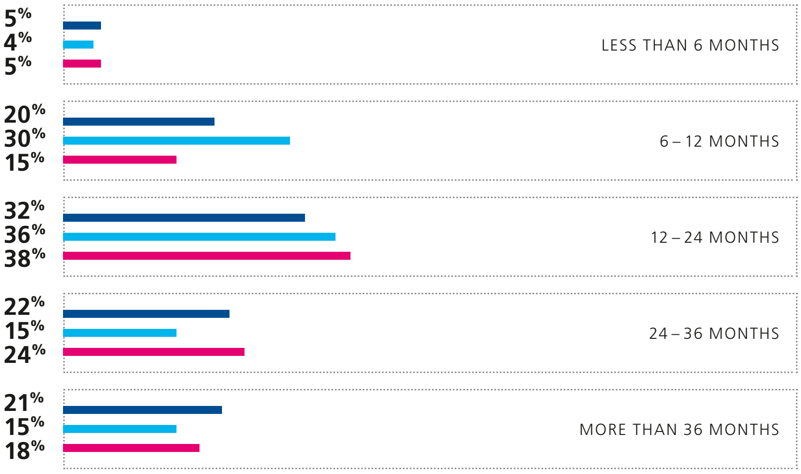
EBIT / EBITDA-based earn-outs

54%

Earn-out Duration

2022 saw the trend on earn-out duration flip-flop, with a return to longer earn-out periods. Whilst periods of 12 to 24 months continued to be the most frequently applied (up 2% to 38%), there was a rise in earn-out durations of between 24 and 36 months – up 9% to 24%, which is the same figure seen in 2020 and consistent with the historic rolling average. There was also a 3% increase in earn-out periods of more than 36 months. This trend confirms our prediction from the 2021 Study, where we stated that we expected longer earn-outs would be required to smooth out any extraordinary effect the pandemic might have on a business's financial performance – perhaps buyers are now coming to the same view.

Duration of Time Periods Relevant for Assessment of Earn-out



● 2010–2020 ● 2020 ● 2021
100% = all transactions including an earn-out clause

Longer earn-out periods returned but those of 12 to 24 months remain most popular

Earn-out duration ↗

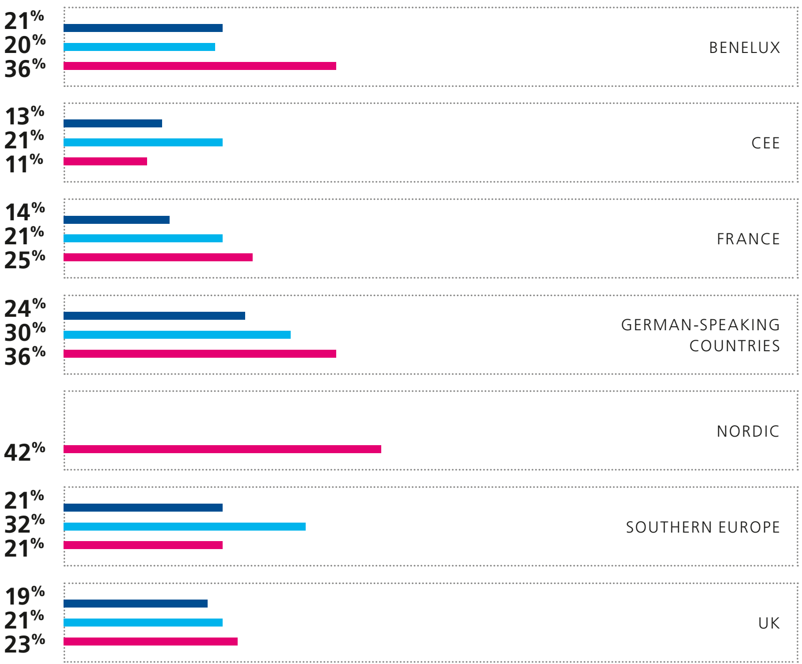
Earn-out periods of 24 to 36 months

24% ↗

Regional Differences

The overall high point in the use of earn-outs across all of the CMS European territories at 27% is similarly reflected in Benelux, France, the UK and the German-speaking countries. There were drops in use in both CEE and Southern European countries to levels more consistent with the historic rolling average.

Time Trend Europe

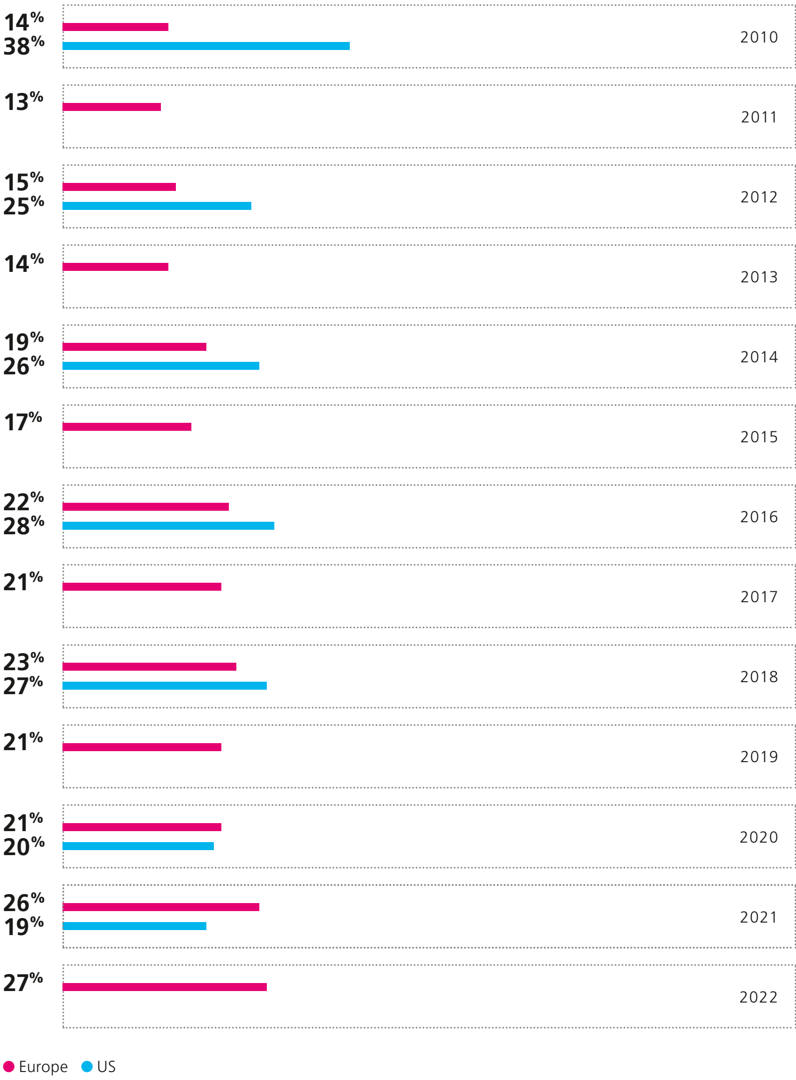


● 2010–2020 ● 2020 ● 2021
100% = all evaluated transactions
No data for region Nordic before 2022 available

European/US Differences

Earn-outs remained more common in Europe than in the US, continuing the new trend seen last year. Over the last decade there has been an upward trend in Europe whilst popularity in the US has levelled off (after a stark decrease between 2010 and 2012). 2022 also demonstrated the notable divergence between European and US market practice in terms of earn-out metrics, with EBITDA/EBIT dominating in Europe but Revenue being increasingly used in the US. Note however that in the SRS Report the data for EBITDA and Earnings are combined.

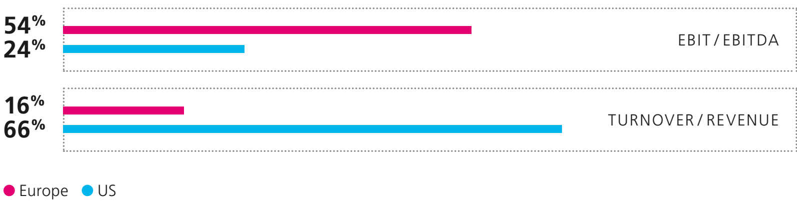
Earn-out Europe/US



100% = all evaluated transactions

Earn-out Europe/US

Earn-out criteria



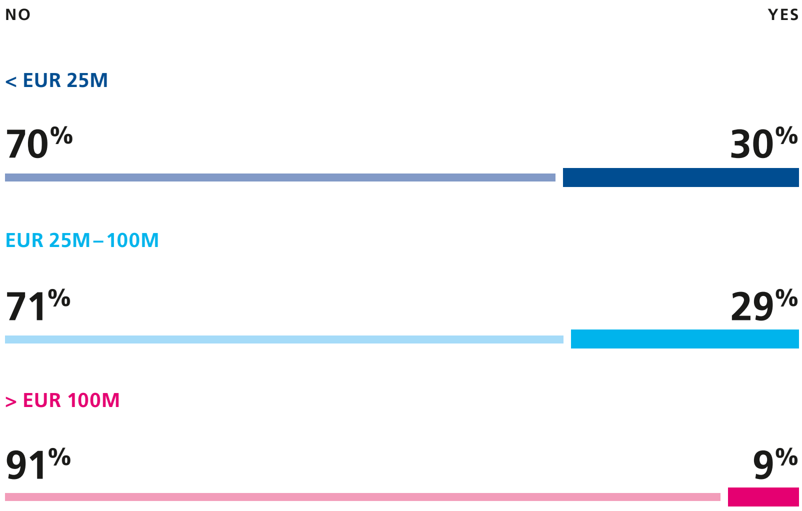
100% = all evaluated transactions with an earn-out mechanism

Analysis by Deal Size

These three graphs highlight certain differences in the earn-out data depending on transaction value. Consistent with prior years, earn-outs were most frequently used on small deals and least popular on large deals. The percentage use of earn-outs on medium sized deals has grown to approximately 30%.

Earn-outs used on 30% of deals with values up to EUR 100m

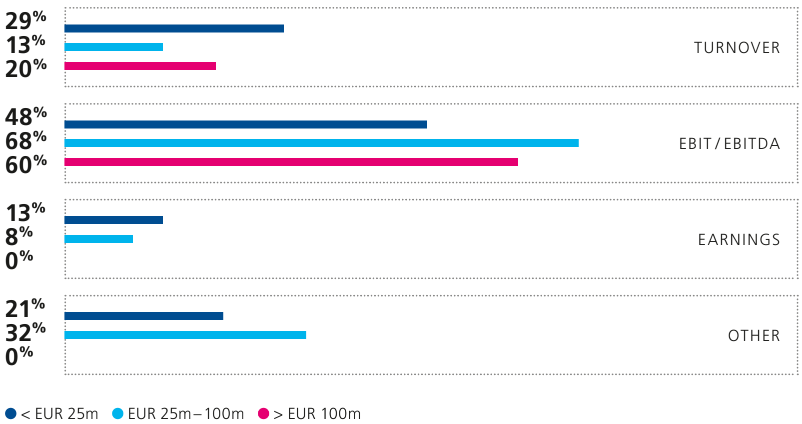
Earn-out 2022



100% = all evaluated transactions

EBIT / EBITDA is the most popular basis on which to measure earn-outs on all deal sizes (with a large fall in the use of Turnover metrics on large deals in 2022).

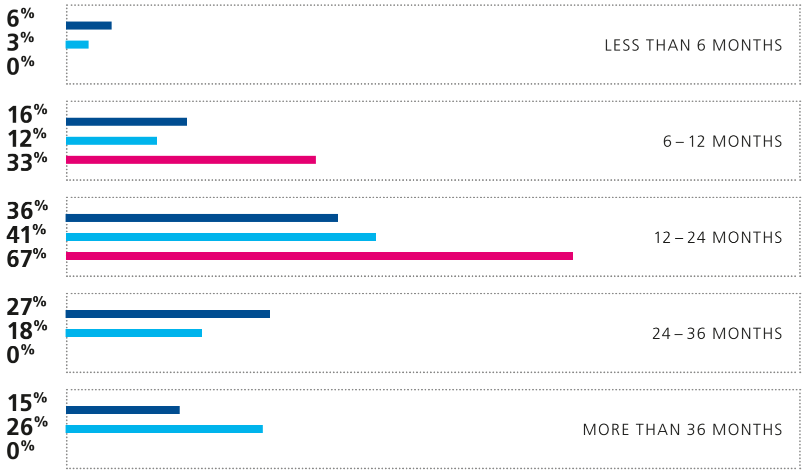
Comparison of criteria used for earn-out by purchase price 2022



100% = all transactions including an earn-out clause

There was a return to normality with earn-out durations on large deals all being between six and 24 months.

Duration of Time Periods Relevant for Assessment of Earn-out



● < EUR 25m ● EUR 25m – 100m ● > EUR 100m
100% = all transactions including an earn-out clause

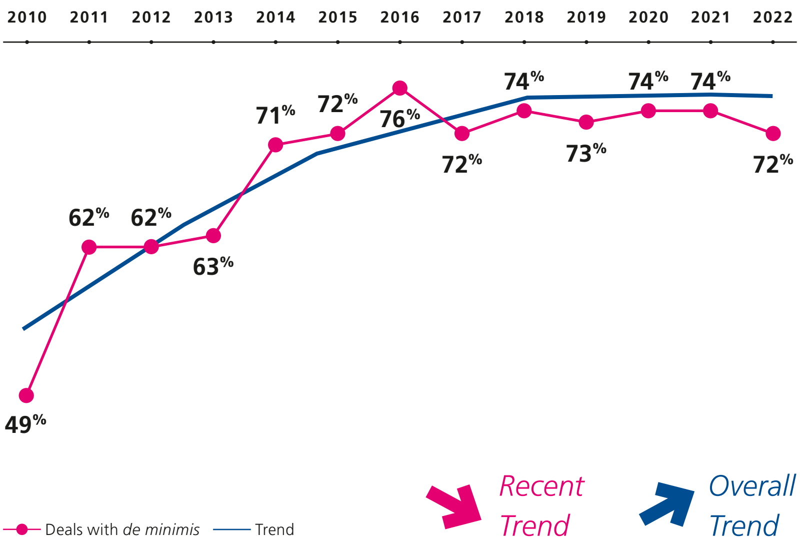
De minimis

The majority of M&A agreements provide that the buyer is prevented from bringing certain warranty claims below an agreed minimum amount, often referred to as the *de minimis*. If a warranty claim is less, then the claim is automatically excluded. The seller is thereby protected from potential liability for small claims. However, the *de minimis* arrangement may not be appropriate for deals with full W&I insurance cover, as this is reflected in the W&I insurance policy itself.

General Overview

This year's Study shows a continuation in the flattening of the number of transactions, with a *de minimis* clause at 72%, which is broadly consistent with the trend over recent years albeit a slight drop from the level of 74% in 2021. In our view this demonstrates that a *de minimis* is now the market norm across most European jurisdictions.

