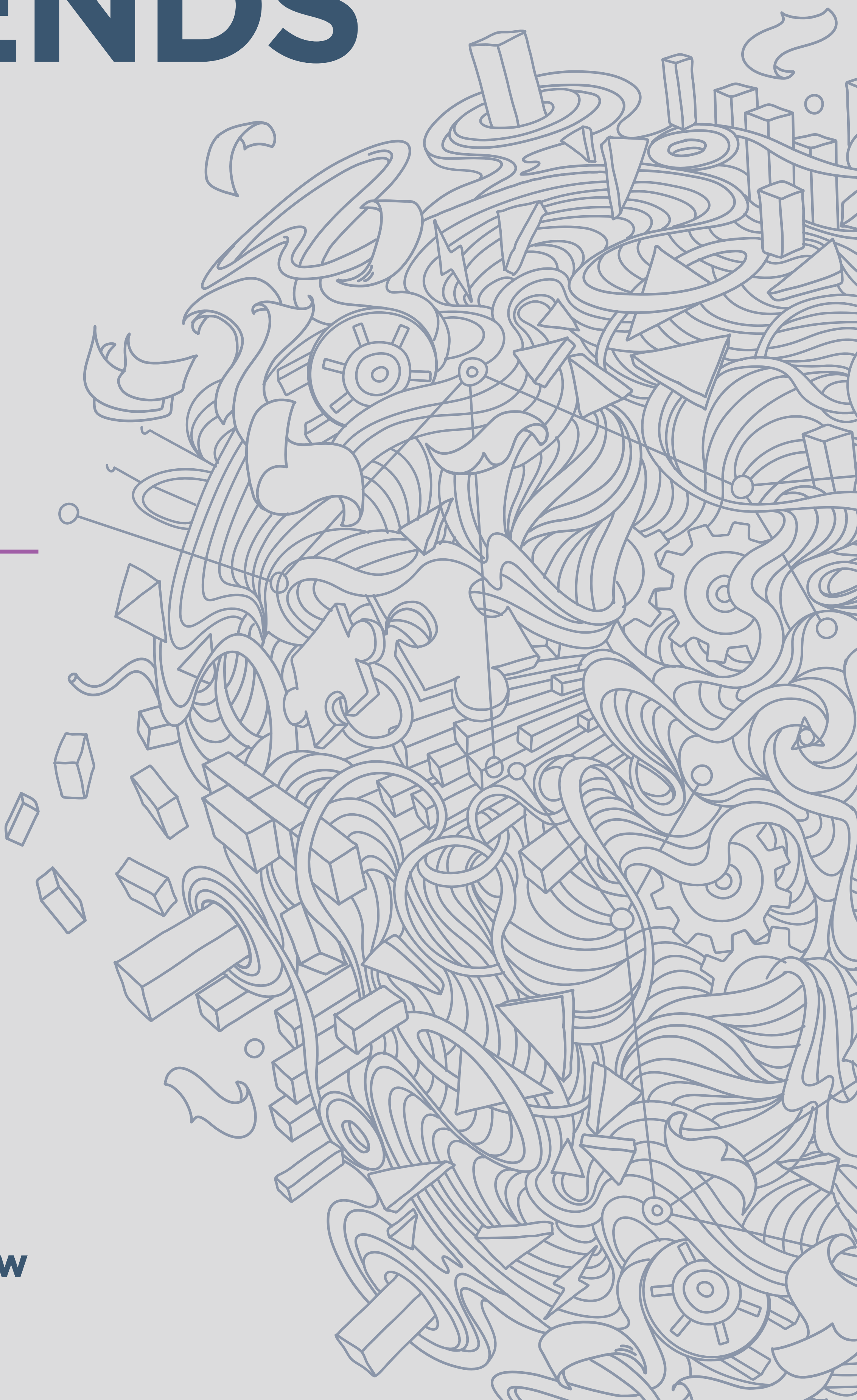
M&A TRENDS

2020



ADDLESHAW GODDARD

Illustration: A world of complexity by Sam Hadley

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INTRODUCTION

We are delighted to present our M&A Trends 2020 report.

Despite the political uncertainty that dominated much of the year, culminating in the UK General Election in December and Brexit on 31 January 2020, M&A activity held up well in 2019. During the year, our M&A team advised on over 200 deals with an aggregate value of more than £8.2 billion, completing on average more than one deal every other day throughout the year. Market uncertainty did not prevent deals getting done, but they generally took longer to execute. Numerous processes were put on hold, to be resurrected later in the year when the position on Brexit became clearer, whilst a few deals saw completion put back pending the outcome of the General Election.

Against that backdrop, the market outlook at the start of 2020 looked more positive than it has for some time. Trade negotiations between the UK and EU, plus the ongoing US / China trade war, were expected to pose challenges, but businesses went into the year with greater certainty as to the political and economic climate off the back of Brexit and a return of a Government with a clear majority.

How quickly things can change. It wasn't long before European businesses were looking with concern at the developing coronavirus outbreak in China, assessing what this meant for their supply chains. Outbreak quickly became pandemic, and concerns escalated from the supply chain to the very heart of businesses across a range of sectors – particularly leisure and tourism, and retail and consumer. The coming months will present unique challenges for businesses and it is inevitable some will not survive. But there are steps that can be taken to seek to withstand the unprecedented disruption, and as with all challenging markets there will be opportunities created for those who are able to adapt quickly to capitalise on them.

In this report you will find the usual wealth of data on key deals, which we have now been capturing and analysing for more than 10 years, and our thoughts on some of the key trends we saw in 2019. We also consider what happens after an M&A transaction completes. How smoothly does the integration process proceed and which aspects cause the most headaches for buyers and sellers? Having negotiated extensive warranties, how often are these utilised by buyers? By shedding some light on these points, we hope to assist deal teams in reflecting on whether the terms that they focus on during negotiations deliver what the business ultimately requires.

Looking forward, we consider how the changing regulatory landscape might effect M&A dealmakers. And of course, we address the elephant in the room and assess what the coronavirus outbreak means for businesses.

Thank you to all of our clients for entrusting us to deliver their M&A transactions in 2019. We look forward to working with you to manage the unique challenges (and opportunities) that 2020 will present.

FIRST, A FEW FACTS

Advised on a third of all

AIM IPOS

– More than any other law firm

Advised on 220 deals with an aggregate value of more than

£8.2BN

TIER 1 RANKED

In both Legal 500 and Chambers and Partners

A DEAL EVERY OTHER DAY

We completed over 200 deals in 2019: one every other day

LED ON

20%

Of all public takeovers in the UK

RANKED 7TH

In Mergermarket's M&A Deal Report

Repeat advisers to

40+

clients; ranked top 5 by The Lawyer for FTSE100 advisory roles

Average length of our FTSE100 client relationships is now

22 YEARS

VENTURE INVESTMENT STRATEGIES

A continuing trend in 2019 was for corporates to make “venture capital” style minority investments in start-up/scale-up businesses, with a view to taking full control at a later stage. Diageo’s well publicised success in using its venture arm, Distill Ventures, to firstly invest in (and then buy out) the market leading non-alcoholic spirits brand, Seedlip, is a prime example of this type of investment, which is now common among Europe’s corporate population.

The logic for this strategy is obvious – what right minded Finance Director wouldn’t want to back the next Google without having to pay the sorts of multiples more developed businesses can command (particularly following PE investment). And for brand businesses, which are typically valued as a multiple of sales (rather than profit), investing early is even more important. The start-up gets much needed funding during its difficult early stages and the ability to draw on the corporate’s expertise. In exchange, the corporate can properly road test the start-up, and ensure it is professionalised, safe in the knowledge that it will have virtual exclusivity should it wish to buy it out.

Whilst the strategy may be obvious, the approach taken by corporates when making such investments varies considerably from the location and structure of the venture vehicle itself to the type of instruments used when investing (which ranges from convertible debt to preference shares). An interested corporate will also need to grapple with a number of challenges which may feel alien to it including:

> “
> **Having an investment arm is increasingly being seen as a key part of a PLC’s inorganic growth strategy.**

- **Should the venture arm (if there is one) carry the same branding as itself?** There is no doubt that utilising the group’s brand equity to generate opportunities with start-ups may seem beneficial but, equally, entrepreneurs can have concerns that aligning with a large corporate can (i) crush the innovation essential to the successful growth of a young company and (ii) create reputation concerns for the start-up regarding its independence. To combat this, we have seen corporates create a clear separation from its venture arm in terms of branding, personnel, location and even look and feel when dealing with the venture business. Some don’t even publicise that they have made the investment at all.

- **Often such investments are structured as staged acquisitions** (with the value at each stage linked to the performance of the business at the time) or complete acquisitions, with a corresponding earn out. Earn outs come with their own unique set of challenges, some of which we have set out in pages 11 and 12;

- **Some investments will fail.** This requires a change in mind-set for most corporations where failure is an anathema and completely contrary to how they operate and measure performance. Any company embarking on an incubator investment strategy needs to accept that this is a numbers game where the more investments made increases the likelihood of success.

- It will not be in control of the start-up. Initially, steps need to be taken to ensure that the corporate does not exercise dominant influence over the start-up so as to avoid consolidation risk. Likewise, the corporate will want to stop short of material influence to stay the right side of the competition authorities. The corporate will need to balance these considerations against its desire to professionalise the start-up and prepare it for integration should it buy it out. A careful balance is often needed especially around whether the corporate’s policies and procedures need to be adopted which can create a significant burden on a start-up.

THE PUBLIC MARKETS

66

completed bids in 2019, VS

45

in 2018

£812M

average deal size, down from £2.9bn in 2018

13 BIDS

having a value in excess of

£1BN

25%

of all deals in the TMT or IT sectors

VOLUME UP BUT VALUE DOWN

INCREASED PRIVATE EQUITY INVOLVEMENT

The most notable feature of public M&A in 2019 was the increased interest from private equity in pursuing public-to-private transactions. The acute competition for quality privately held assets combined with the significant cash reserves within PE funds has made the public markets more attractive - the right deal provides private equity an undervalued listed business with less competition. The historical deterrents to P2P deals of deliverability and deal costs seem to be becoming less of a dissuasive factor for PE funds, particularly when a PE fund these days may run up significant abort costs if it loses out in a private auction process.

MORE MANDATORY OFFERS THAN 2018

Several of 2019's mandatory offers arose due to the offeror's strategy of seeking to increase its influence in the target by triggering Rule 9 by market purchases, whilst seemingly being agnostic as to the ultimate success of a consequential mandatory bid. Several mandatory bids lapsed, notably Sports Direct's bid for Findel, where only a further 1% of shareholders accepted the mandatory offer once it had been triggered by the initial market purchase. The increased number of Rule 9 bids appears to have been driven by specific commercial circumstances – particularly within the Sports Direct boardroom. Two of the seven mandatory offers were triggered by Sports Direct increasing its stakes in Findel and Game respectively, where it had pre-existing commercial partnerships with the targets. This isn't something which should necessarily be seen as a long-term trend.

COURTS DEAL A BLOW TO ACTIVIST SHAREHOLDERS

The Inmarsat takeover by a PE consortium may mark something of a positive turning point for schemes of arrangement, with bidders and targets perhaps no longer harboring significant worries of activist shareholders successfully raising objections to a scheme with the Court with the intention of "greenmailing" the offer participants to win a higher price – as notably happened on InBev's offer for SABMiller in 2017. In this instance, the Inmarsat board rejected the activists' procedural objections to the scheme and was willing to defend its actions in Court. Following the earlier judgment in Ophir Energy Plc where the Court determined that shareholders need to raise their objections at the earliest opportunity and directly with the Court, the activists on the Inmarsat case capitulated. Following this, both targets and bidders on future deals will feel emboldened to defend their transactions in Court rather than give way to pricing pressure from activist investors.

"The increased number of Rule 9 bids appears to have been driven by specific commercial circumstances... This isn't something which should necessarily be seen as a long-term trend.

WHAT GOES WRONG?

A straw poll of clients about their deals last year revealed some clear headlines:

- price adjustment and IT migration are challenging and time-consuming aspects of M&A
- warranties generally deliver on their core purpose of sharpening and finalising DD, and produce relatively few claims (but warranty issues also provide leverage in any wider post-completion seller-buyer discussions)

PRICE ADJUSTMENT CHALLENGES

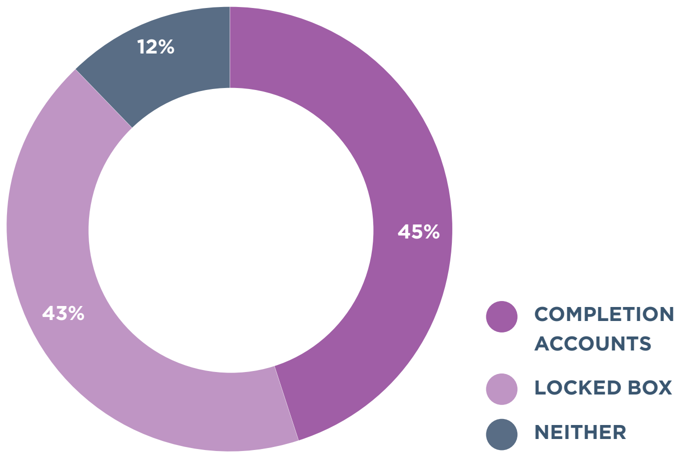
Adjustment to the purchase price remains one of the most common causes of disputes on M&A transactions.

