

EUROPEAN PRIVATE TARGET
DEAL POINTS STUDY 2017
(INCLUDING TRANSACTIONS FROM 2014, 2015 AND 2016)



PRIVATE TARGET

**A PROJECT OF THE M&A MARKET TRENDS SUBCOMMITTEE
OF THE MERGERS & ACQUISITIONS COMMITTEE**



Kramer Levin Naftalis & Frankel LLP is pleased to make available this study, co-chaired by one of our partners, presenting data about European M&A deals and comparisons with U.S. practice.



EUROPEAN PRIVATE TARGET M&A DEAL POINTS STUDY

A Project of the M&A Market Trends Subcommittee
of the Mergers & Acquisitions Committee
of the American Bar Association's Business Law Section

SUBCOMMITTEE CHAIR

Rita O'Neill, Sullivan & Cromwell LLP

PAST SUBCOMMITTEE CHAIRS

Claudia K. Simon

Hal J. Leibowitz, Wilmer Hale

Wilson Chu, McDermott Will & Emery LLP (Founding Subcommittee Chair)

Larry Glasgow, Gardere Wynne Sewell, LLP (Founding Subcommittee Chair)

Keith A. Flaum, Weil Gotshal & Manges LLP

James R. Griffin, Weil Gotshal & Manges LLP

Jessica C. Pearlman, K&L Gates LLP

CHAIR, MERGERS & ACQUISITIONS COMMITTEE

Scott T. Whittaker, Stone Pigman Walther Wittmann L.L.C.



EUROPEAN PRIVATE TARGET M&A DEAL POINTS STUDY

CO-CHAIRS

Reid Feldman
Kramer Levin Naftalis & Frankel
Paris, France

Jan-Willem van Rooij
Loyens & Loeff
Rotterdam, The Netherlands

Yan Pecoraro
Portolano Cavallo
New York, USA

Bob Calmes
Arendt & Medernach
Luxembourg

EDITORS

Ksenia Dzagoeva
Kramer Levin Naftalis & Frankel
Paris, France

Victor van Nuland
Loyens & Loeff
Rotterdam, The Netherlands

CONTRIBUTORS

Federico Bal
Gattai, Minoli,
Agostinelli & Partners
Milan, Italy

John Bennett
Bryan Cave Leighton Paisner
London, UK

Martin Brodey
Dorda Rechtsanwälte
Vienna, Austria

**Mattia Colonnelli de
Gasperis**
Colonnelli de Gasperis
Milan, Italy

Sarah Crabtree
Osborne Clarke
London, UK

Eva Das
Stibbe
New York, NY

Annamari Engelberg
Krogerus Attorneys
Helsinki, Finland

Luca Gambini
Portolano Cavallo
Milan, Italy

Enrico Granata
King & Spalding
New York, UK

Philippe Harles
Arendt & Medernach
Luxembourg

Christian Herbst
Schoenherr
Vienna, Austria

Martin Imhof
Heuking Kühn Lüer Wojtek
Düsseldorf, Germany

Till Kosche
Noerr
Frankfurt, Germany

Jarle Kvam
Wiersholm
Oslo, Norway

Rainer Loges
Glöss Lutz
Munich, Germany

Diogo Perestrelo
PLMJ Advogados
Lisbon, Portugal

Mari Pihalehto
Hannes Snellman
Helsinki, Finland

Lola Tejero
Cuatrecasas
Barcelona, Spain

Marie Michel Verron
Herbert Smith Freehills
Paris, France

DISCLAIMERS

The findings presented in this Study do not necessarily reflect the personal views of the Working Group members or the views of their respective firms. In addition, the acquisition agreement provisions that form the basis of this Study are drafted in many different ways and do not always fit precisely into particular "data point" categories. Therefore, Working Group members have had to make various judgment calls regarding, for example, how to categorize the nature or effect of the provisions. As a result, the conclusions presented in this Study may be subject to important qualifications that are not expressly articulated in this Study.



EUROPEAN PRIVATE TARGET STUDY SAMPLE OVERVIEW

- This study analyzes share purchase agreements for acquisitions of privately held targets in Europe signed or closed in 2014, 2015 or 2016 meeting the following criteria: (a) transaction value* was at least €15 million; (b) the Target was a company whose shares are not publicly traded; (c) the transaction was a pure share deal (i.e. not for purchase of assets or acquisition of a combination of assets and shares); and (d) the Target or a substantial part of its assets or operations were in Europe.
- As acquisition agreements are not generally publicly available in Europe, the Study sample consists of information on acquisition agreements provided by Working Group members' firms in Austria, Belgium, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, the UK and the USA.
- Data were collected by means of questionnaire responses (with no communication of confidential data from the deals studied). Validity and consistency of data were verified by review of sanitized agreements or excerpts thereof. On some slides percentages do not total 100% due to rounding.
- Some comparisons are made in this study (referred to in that context as the "2017 Study") to the 2015, 2013 and 2010 European Private Target Deal Points Studies and the 2017, 2015 and 2013 US Private Target Deal Points Studies.**

Transaction Value Range (millions)		# of Deals	Closing	
Minimum	Maximum		Deferred	Simultaneous Sign-and-Close
€15M	€3500M	83	69%	31%

* Transaction value includes capped or calculated earn-outs and assumption of Seller's debt but not uncapped earn-outs to the extent not yet calculated or Target's debt.

** These studies are available at <http://apps.americanbar.org/dch/committee.cfm?com=CL560003>.



CONTENTS

I.	Study Sample	<i>Slide 6</i>
A.	Analysis of study sample by transaction value, industry, nature of parties, use of controlled auctions, Target's country of principal operations and applicable law	Slides 7-14
B.	Comparative Data re: Sample	Slide 15
II.	Financial Provisions	<i>Slide 16</i>
A.	Payment Terms	Slide 17
B.	Post-Closing Purchase Price Adjustments	Slide 18
III.	Pervasive Qualifiers	<i>Slide 19</i>
A.	Material Adverse Effect	Slide 20
B.	Knowledge	Slide 29
C.	Comparative Data re: Pervasive Qualifiers	Slide 31
IV.	Representations and Warranties	<i>Slide 32</i>
A.	Financial statements - "Fair Presentation Representation"	Slide 33
B.	"No Undisclosed Liabilities" Representation	Slide 35
C.	"Full Disclosure" Representation	Slide 37
D.	"Compliance with Law" Representation	Slide 39
E.	Representations Implied by Law	Slide 41
F.	Comparative Data re: Representations	Slide 42
V.	Conditions to Closing	<i>Slide 43</i>
A.	Accuracy of Representations	Slide 44
B.	Material Adverse Change Condition	Slide 49
C.	No Legal Proceedings Challenging the Transaction	Slide 51
D.	Legal Opinions (Non-Tax) of Seller's Counsel	Slide 53
E.	Retention of Employees	Slide 54
F.	Comparative Data re: Closing Conditions	Slide 55
VI.	Indemnification	<i>Slide 56</i>
A.	"Sandbagging"	Slide 57
B.	"No Other Representations and Warranties"	Slide 59
C.	Survival/Time to Assert Claims	Slide 64
D.	Definition of Damages	Slide 67
J.	Baskets	Slide 69
K.	Caps	Slide 76
L.	Indemnification as Exclusive Remedy	Slide 79
M.	Right of Seller to Remedy a Breach	Slide 81
N.	Control of Defense Against Third-Party Claims	Slide 82
O.	Security for Payment of Seller's Indemnification Obligations	Slide 84
P.	Comparative Data re: Indemnification	Slide 86
VII.	Dispute Resolution	<i>Slide 87</i>
A.	Dispute Resolution Mechanism	Slide 88
B.	Comparative Data re: Dispute Resolution	Slide 89