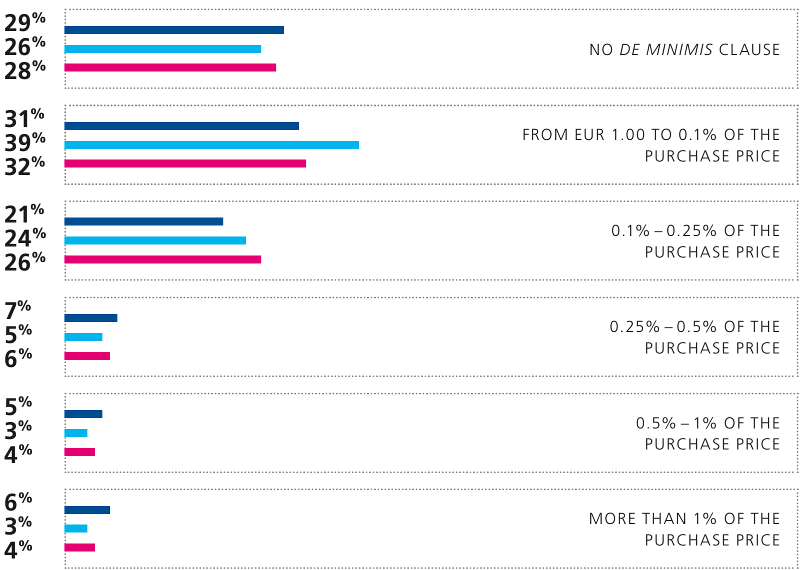
CMS Trend Index



***De minimis* levels**

Most *de minimis* levels are from EUR 1 to 0.25% of the purchase price (58% of transactions) although the 28% of transactions without any de minimis provisions may reflect the application of W&I insurance. However, in 2022 there was a marked decrease of *de minimis* levels of less than 0.1% of the purchase price, from 39% in 2021 back to its more usual level of 32%. The use of a *de minimis* at 0.1 to 0.25% of the purchase price moved up slightly to 26% compared to 24% in 2021. The overall results indicate that sellers are not negotiating higher *de minimis* levels.

***De Minimis* Levels 2011–2022**



● 2011–2021 ● 2021 ● 2022
100% = all evaluated transactions

De minimis of 0.1% to 0.25% of purchase price

26% ↗

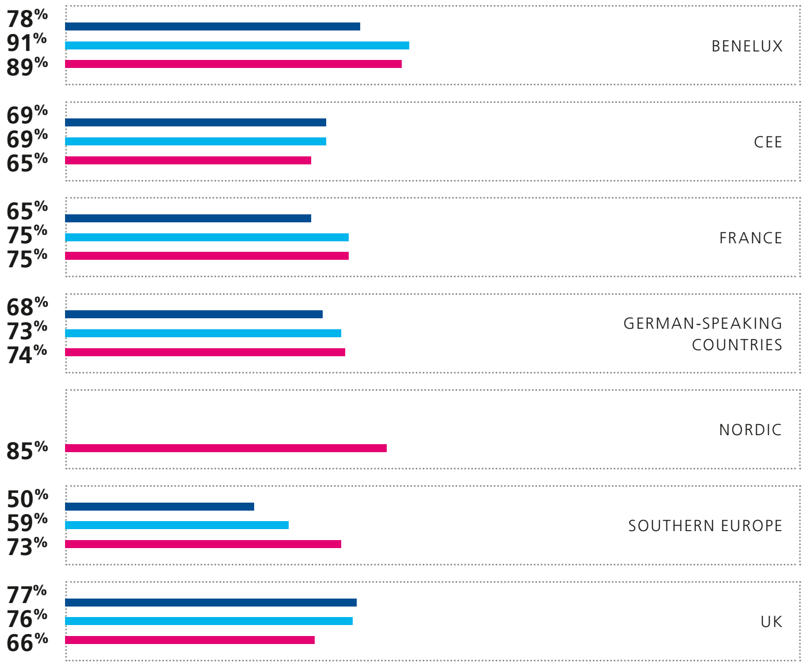
De minimis levels of 0.1% to 0.25% of the purchase price were more common

Specific Issues

Regional Differences

The application of *de minimis* clauses across Europe appears to be converging. The gap between countries is shrinking and the range varies from 89% for Benelux transactions to 65% for CEE countries. This is balanced by a significant drop in respect of the UK to 66% of reviewed transactions. It seems likely that this arises from the greater use of W&I insurance in the UK, where the seller has passed on warranty risk to the insurer.

Time Trend Europe



● 2010–2021 ● 2021 ● 2022
100% = all evaluated transactions
No data for region Nordic before 2022 available

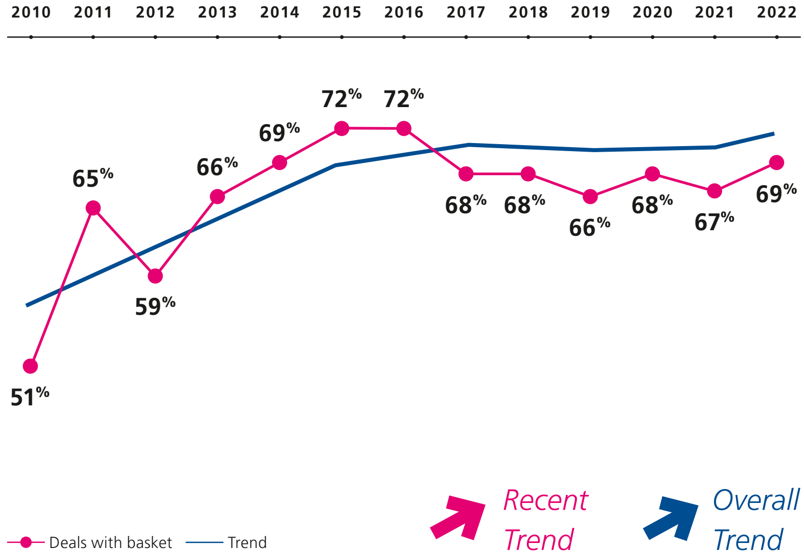
Basket

The majority of M&A agreements have a basket provision which prevents warranty claims from being made where the total amount claimed in respect of all warranties is less than an agreed 'basket' amount. This is often agreed as a percentage of the purchase price. The basket will either protect sellers against warranty claims up to the agreed amount (i.e. 'first dollar') or for claims once the amount claimed exceeds that agreed amount (i.e. 'excess only'). For deals with full W&I insurance cover a basket provision may not be required, as this is reflected in the W&I insurance policy itself.

General Overview

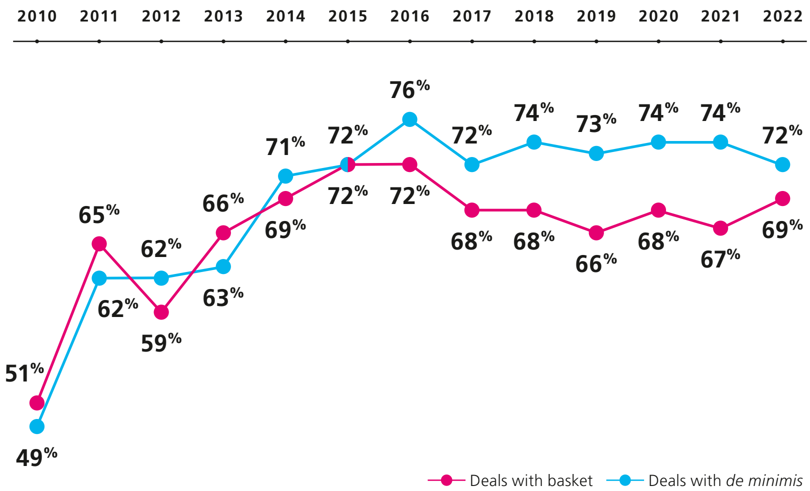
There was a slight increase in the application of baskets in European transactions at 69% for 2022 compared with 67% for 2021, which is reflective of the average seen over the period from 2010. This level most likely reflects the use of W&I insurance, particularly in the UK, where the basket may not be as relevant if the equivalent liability is assumed by the W&I insurer.

CMS Trend Index



The correlation between the application of a basket and a *de minimis* provision was more marked in 2022 as a *de minimis* applies to 72% of transactions compared with a basket of 69% (being much closer than the recent average of 74% versus 67%).

Comparison: Existence of *De Minimis* and Basket



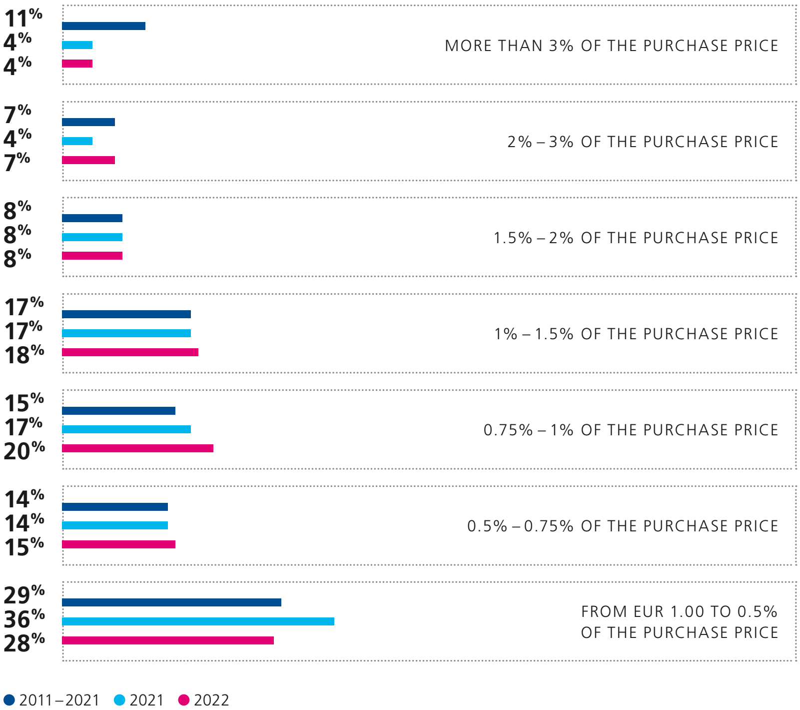
Specific Issues

Size of Baskets

Baskets at the lowest level from EUR 1 to 0.5% of the purchase price returned to the recent average of 28% of transactions. As in previous years, most baskets in 2022 (63%) were equal in value to up to 1% of the purchase price and the remainder (37%) were at more than 1% of the purchase price. Similarly most basket provisions (81%) are on a 'first dollar' basis, thereby requiring buyers to be on risk up to the relevant level but not once it is exceeded. A 'first dollar' basket is usually larger than an 'excess only' basket. The percentage of transactions with baskets at 2% of the purchase price increased slightly from 8% to 11% but we do not think this indicates any trend to higher basket amounts, as most are still less than 1.5% (being 81% of all transactions).

Basket sizes increased with most at 1.5% of the purchase price or less

Time Trend



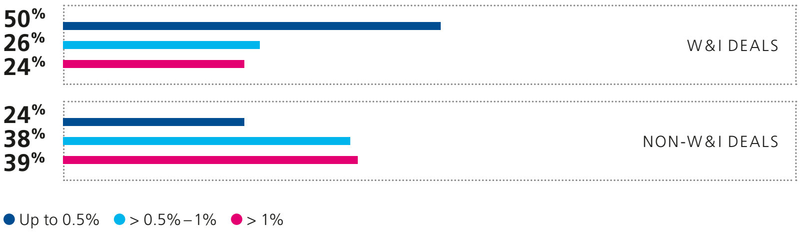
100% = all transactions with a basket clause

Impact of W&I Insurance

The comparative statistics relating to the use of basket provisions in W&I and non-W&I deals demonstrates that there is scope for sellers to reduce the basket level significantly if W&I insurance applies. In particular, 39% of non-W&I insurance deals had a basket of more than 1% of the purchase price as compared to 24% for W&I insurance deals. Most striking is the statistic that, where the basket is up to 0.5% of the purchase price, this is achieved in 50% of W&I deals compared with 24% for non-W&I deals. The statistics continue to show the advantage for sellers where W&I insurance applies.

Basket Thresholds for 2022

W&I deals + non-W&I deals



100% = all evaluated transactions in the respective category

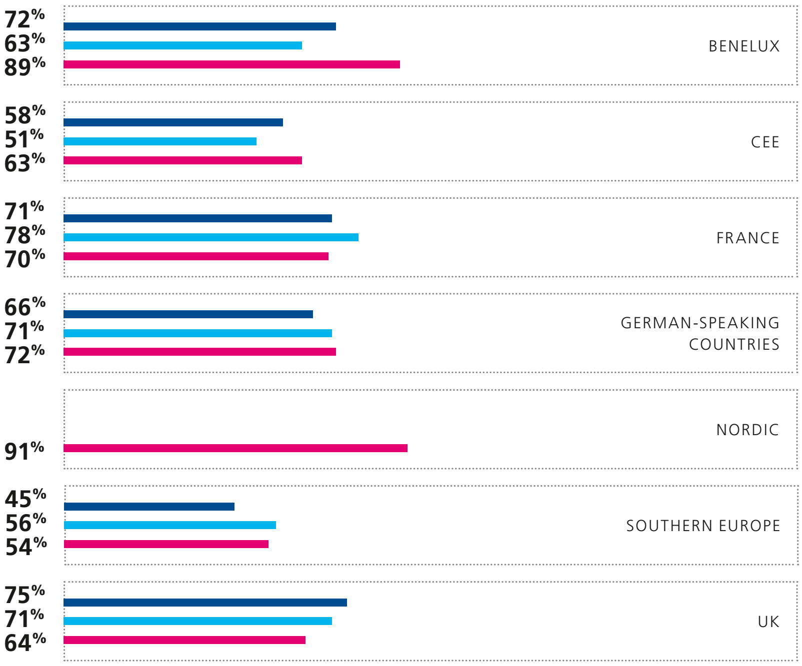
Basket levels reduce significantly if W&I insurance applies

Regional Differences

There was a wider application of baskets across European transactions in 2022. The Nordic and Benelux countries led the field with 91% and 89% application respectively, which represents a big increase for Benelux from 63% in 2021. France and the German-speaking countries remained at broadly the same levels, at 70% and 72% respectively. There was a big swing for UK transactions, with baskets applying only to 64% of its transactions, a big drop from the previous average of 75%. In our view this is linked to the increased use of W&I insurance cover.

Time Trend Europe

Basket application



● 2010–2021 ● 2021 ● 2022

100% = all evaluated transactions

No data for region Nordic before 2022 available

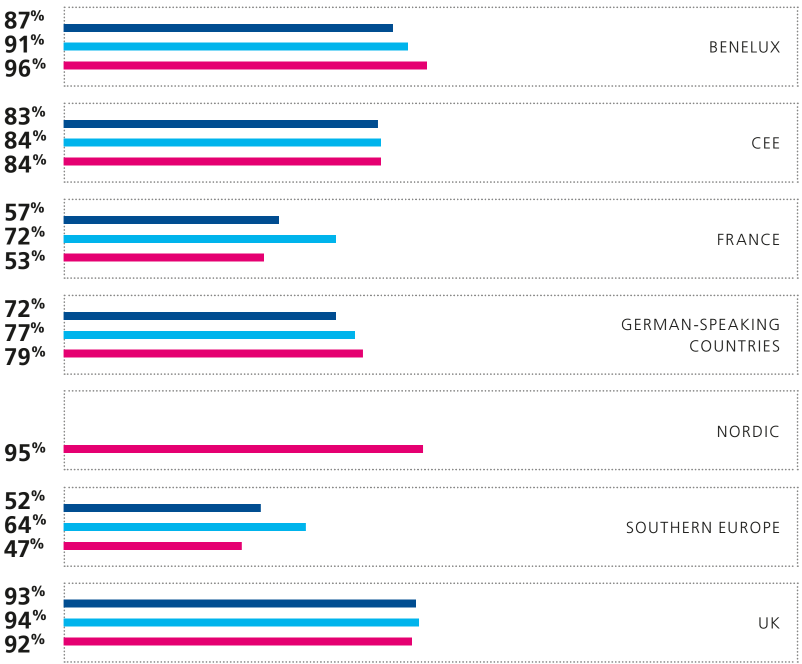
The variation in the application of 'first dollar' baskets across the various jurisdictions remains marked, with this applying in an extraordinary 96% and 95% of Benelux and Nordic transactions respectively, as compared with levels of 53% and 47% respectively in France and the Southern European countries.