- More than two-thirds of **completion accounts deals** required multiple drafts of the completion accounts before price adjustments could be agreed.
- Parties and their advisers need to **focus on completion accounts mechanics and policies early on** in negotiations. These are often amongst the last areas that parties (including their accountants and financial advisers) consider, which is surprising when they have such a direct impact on the ultimate price payable.
- A **locked box mechanism** is far less likely to lead to post-deal disputes. Disagreements regarding accounting policies are instead brought forward to be dealt with as part of the pricing negotiations.
- But a locked box mechanism **will not be suitable for every deal**, for example asset purchase transactions.
- Whilst the position is shifting, a number of corporates continue to have a strong preference for completion accounts.

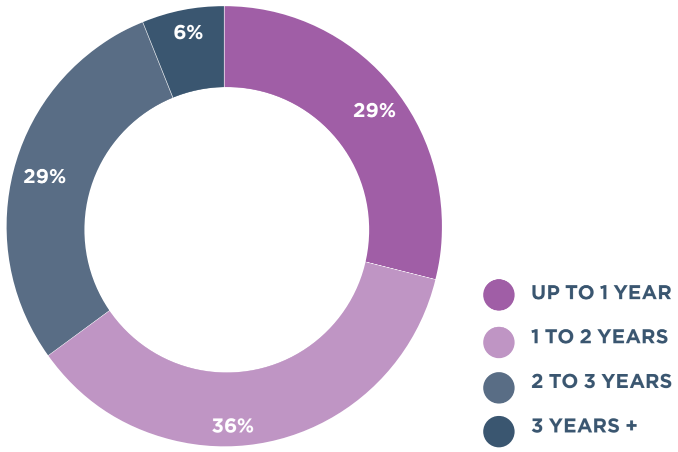
Deferred consideration continues to be on the increase: 25% of our deals featured an earn out or other element of contingent deferred consideration.

- As a tool for bridging a genuine valuation gap between parties, earn outs are very valuable to facilitate transactions.
- They also maintain a sense of **shared ownership and responsibility**, help maintain the entrepreneurial, agile mindset that underpins the target and help founders transition out of businesses in which they have a lot of personal investment.
- But they can also give rise to complex negotiations before signing (causing relationship challenges with the seller) and significant navigational challenges after completing:
  - there is an important risk of a **misalignment of goals** between buyer and continuing management (for example between long term strategic goals and investment and short term profit maximisation)
  - also of a **gaming risk**: the more ‘rules’ governing the earn-out, the greater the likelihood that they disproportionately impact behaviour and personal goals
  - prolonged restrictions on the way the target can operate often **delays investment**, **integration** and strategic growth
  - a successful earn-out often relies upon the seller(s) **remaining in a senior position** in the business for the duration of the earn-out period

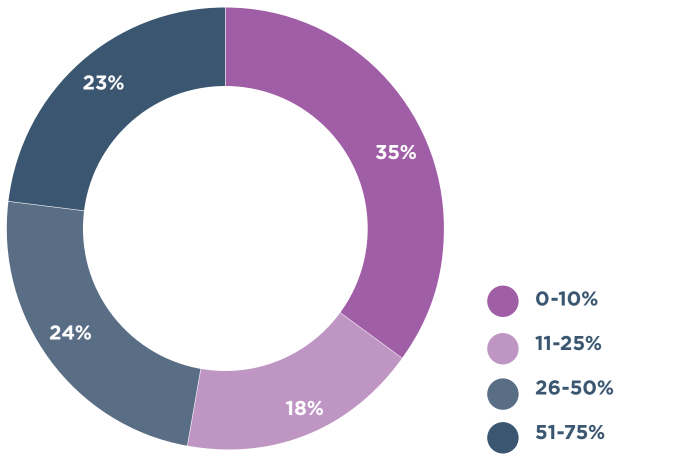
PRICE ADJUSTMENT MECHANISMS



DURATION OF EARN OUT PERIOD



% OF PRICE REPRESENTED BY EARN OUT



in order to deliver on the projected numbers. However our review of client deals showed that 2/3 **of acquired businesses saw a change in the management team within 12 months** of completion

- dealing with a **departing manager** who stood to benefit from an earn out can cause significant issues and lead to protracted disputes and allegations of wrongful dismissal (however spurious)
- a very short earn out period to test performance for just a few months post-completion may not be justified unless performance could vary wildly such that **pricing the deal accurately at completion is impossible**
- it is always worth considering whether an earn out is appropriate in the circumstances: where sellers are staying on in the acquired business, would conventional **employee incentive schemes and bonuses** work instead, not least in aligning the target management better with the wider management community in the buyer group?

> **Parties and their advisers need to consider carefully the earn out mechanics, including the optimal duration.**

INTEGRATION ISSUES

Advance planning on matters that will impact on integration during due diligence and negotiation of transaction documents is crucial to mitigate disruption to the acquired (and even acquiring) business during integration.

Common causes of integration issues include:

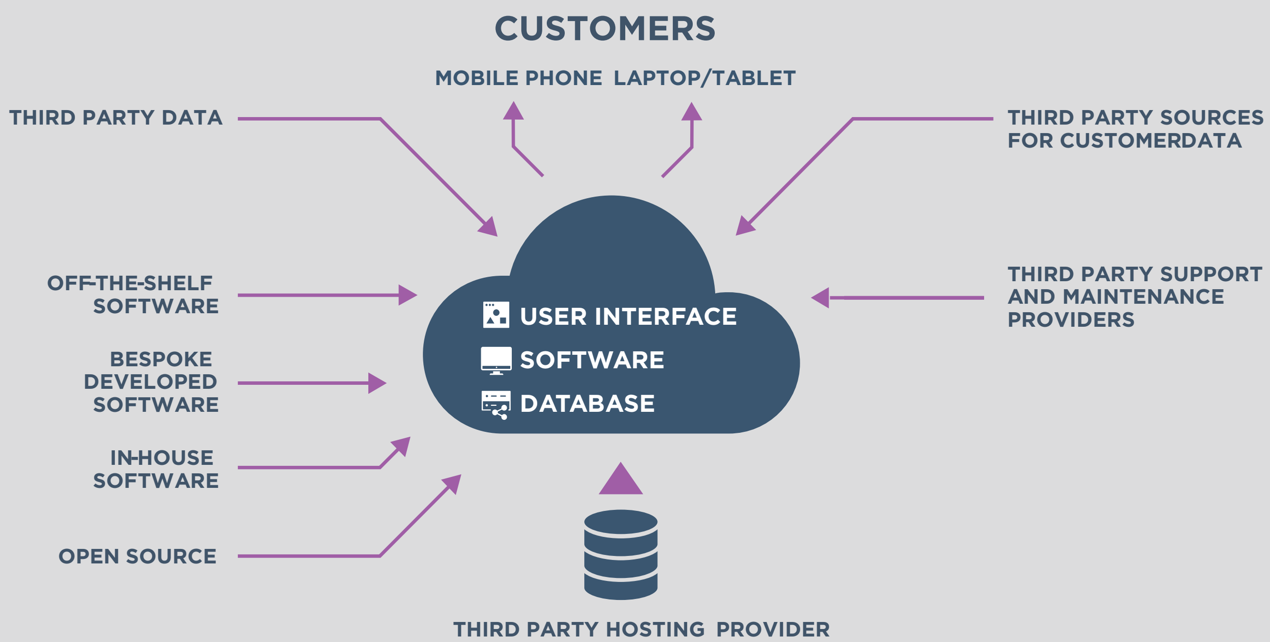
A DISCONNECT IN REGULATORY AND COMPLIANCE REQUIREMENTS

- This is a prominent issue when the acquired business is considerably smaller than the buyer group (and/or operating in different jurisdictions), which is exacerbated when the buyer is listed or operates in a heavily regulated area.
- Increased regulatory requirements (a trend which will only continue) mean that compliance for larger companies and groups can be a very different environment to that which smaller businesses are used to.
- Requirements to report on matters such as modern slavery & human trafficking, tax strategy and carbon emissions may well be new to management of smaller acquired businesses, meaning that the buyer is not easily able to access the required information in the target.

The need for a target to adapt to fit into the buyer's group can easily have a negative impact on its culture and growth, damaging the very entrepreneurial spirit that the buyer has bought into. So integration needs to be handled really sensitively – a culturally-attuned and personally-tailored and thoughtful approach is critical to bridging the gap.

IT MIGRATION

- As mentioned earlier, IT migration was cited by clients as the most common cause of issues during integration and can often be one of the most complicated aspects of a transaction.
- IT migration issues can take various forms but all share the same potential to cause significant business disruption and to delay integration and postpone delivery of the strategic goals.
- IT is also the most likely reason for ongoing support arrangements between the buyer and the seller, ensuring both parties can continue to operate throughout the IT integration / migration period.
- Each situation is different but some important areas to consider, to **reduce migration risk** are:
    - **ensuring senior buy-in** – helping key stakeholders to visualise and understand the IT migration journey and challenges, from an early stage, and to understand where their intervention is likely to be necessary
    - **early sight of key challenges** (again visually summarised) such as possible third party consents, where new licences will be required, any specific bespoke software eg payroll
    - **proactive monitoring** – staying '2 weeks ahead', to see where the issues lie
    - **collaboration** – transitional services may well be required and whilst a clear TSA is important, it is probably more important to build the right relationships between IT teams in buyer and seller groups, creating a shared problem-solving mentality



WARRANTIES & RISK MANAGEMENT

Fewer than

1 IN 10

M&A transactions sees a formal warranty claim

W&I insurance policies see a claims notification rate of around

20%

Whilst an extensive set of warranties will be negotiated on every M&A transaction on the basis that it will allow the buyer to bring a claim should the warranted state of affairs not be true, the reality is that litigated warranty claims remain relatively uncommon. In our experience, fewer than **one in every ten M&A transactions** sees a formal warranty claim.

Data from warranty and indemnity insurers shows a higher claims **notification rate of around 20%** on W&I insurance policies, but this is a global figure that is skewed by the volume of policies taken out in the US market where corporate acquirers might scour warranty schedules post-completion to identify potential grounds for a claim. We have not generally seen UK-based acquirers adopting this approach, with claims typically reserved for bigger issues that arise during the course of integration and operation of the acquired business.

We are also testing the theory that it feels **easier to make an insurance claim** than a warranty claim and more of an ordinary course solution. It can certainly be perceived as less combative than asserting breach of contract, particularly where sellers are still involved in management of the business, with support from an existing broker relationship making it an easier process as insurers are set up for claims (although making an insurance claims is clearly not the same as being paid out on such claim!).

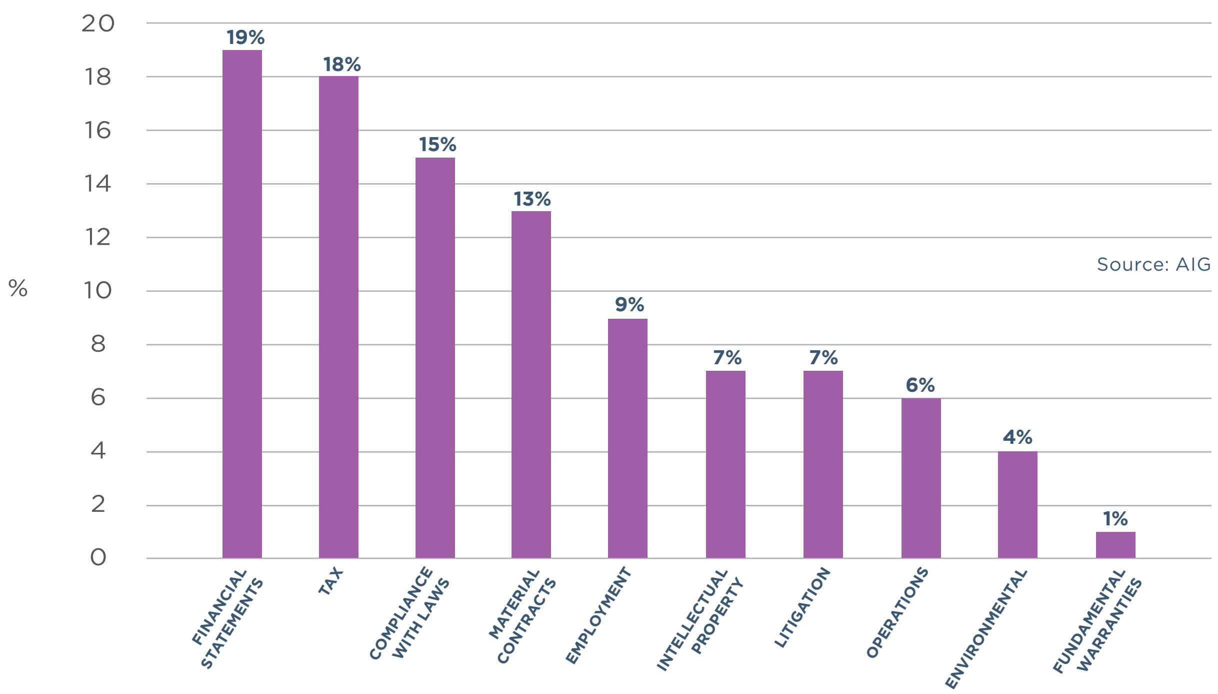
Warranties regarding **financial matters and accounts** continue to be the warranties that result in the greatest proportion of claims and accordingly merit focussed attention from the buyer and its advisers.