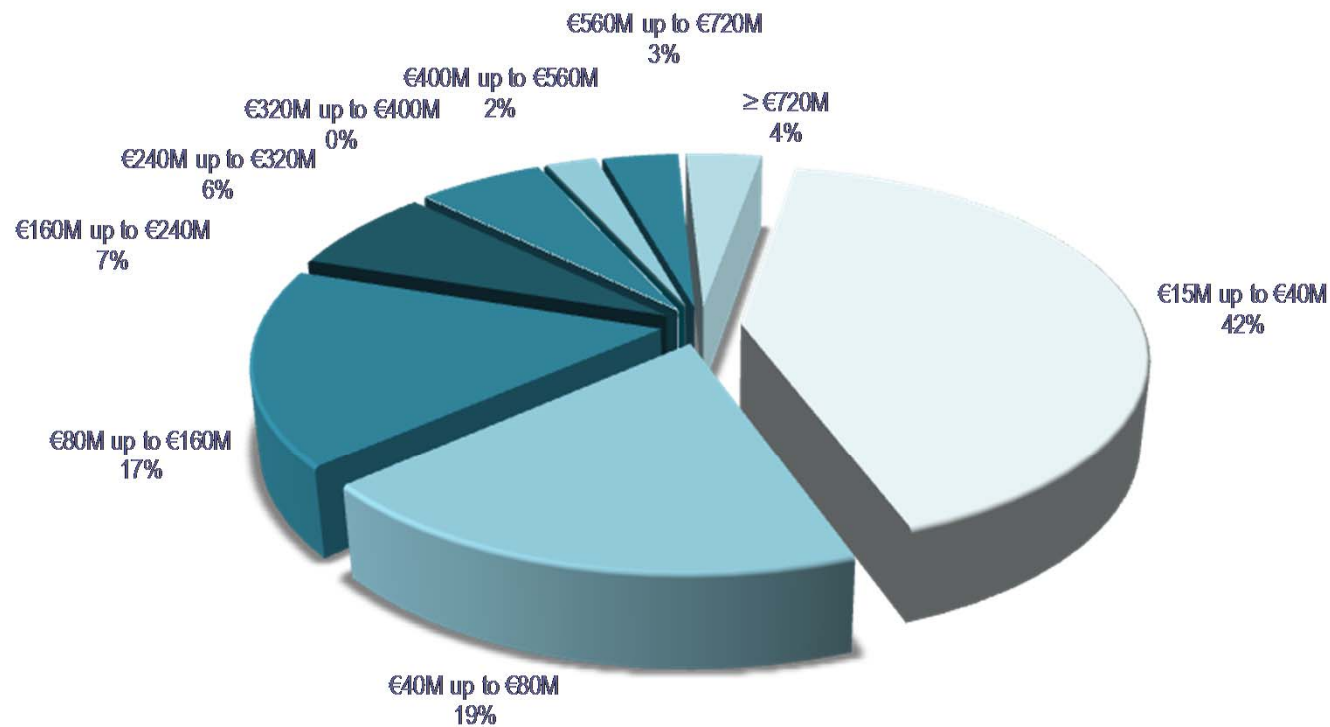


STUDY SAMPLE



EUROPEAN PRIVATE TARGET STUDY SAMPLE

(by transaction value)*

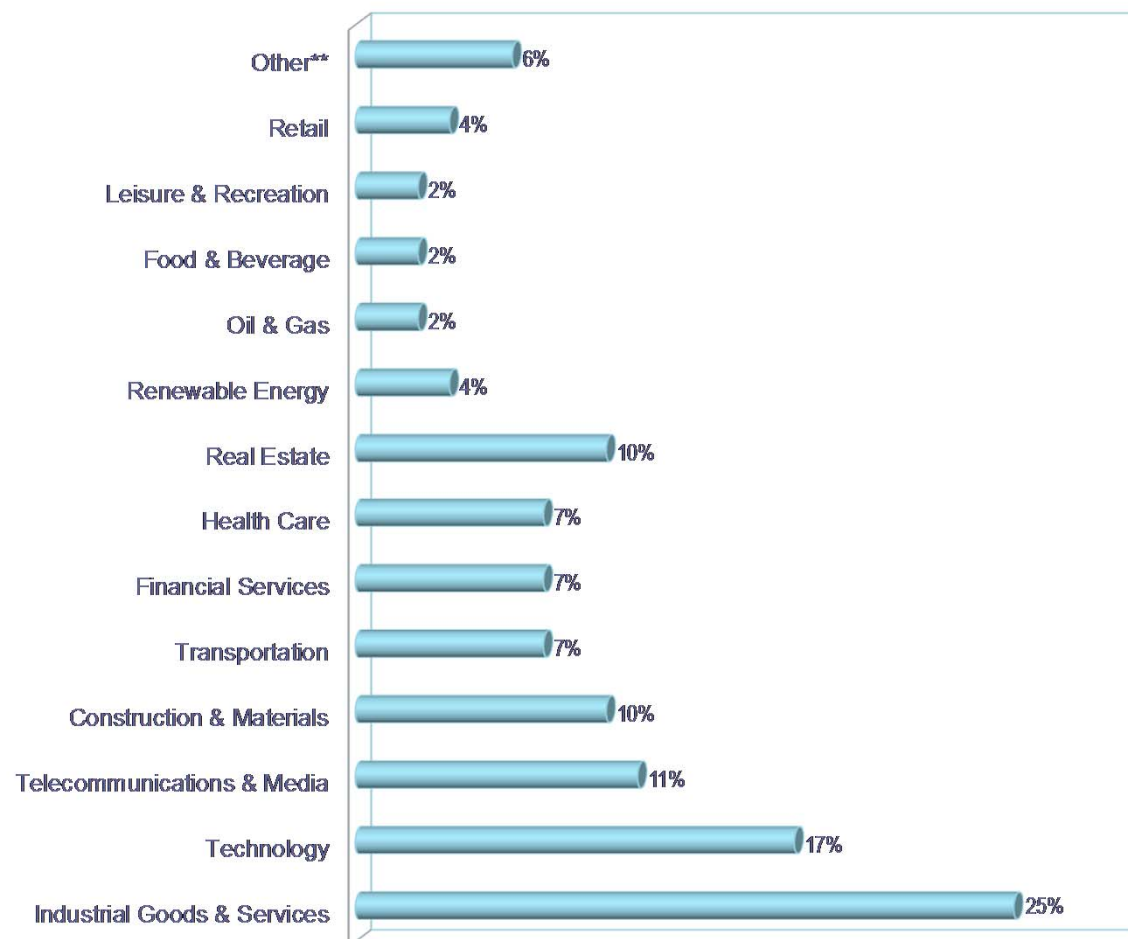


* Mean transaction value was €167M and median transaction value was €53M.



EUROPEAN PRIVATE TARGET STUDY SAMPLE

(by industry)*



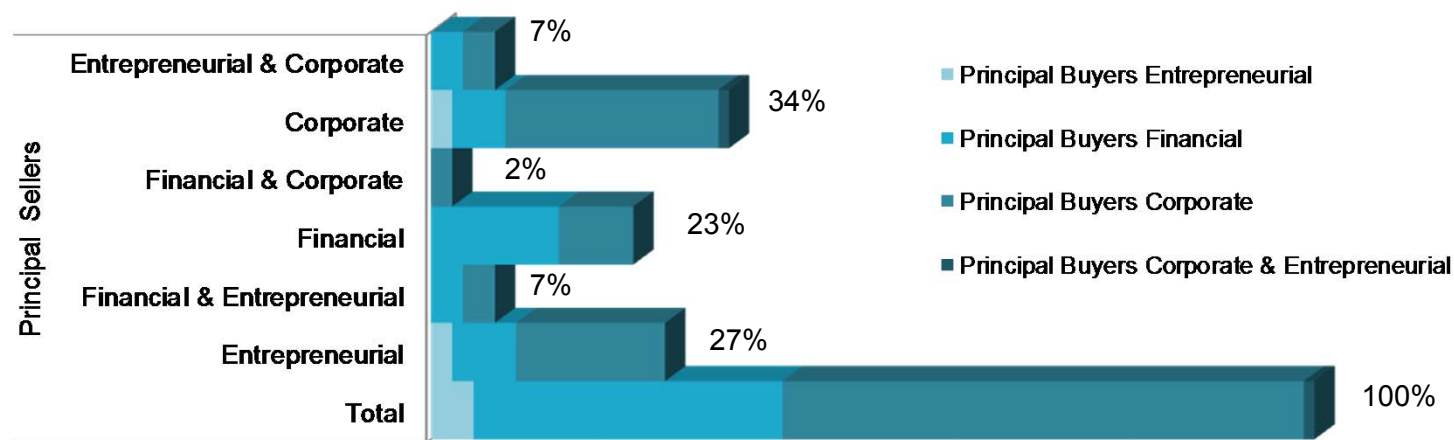
* 13% of Targets had activities in more than one industry.