'First dollar' recovery in Benelux

96% ↗

Time Trend Europe

First dollar

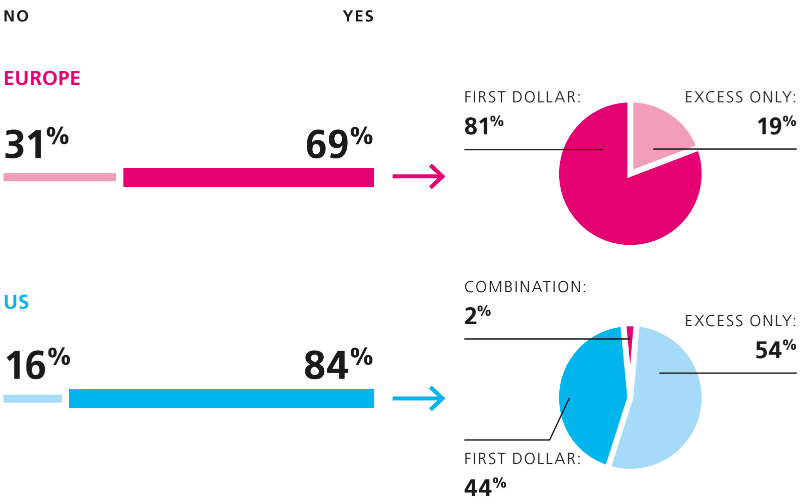


● 2010–2021 ● 2021 ● 2022

100% = all transactions with a basket

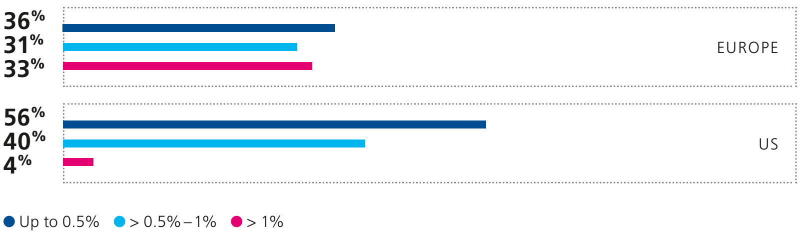
No data for region Nordic before 2022 available

Frequency of Baskets



100% = all evaluated transactions

Thresholds Europe/US



100% = all transactions with a basket clause

European/US Differences

We have previously noted that the US market applies a basket in nearly all transactions (84%). The US market uses 'excess only' baskets in 54% of transactions whereas such baskets do not apply in most of the European countries, with just 19% of deals covered. As indicated above there is a trend in France and the Southern European countries to apply an 'excess only' basket in a greater number of transactions. There is also a disparity in the size of the basket, with just 4% of US transactions applying a basket of more than 1% of the purchase price as compared with 33% for European transactions.

Liability caps

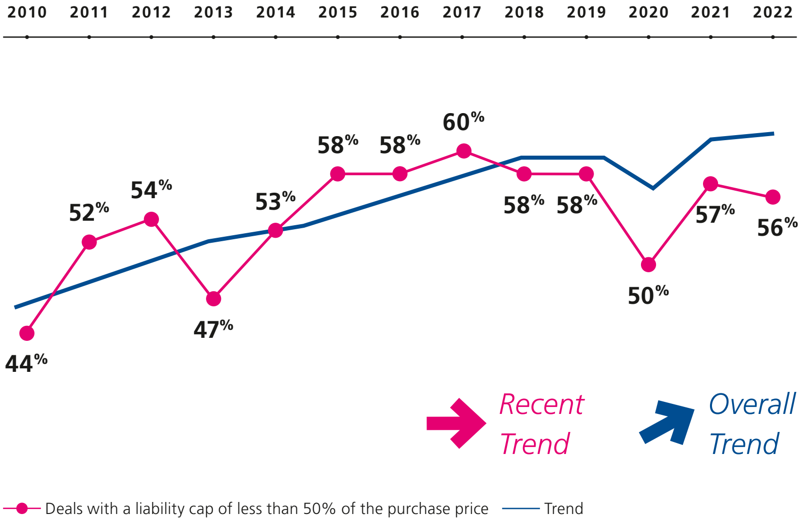
In the majority of M&A transactions it is accepted that the seller will cap its liability in respect of warranty claims. This capped amount is often simply the purchase price, so the buyer cannot recover from the seller any more than it has paid. However, there is often extensive debate as to the level of the liability cap, which level can vary significantly from deal to deal, particularly for large deals. For deals with full W&I insurance cover the liability cap is often a nominal amount, as the W&I insurer assumes the risk in respect of the warranties in place of the seller.

General Overview

In 2022 there was a continuation in the general trend that in the majority of deals the sellers' liability for warranty claims is capped at less than 50% of the purchase price. The proportion of deals with liability caps equal to the purchase price dropped slightly to 28% but those with a cap of less than 10% of the purchase price decreased significantly to 14% from 22% in 2021. The amounts of liability caps are also subject to significant variation depending on deal size. For example, 42% of large deals have a liability cap of less than 10% of the purchase price compared to 7% for small deals.

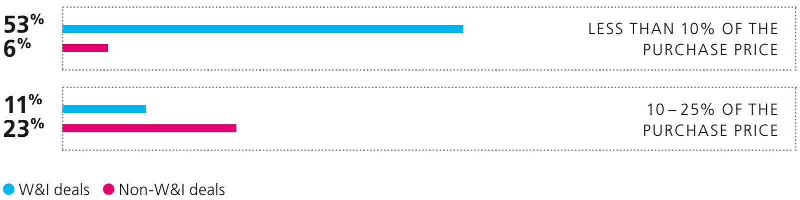
CMS Trend Index

Liability caps (less than 50% of purchase price)



Liability Caps for 2022

W&I deals + non-W&I deals



100% = all evaluated transactions in the respective category

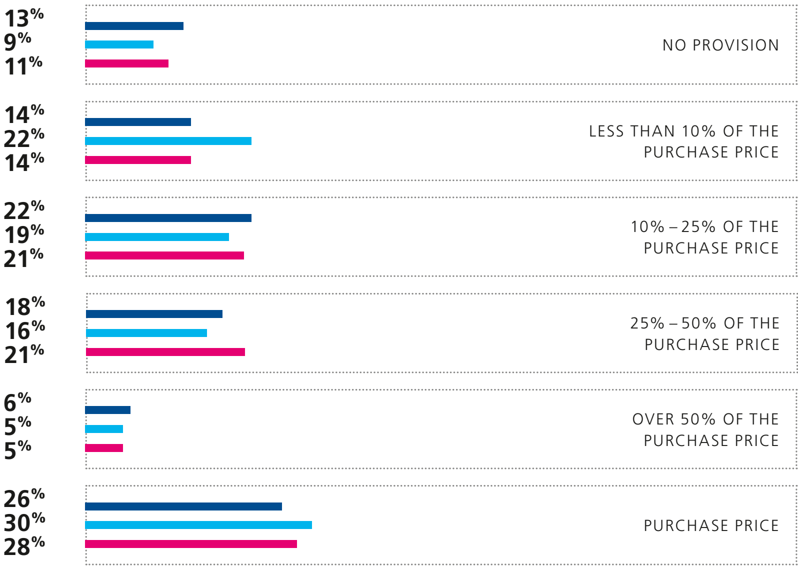
Liability cap less than 50% of purchase price

56%

The number of deals with liability caps of less than 50% of the purchase price has remained stable

This year's Study indicates a return to the historic rolling average in respect of deals with a liability cap of less than 10% of the purchase price (at 14%), which is a drop on the level seen in 2021. The proportion of deals with liability caps equal to 10–25% and 25–50% of the purchase price remained broadly constant at 21% in each case. The proportion of deals with a liability cap equal to the purchase price also remained broadly constant at 28%. A small minority of 11% of the transactions do not have a liability cap at all.

Amount of Liability Cap



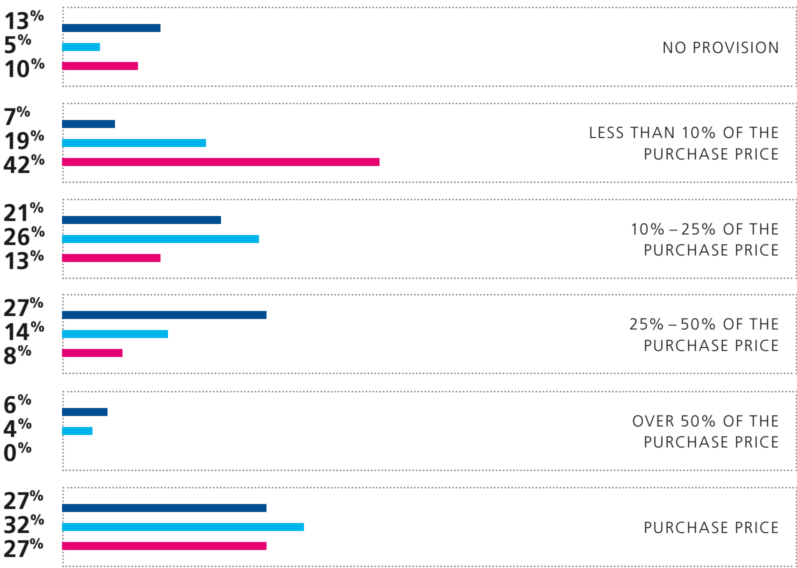
● 2010–2021 ● 2021 ● 2022
100% = all evaluated transactions

Analysis by Deal Size

The results of this year's Study indicate that liability caps for large deals are decreasing and fewer of these deals have caps of less than the purchase price. For 42% of large deals and 19% of medium sized deals the liability cap is less than 10% of the purchase price, whereas for small deals such a liability cap only applies in 7% of such deals. For small deals the purchase price or no cap at all is most likely to be the agreed position and applies in 40% of those deals.

For small deals the purchase price or no cap is most likely to be the agreed position

Amount of Liability Cap by Deal Size



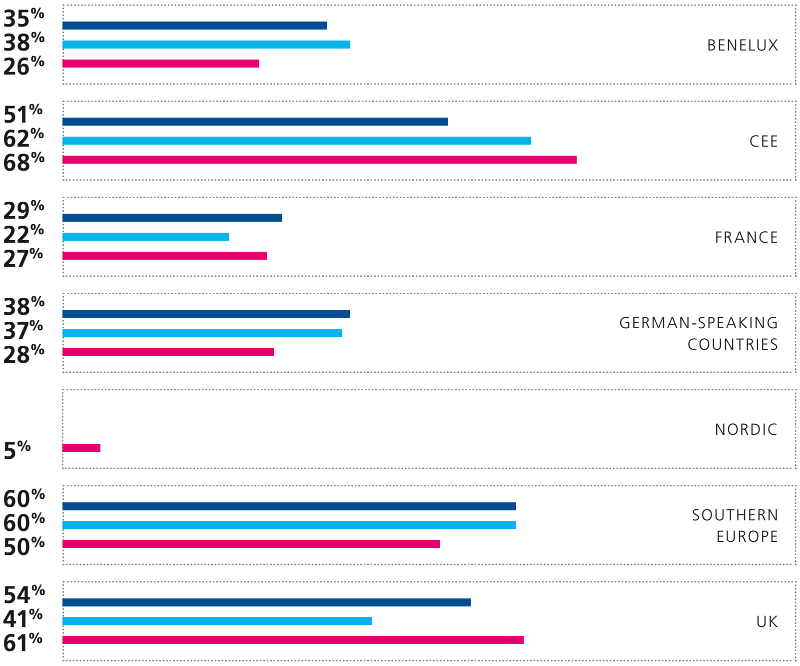
● < EUR 25m ● EUR 25m–100m ● > EUR 100m
100% = all evaluated transactions

Specific Issues

Regional Differences

The European average for deals with a liability cap of more than 50% was 44% of all deals in 2022, which is consistent with the historic rolling average. The most noticeable increase was seen in CEE, at 68%. There were significant drops for Benelux and the German-speaking countries to, respectively, 26% and 28% of deals with a liability cap of more than 50%, as compared with a large jump for the UK to 61%. As can be seen, market practice in this respect continues to vary significantly between European regions and countries.

Time Trend Europe Liability Caps of more than 50%

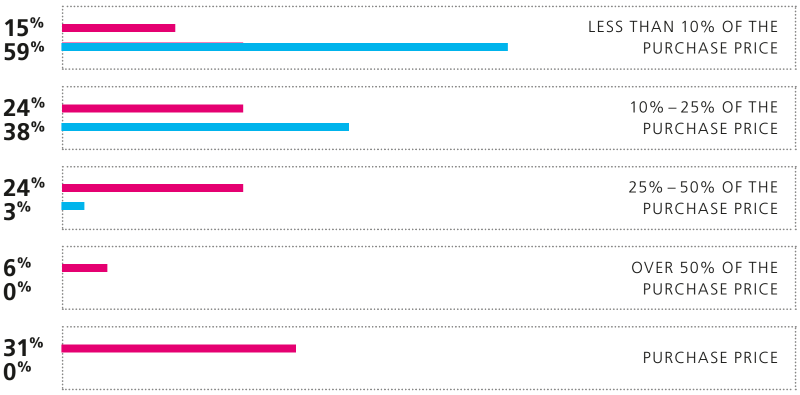


● 2010–2021 ● 2021 ● 2022
100% = all evaluated transactions
No data for region Nordic before 2022 available

European/US Differences

The US market has a more consistent and less varied range of liability caps in that the vast majority (97%) of deals there have a cap of 25% or less of the purchase price. Indeed 59% of US deals have a cap of less than 10% of the purchase price. In our European sample only 15% of deals in 2022 had a cap of less than 10% of the purchase price and most European deals (31%) had a liability cap equal to the purchase price, as compared with 0% of US deals.

Liability Caps



● Europe ● US
100% = all transactions with a general liability cap
US data refers to 'transaction value'

Sector Differences

As indicated above, 35% of all our European deals had caps of up to 25% of the purchase price and this average applied in most of the sectors covered. The exceptions were in the Infrastructure & Projects and Consumer Products sectors, in respect of which 75% and 51% had caps at this level and just 23% of deals in the Lifesciences & Healthcare sector had a liability cap at this level. The variations year on year in respect of particular sectors are often quite significant, so we continue to assume that deal size and geography, rather than sector, are the major determining factors in settling on an agreed level of liability cap.

Frequency of Liability Caps up to 25%

SECTOR	2010–2021	2021	2022
BANKING & FINANCE	29%	37%	44%
HOTELS & LEISURE	43%	57%	43%
ENERGY & CLIMATE CHANGE	27%	22%	27%
CONSUMER PRODUCTS	38%	41%	51%
TECHNOLOGY, MEDIA & COMMUNICATIONS	34%	34%	36%
INFRASTRUCTURE & PROJECTS	22%	50%	75%
LIFE SCIENCES & HEALTHCARE	37%	37%	23%
REAL ESTATE	50%	67%	26%
INDUSTRY	41%	36%	41%
BUSINESS (OTHER SERVICES)	33%	47%	43%
CMS AVERAGE	37%	41%	35%

100% = all evaluated transactions of the respective sector

Warranty & Indemnity insurance

Warranty & Indemnity (W&I) insurance has become established as a customary solution to situations where (i) there is no obvious or willing warrantor to stand behind the warranties (e.g. private equity sellers) or (ii) there is an insufficient amount of coverage provided by the warrantors.