Seasoned acquirers rightly regard warranties as their **back-up protection mechanism**, prioritising extensive due diligence on the target business to pre-emptively identify and address key issues (whether by pre-completion remedial conduct, price adjustments or contractual protection). Inevitably, issues can still come to light after completion, even where a thorough due diligence exercise has been undertaken.

However, unless the issue is clearly material, the breach relatively evident, buyers are often **reluctant to assert breach of warranty** (and contract), with the ensuing time and cost and potential court or arbitration process. Instead the right to bring claims may well be used as **leverage** by a buyer when agreeing purchase price adjustments (including earn-out payments) or as part of wider post-completion disputes or commercial discussions with sellers.

Warranties can therefore play a valuable role as a **negotiating tool in the post-completion interactions** between buyer and seller, even if they do not serve as the trigger for formal claims in the majority of deals.

SUBJECT OF W&I INSURANCE POLICY NOTIFICATIONS



THE CMA'S CHANGING LANDSCAPE

As well as publishing proposals for more wide-ranging powers, the Competition & Markets Authority (CMA) has been making a concerted effort to make **more effective and pro-active use of its existing powers** over the past year. Whilst the UK merger control regime is voluntary, parties who complete deals without assessing the anticipated effects of the deal on competition, and then notifying the CMA where relevant, are taking increased risks of post-deal intervention.

A number of recent high profile examples have seen the **CMA take the following steps:**

- calling in completed mergers for review
- imposing interim measures (and fines for any breach of these)
- partially unwinding integration on transactions whilst conducting its analysis

An important shift in the CMA's analysis of the effects of a transaction on competition is the move, in certain situations, away from looking at pre-merger conditions – e.g. what are the current activities of the buyer and target. Instead, the CMA might assess the merger against dynamic counterfactuals that consider the **likely future activities of the buyer and target if the merger did not take place**. This approach is particularly relevant in the digital and online markets, such as the PayPal/iZettle merger and Amazon's proposed investment in Deliveroo. Whilst Amazon does not currently participate in the home food delivery market, the CMA will look at the likelihood that it would re-enter into the market in future and assess the competitive effects of the merger against that backdrop.

An increasingly important component of the CMA's analysis of proposed mergers is the review of the parties' **internal documents**, including board papers, strategy reports and email correspondence concerning the merger. The CMA is requesting sight of a greater volume of internal documents and has noted how these can be "particularly informative", presenting invaluable information on the different strategic options available to the parties and their impact on competition in the market.

Whilst internal strategy reports and board papers are an essential part of the M&A process, it is important – not just with a view to potential CMA investigations - to ensure that they do not present an **exaggerated view of the likely benefits** to the company (and potentially, of the adverse impacts for consumers and competition) of a proposed merger.

The combination of **rapidly developing market dynamics and a more pro-active CMA** mean that careful consideration should be given to competition law aspects on every transaction and that parties should also factor in the ever-increasing costs involved where they anticipate a merger control review being undertaken.

There are also early signs across Europe that screening of foreign investment, which governments have focussed on significantly over the past 18 months, will increase further as a result of concerns over predatory takeovers amid the COVID-19 crisis. Italy has already introduced measures to screen acquisitions by non-EU parties of stakes as little as 10%, a move which is consistent with policy at a European level.

"The CMA might assess the merger against dynamic counterfactuals that consider the likely future activities of the buyer and target if the merger did not take place.

WHAT NEXT?

LOOKING AHEAD, WHAT IS BECOMING MORE IMPORTANT TO BUYERS; WHAT ARE THEY LOOKING FOR IN TARGETS?

There is a rapidly increasing focus on **ESG goals** - environmental, social and governance commitments. The drivers are threefold:

- **Investors** - where Larry Fink and Blackrock lead other major funds will surely follow: investors already require that their investments set, and achieve, demanding sustainability goals; this will only increase
- **Consumers** require products and services to have an authentic connection with their sustainability values and bigger businesses tend to have to fight hard to prove their own values and commitments
- **People** - an inexorable generation shift is also driving change from within - each organisation's own community has high expectations and is demanding, and driving, change

Will the **current crisis** drive this agenda even harder? Some M&A will doubtless be driven by traditional metrics as businesses transact to rebuild, but we are already seeing an acknowledgment from bigger businesses that the global shock we are facing will contribute to a wider reset. More businesses will acknowledge their 'social contract', their debt to society and taxpayers, which may lead to an increase in businesses looking to obtain certified B Corporation status (giving external validation that the business meets the highest standards of social and environmental performance, public transparency, and legal accountability to balance profit and purpose). There is also a strong overlap in supply chain control in both the ESG agenda and the post-COVID-19 agenda.

So looking ahead:

- we expect M&A for many clients to be driven in part by a desire to buy progress, to create a step change which brings it closer to its ESG goals (or at the very least which is neutral to those targets)
- control of supply chain, which has a huge impact on a business' ability to hit sustainability targets, will become particularly important

"In the near future – and sooner than most anticipate – there will be a significant reallocation of capital …. climate risk is investment risk.

The picture should extend beyond climate to questions around how each company serves its full set of stakeholders, such as the diversity of its workforce, the sustainability of its supply chain, or how well it protects its customers' data.

A company cannot achieve long-term profits without embracing purpose and considering the need of a broad range of stake-holders.

Larry Fink, CEO Blackrock

> **The crisis has helped make clear that a world in which a company's sole purpose is the pursuit of profit is no longer acceptable.**
>
> Bob Looney, CEO BP

WHAT DOES THIS MEAN IN PRACTICE?

- **Value and pricing** - we would expect sweetspot targets (a technology solution, an ethical supply chain or recycling platform perhaps) to carry an 'ESG premium' in the same way we have seen in recent times for digital engagement platforms, where a multinational group is buying not just the opportunity to grow the target but also inject the target's mindset, capability, know-how and people into the buyer's wider business
- **Diligence**, especially legal diligence, likes certainty - Is target compliant? If not what happens? Price reduction, indemnity, integration action? The ESG agenda can still be fairly subjective, so harder to frame a DD question and to provide and judge a response. Some potential areas that could expand (and indeed the wall of CV19 related legislation including food supply regulations point this way):
  - Modern Slavery perhaps provides an insight - a basic area of compliance (have you complied with the MSA disclosure requirements?), opening up into more specific questions on active strategies in relation to **supply chain transparency** and management, whether in relation to labour or sustainability commitments
  - **Core duties and obligations** (eg the UK Companies Act duty to consider various stakeholder interests, including the environment) may also be more specifically tested, for example through review of decision making protocols and board minute reviews
  - **Testing of the target's ESG metrics** and scores might also require more legal testing, eg the target's contractual framework might be tested to understand how it engages with its own suppliers and customers (and passes down its own ESG benchmarks)
- **Integration** - as ever for bigger corporates, the critical challenge may well be around integration of an entrepreneurial business, quite probably with different purpose and values. Allowing the entrepreneurial spirit to continue to flourish whilst harnessing the key qualities and benefits in the wider business is always challenging: mooring a speedboat to an oil tanker!

...AND WHAT NOW?

AS FLAGGED IN THE INTRODUCTION, WE CAN'T TALK ABOUT M&A WITHOUT REFLECTING ON THE CURRENT GLOBAL HEALTH CRISIS AND ITS PROFOUND IMPACT ON PEOPLE AND BUSINESSES.

In the M&A world, we are seeing deals put on hold, finance withdrawn, sale strategies deferred and indeed some testing of completion obligations for live deals, plus increased scrutiny of foreign investments into certain sectors in light of concerns over predatory takeovers.

However M&A life is continuing, on a scaled back basis, and **looking ahead to where necessity or opportunity might lead**.

If you are transacting what can be done to navigate the uncertainty? A few headline thoughts:

- **Diligence** - a greater focus on the resilience and agility of the target (eg is it able to divert product from retail or F&B channels to online or home delivery channels)?
- **Gap period risks:**
  - **MAC** - ultimately these are always a function of the seller/buyer dynamic, but any buyer MAC exit right will need very careful and business-specific definition to capture the precise measures of 'material' and 'adverse', eg in relation to % of production employees in self-isolation? We have also seen Covid19 expressly excluded from MAC clauses, as a 'known unknown'
  - **Repeating warranties** - again of course a function of which party has the upper hand, but we might see a narrow range of repeated warranties, leaving the buyer with 'trading' risk, eg in relation to change following signing
  - **Business controls** - any gap period duties are always subject to fiduciary duties and the need to keep the target agile and responsive, but sellers should be particularly clear that they need to retain a strong hand at the tiller, given the rapidly changing legislative and trading environment
- **Insurance** - as Adrian Furlonge of HWF notes on page 23, the M&A insurance market is very much open for business

- **Third party engagement eg consents from critical third party suppliers/ customers** - generally the timeline and assessment of execution risk should assume third parties will be slower to engage, more risk averse, maybe resistant to making any medium/long term decisions
- **Logistics and practicalities** - everything is harder and slower (eg Companies House, other searches, stamping processes, signing documents, including witnessing or notarising arrangements where needed): plan ahead, visualise processes, allow enough time
- **Transition and price adjustments** – again practicalities will need to be planned carefully, eg physical stock inspection/ count, practical installation of new IT systems and hardware, availability of the key transition personnel (finance, IT etc)
- **Collaboration** - perhaps most importantly it needs a higher level of trust and collaboration between buyer and seller to navigate to a successful close: transparent planning and discussions, some worst case planning, acceptance that the unexpected is likely to happen and will need a joined up, quick response
- **Litigation risk** – deals signed in a different economic environment may have suddenly become very challenging to complete – be prepared for counterparties looking for rights and options, from delaying completion, to reconfiguring the financing, to looking to abort

Getting ready - of course the other activity that is continuing is preparing for deals, with a window of opportunity to prepare well and be ready to transact quickly and well when some measure of normality returns. What might this look like?

  - there is an opportunity to focus on **vendor due diligence**, vendor house-keeping and deal-readiness, including use of IT platforms which enable and drive auction processes
  - there will be a **reassessment of DD**, warranty and other legal requirements and protection in relation to the CV19 impact on the target business, for example in any overhang of deferred finance or lease costs, VAT, supplier debts etc, in steps taken by targets to weather the storm (and then to re-open for business) and wider compliance with the new regulatory environment
  - we may well see an early **readiness to transact by PE funds** which have considerable dry powder (a significant number of funds are arguably behind where they expected to be at this point of their fund life)

- in particular **P2Ps** were already coming back into fashion with PE funds and the depressed share price of listed entities will only increase interest

W&I INSURANCE

HWF PARTNERS

WE ASKED ADRIAN FURLONGE, PARTNER AT HEMSLEY WYNNE FURLONGE LLP, FOR HIS VIEW ON THE IMPACT OF THE CORONAVIRUS PANDEMIC ON THE M&A INSURANCE MARKET.

- The M&A Insurance market is **100% open for business**. All insurers have confirmed that while, like most businesses, their offices are closed, their staff are working from home with fully operational and secure setups. Aside from the inability to have face-to-face meetings it is very much business as usual with full capacity despite social distancing measures.
- What is the impact on **commercial terms**? With approaching 30 different insurers servicing M&A deals of all sizes and sectors across Europe, the inevitable downturn in activity means that insurers are competing fiercely for fewer deals. This is already resulting in pricing coming down. HWF's expectation is that this downward pressure on pricing will continue throughout the pandemic simply as a result of insurers trying to at least win the deals that are going ahead. We do not think that pricing will remain low once activity returns to normal level due to the lack of sustainability of such low pricing.
- What is the **impact on coverage**? At first it was clear that the primary impact of the pandemic on existing deals was where there was a gap between signing and closing. Insurers have been mandating exclusions in respect of losses arising in the gap caused by the impact of Covid-19 on the target – this has been mirrored by many buyers requesting to include the impact of Covid-19 as part of MAC clauses in the SPA. However as the pandemic continues we are seeing more insurers including blanket exclusions for past financial exposures. This would be particularly relevant on locked box deals where the locked box date was before the outbreak.
- **September madness**: While nobody can really predict an outcome at this stage HWF are seeing a number of early stage auction processes being prepared so that when the pandemic is under control they can hit the ground running. This sort of planning together with the huge amount of unused fund capital in the private equity market at the moment is predicted to result in an extremely busy September and lead up to the year-end.