** "Other" includes education, daycare, social and welfare services and fashion.



European Private Target Study Sample

(by nature of parties)



Note: In none of the deals was the Buyer both Financial & Corporate or both Financial & Entrepreneurial.

(These data are also presented in table form on next slide.)



EUROPEAN PRIVATE TARGET STUDY SAMPLE

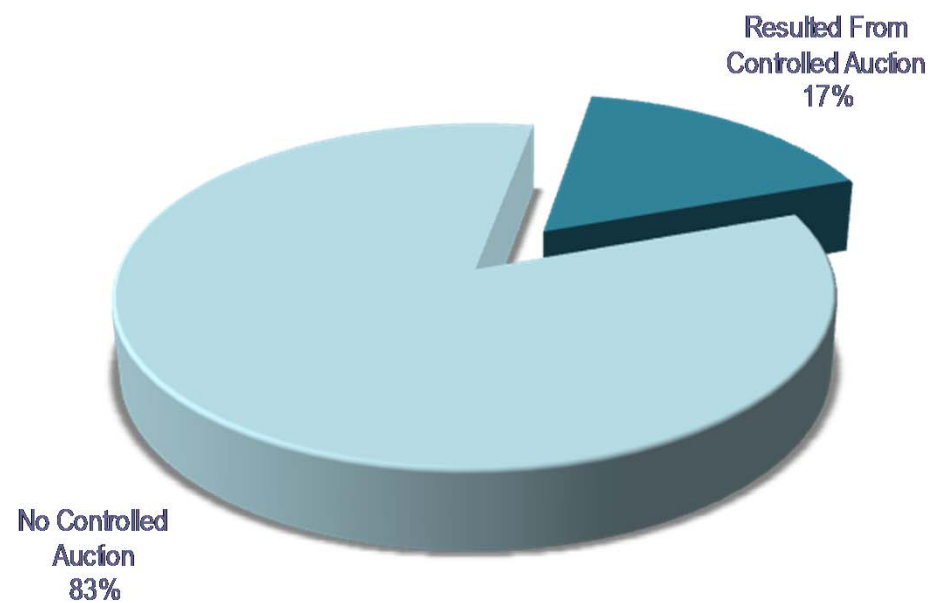
(by nature of parties)

		Principal Buyers				
		Entrepreneurial	Financial	Corporate	Entrepreneurial & Corporate	Total
Principal Sellers	Entrepreneurial & Corporate	0%	4%	4%	0%	7%
	Corporate	2%	6%	24%	1%	34%
	Financial & Corporate	0%	0%	2%	0%	2%
	Financial	0%	14%	8%	0%	23%
	Financial & Entrepreneurial	0%	4%	4%	0%	7%
	Entrepreneurial	2%	7%	17%	0%	27%
	Total	5%	35%	59%	1%	100%



EUROPEAN PRIVATE TARGET STUDY SAMPLE

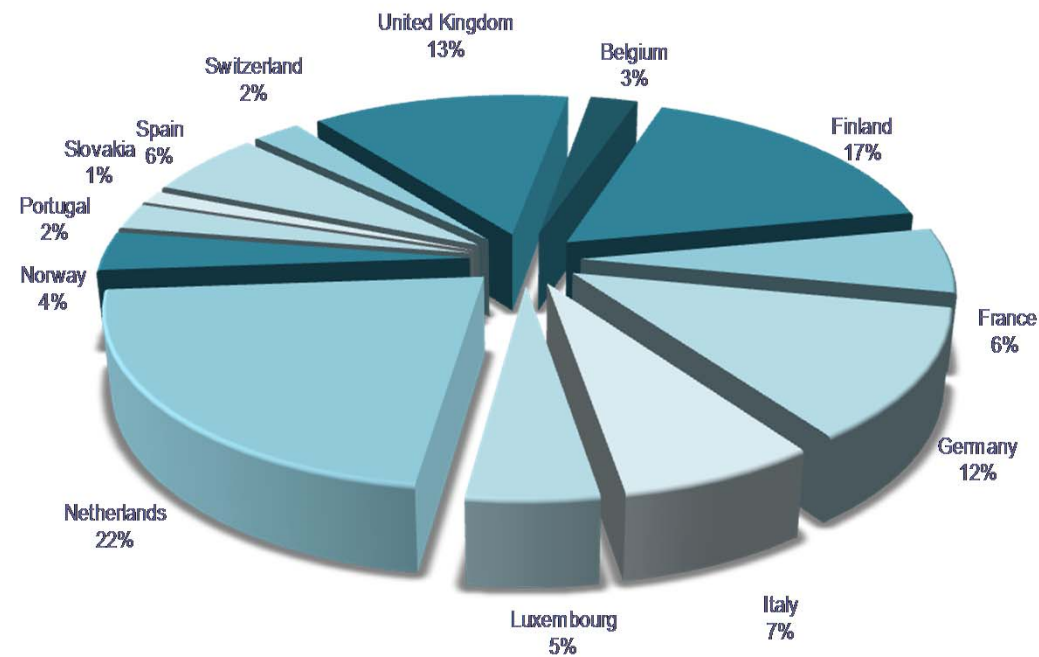
(use of controlled auctions)





EUROPEAN PRIVATE TARGET STUDY SAMPLE

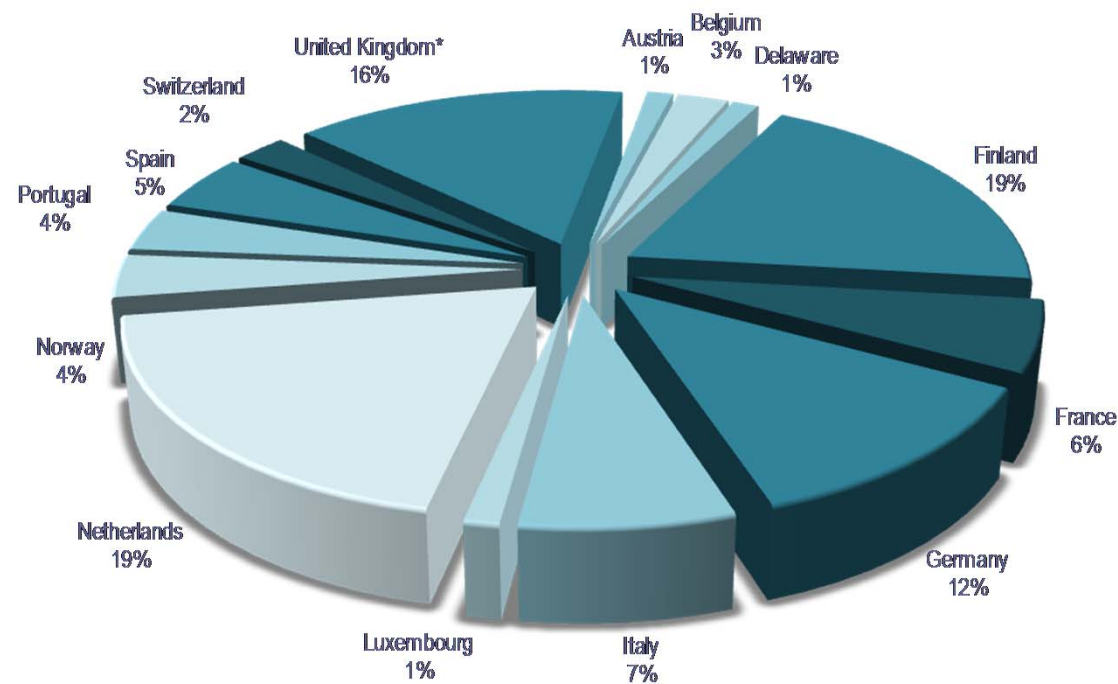
(by country of principal operations of Target)





EUROPEAN PRIVATE TARGET STUDY SAMPLE

(applicable law)