General Overview

Our data indicates a levelling off in Europe in the overall use of W&I insurance in 2022 to 16%, reflective of an overall fall in M&A volumes and also, perhaps, that transaction values have been lower and to date W&I insurance has proved less cost effective at lower deal values. It will be interesting to track this point as there are new W&I insurers entering the European market, focusing on SME deals and offering lower minimum premiums.

W&I insurance usage

16% ↘

Time Trend W&I Insurance

100% = all evaluated transactions

The market this year

Brian Hendry, Head of Mergers & Acquisitions at W&I Insurance broker Paragon International Insurance notes that:

"On the basis that the M&A insurance market mirrors global M&A activity, 2022 started, as 2021 ended, with the completion of a swathe of transactions originally scheduled for Q4 2021 and a continuation of new transactions being submitted into the M&A market. The number of policies taken up and new enquiries continued at record levels through to May 2022 when there was a general slowdown, not only in volume but also in the time taken to complete transactions. Pricing for W&I insurance at the start of 2022 remained robust. However, as deal volumes dropped insurers had to compete harder to win business. Deal volumes remained low in the second half of 2022 (particularly in for mid-cap and large deal sizes) and new insurers entered the market resulting in fiercer competition and falling prices. We expect to see further softening in the markets until deal flows rise.

Increasingly the M&A insurance market can now be split into three sub categories. W&I for M&A continues, by a significant margin, to be the predominant product; however, there is now a well-established specialist tax insurance community and a growing contingent risk market. Other trends we are seeing are a move by insurers to focus on deal sizes with a split for SME, mid-market and large cap deals, plus the introduction of sector specific underwriters to add expertise in certain areas. Insurers have innovated substantially around secondaries and can now offer coverage that is commensurate with a vanilla M&A transaction especially with GP-led continuation vehicle transactions if they are structured correctly. Insurers continue to innovate around distressed and public to private transactions but W&I insurance is not yet commonplace for them."

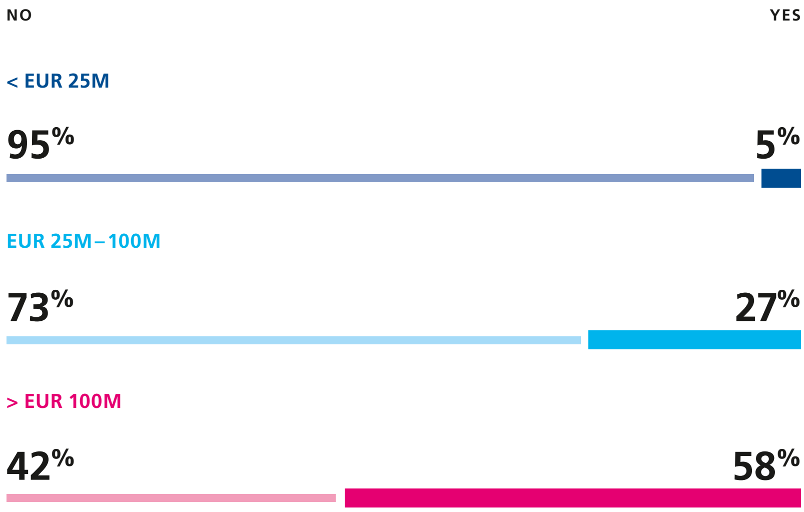
Analysis by Deal Size

2022 again showed the continuing trend that W&I insurance is adopted mainly on large deals. W&I insurance was purchased on 58% of deals with a purchase price exceeding EUR 100m, reflecting an 11% increase from 2021 figures. There was however a corresponding 6% fall in usage to 27% on medium sized deals, whilst W&I insurance remains relatively uncommon on small deals (at 5%), where perhaps cost of the premium is not justified.

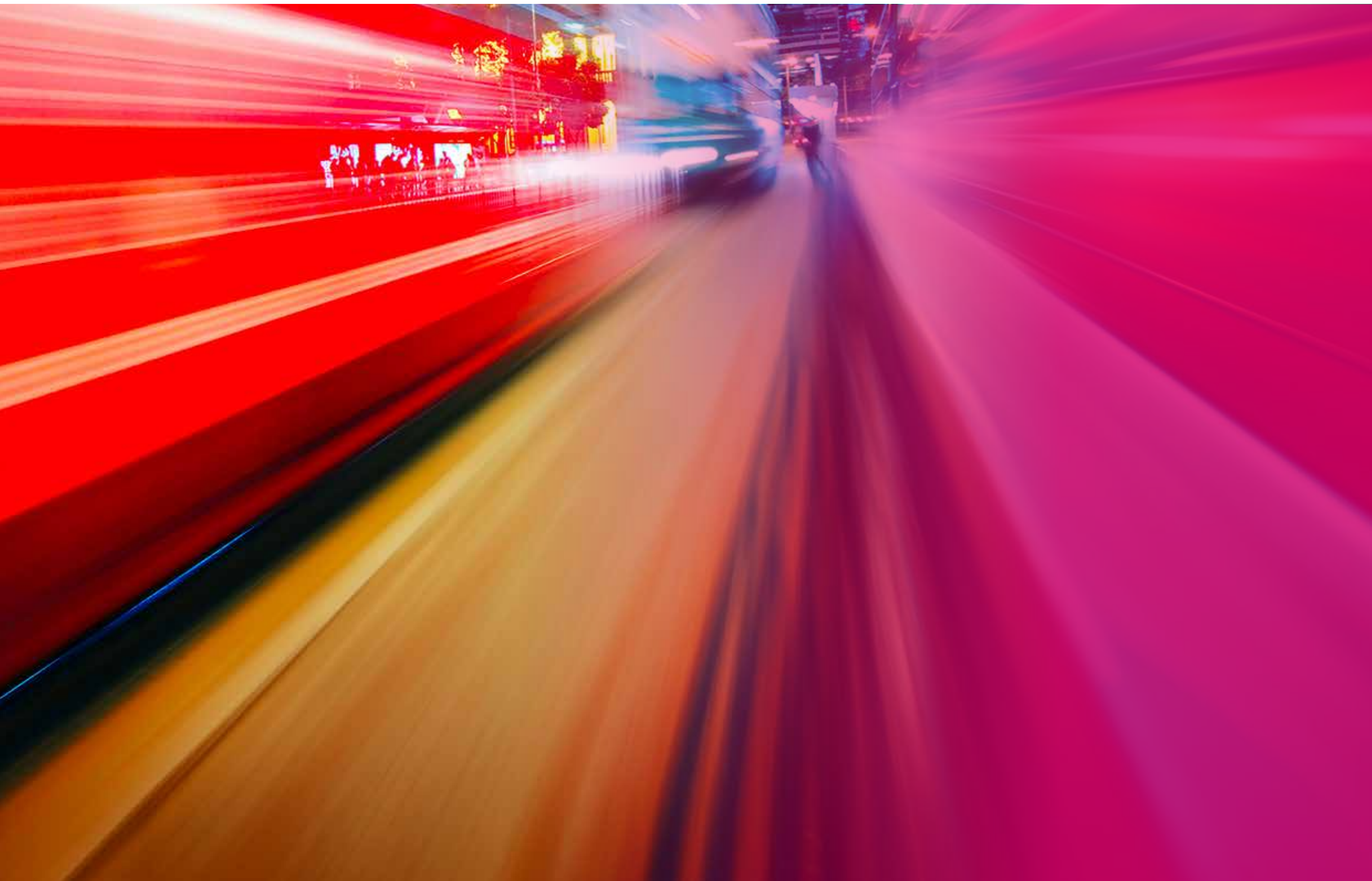
W&I insurance most used on deals with larger values and was purchased on 58% of deals with a purchase price exceeding EUR 100m

W&I Insurance 2022

By purchase price (Europe-wide)



100% = all evaluated transactions



Specific Issues

Sector Differences

Whilst there is a consistent trend when comparing W&I insurance use against deal size, the same cannot necessarily be said when analysing the sector data. This year sees Energy & Climate Change as the sector which has adopted W&I insurance the most. W&I Insurance remains, as expected, relatively common in the Real Estate, Hotels & Leisure and Technology, Media & Communications sectors. The data shows significant variances in other sectors but continues, according to CMS data, to be unpopular in the Infrastructure & Projects sectors.

Frequency of W&I Insurance

SECTOR	2011–2021	2021	2022
BANKING & FINANCE	3%	4%	6%
HOTELS & LEISURE	11%	9%	13%
ENERGY & CLIMATE CHANGE	12%	11%	23%
CONSUMER PRODUCTS	9%	4%	8%
TECHNOLOGY, MEDIA & COMMUNICATIONS	15%	20%	16%
INFRASTRUCTURE & PROJECTS	1%	1%	1%
LIFE SCIENCES & HEALTHCARE	6%	13%	8%
REAL ESTATE	23%	16%	15%
INDUSTRY	11%	11%	8%
BUSINESS (OTHER SERVICES)	9%	11%	3%
CMS AVERAGE	13%	19%	16%

100% = all evaluated transactions of the respective sector

Type of Policy and Costs

The data for 2022 appears to show a 6% increase in the number of sell-side policies being purchased albeit overall it remains the case that a W&I insurance policy will almost always be a buy-side policy (i.e. the buyer will be the insured party). This was the case on 91% of the deals that involved W&I insurance (consistent with the historic rolling average). Despite sell-side policies being rare, sellers still participate in the market and may actually agree to pay some or all of the premium payable for the relevant policy (e.g. by accepting a reduction in purchase price as the means of contribution), with the premium being paid by the seller on 8% of deals with W&I insurance. We also have data which indicates that the non-purchasing party bore a proportion of the W&I insurance costs 25% of the time and when doing so the proportion of the costs it agreed to bear typically were between 25–50%.

W&I Insurance

By purchase price

	SELL SIDE	BUY SIDE
2012–2021	9%	91%
2021	3%	97%
2022	9%	91%

100% = deals in which W&I insurance was actually used

Premium paid by

SELLER	BUYER
8%	92%

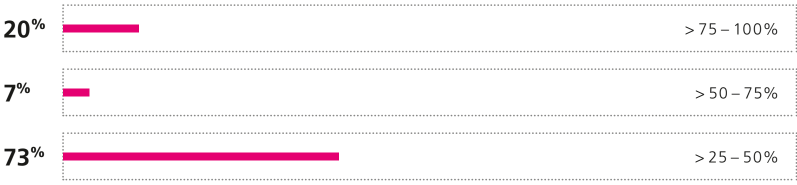
The non-purchasing party bore proportion of costs

YES	NO
25%	75%

100% = all evaluated transactions

W&I Insurance
Proportion of costs that the non-purchaser party bore

A W&I insurance policy is almost always a ‘buy-side’ policy but sellers may bear some costs



● 2022
100% = all evaluated transactions in the respective category

In terms of costs and a further insight on the market, David Layton, director of specialist W&I insurance broker HWF comments:

“Lower volumes of M&A generally have meant certain insurers have sought to broaden coverage, offer more competitive terms and expand into geographies/sectors with which they previously had limited experience – this has led to increased claims activity for local/specific matters they were unfamiliar with. Insurers who have been in the market for 5+ years have paid out hundreds of millions worth of claims in the last couple of years, with most of these claims stemming from mid to larger cap transactions on multi-jurisdiction assets. Those insurers with a greater historic book of business and claims experience are generally holding their line on pricing, sector/geography focus and asking more underwriting questions based on their claims experience, compared to the large number of newer entrants joining the market over the last two years, who are focused on the mid to lower end of the market and offering lower premium levels and lighter touch underwriting.”

Level of coverage

For the first time we report on the level of cover purchased via W&I insurance. Our data indicates that typically the insured seeks insurance cover over 30% of the deal value almost 40% of the time and between 10-30% of deal value 44% of the time. It will be interesting to measure this over time and compare against the experiences of W&I insurance brokers.

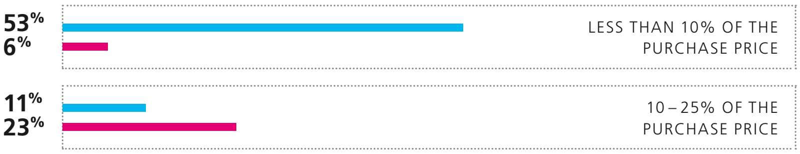
W&I Insurance
Level of coverage

● 2022
100% = all evaluated transactions

Liability Caps

Deals with W&I insurance are more likely to see the seller being able to agree a lower liability cap in its negotiation with the buyer. This may be a nominal amount with the buyer able then to purchase a W&I insurance policy either to top up its warranty coverage or, as is common, its sole recourse. In 2022, 53% of deals (down 10%) involving W&I insurance had liability caps that were less than 10% of the purchase price compared to only 6% of non-W&I insured deals.

Liability Caps for 2022
W&I deals + non-W&I deals

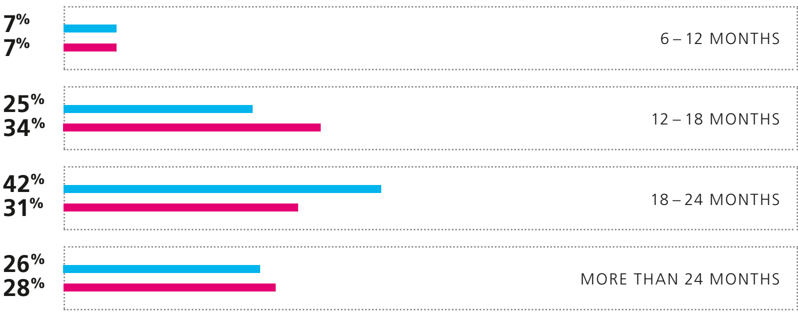


● W&I deals ● Non-W&I deals
100% = all evaluated transactions in the respective category

Limitation Periods

Usually the length of any W&I insurance policy period will match the equivalent time limitation period for bringing warranty claims in the purchase agreement. However, it is possible to agree with the underwriter to purchase a different (usually longer) period. The data for 2022 (similar to 2020 and 2021) shows that a time limitation period of between 18 and 24 months is more common on W&I insurance deals than on those deals without insurance. There was a continued increase in 2022 in longer limitation periods (more than 24 months) featuring on W&I insured deals (up 42% to 26%).