OUR 2019 M&A HIGHLIGHTS

BATTERSEA POWER STATION

Sale of assets within Phase 2 of the BPS development – largest ever UK corporate property deal

TERRA FIRMA

Sale & break up strategy of the Wyevale Garden Centres business, instigated by its shareholder Terra Firma

SAMWORTH BROTHERS

Disposal of dessert business to Bakkavor and acquisition of Higgidy Pies

SEALINK TRAVEL GROUP

Acquisition of Transit Systems and Tower Transit Group

CDC

Equity investment in Mettle Solar Investments, a leading provider of off-grid solar systems in Africa

KPMG

Proposed sale of pensions business to Exponent

CELADOR ENTERTAINMENT

Sale of Celador Radio Broadcasting to Bauer Radio

BASE SOCCER AGENCY

Sale of Base Soccer Agency to Creative Artists Agency

MOORE STEPHENS

Sale of “Rulebook” software business to Verisk, a leading data analytics provider

FASTFLOW

Merger with United Living

ALLIED GLASS

Sale to Sun Capital

SAFECHARGE

$889m recommended takeover offer by the Nuvei Corporation

KCOM

£627 million competitive takeover of KCOM (process won by Macquarie)

ABF

Acquisition of the Al'Fez ethnic food brand and business

TED BAKER

JV in China and business sale and new commercial partnership in Japan

BP

Sale of Kingsbury and Essar storage terminals and an interest in the UKOP oil pipeline to Essar Oil

A&J MUCKLOW GROUP

£415m recommended cash and share takeover offer from FTSE250 listed REIT LondonMetric Property

JD SPORTS FASHION

Takeover offer for Footasylum plc

NATWEST

Launch of NatWest Tyl and its related investment in Pollinate Networks, representing the Bank's return to merchant acquiring

BRITISH AMERICAN TOBACCO

Acquisition of Twisp, the leading South African vaping business

TOSCAFUND

Takeover offer for easyProperty

SCG

Acquisition of the global fund administrator Augentius

OUR 2019 PUBLIC M&A HIGHLIGHTS

DURING 2019, THE ADDLESHAW GODDARD TEAM ACTED ON A HOST OF HIGH VALUE AND COMPLEX TAKEOVER TRANSACTIONS, INCLUDING:

13

takeover situations advised on.

Largest AIM takeover:

$889M

recommended takeover of SafeCharge by Nuvei Corp

£365M

average offer value of the takeovers we advised on

Advised KCOM Group plc on its contested

£627M

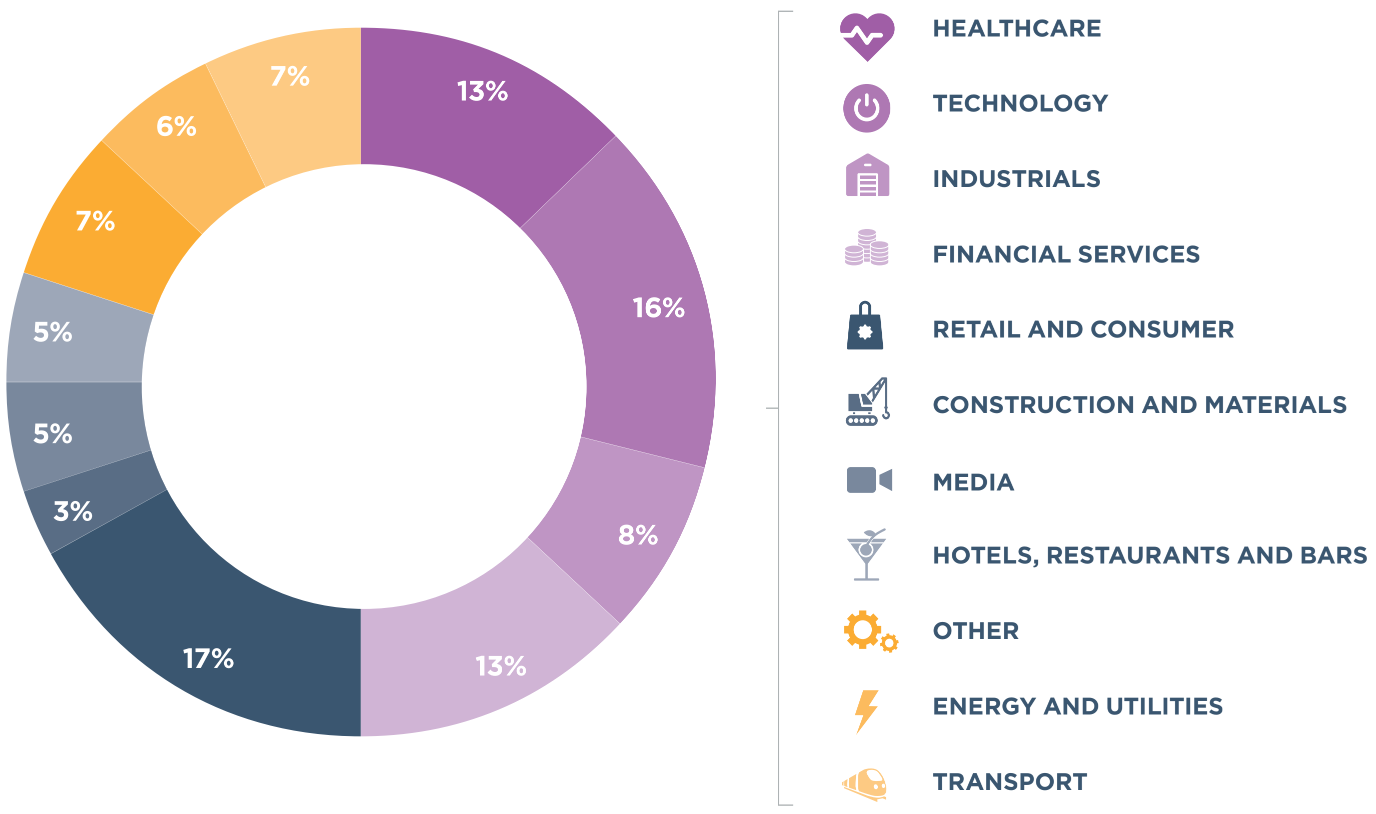
takeover – the first time the Panel's default auction rules have been used

Advised Main Market REIT A&J Mucklow on its

£415M

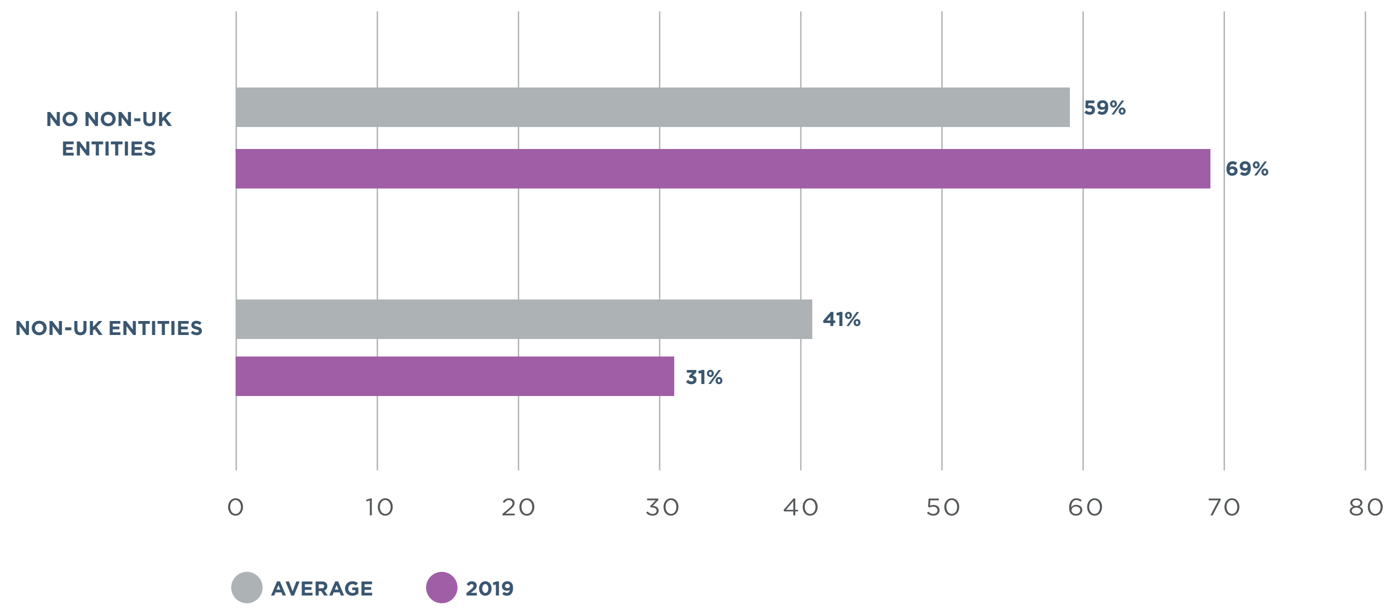
cash and share takeover by LondonMetric – one of the first takeovers under the Panel's revised asset valuation regime

SECTORS



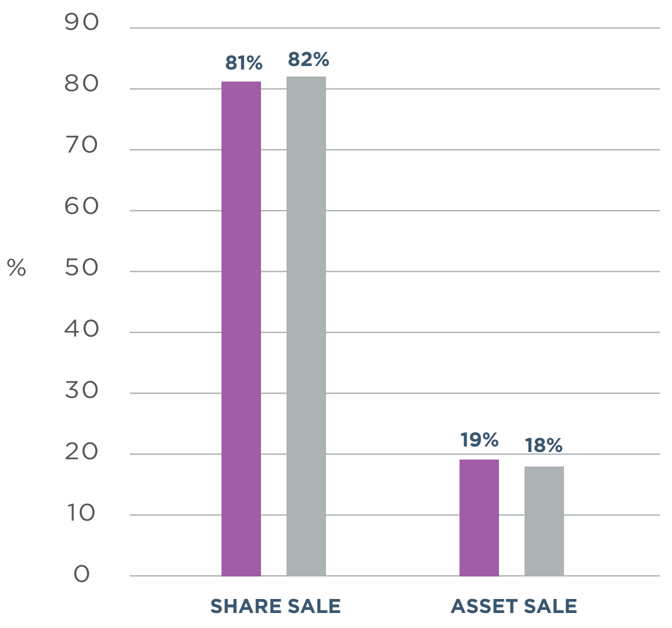
INTERNATIONAL INVOLVEMENT

DEALS INVOLVING NON-UK ENTITIES

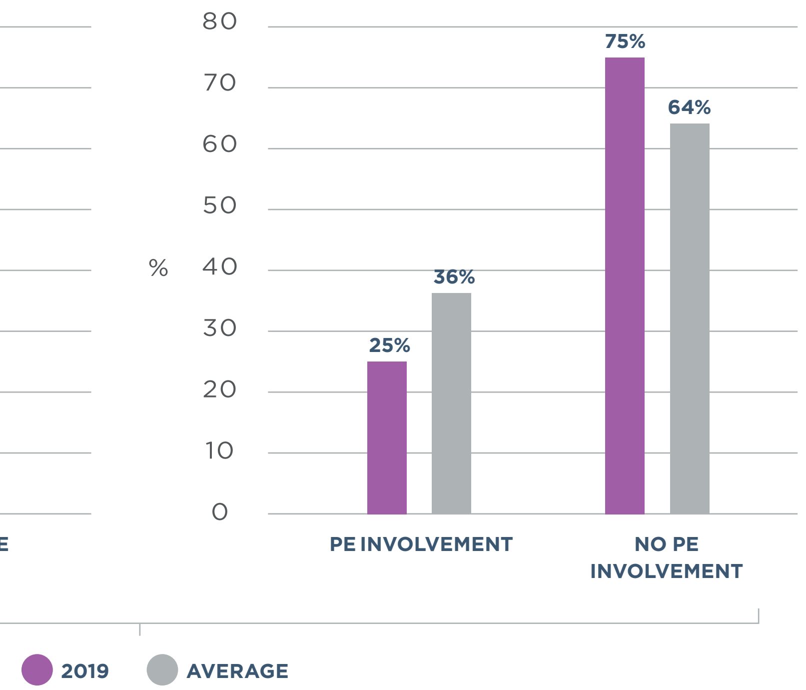


TRANSACTION TYPE

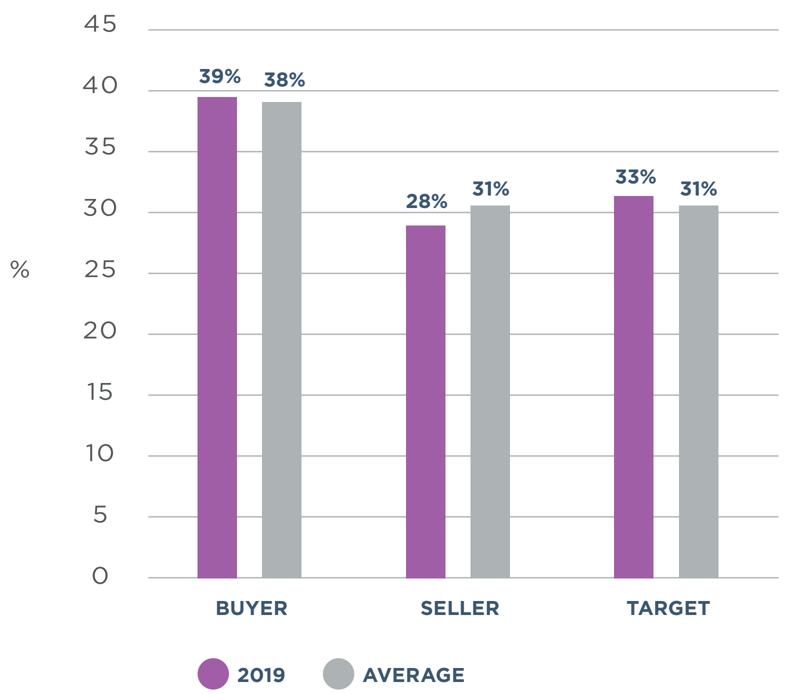
SHARE SALE OR ASSET SALE?