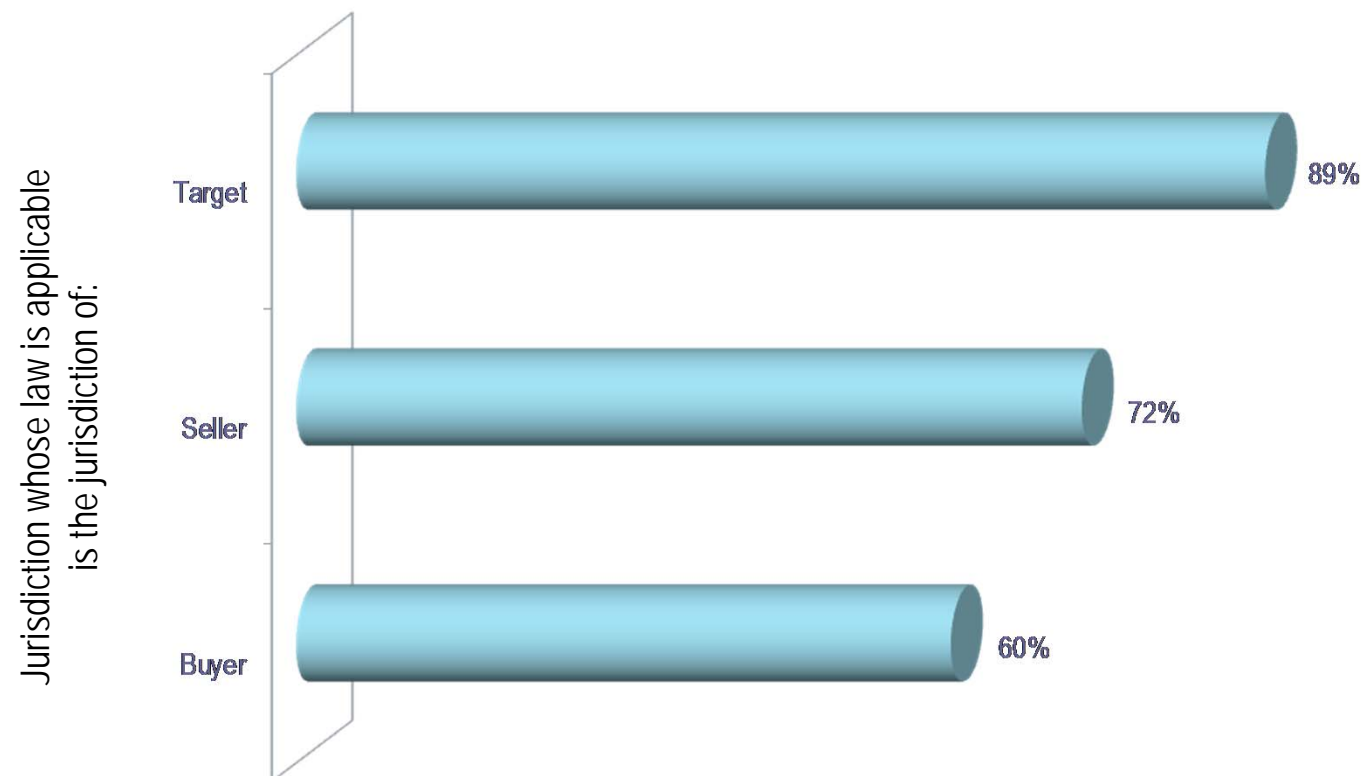


* For deals in this study, the law of England and Wales.



EUROPEAN PRIVATE TARGET STUDY SAMPLE

(applicable law)





PRIVATE TARGET M&A STUDIES COMPARATIVE DATA RE: SAMPLE

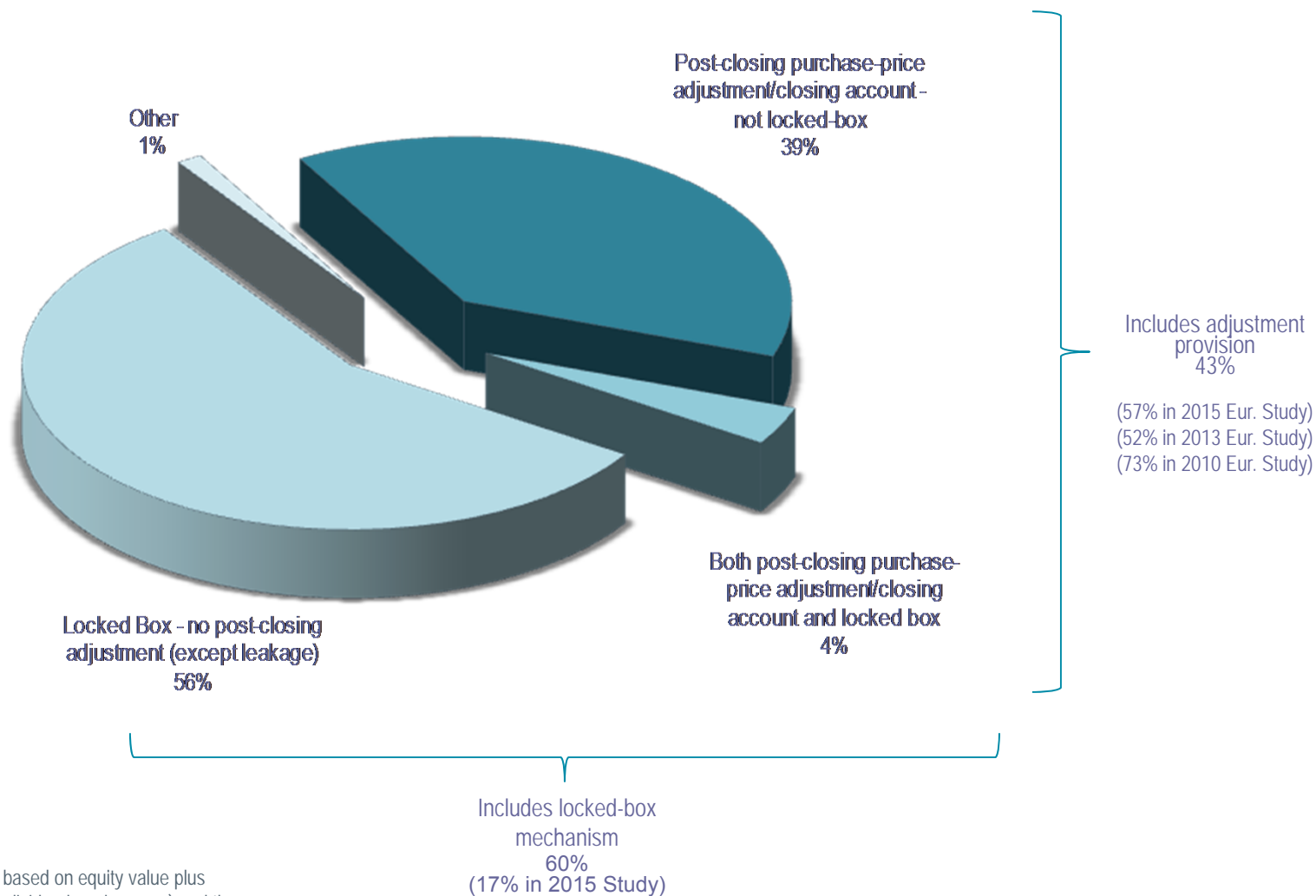
	US Studies				European Studies		
	2011	2013	2015	2017	2013	2015	2017
Years covered	Deals closed in 2010	Deals closed in 2012	Deals closed in 2014	Deals signed and/or closed in 2016 or 2017 Q1/Q2	Deals signed and/or closed in 2009-2011	Deals signed and/or closed in 2012 or 2013	Deals signed and/or closed in 2014, 2015 or 2016
Sample	100 agreements (83% share deals, 17% asset deals, 70% with a deferred closing)	136 agreements (90% share deals, 10% asset deals, 88% with a deferred closing).	117 agreements (83% share deals, 17% asset deals, 89% with a deferred closing)	139 agreements (14% asset deals, 118 with a deferred closing)	101 agreements (100% share deals, 79% with a deferred closing.)	81 agreements (100% share deals, 72% with a deferred closing)	83 agreements (100% share deals, 69% with a deferred closing)
Most recent sample	Technology 29% Health Care 16% Industrial Goods & Services 10%	Technology 26% Health Care 20% Industrial Goods & Services 11%	Technology 20% Health Care 18% Fin'l Services 12%	Technology 24% Health Care 22% Construction & Materials 9%	Industrial goods & Services 20% Technology 17% Food & Bevrq 13%	Industrial goods & Services 21% Technology 16% Food & Bevrq 10%	Industrial goods & Services 22% Technology 15% Telcm/media 9%
Transaction value	\$25M to \$50M 28%	\$17M to \$50M 16%	\$17M to \$50M 2%	\$30M to \$50M 8%	€20M up to €40M 35%	€15M up to €40M 46%	€15M up to €40M 42%
	\$51M to \$100M 25%	\$51M to \$100M 21%	\$51M to \$100M 33%	\$51M to \$100M 30%	€40M up to €80M 22%	€40M up to €80M 26%	€40M up to €80M 19%
	\$101M to \$300M 16%	\$101M to \$200M 21%	\$101M to \$200M 30%	\$101M to \$200M 24%	€80M up to €240M 29%	€80M up to €160M 13%	€80M up to €160M 17%
	\$301M to \$500M 7%	\$201M to \$500M 27%	\$201M to \$500M 35%	\$201M to \$400M 35%	€240M up to €400M 7%	€160M up to €400M 8%	€160M up to €400M 13%
	>\$500M none	>\$500M 15%	>\$500M 0%	\$401M to \$500M 4%	> €400M 8%	>€400M 7%	>€400M 9%