Limitation Period for Warranty Claims for 2022
W&I deals + non-W&I deals

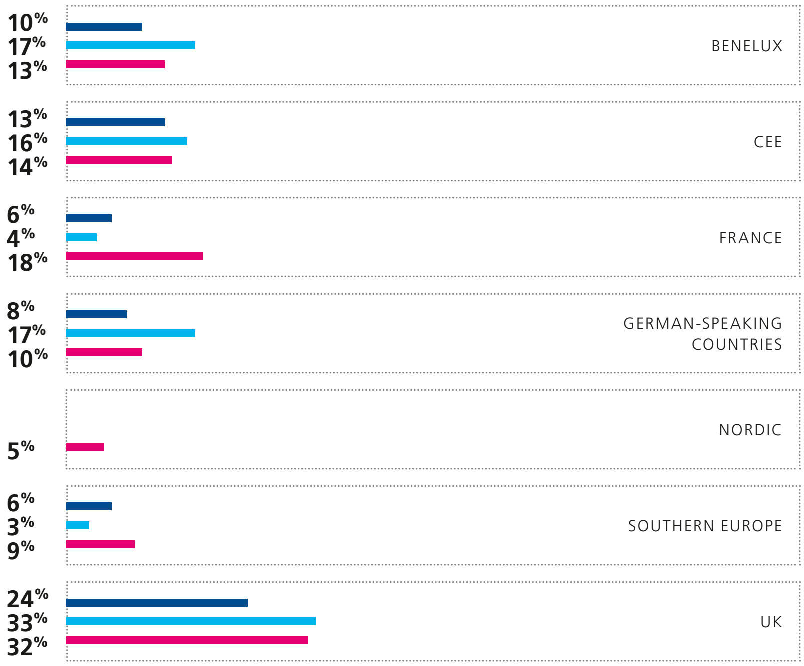


● W&I deals ● Non-W&I deals
100% = all evaluated transactions in the respective category

Regional Differences

Regional disparity in the popularity of W&I insurance is demonstrated again in 2022. The UK remains the market most comfortable with W&I insurance albeit the frequency of use levelled off at 32% of deals (8% higher than the historic rolling average). France and the Southern European countries saw a rise in popularity, whilst there were falls in the use of W&I insurance in Benelux and the German-speaking countries. However, nowhere was W&I insurance more popular than in the US, as the SRS Report indicates that RWI insurance (as it is known in the US) was purchased on 44% of deals.

Time Trend Europe



● 2010–2021 ● 2021 ● 2022
100% = all evaluated transactions
No data for region Nordic before 2022 available

Adrian Furlonge, director of HWF, commented on the W&I insurance market in different European territories:

"European expansion in the transactional risk insurance market has continued through 2022: the majority of firms opening offices or growing existing offices in the hubs of Germany, Nordics and Spain. However, with the volumes of dry powder being deployed across the Southern European region we have also seen a real push into France and Italy as clients who had previously been underserviced are now using the product more regularly."

Limitation period for warranty claims

Sellers and buyers typically agree to reduce the statutory limitation period for warranty claims under a sale and purchase agreement by choosing shorter limitation periods than that which would apply under the relevant statute. This is favourable to sellers because buyers have less time to bring claims. Since 2019 and continuing in 2022, the former 'seller-friendly' trend of shorter periods has shifted towards longer periods.

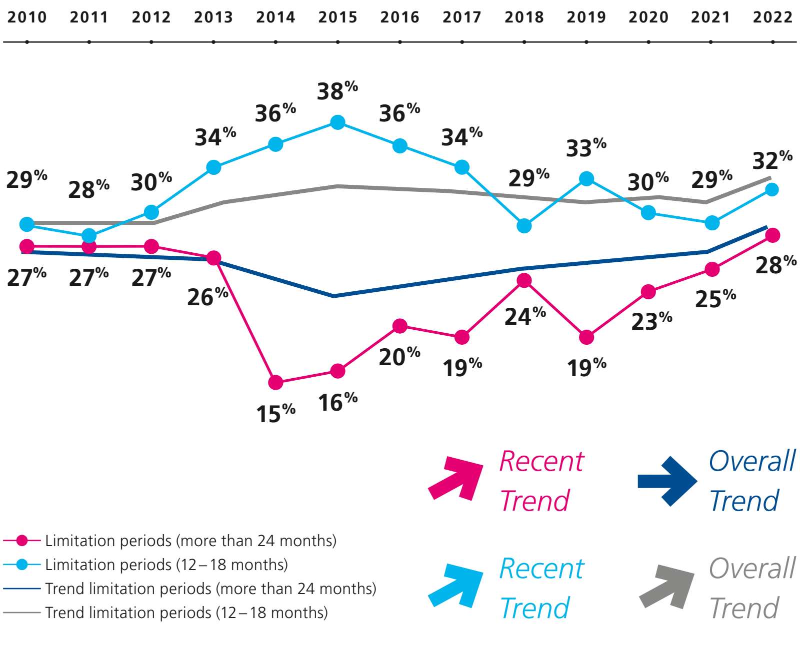
General Overview

Limitation periods tended to be longer in 2022 and those of more than 24 months have now exceeded the peaks reported in the earlier years of the Study (at 28% of deals in 2022). The trend for longer limitation periods has been experienced since the dips to 15% and 16% in 2014 and 2015. This is in line with the country comparison, which shows a steady increase in the number of deals with limitation periods of more than 24 months.

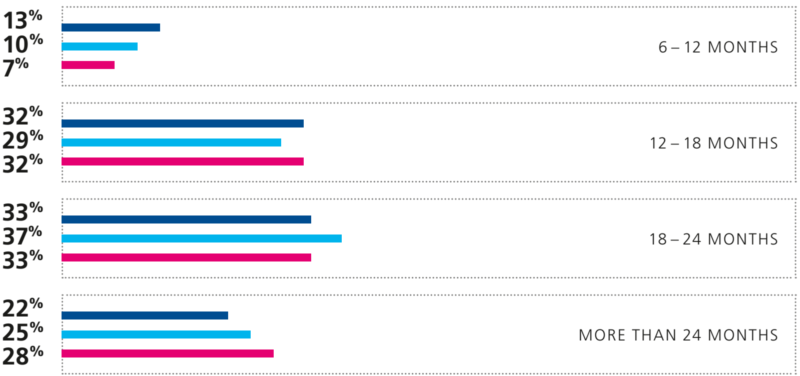
Limitation periods tend to be longer

In line with the above, the number of deals with a limitation period of 12 – 18 months also increased. The use of short limitation periods, in contrast, decreased. The use of the shortest periods (from six to 12 months) fell by 3% (from 10% in 2021 to 7% in 2022). After a small decrease in the limitation period of 12 – 18 months (from 33% in 2019 to 29% in 2021), the trend is returning to longer limitation periods.

CMS Trend Index



Time Trend



● 2010 – 2021 ● 2021 ● 2022
100% = all evaluated transactions

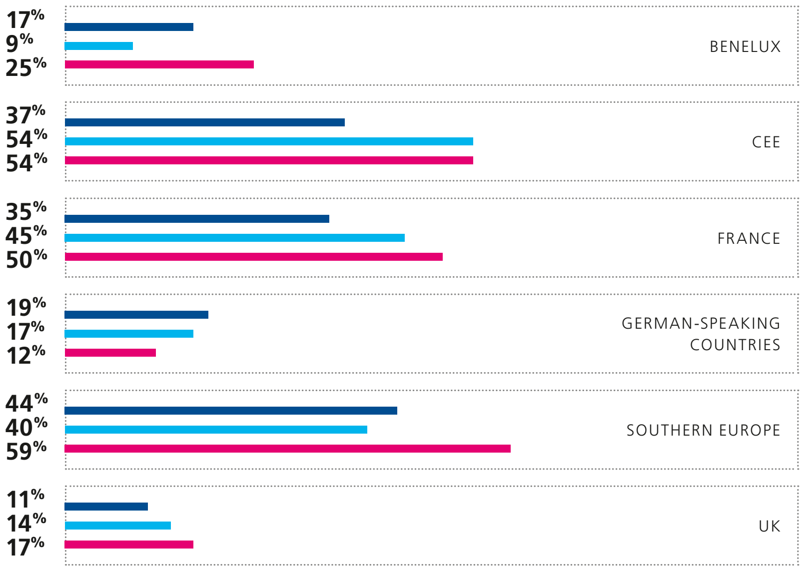
Specific Issues

Regional Differences

In almost all regions we saw a decrease in deals with shorter limitation periods (under 12 months). By contrast all regions (other than the German-speaking countries) saw increases in deals with limitation periods of more than 24 months. In particular France, CEE and the Southern European countries appear particularly in favour of long limitation periods.

Time Trend Europe

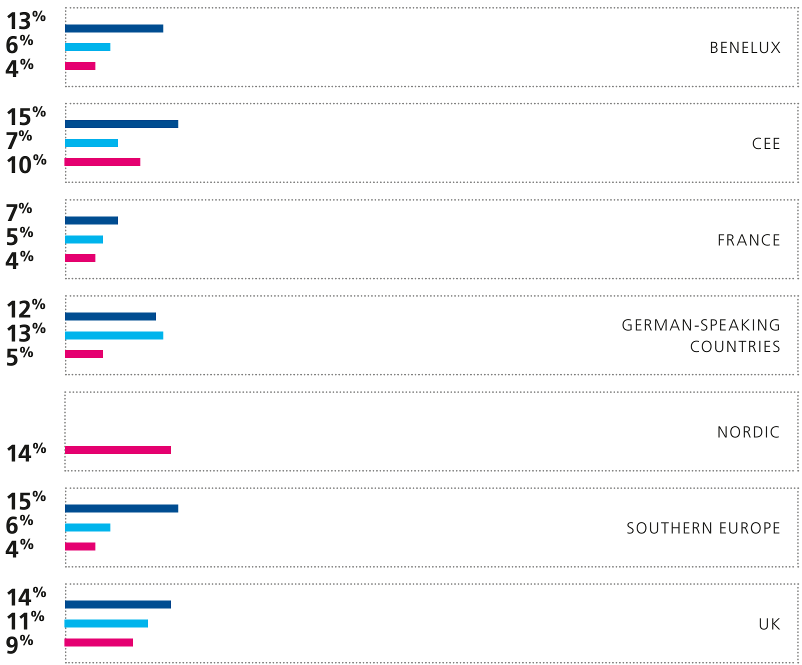
More than 24 months



● 2010–2021 ● 2021 ● 2022
100% = all evaluated transactions

Time Trend Europe

Six to 12 months



● 2010–2021 ● 2021 ● 2022
100% = all evaluated transactions
No data for region Nordic before 2022 available

Sector Differences

In 2022 longer limitation periods (i.e. those exceeding 24 months) were most likely in the Hotels & Leisure and the Banking & Finance sectors (59% and 40% of deals recorded in those sectors respectively). These sectors reflect the biggest rise in longer limitation periods compared to 2021 (for comparison: 24% and 27% respectively). The sectors with the longest limitation periods in 2021, Energy & Climate Change and Lifesciences & Healthcare (39% and 36% of deals recorded in those sectors) declined to 32% and 25% respectively. However, in the Lifesciences & Healthcare sector 52% of deals still have limitation periods between 18 to 24 months (compared to the average of 34% during 2010–2021).

Limitation Periods (more than 24 months)

SECTOR	2010–2021	2021	2022
BANKING & FINANCE	18%	27%	40%
HOTELS & LEISURE	26%	24%	59%
ENERGY & CLIMATE CHANGE	23%	39%	32%
CONSUMER PRODUCTS	25%	24%	16%
TECHNOLOGY, MEDIA & COMMUNICATIONS	18%	19%	23%
INFRASTRUCTURE & PROJECTS	14%	0%	0%
LIFE SCIENCES & HEALTHCARE	25%	36%	25%
REAL ESTATE	25%	14%	15%
INDUSTRY	20%	31%	26%
BUSINESS (OTHER SERVICES)	24%	13%	44%
CMS AVERAGE	**22%**	**25%**	**28%**

100% = all evaluated transactions of the respective sector

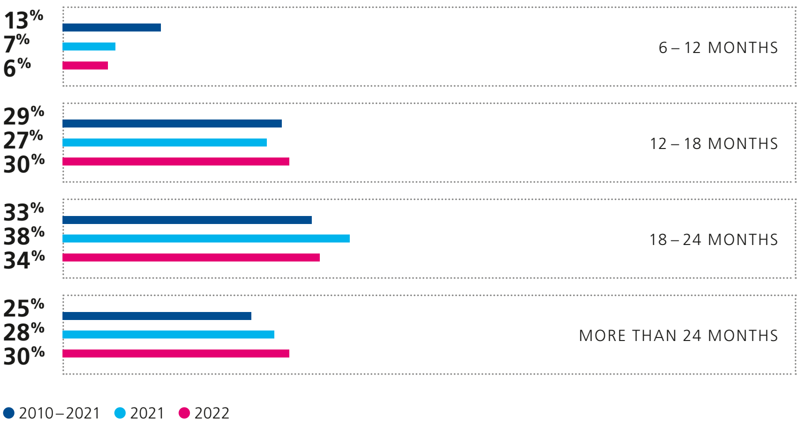
Longest limitation periods in the sectors for Hotels & Leisure and Banking & Finance

Analysis by Deal Size

In contrast to previous years, deal size has not been a main factor in relation to the duration of limitation periods. Nearly one-third of all deals contained limitation periods between 18 and 24 months irrespective of deal size. For all deal sizes the duration of limitation periods of more than 24 months increased and, in turn, the duration of limitation periods below 12 months decreased (except for medium sized deals, which was unchanged at 8%).

Time Trend

By purchase price less than EUR 25m



100% = all evaluated transactions

In 2021 limitation periods were quite favourable to sellers in large deals, as one quarter of deals contained short limitation periods (six to 12 months). However, in 2022, only 9% of large deals had such a short limitation period (a drop of 15% and below the historic rolling average), becoming more consistent with the equivalent data for small and medium sized deals. In contrast, the number of large deals with limitation periods between 12 to 18 months almost doubled (from 21% in 2021 to 40% in 2022).

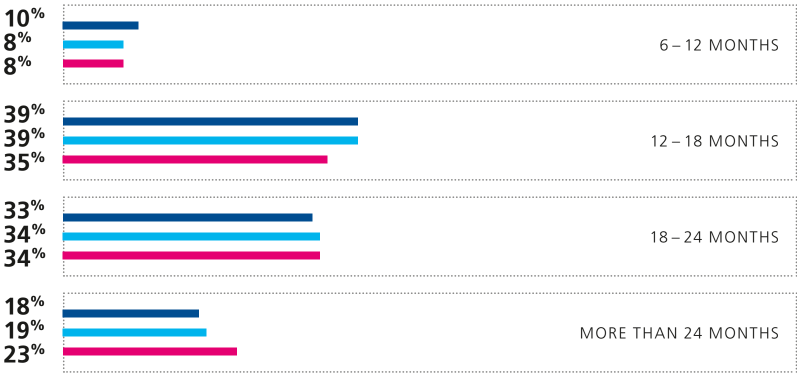
Limitation periods 12 – 18 months increased

40%

Limitation periods of more than 24 months increased irrespective of deal size

Time Trend

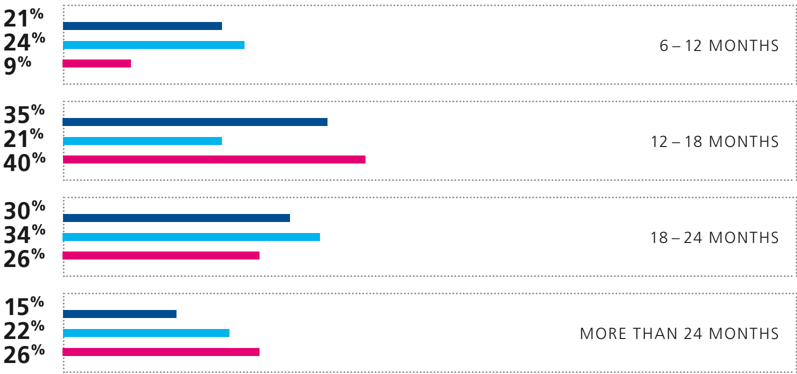
By purchase price EUR 25m – 100m



● 2010 – 2021 ● 2021 ● 2022
100% = all evaluated transactions

Time Trend

By purchase price more than EUR 100m



● 2010 – 2021 ● 2021 ● 2022
100% = all evaluated transactions

Security for warranty claims

M&A deals may include a form of security for warranty claims where the buyer is concerned about the seller’s ability to satisfy any liability to meet a claim. The type and the value of the security depends on many factors, such as the likelihood of a claim occurring, the strength of the seller's covenant and the cost, administration and time needed to obtain a particular type of security.