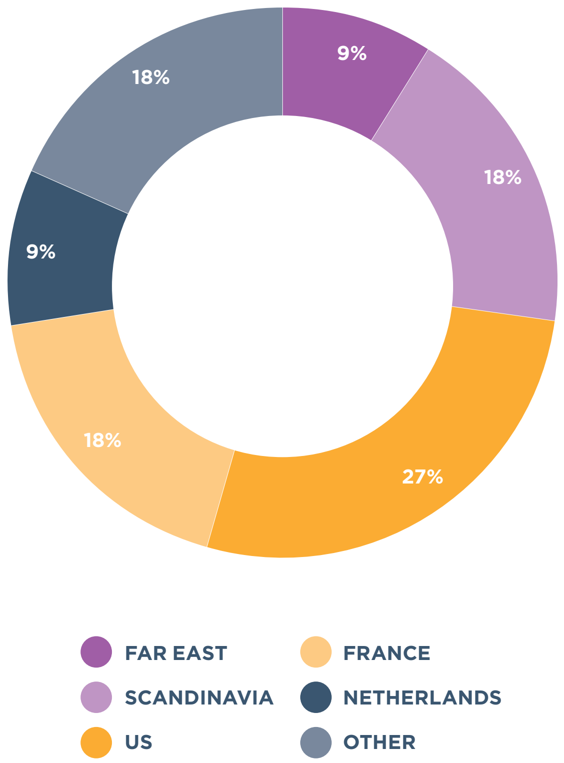
PRIVATE EQUITY INVOLVEMENT



ROLE OF NON-UK ENTITIES



JURISDICTION OF NON-UK BUYERS



PURCHASE PRICE ADJUSTMENTS

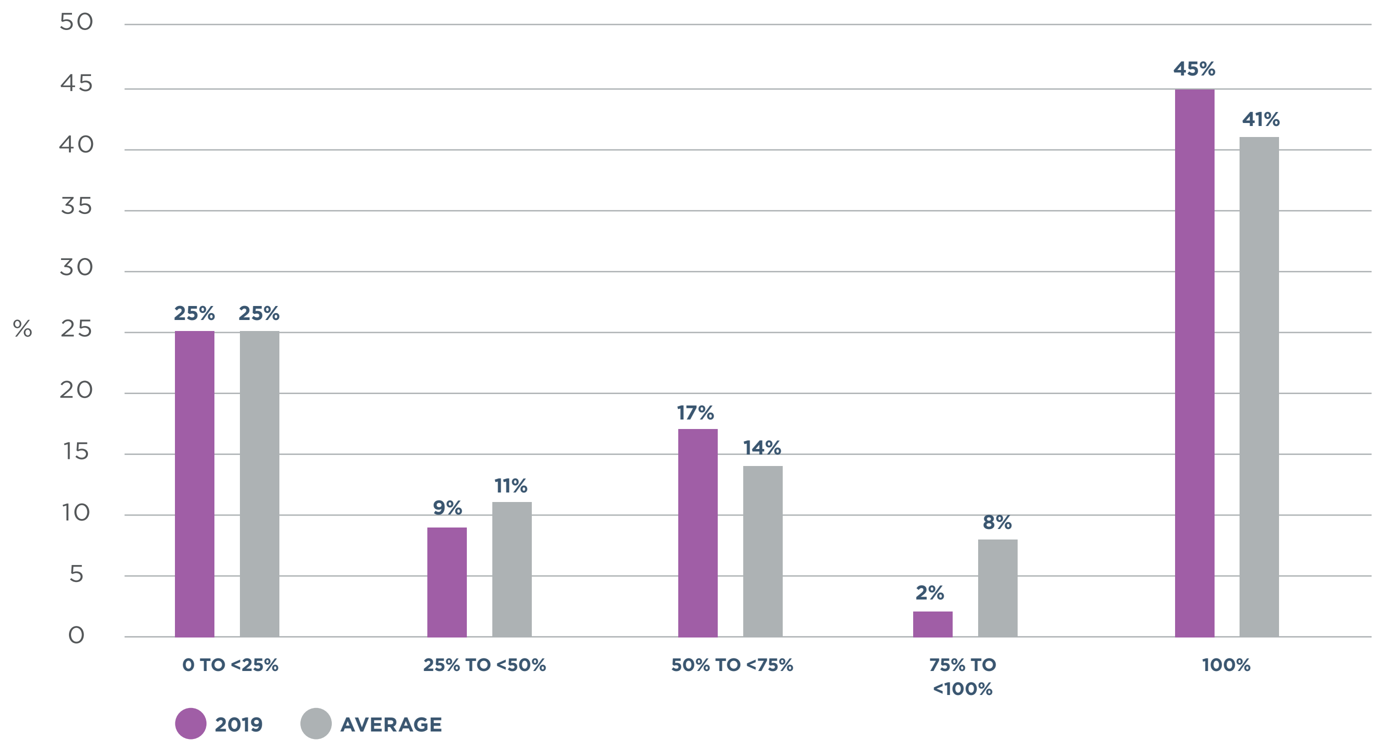
PRICE ADJUSTMENT MECHANISM

COMPLETION ACCOUNTS: WHO PREPARES FIRST DRAFT?

WHAT METRICS DID THE COMPLETION ACCOUNTS TEST?