FINANCIAL PROVISIONS



PAYMENT TERMS



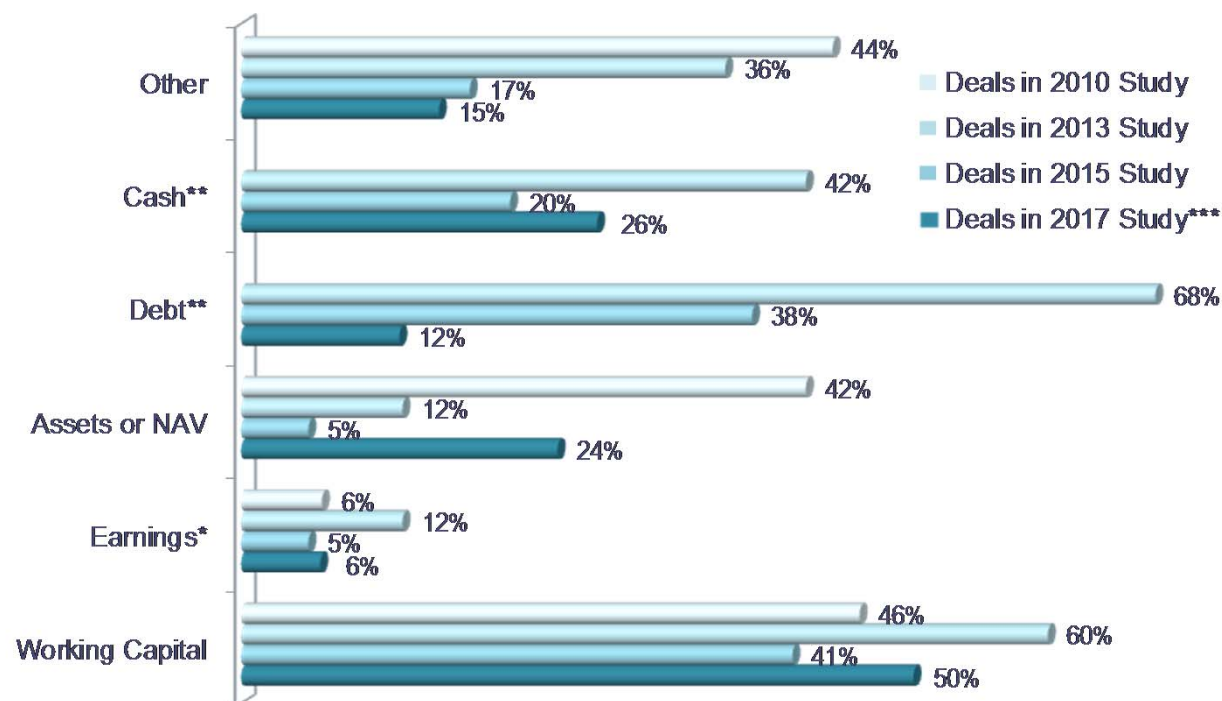
* Example of "Other": price based on equity value plus interest less leakage (e.g., dividends or bonuses) and the amount of a certain claim.



POST-CLOSING PURCHASE PRICE ADJUSTMENTS

(Subset: deals with post-closing purchase price adjustments)

Post-closing Adjustment Metrics



* Includes EBITDA or other measure of earnings.

** Not separately categorized in 2010 Study

*** In 2017 Study 21% of the subset featured more than one metric.



PERVASIVE QUALIFIERS



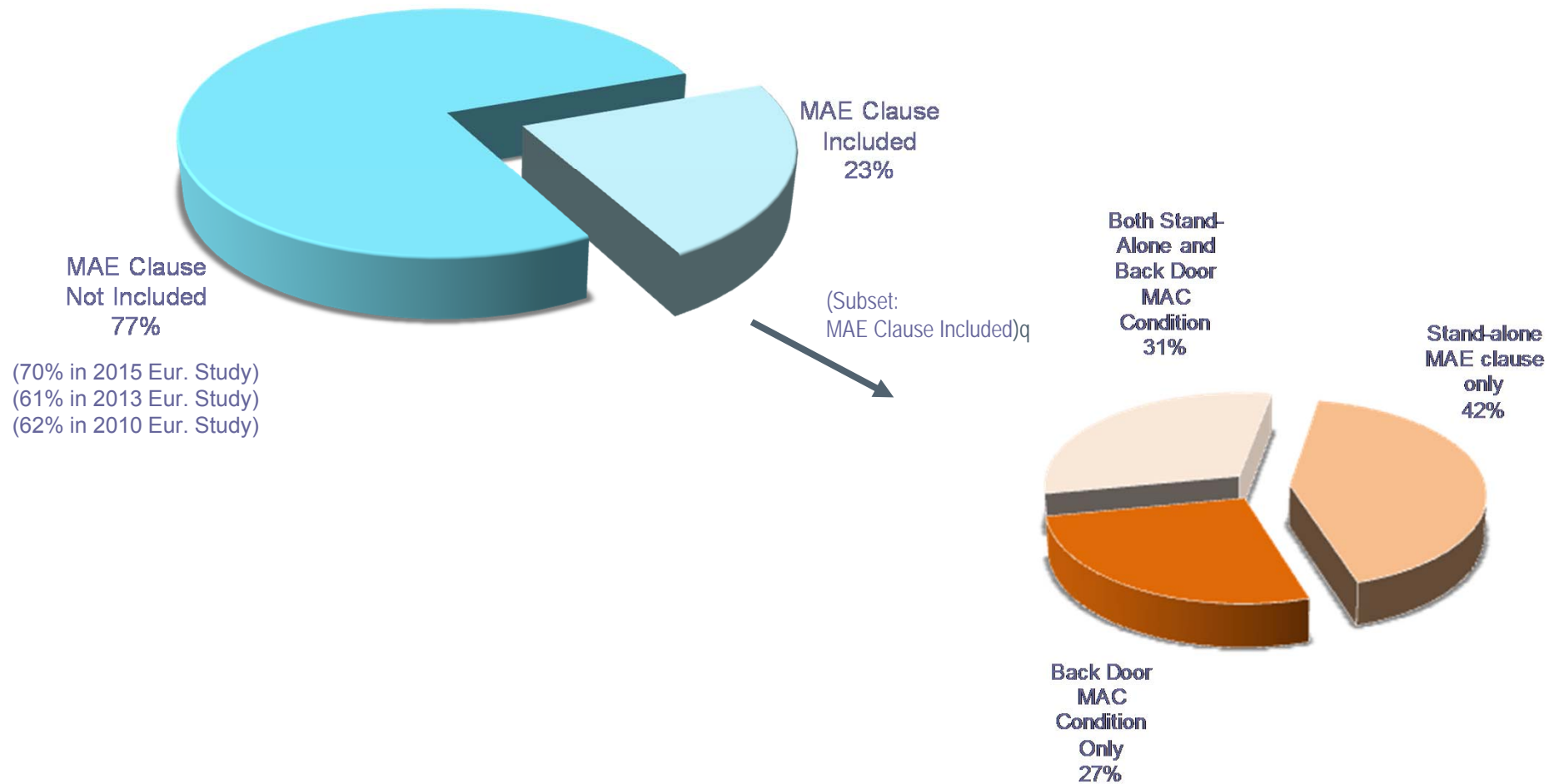
“MATERIAL ADVERSE EFFECT”*

“Material Adverse Effect” means any result, occurrence, fact, change, event or effect that has a material adverse effect on the business, assets, liabilities, capitalization, condition (financial or otherwise), results of operations *[or prospects]* of the Target.