General Overview

28% of deals contained security for warranty claims in 2022, just like in 2021. The "seller-friendly" trend in recent years continued to permit sellers to avoid having to provide security, a trend which may have been encouraged by the greater use of W&I insurance (16% in 2022 compared to the historic rolling average of 11%), meaning that buyers require less direct recourse to the seller. The use of escrow accounts has further decreased sharply to 38% of deals (compared with the average of 56% for the period 2010–2021). Where the parties agreed to use security for warranty claims, we noted a "buyer-friendly" trend regarding the specific forms of security used, e.g. purchase price retention.

Time Trend

	NO	YES
2010–2021	69%	31%
2021	72%	28%
2022	72%	28%

100% = all evaluated transactions

Sellers able to avoid providing security

Frequency of security

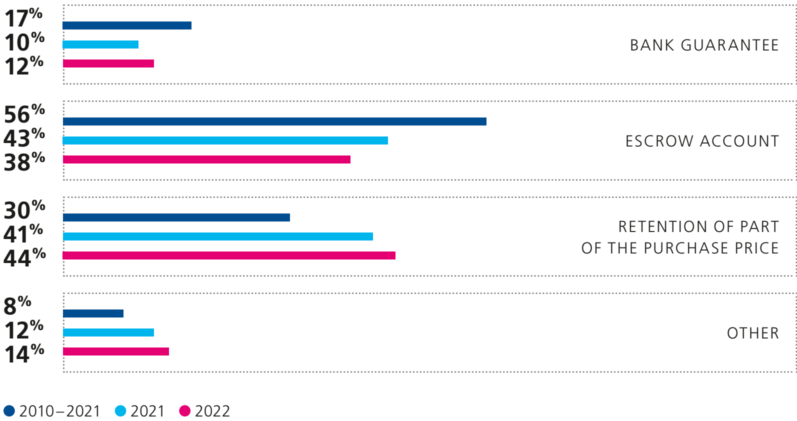
28% →

Specific Issues

Type of Security

In the past, granting security for warranty claims by means of an escrow account was the most popular form of security (reduced to 38% in 2022). However, this has shifted towards a more "buyer-friendly" type of security of a purchase price retention or holdback. A retention was used in 44% of the deals with security, which marks a small increase compared to 2021 (41%) and a big increase compared to the historic rolling average (2010 to 2021: 30%). Similarly, the use of escrows dropped to 38% as compared to 56% in the historic rolling average and 43% in 2021. The use of bank guarantees as a form of security increased modestly but remains uncommon.

Time Trend



100% = transactions with safeguarding mechanism – more than one type of security possible

The use of escrow accounts as security has dropped significantly

Use of escrow accounts

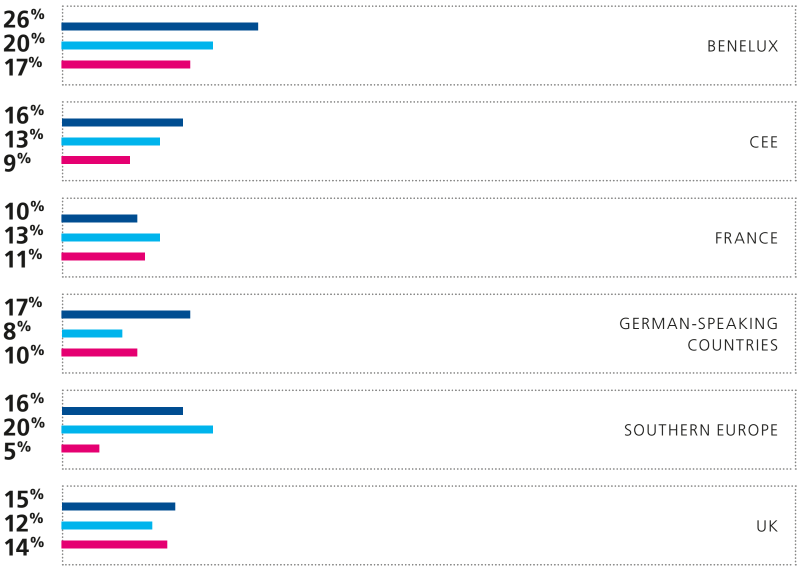
38% ↘

Regional Differences

The use of escrow accounts used to be especially popular in Southern European countries and Benelux, applying to 20% of deals in 2021, but this dropped markedly in 2022, particularly in the Southern European countries. Whilst the use of escrow accounts increased slightly in the UK and the German-speaking countries, we recorded the opposite trend in France and CEE in 2022.

Time Trend Europe

Use of escrow accounts



● 2010–2021 ● 2021 ● 2022
100% = all evaluated transactions

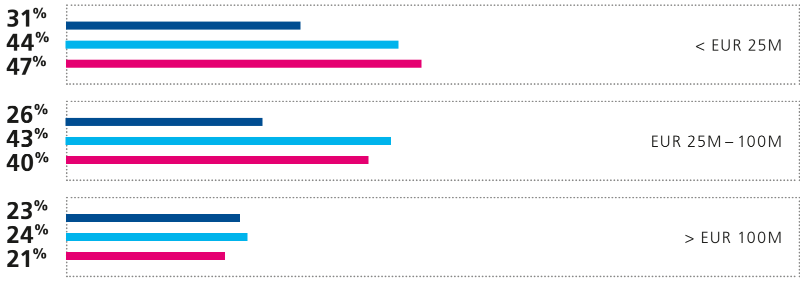
Analysis by Deal Size

The use of a retention/holdback on small and medium sized deals (47%) is more common given that, in a similar way to W&I insurance, the lower deal value does not justify the costs, complexity, administration etc required to establish an escrow account. The opposite is the case on large deals, where escrows are used in 57% of deals involving a form of security – parties likely requiring the independent security an escrow provider can provide.

Retention of a part of the purchase price is more popular than the use of escrow accounts; especially for deals in the size range up to EUR 25m

Retention of part of the purchase price

By purchase price 2010 – 2022

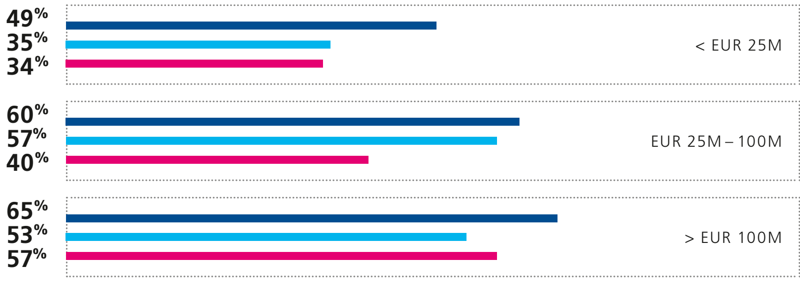


● 2010 – 2021 ● 2021 ● 2022

100% = transactions with safeguarding mechanism – more than one type of security possible

Escrow accounts

By purchase price 2010 – 2022



● 2010 – 2021 ● 2021 ● 2022

100% = transactions with safeguarding mechanism – more than one type of security possible

MAC clause

Material adverse change clauses (MAC clauses) allocate the risk of fundamental changes occurring between signing and closing. MAC clauses entitle the buyer to terminate the agreement if a specific event materialises before closing. Such events are expressly defined in the contract and are often subject to extensive and detailed negotiations. The seller will usually try to exclude specific unavoidable events from triggering the MAC clause so that the risk of any fundamental change is borne by the buyer.

General Overview

In 2022, MAC clauses were only used in 13% of the deals. This is a slight decrease both when compared with 2021 (16%) and with the historic rolling average (15%). This may indicate that sellers have been more successful in resisting MAC clauses because of their strong commercial position. In last year's Study, it was suspected that the slight increase might have been related to the economic environment resulting from the Covid-19 pandemic. In addition, the invasion of Ukraine, inflation and supply chain bottlenecks were expected to intensify this development in 2022. To our surprise, however, the opposite appears to be the case.

Time Trend

MAC CLAUSES

100% = all evaluated transactions

MAC clause ratio 2022

13%

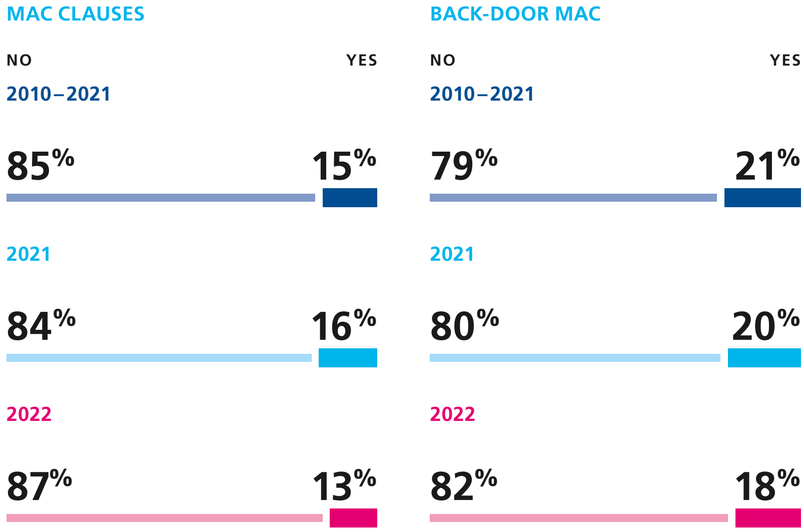
There are often carve-outs from a MAC clause, although it remains challenging for buyers to negotiate general carve-outs. Whilst the exemption based on sector-specific economic development has slightly lost significance in 2022 compared to previous years (from 19% in 2021 to 17% in 2022), exemptions in the event of force majeure have increased by 8% to 30%, and exemptions based on "overall economic development" increased by 4% to 30%.

Exemptions from Material Adverse Change

100% = all transactions including a MAC clause – more than one exemption possible

The frequency of Back-Door-MAC clauses in a transaction (i.e. a right of the buyer to rescind or terminate the SPA in the event that warranties given as of signing are not true and accurate after signing) has decreased a little in 2022, with 18% of deals including such clauses, in comparison with 20% in 2021 and the historic rolling average of 21% for 2010 to 2021.

Back-Door MAC 2010–2022



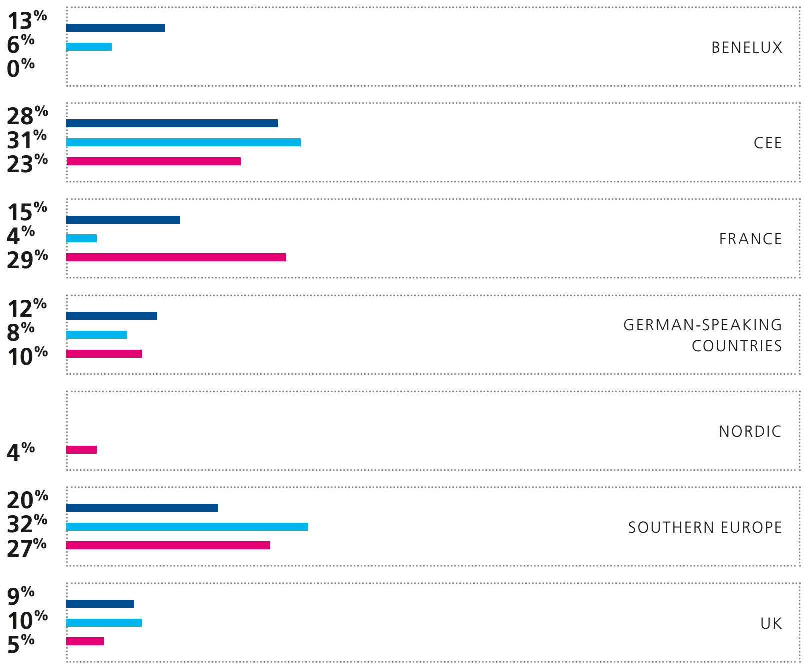
Specific Issues

Regional Differences

There continue to be stark regional inconsistencies in the use of MAC clauses. Compared to 2021, MAC clause usage in 2022 decreased notably in Benelux (from 6% to 0%), CEE (from 31% to 23%), Southern European countries (from 32% to 27%) and the UK (from 10% to 5%). MAC clause usage remained nearly stable in German-speaking countries (a slight increase from 8% to 10%). MAC clauses were used in almost one third of all 2022 deals in France (29%), which indicates that MAC clauses have been used twice as often compared to the historic rolling average (from 2010–2021: 15%).

While use of MAC clauses is declining in many countries, their use in France increased significantly

Time Trend Europe



● 2010–2021 ● 2021 ● 2022
100% = all evaluated transactions
No data for region Nordic before 2022 available

Sector Differences

In 2022, MAC clauses were most frequently used in the Energy & Climate Change (19%) and the Industry sector (18%). In both sectors, slightly more MAC clauses were seen than compared with the historic rolling average (15%). The frequency of MAC clauses dropped significantly compared to the historic rolling average trend in sectors like Banking & Finance (6% to 19%), Real Estate (9% to 15%) and Technology, Media and Communications (6% to 13%).

Frequency of MAC Clauses

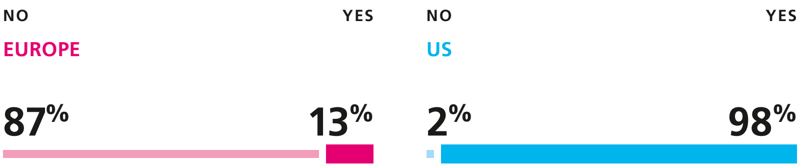
SECTOR	2010–2021	2021	2022
BANKING & FINANCE	19%	10%	6%
HOTELS & LEISURE	14%	6%	11%
ENERGY & CLIMATE CHANGE	15%	20%	19%
CONSUMER PRODUCTS	13%	13%	14%
TECHNOLOGY, MEDIA & COMMUNICATIONS	13%	18%	6%
INFRASTRUCTURE & PROJECTS	10%	13%	0%
LIFE SCIENCES & HEALTHCARE	18%	25%	14%
REAL ESTATE	15%	13%	9%
INDUSTRY	15%	14%	18%
BUSINESS (OTHER SERVICES)	13%	11%	16%
CMS AVERAGE	15%	16%	13%

100% = all evaluated transactions of the respective sector

European/US Differences

In contrast to Europe, where only 13% of deals included MAC clauses in 2022, MAC clauses applied in 98% of US deals according to the most recent SRS Report. This remarkable disparity, which was further extended (16% in 2021 compared to 13% in 2022) is, on the one hand, explicable by sellers' higher success in demanding deal certainty on controlled auctions in Europe and, on the other hand, by the greater number of transactions that sign and close simultaneously in certain European jurisdictions.