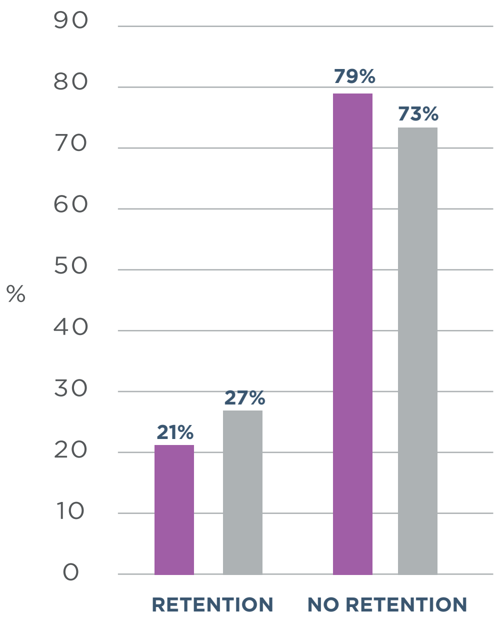
LIABILITY CAPS

LIABILITY CAP AS A % OF PURCHASE PRICE: ALL DEALS

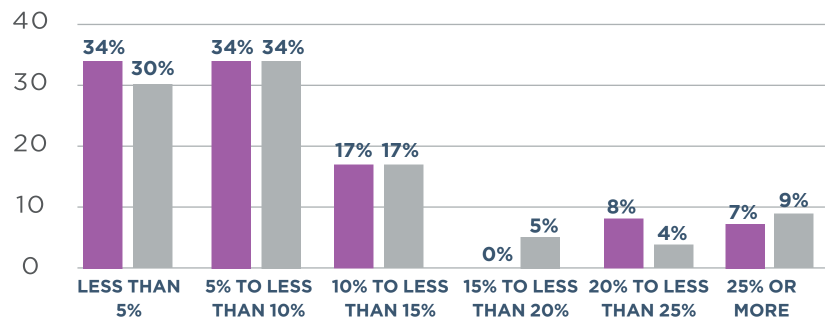


RETENTIONS & EARN OUTS

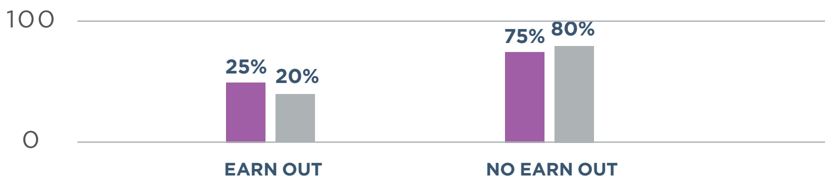
RETENTION



RETENTION AS A % OF THE PURCHASE PRICE

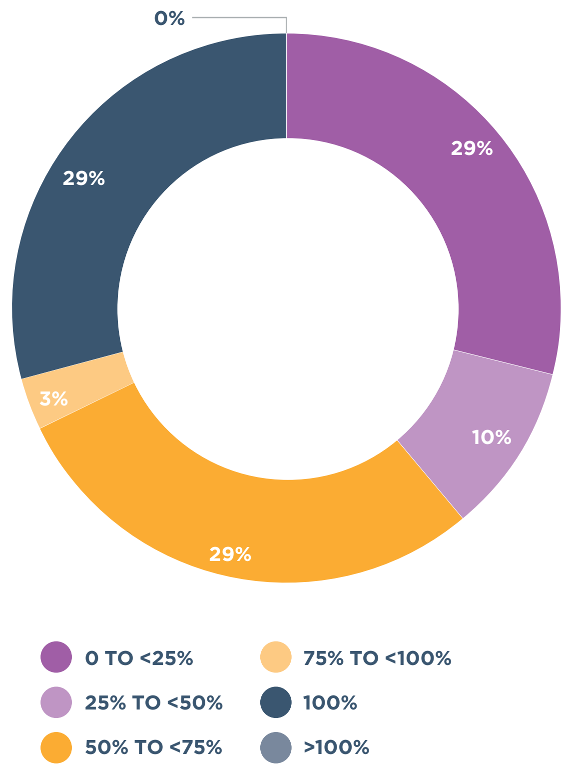


EARN OUTS

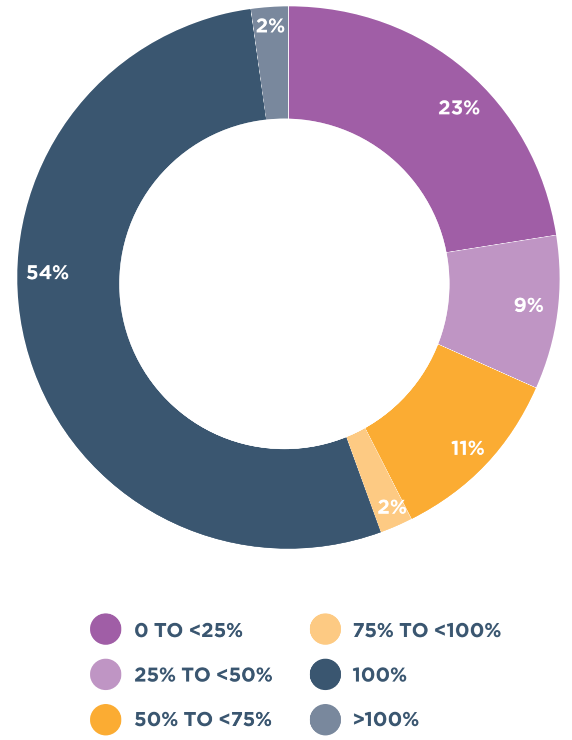


2019 AVERAGE

LIABILITY CAP AS A % OF PURCHASE PRICE: PE DEALS

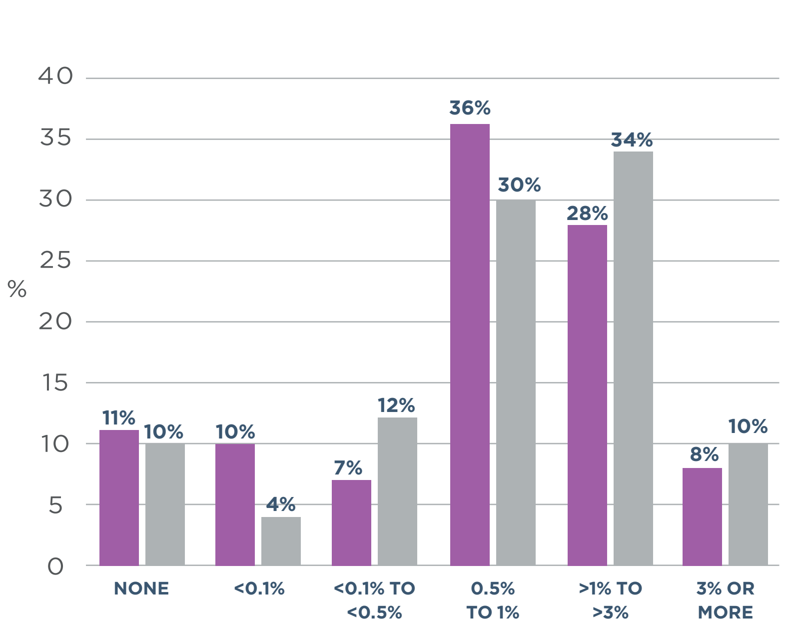


LIABILITY CAP AS A % OF PURCHASE PRICE: NON-PE DEALS

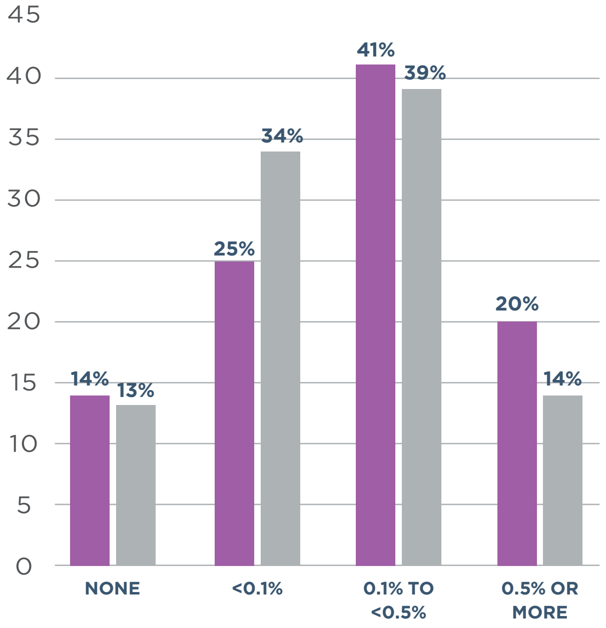


LIMITATIONS ON LIABILITY

BASKET AS A % OF THE PURCHASE PRICE

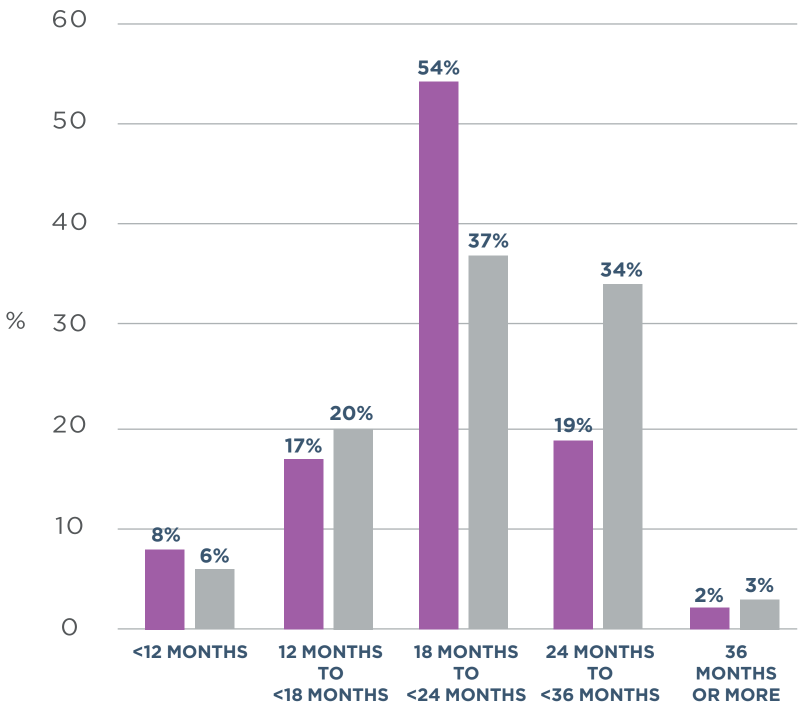


BASKET AS A % OF THE PURCHASE PRICE

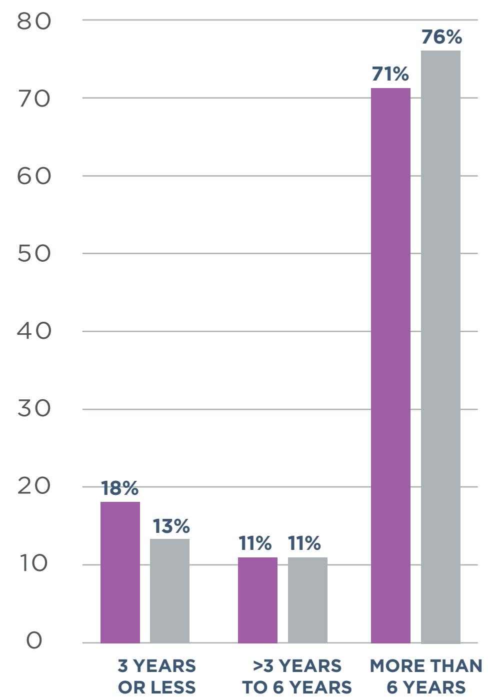


2019 AVERAGE

CLAIMS PERIOD (NON-TAX CLAIMS)



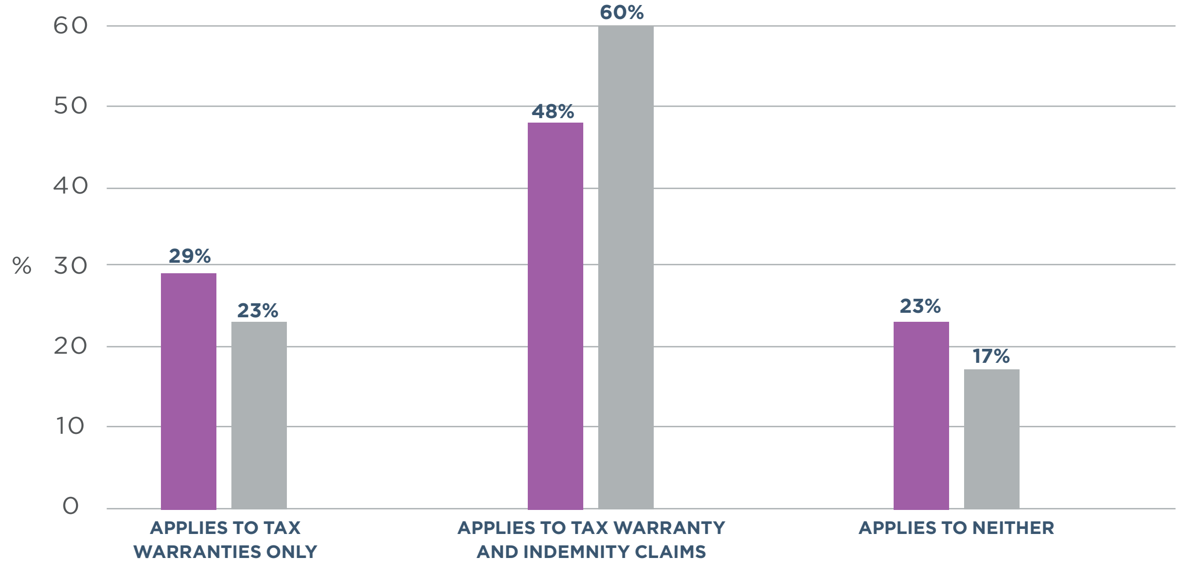
CLAIMS PERIOD (TAX CLAIMS)



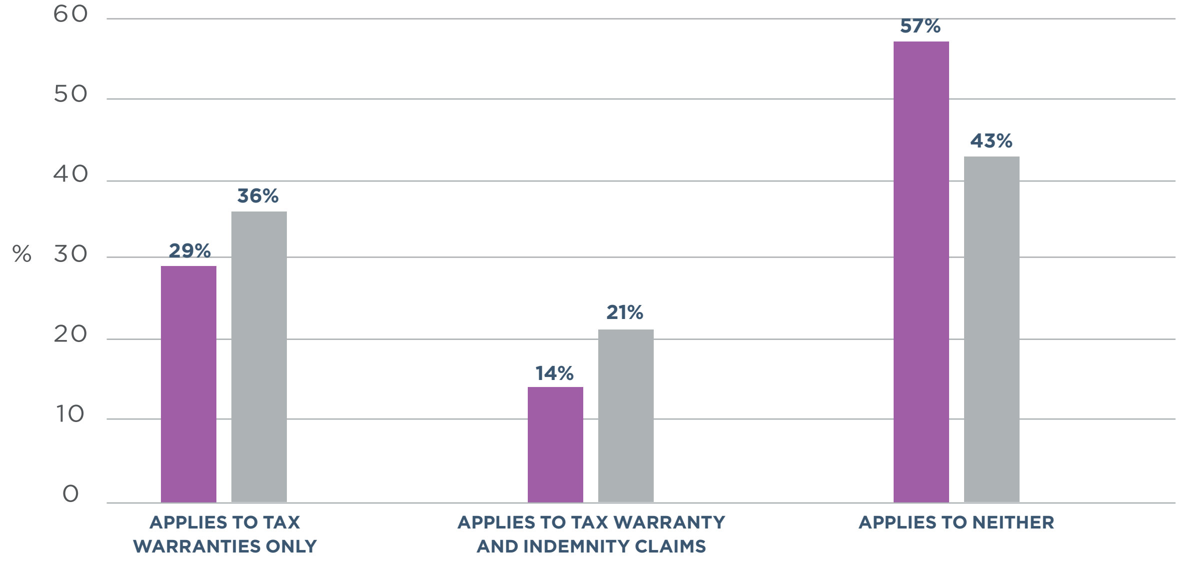
2019 AVERAGE

LIMITATIONS ON TAX CLAIMS

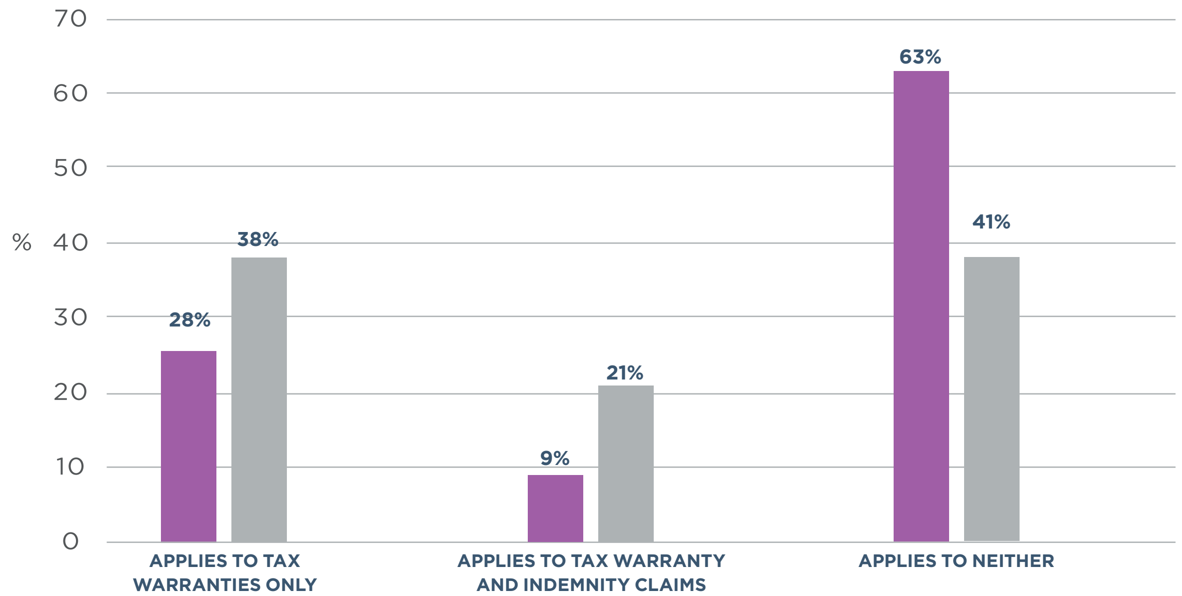
APPLICATION OF LIABILITY CAP TO TAX CLAIMS



APPLICATION OF DE MINIMIS TO TAX CLAIMS



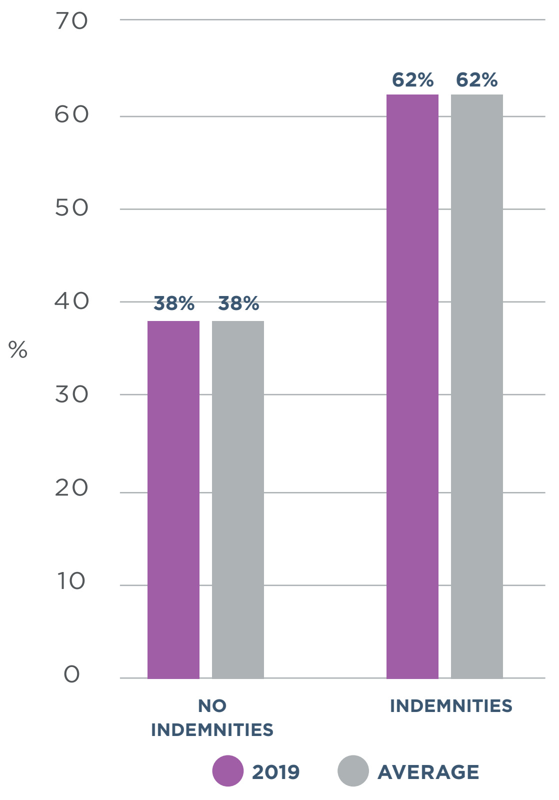
APPLICATION OF BASKET THRESHOLD TO TAX CLAIMS