* Data regarding Material Adverse Effect (“MAE”) clauses include clauses in some agreements which refer to a Material Adverse Change (“MAC”).

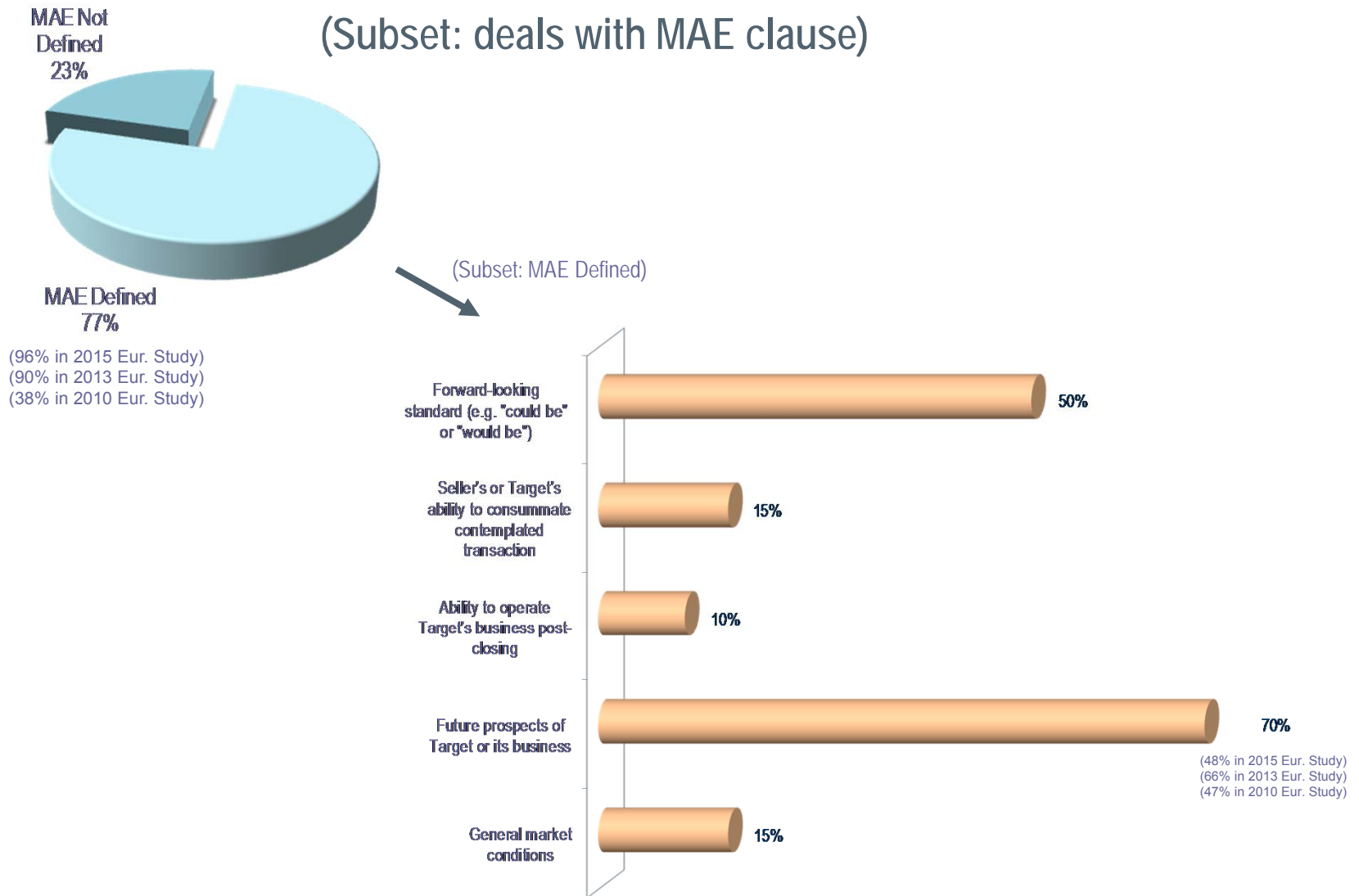


MATERIAL ADVERSE EFFECT – CLAUSES





DEFINITION OF MATERIAL ADVERSE EFFECT





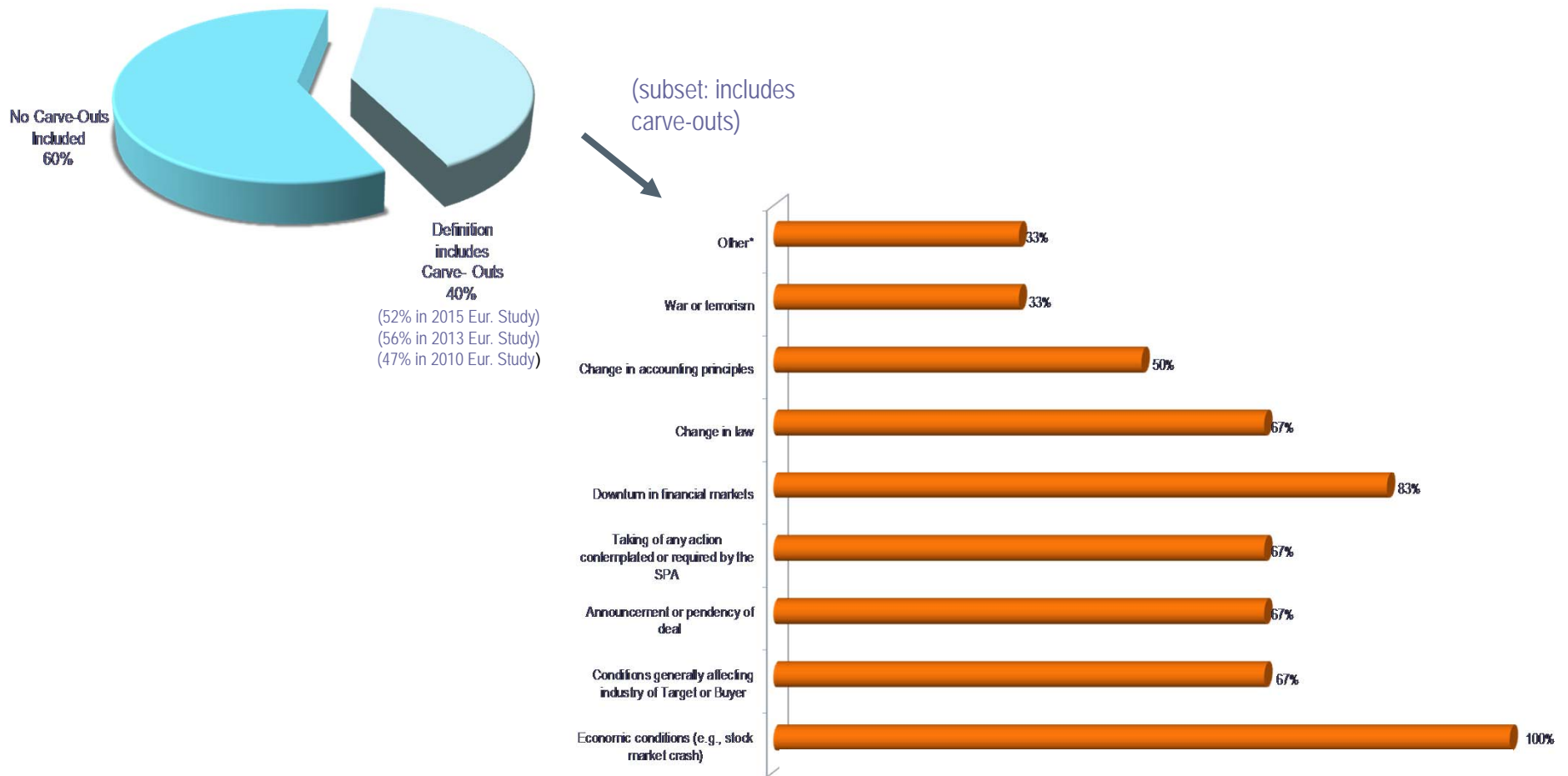
DEFINITION OF MATERIAL ADVERSE EFFECT – CARVE-OUTS

“Material Adverse Effect” means ..., *except to the extent resulting from* (A) economic conditions (e.g., stock market crash), (B) conditions generally affecting Target’s or Buyer’s industry, (C) announcement or pendency of deal, (D) taking of any action contemplated or required by the acquisition agreement, (E) downturn in financial markets, (F) change in law, (G) change in accounting principles or (H) war or terrorism.