MAC Clauses Europe/US 2022



100% = all evaluated transactions

Disparity between Europe (13%) and the US (98%) increases

MAC clause frequency US

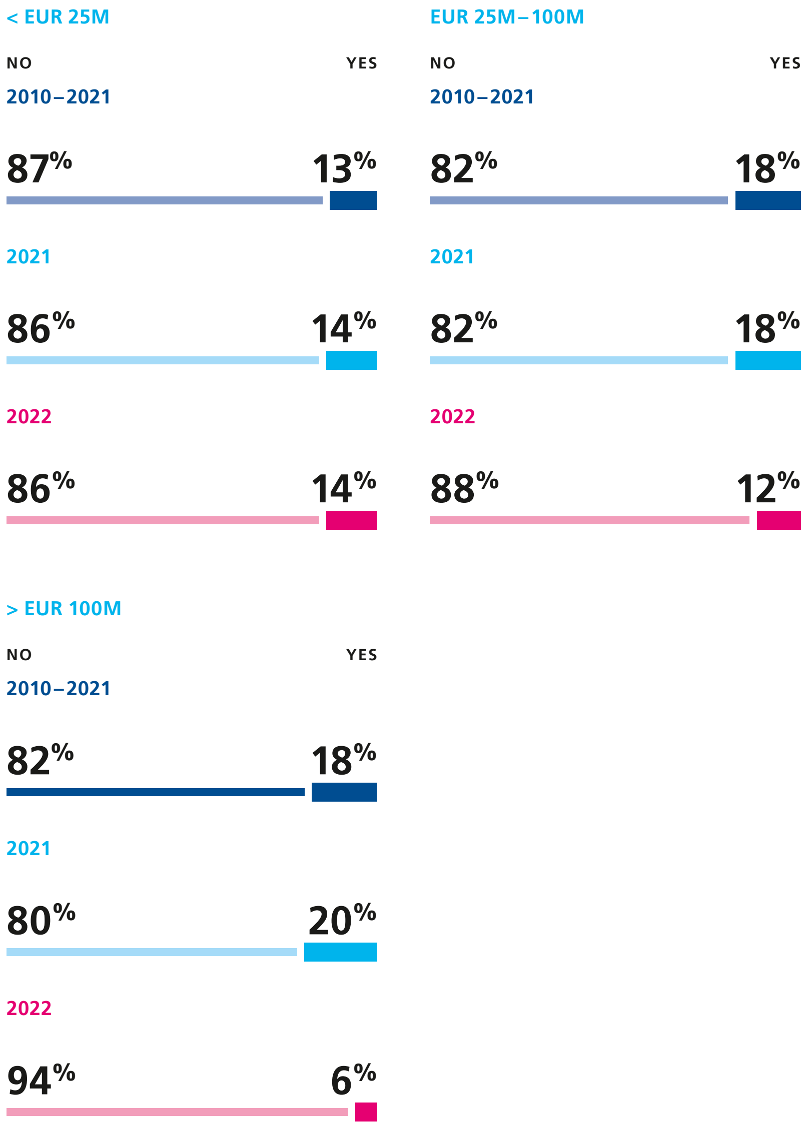
98%

Analysis by Deal Size

The bigger the deal, the less often a MAC clause was used in 2022. A MAC clause was used only in 6% of large deals. This is a sharp decline from 20% in 2021, and the historic rolling average of 18%, especially considering that there was an increase from 13% in 2020 to 20% in 2021. Contrary to what was assumed in 2021, the sudden drop of MAC clause usage in large deals in 2020 was not a unique occurrence, but rather indicative of less frequent use overall. The same trend can be seen for medium sized deals, where MAC clauses were applied in 12% of such deals.

MAC clause usage becomes significantly less common in large deals

MAC Clauses 2010–2022
By purchase price



100% = all evaluated transactions

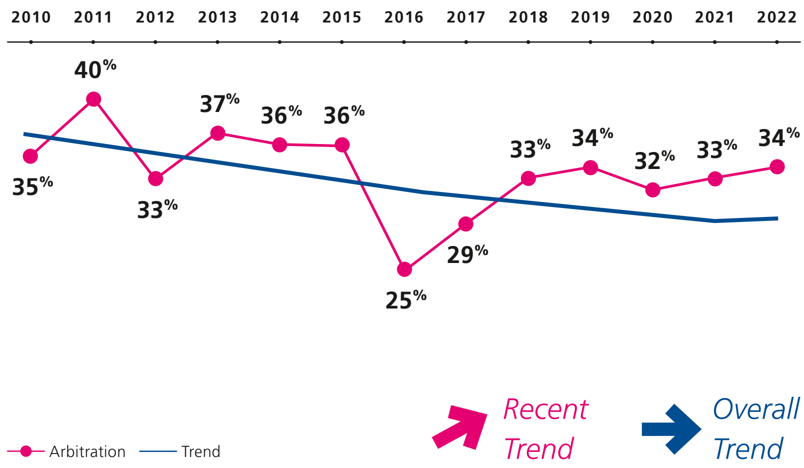
Arbitration

The effect of an arbitration clause is to require all disputes arising out of a deal to be decided before a private tribunal instead of a public court (litigation). Reasons for agreeing on arbitration include the desire to avoid courts in jurisdictions where proceedings are time-consuming and the outcome is highly unpredictable, as well as a wish to avoid a public process. There are perceived downsides, such as the relatively high costs of arbitration and the concerns that potential increases in efficiency are not actually achieved in practice. However, since in some jurisdictions it may be easier to enforce arbitral awards than foreign judgments, the need to obtain an award that can be enforced in multiple jurisdictions is probably the strongest driving force for choosing arbitration.

General Overview

In 2022, arbitration clauses were used as the dispute resolution mechanism in 34% of deals. This reflects another modest increase (1% rises for the last two years of the Study) and is up 9% since a low of 25% in 2016. The current popularity of arbitration as a dispute resolution mechanism is consistent with its long-term popularity between 2010 and 2021, where the use of arbitration averaged 33%. The overall trend shows that arbitration is less popular in certain regions (UK, France and Benelux) than others (CEE, German-speaking and Southern European countries).

CMS Trend Index



Arbitration clause ratio 2022

34%

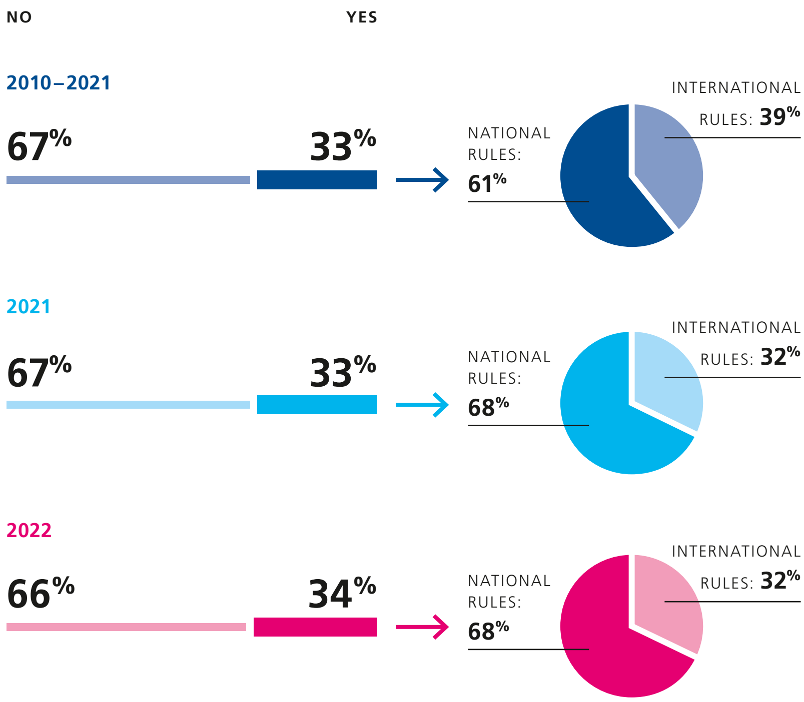
In 2022, the use of national rules to govern arbitration (68%) continued to be more popular than the use of international rules when compared with the historic rolling average of 61% (2010–2021).

National rules arbitration clauses remain popular

National rules

68% ➜

Time Trend



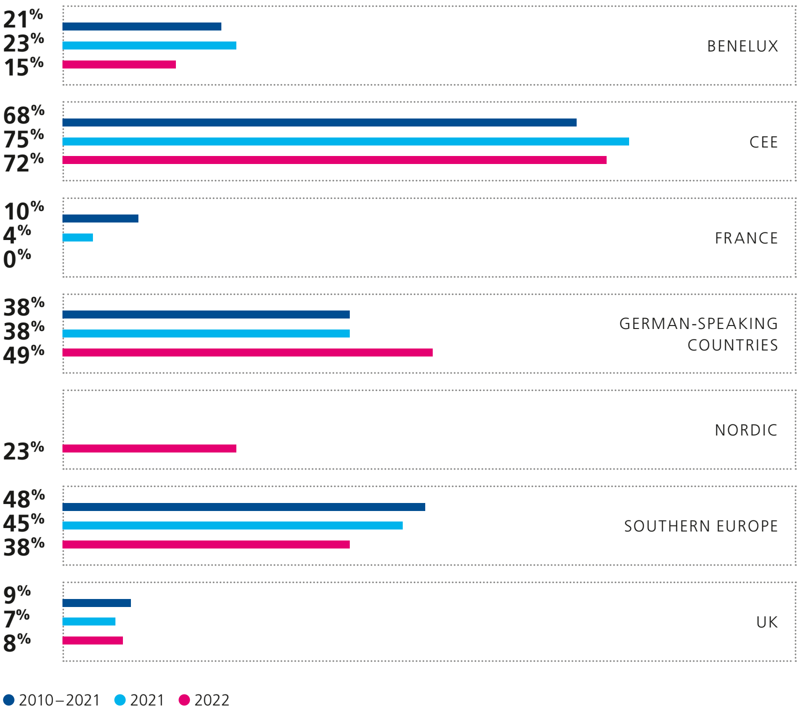
100% = all evaluated transactions

Specific Issues

Regional Differences

In 2022, arbitration clauses remained relatively uncommon in the UK at 8% and were not used at all in France (10% below the rolling historic average). Benelux experienced an 8% decline (2022: 15%, 2021: 23%, 2010 to 2021: 21%). In fact, a slight decrease in the use of arbitration clauses was seen in almost all countries (e.g. CEE: from 75% in 2021 to 72% in 2022; Southern European countries: from 45% in 2021 to 38% in 2022), although the utilisation rate in CEE is still extremely high compared to other countries. There was a significant increase in the use of arbitration clauses only in German-speaking countries. Arbitration clauses were used in 11% more deals there than in 2021 (from 38% in 2021 to 49% in 2022). This also exceeds the average percentage of 38% by 11%, so arbitration as a dispute resolution mechanism is getting even more popular in the German-speaking countries.

Time Trend Europe



100% = all evaluated transactions
No data for region Nordic before 2022 available

Arbitration clauses in German-speaking countries

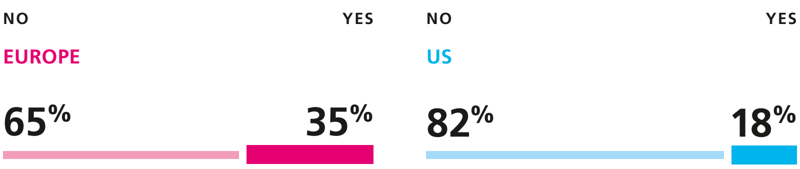
49%

Arbitration clauses used in CEE in three out of four deals and there is a significant increase in German-speaking countries

European/US Differences

Compared to the US (18%), the use of arbitration clauses is much more popular in Europe (35%).

Arbitration Clauses Europe/US



100% = all evaluated transactions

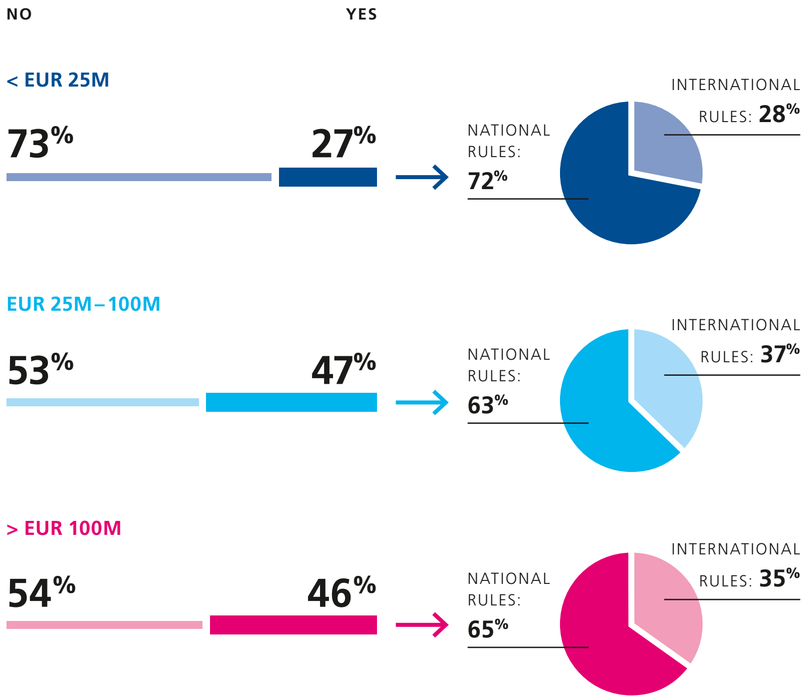
Analysis by Deal Size

2022 saw a slight decline in the use of arbitration clauses in small deals (from 32% in 2021 to 27% in 2022). In deals with a higher transaction value, however, arbitration was used more often. In 2022, 47% of the medium sized deals and 46% of the large deals contained an arbitration clause. For large deals especially, this means an increase of 16% compared to 2021. The application of national rules is frequently chosen for all deal sizes (65% of large deals; 63% of medium sized deals and 72% of small deals).

National rules of arbitration were favoured in at least two-thirds of deals with an arbitration clause regardless of deal size

Use of Arbitration

By Purchase Price 2022



100% = all evaluated transactions with an arbitration clause

Tax

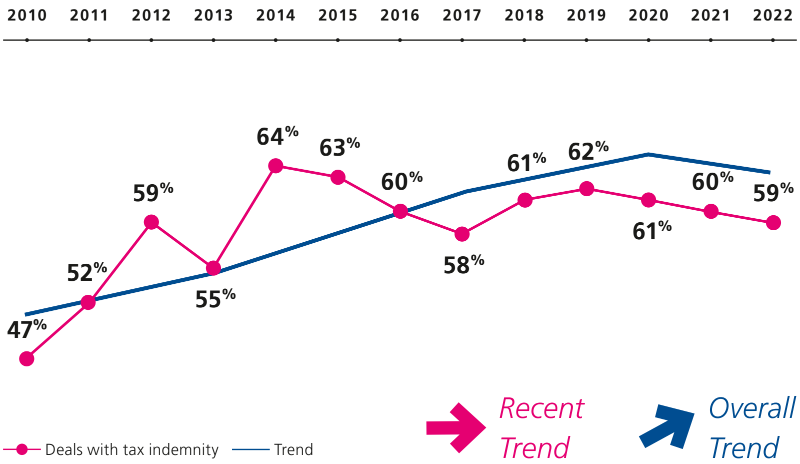
The rationale behind a tax indemnification provision is that the buyer wants to be held harmless for pre-closing tax risks. Tax indemnities often include specific caps and time limitation periods. There are also different types of limitation periods for tax indemnity claims, namely "absolute" limitation periods and "relative" limitation periods. An "absolute" limitation period bars tax claims by the buyer against the seller after a fixed date. A "relative" limitation period is directly related to a decision by the relevant tax authority. In these cases, the limitation period (which is usually very short) does not start until a relevant decision has been made by a tax authority.

General Overview

Tax indemnities were agreed in 59% of the deals in 2022. This seems to reflect a levelling off in their use over several years and reflects a slight decrease from the high of 64% in 2014. However, this is consistent with the historic rolling average (59%).