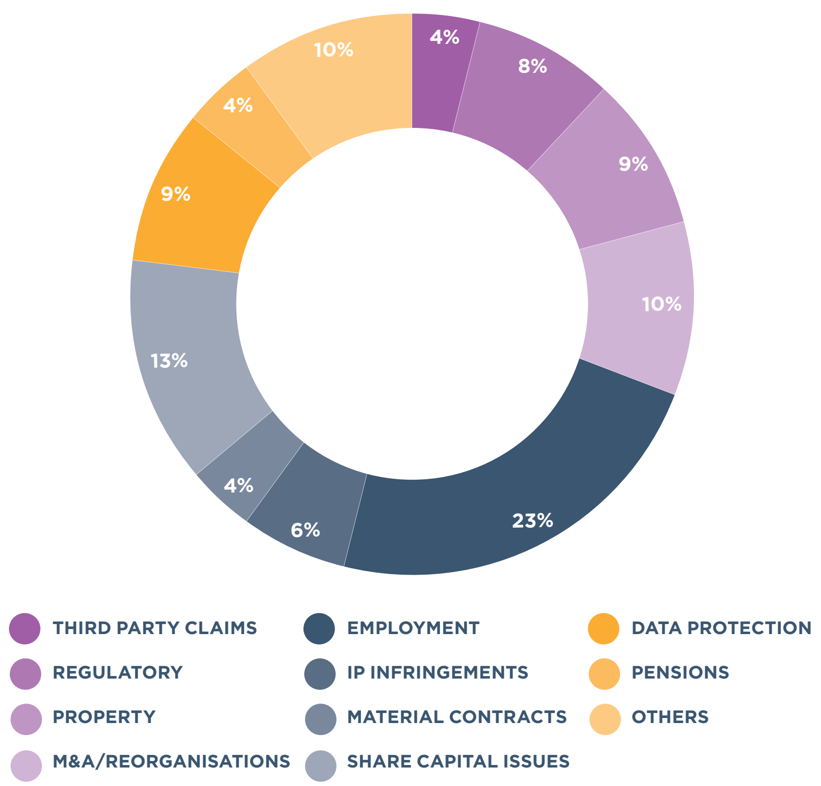
2019
AVERAGE

INDEMNITIES

INDEMNITIES GIVEN BY SELLER



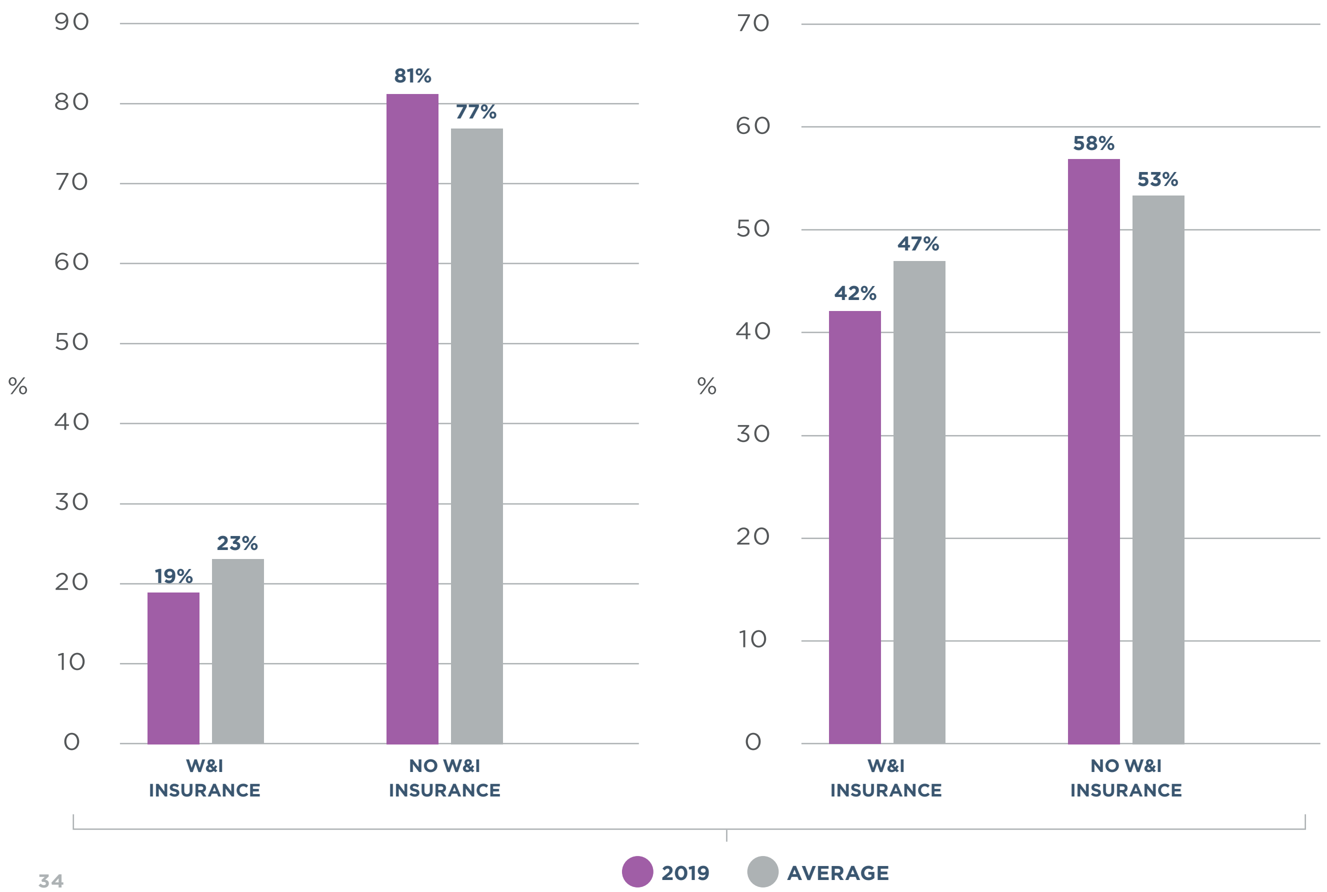
SUBJECT MATTER OF INDEMNITIES



W&I INSURANCE

DEALS INVOLVING W&I INSURANCE: ALL DEALS

DEALS INVOLVING W&I INSURANCE: PE DEALS

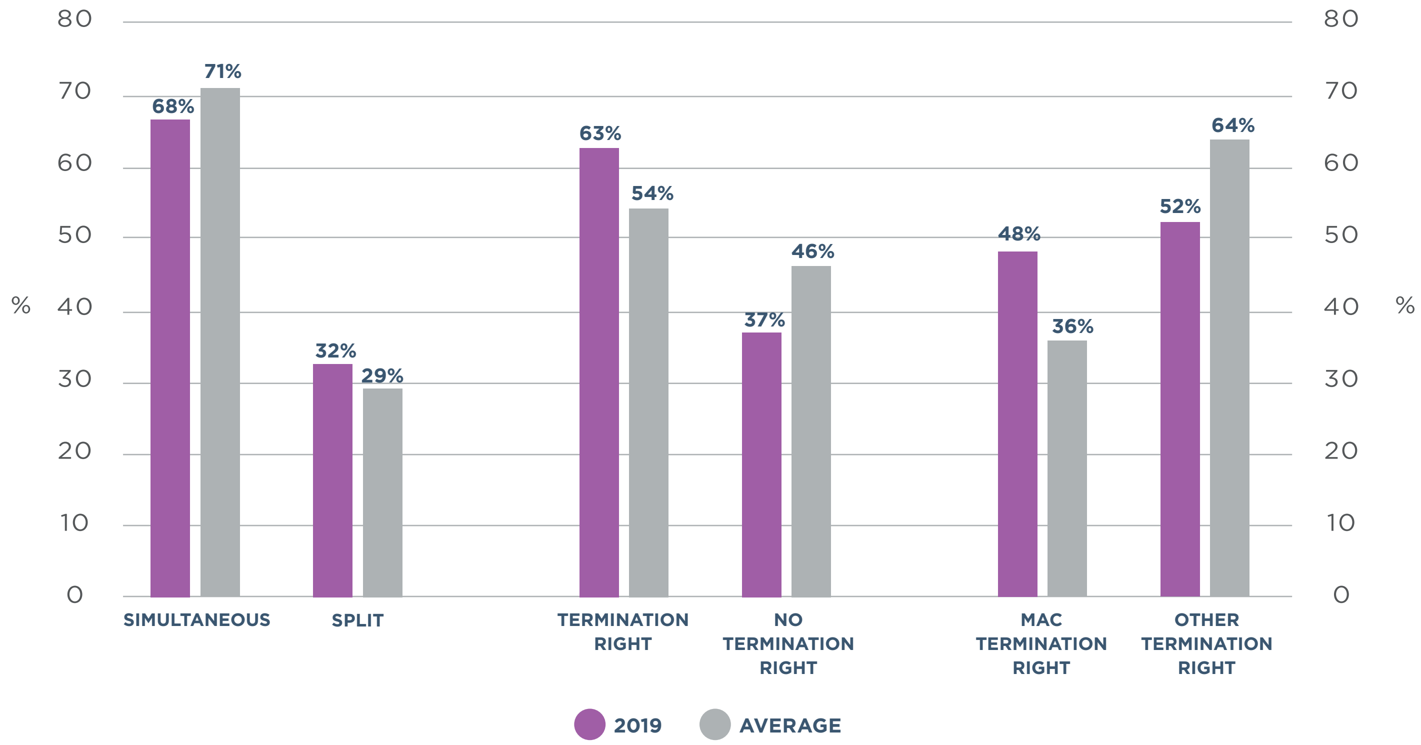


CONDITIONAL DEALS

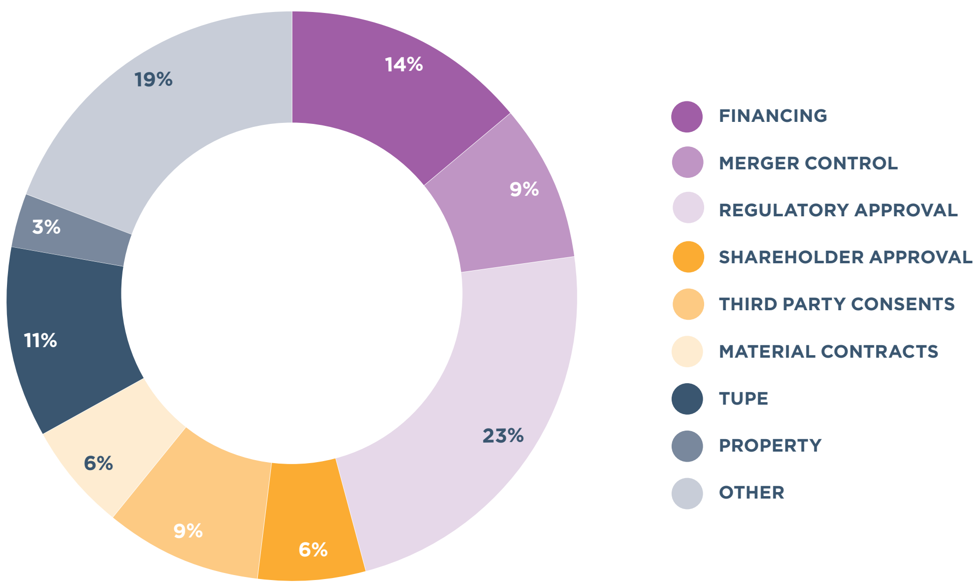
SPLIT EXCHANGE AND COMPLETION OR SIMULTANEOUS?