DEFINITION OF MATERIAL ADVERSE EFFECT – CARVE-OUTS

(Subset: deals with MAE definition)



* "Other" includes act of god, action taken (or omission) with the written consent or at the written request of purchaser.



DEFINITION OF MATERIAL ADVERSE EFFECT – CARVE-OUTS QUALIFIED BY DISPROPORTIONATE EFFECT

“Material Adverse Effect” means . . . , except to the extent resulting from (A) changes in general economic conditions, (B) changes affecting generally the industries in which the Target operates . . . , *provided that such event, change or action does not affect the Target in a substantially disproportionate manner.*



DEFINITION OF MATERIAL ADVERSE EFFECT – CARVE-OUTS QUALIFIED BY DISPROPORTIONATE EFFECT

(Subset: deals with MAE definition and one or more carve-outs)

At Least One Carve-
Out Qualified by
Disproportionate
Effect
38%



No Carve-Out
Qualified by
Disproportionate
Effect
62%

(64% in 2015 Eur. Study)
(62% in 2013 Eur. Study)

* In one deal MAE was qualified by disproportionate effect even though MAE was not defined.



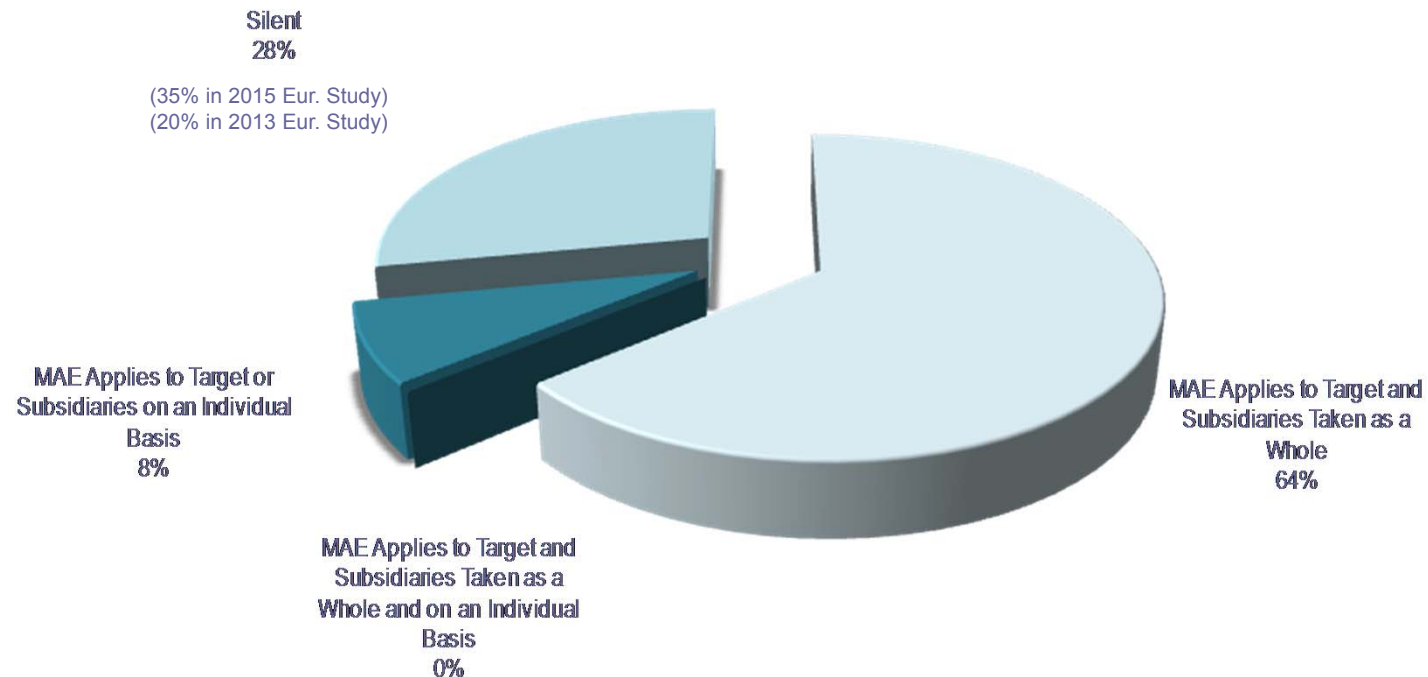
DEFINITION OF MATERIAL ADVERSE EFFECT – APPLICATION TO INDIVIDUAL SUBSIDIARIES

“Material Adverse Effect” means any result, occurrence, fact, change, event or effect that has or could reasonably be expected to have a materially adverse effect on (i) the business, assets, liabilities, capitalization, condition (financial or other), or results of operations of *the Target or any of its Subsidiaries*, or (ii) Seller’s ability to consummate the transactions contemplated hereby.



DEFINITION OF MATERIAL ADVERSE EFFECT – APPLICATION TO INDIVIDUAL SUBSIDIARIES

(Subset: deals with MAE definition)





KNOWLEDGE

Actual Knowledge:

"Knowledge" means the *actual knowledge* of the directors and officers of Target.

Constructive Knowledge:

- *Role-Based Deemed Knowledge*

"Knowledge" means the actual knowledge of the directors and officers of Target *and the knowledge that each such person in his/her role as director or officer should have.*