CMS Trend Index

Tax indemnity agreed



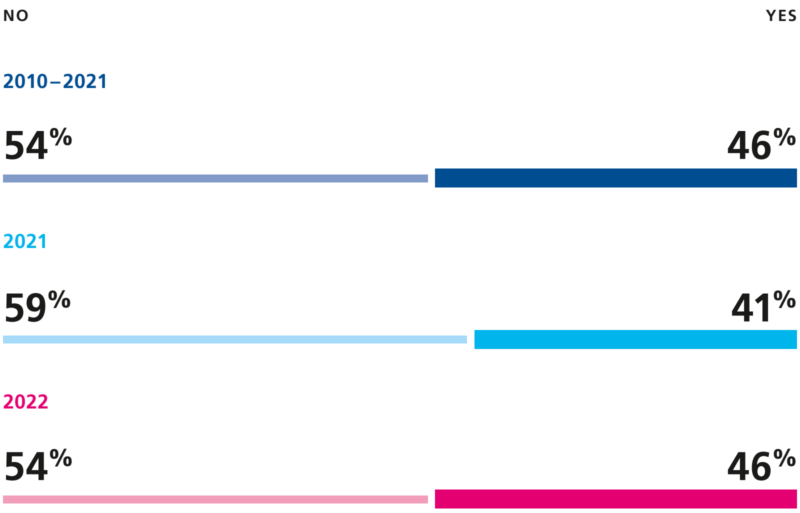
In 2022, 46% of deals contained a clause granting the seller the right to participate in a future tax audit. After a slight decrease in 2021 (41%), this is consistent with the historic rolling average (46%).

Sellers are more frequently able to negotiate a right to participate in future tax audits

Seller's participation right

46%

Participation Right in Future Tax Audit

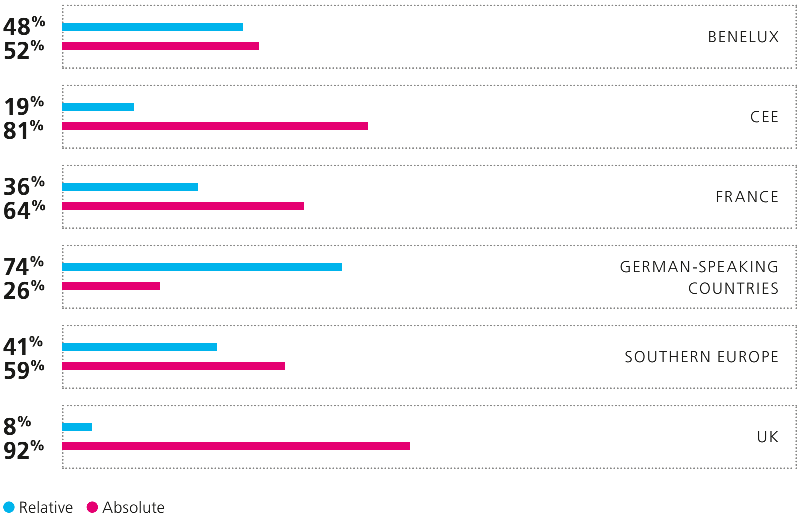


100% = all evaluated transactions

Regional Differences

Strong regional differences in the use of absolute and relative limitation periods remain. While relative limitation periods continue to prevail in German-speaking countries (2022: 74%, 2021: 76%), the opposite trend has been detected in the UK, France and CEE in recent years. Absolute limitation periods are still the norm in the UK (2022: 92%, 2021: 91%) and France (2022: 64%, 2021: 67%) as well as in CEE (2022: 81%, 2021: 87%). The use of either absolute or relative limitation periods tends to be almost universal in most regions, except in Benelux (2022: 52% absolute, 48% relative limitation periods) and Southern European countries (2022: 59% absolute, 41% relative).

Absolute and Relative Limitation Period 2022

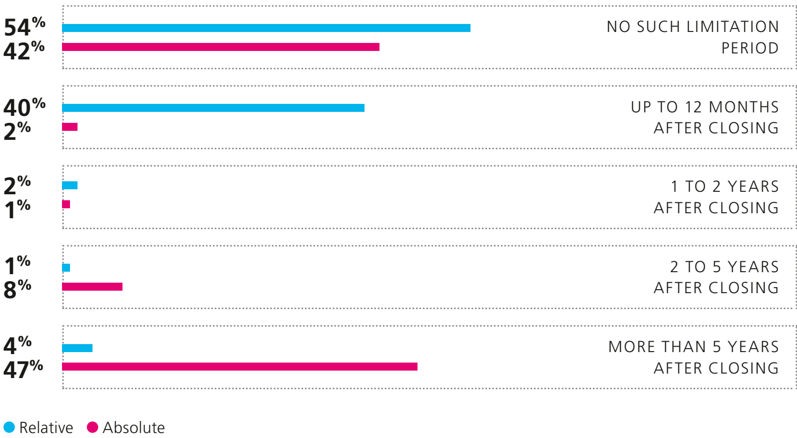


100% = all transactions with tax indemnity clause

Type of Limitation Period

Parties who agree on an absolute limitation period tend to choose a period of more than five years after closing (2022: 47%, 2021: 46%). If the parties agree on a relative limitation period for tax indemnification, the vast majority choose a period of up to 12 months after the decision by the tax authority (2022: 40%, 2021: 32%).

Duration of Limitation Period



100% = all evaluated transactions with a tax indemnity clause
Due to rounding, totals do not correspond with the sum of the separate figures.

Analysis by Deal Size

In 2022, tax indemnities were mainly agreed in large deals, (2022: 65%, 2021: 62%), closely followed by medium sized deals, where tax indemnities were agreed in 64% of the transactions (2021: 70%).

Our deal size analysis demonstrates that in medium sized deals sellers were able to preserve a right to participate in proceedings initiated by a tax authority in 53% of the deals, which is a great increase compared to previous years (2021: 43%, 2020: 44%). In comparison, the sellers' right to participate in proceedings in all other deals remained stable: 44% in small deals (2021: 42%) and 39% in large deals (2021: 38%).

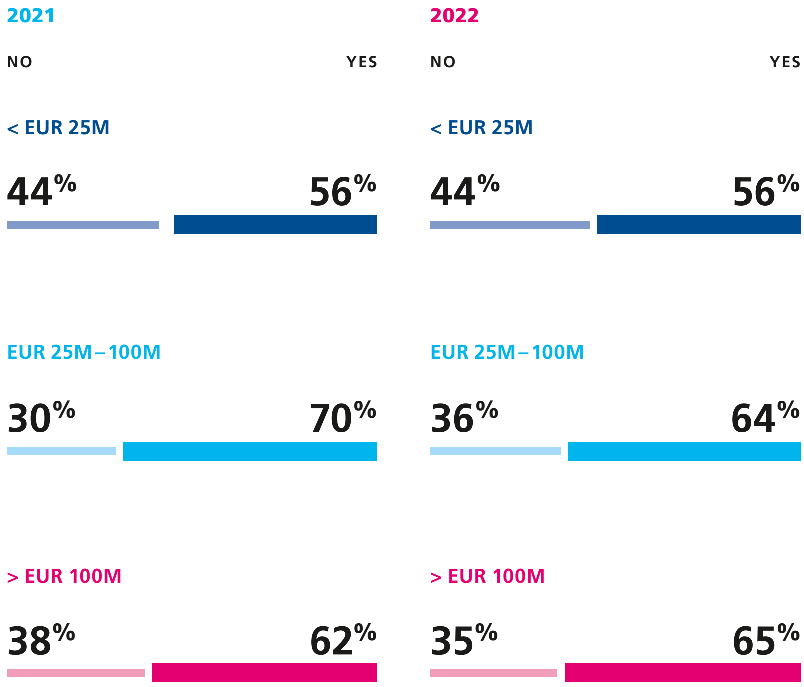
Tax indemnity

65% of deals > EUR 100m

Tax indemnities are getting more common in high value transactions

Tax Indemnity Agreed

By purchase price



100% = all evaluated transactions

Global reach, local knowledge

The Americas

Bogotá
Cúcuta
Lima
Mexico City
Rio de Janeiro
Santiago de Chile

Europe

Aberdeen
Amsterdam
Antwerp
Barcelona
Belgrade
Bergen
Berlin
Bratislava
Bristol
Brussels
Bucharest
Budapest
Cologne
Duesseldorf
Edinburgh
Frankfurt
Funchal
Geneva
Glasgow
Hamburg
Istanbul
Kyiv
Leipzig
Lisbon
Liverpool
Ljubljana
London
Luxembourg
Lyon
Madrid
Manchester
Milan
Monaco
Munich
Oslo
Paris
Podgorica
Poznan
Prague
Reading
Rome
Sarajevo
Sheffield
Skopje
Sofia
Stavanger
Strasbourg
Stuttgart
Tirana
Vienna
Warsaw
Zagreb
Zurich

Africa

Algiers
Casablanca
Johannesburg
Luanda
Mombasa
Nairobi

Middle East

Abu Dhabi
Dubai
Muscat
Tel Aviv

Asia-Pacific

Beijing
Hong Kong
Shanghai
Singapore

Our latest CMS Corporate / M&A headline deals

ALPLA

An international CMS team comprised of lawyers from Austria, Hungary and Romania advised ALPLA Group, a world-leader in packaging and recycling solutions, on the acquisition of Wolf Plastics Group, a leading specialised packaging solutions provider in Central and Southeastern Europe with production facilities in Austria, Hungary and Romania.

BAE Systems

CMS acted for BAE Systems, the FTSE 100 defence technology business, in connection with the disposal of its regulatory compliance and financial crime detection business, NetReveal, to SymphonyAI, a leader in high-value enterprise AI SaaS for strategic industries.

BMWK

CMS advised the German Federal Ministry for Economic Affairs and Climate Action (BMWK) on the EUR 33bn acquisition of Uniper, the largest importer of Russian gas and of decisive significance for Germany's gas and electricity supply, from Fortum, thus securing gas storage and distribution for companies, municipal utilities and consumers. CMS also advised on stabilisation measures of Rosneft Deutschland and Gazprom Germania to counter impending risk to the security of critical infrastructure.

BT Group

CMS advised BT Group (BT) on its agreement with Warner Bros. Discovery, Inc. to form a 50:50 joint venture company to create a new premium sports offering for the UK and Ireland. The transaction also saw the transfer of the operating businesses of BT Sport to Warner Bros. Discovery.

DuPont

CMS advised DuPont, NYSE listed global innovation leader with technology-based materials and solutions that help transform industries and everyday life, on its Mobility & Materials segment divestiture to Celanese for a purchase price of USD 11bn in cash.

Dussur

CMS advised Saudi Arabian Industrial Investments Company (Dussur) on the acquisition from Bain Capital Private Equity, a leading global private investment firm, of a stake in Italmatch Chemicals, a global specialty chemical additive manufacturer. Concurrently with this acquisition, Dussur also invested an additional EUR 100m into Italmatch as a capital increase.

Ford Otosan

CMS advised Europe's largest commercial vehicle producer on its EUR 700m+ acquisition of Ford's shares in its vehicle and engine manufacturing plant in Craiova, Romania. Ford Otosan is a joint venture between Ford and the largest industrial conglomerate in Turkey. Through this strategic move, Ford Otosan will strengthen its role as a global manufacturing player.

Greiner AG

CMS advised world-leading Austrian plastics and foam specialist Greiner AG on the successful sale of its extrusion division in a complex cross-border transaction involving teams from Austria, Czech Republic, China, UK, France and Poland.

National Grid

CMS advised a consortium comprising Macquarie Asset Management and British Columbia Investment Management Corporation on its agreement to acquire a 60% stake in National Grid's UK gas transmission and metering business. The terms of the transaction imply an enterprise value for the business of approximately GBP 9.6bn

NEUCONNECT

CMS advised UK-German NEUCONNECT on its successful interconnector project with an investment volume of approximately GBP 2.4bn. The interconnector is expected to provide 1.4GW of electricity interconnection capacity and contribute to a stable energy supply via a direct current link between the UK and Germany from 2028.

New Energy

CMS advised UK energy company Neo Energy Upstream on its acquisition of JX Nippon Exploration and Production U.K. Limited for USD 1.7bn. NEO Energy is an independent full-cycle North Sea operator in the UK Continental Shelf. JX UK holds non-operated interests in multiple producing fields and associated infrastructure in the North Sea including a 20% interest in the Mariner field and an 18% interest in the Culzean field.

Onivia

CMS advised on the growth of Onivia, a neutral and independent telecom operator that wholesales bitstream services in Spain, including the acquisition by the greenfield rural arm of Onivia from the telecommunications services company, Masmovil.

ON*NET Fibra and KKR

CMS advised ON*NET Fibra and KKR on the acquisition of the existing fibre optic network of Entel Chileand the primary fibre optic network for P2P services, including a portfolio of 1.2 million houses, thus strengthening its position as the main fibre optic operator in Chile.

Ooredoo

CMS advised Ooredoo Group, an international communications company operating across the Middle East, North Africa and Southeast Asia, on the sale of its telecom business in Myanmar to Nine Communications Pte. Ltd for an enterprise value of USD 576m. Ooredoo Myanmar is one of the leading telecom operators in Myanmar.

Porsche AG

CMS advised Porsche AG on its record IPO with a total capital raised of EUR 9.4bn. The German sports car manufacturer made its stock market debut in the biggest IPO in Germany since Deutsche Telekom in 1996.

United Robotics Group

CMS advised Germany-based United Robotics Group on a cross-border equity joint venture with Japanese technology giant Softbank. United Robotics Group acquired France-based SoftBank Robotics SAS, developer and manufacturer of the world-renowned Pepper and NAO robots.

Warner Music Group

CMS advised Warner Music Group in relation to the USD 250m acquisition by its US subsidiary, Warner Chappell Music Inc., of the entire musical works and the publishing rights to David Bowie's music catalogue from the David Bowie estate.

4IG

CMS advised 4IG on the aquisition of Vodafone Hungary, Hungary's second largest telecommunications company. The transaction, valued at around HUF 660bn (approx. EUR 1.67bn), will see 4iG become the majority owner of 51 percent of Vodafone Hungary.

Methodology

The Study includes deals which were structured either as a share sale or an asset sale, including transactions where a seller held less than 100% of the target company's share capital, provided this represented the seller's entire shareholding in the target company. The Study also includes property transactions provided they involved the sale or acquisition of an operating enterprise such as a hotel, hospital, shopping centre or comparable business, and not merely a piece of land. Internal group transactions were not included in the Study. The data has been divided for comparative purposes into four European regions. The countries included in each of these regions are as follows:

- Benelux: Belgium, The Netherlands and Luxembourg
- Central and Eastern Europe (CEE): Bulgaria, Croatia, Czech Republic, Hungary, Poland, Romania, Slovakia, Slovenia, Serbia and Ukraine
- German-speaking countries: Austria, Germany and Switzerland
- Southern Europe: Italy, Spain and Portugal

France and the United Kingdom are presented as individual categories. The Norway deals are covered in the overall numbers and reported separately as relevant.

Transactions included in the Study cover the following sectors:

- Banking & Finance
- Hotels & Leisure
- Energy & Climate Change
- Consumer Products
- Technology, Media & Communications
- Infrastructure & Projects
- Life Sciences & Healthcare (pharmaceutical, medicinal and biotechnical products)
- Real Estate
- Industry
- Business (Other Services)

Some comparative data from the US was derived from "SRS Acquiom 2022 M&A Deal Terms Study" produced by SRS Acquiom Inc. Due to rounding, some totals may not correspond with the sum of the separate figures.

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Sources: FactSet, Bloomberg, Refinitiv, MergerMarket, by Deal Volume

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