BUYER RIGHT TO TERMINATE BETWEEN EXCHANGE AND COMPLETION

NATURE OF TERMINATION RIGHTS



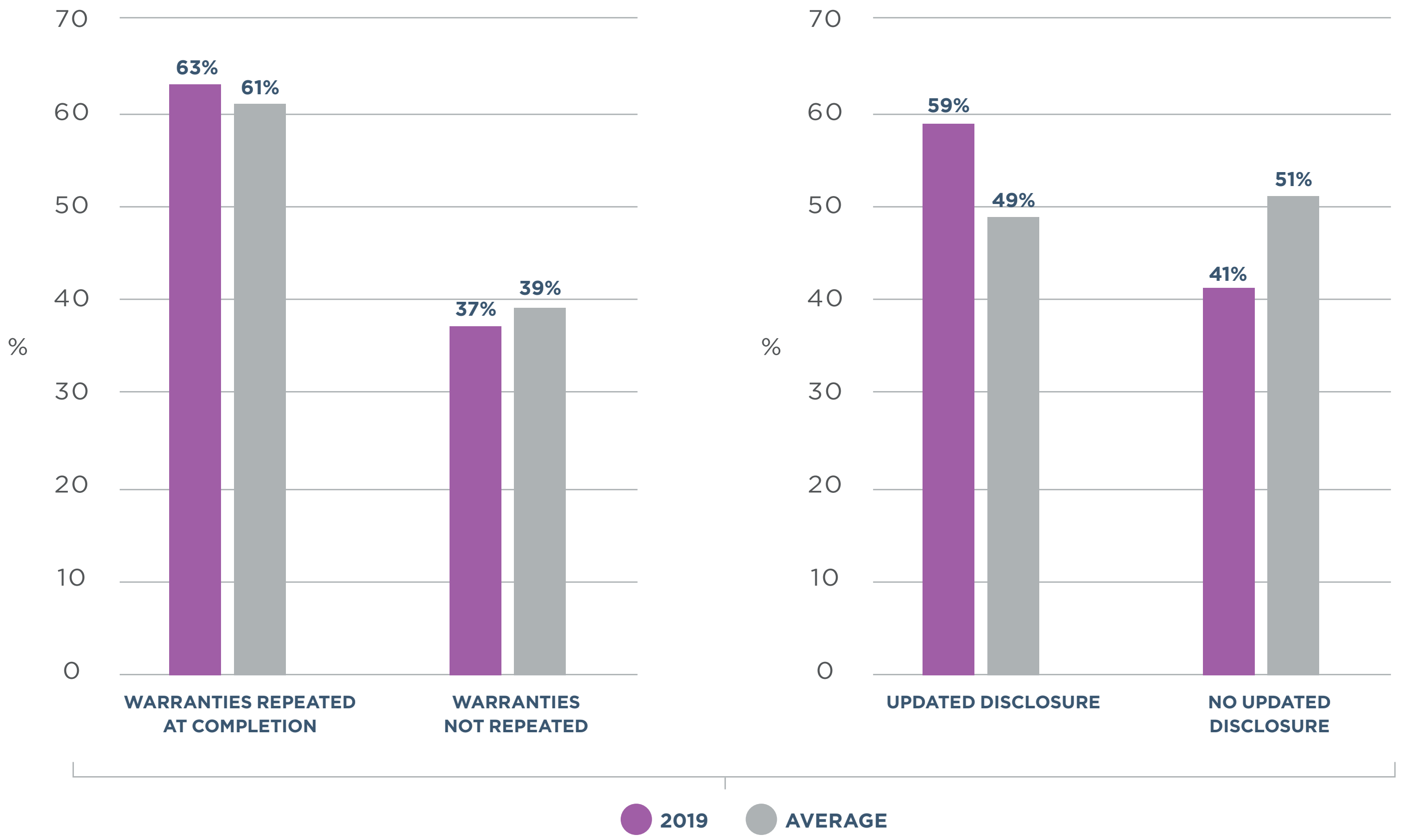
REASON FOR SPLIT EXCHANGE AND COMPLETION



REPETITION OF WARRANTIES

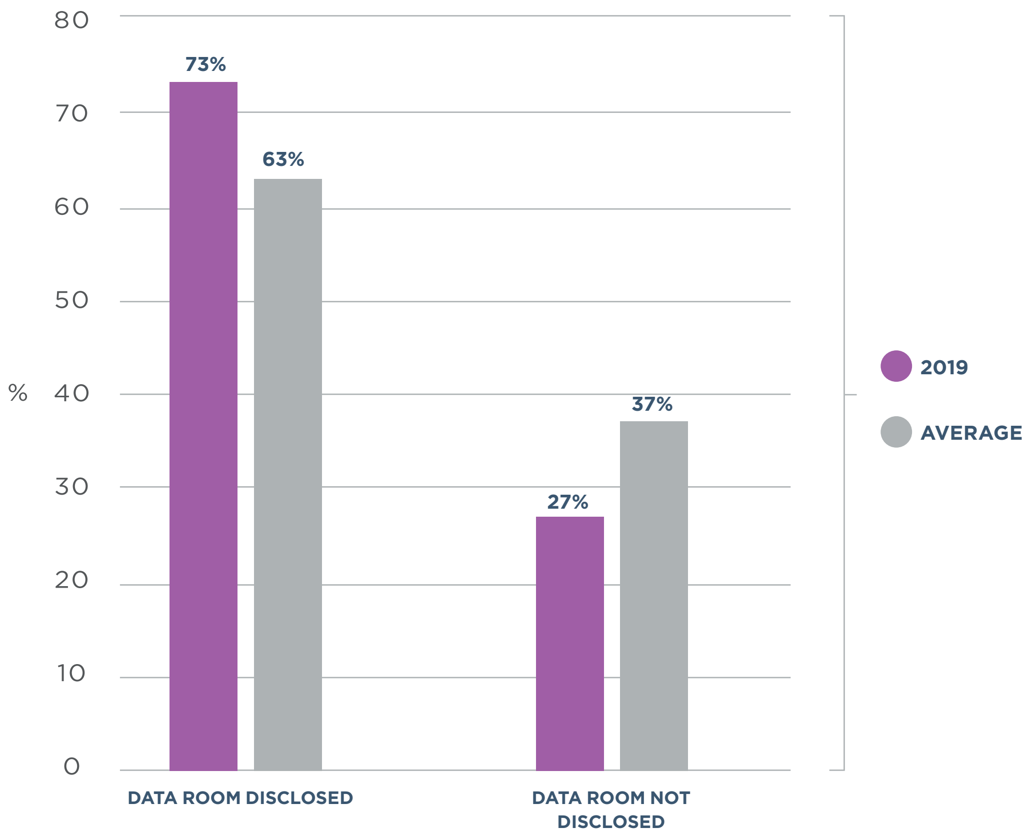
REPETITION OF WARRANTIES

SELLER PERMITTED TO UPDATE DISCLOSURE?



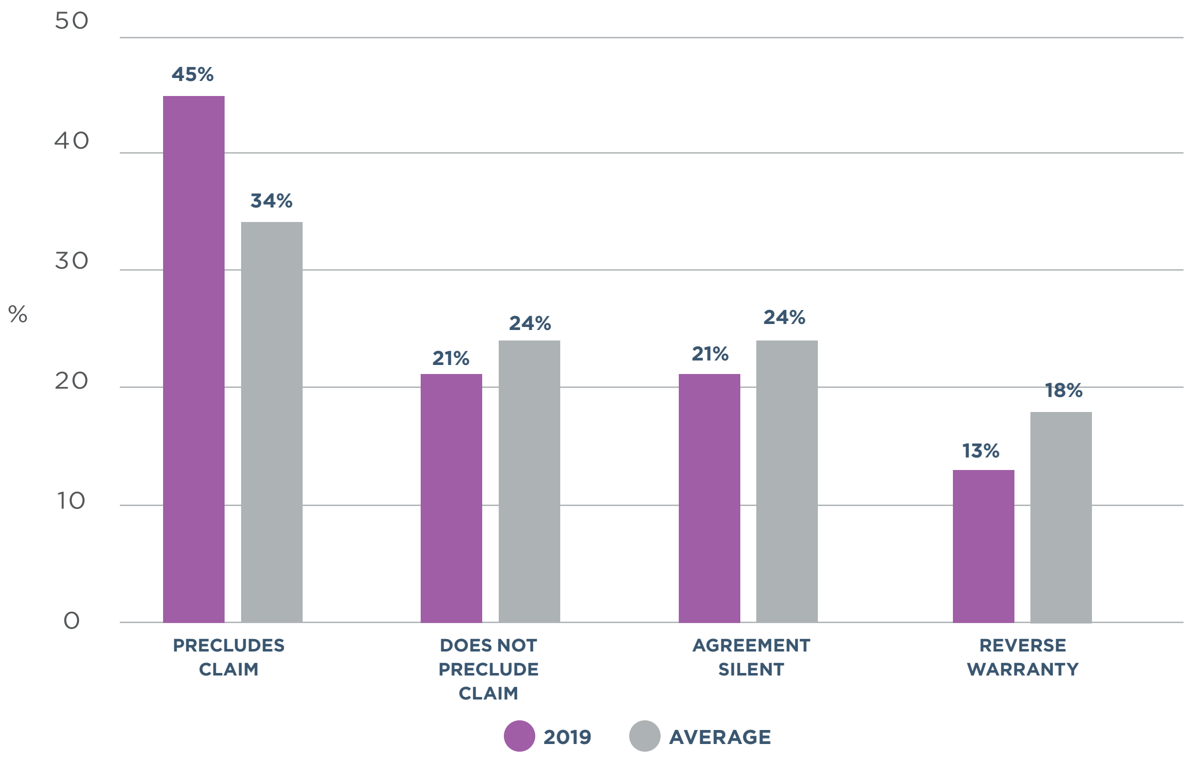
DATA ROOM DISCLOSURE

GENERAL DISCLOSURE OF THE DATA ROOM



BUYER'S KNOWLEDGE

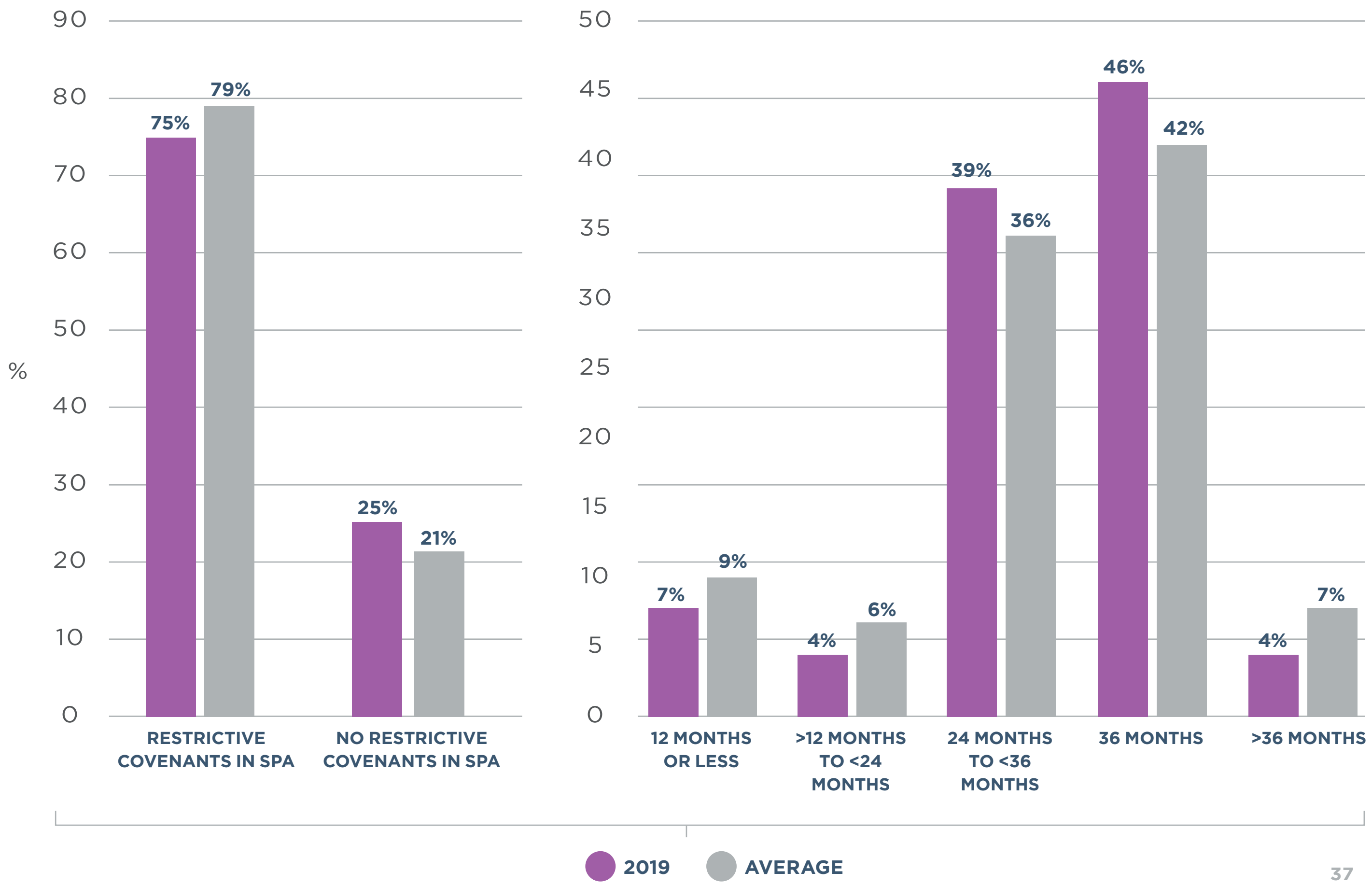
BUYER'S KNOWLEDGE



RESTRICTIVE COVENANTS

RESTRICTIVE COVENANTS

DURATION OF RESTRICTIVE COVENANTS



PROBLEMS. POSSIBILITIES.
COMPLEXITY. CLARITY.
OBSTACLES. OPPORTUNITIES.
THE DIFFERENCE IS IMAGINATION.
THE DIFFERENCE IS AG.

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