- *Express Investigation Requirement*

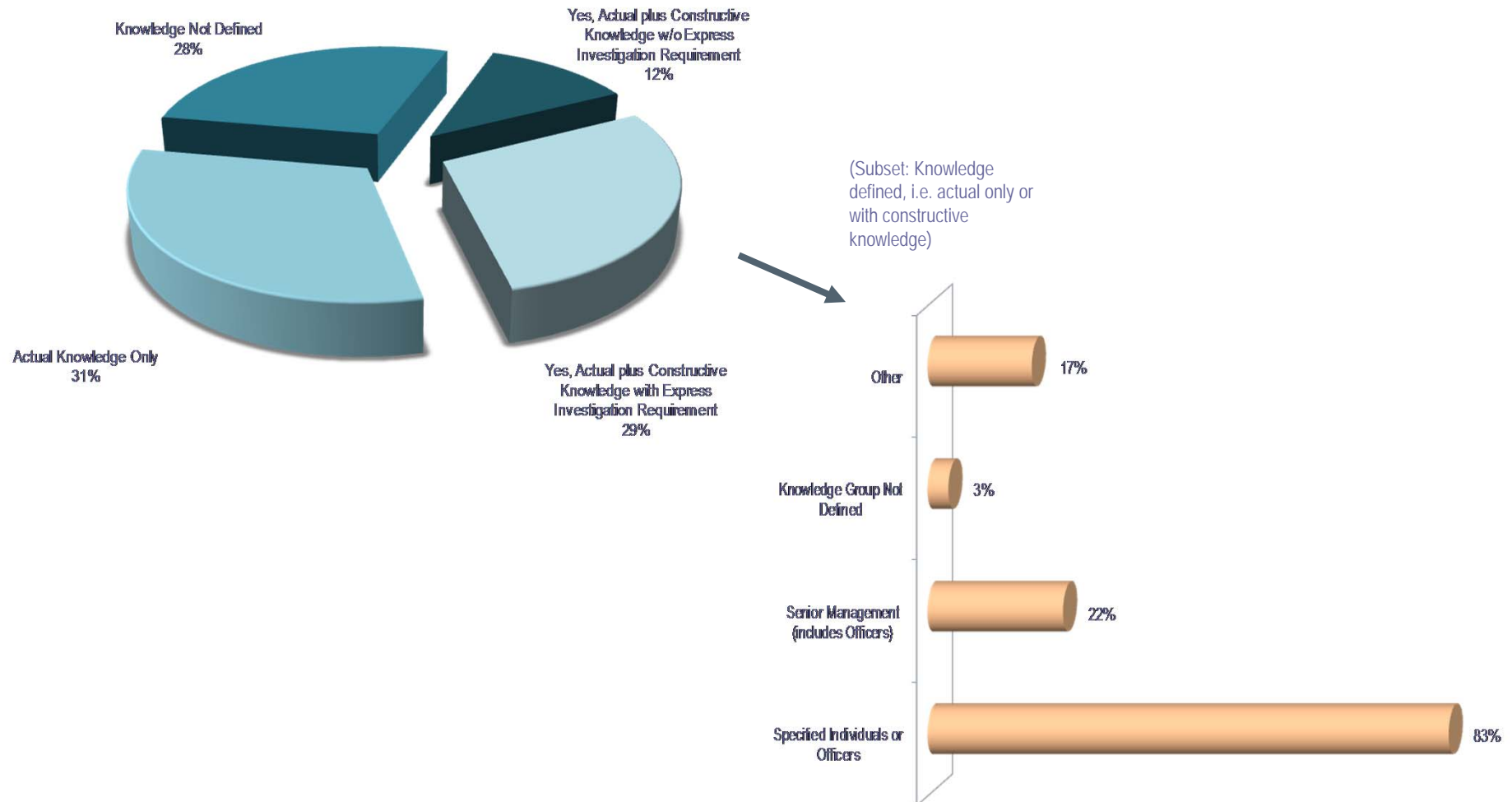
"Knowledge" means the actual knowledge of the directors and officers of Target and the knowledge that each such person in his/her role as director or officer should have *after due and careful inquiry.*

Knowledge Group:

"Knowledge" means the knowledge of the *directors and officers of Target and/or [other specified individuals].*



KNOWLEDGE – STANDARDS





COMPARATIVE DATA RE PERVASIVE QUALIFIERS

	2015 US Study	2017 US Study	2015 European Study	2017 European Study
MAE is defined	99%	99%	96%	77%
-- when defined, includes prospects	12%	15%	48%	70%
-- when defined, includes carve-outs	91%	85%	52%	40%
• of these, at least one carve-out qualified by disproportionate effects	86%	93%	36%	38%
MAE clause applies to:				
-- Target + subsidiaries as a whole only	74%	77%	28%	64%
-- Target + subsidiaries on an individual basis only	3%	2%	4%	8%
-- Target and subsidiaries as a whole <u>and</u> on an individual basis	0%	0%	33%	0%
MAE clause is silent re application to Target or subsidiaries	23%	21%	35%	28%
Knowledge not defined	3%	1%	31%	27%
Knowledge is defined as actual knowledge only	24%	17%	20%	32%
Knowledge is defined as constructive knowledge	73%	82%	49%	41%



REPRESENTATIONS AND WARRANTIES



FINANCIAL STATEMENTS – “FAIR PRESENTATION” REPRESENTATION

“Fairly presents” is GAAP-Qualified:

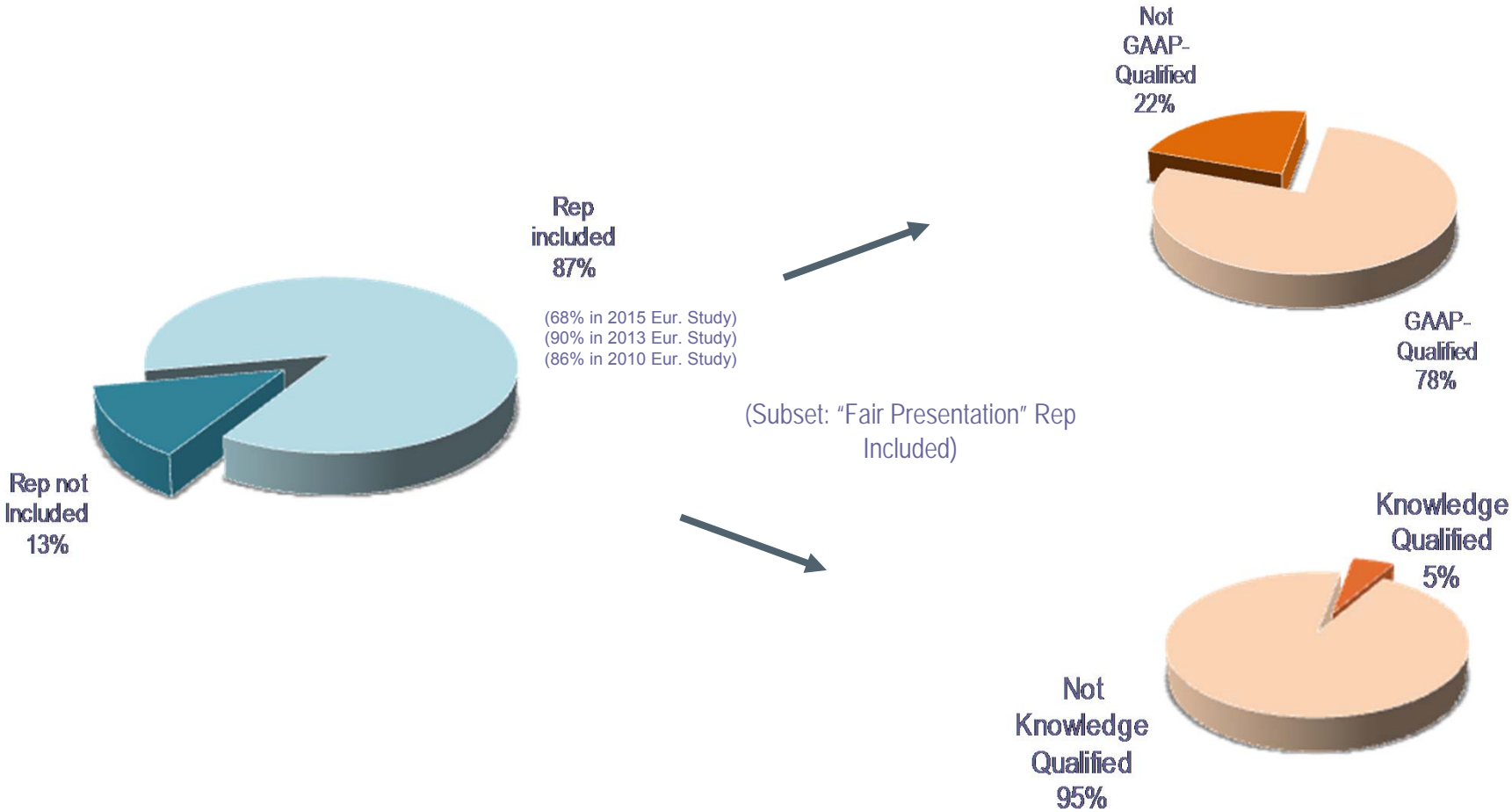
The financial statements fairly present [to the Knowledge of Seller] the financial position of the Target and its consolidated subsidiaries as of the respective dates thereof and the results of operations and cash flows of the Target and its consolidated subsidiaries for the periods covered thereby, *all in accordance with GAAP*.

“Fairly presents” is not GAAP-Qualified:

The financial statements fairly present [to the Knowledge of Seller] the financial position of the Target and its consolidated subsidiaries as of the respective dates thereof and the results of operations and cash flows of the Target and its consolidated subsidiaries for the periods covered thereby.



FINANCIAL STATEMENTS – “FAIR PRESENTATION” REPRESENTATION





“NO UNDISCLOSED LIABILITIES” REPRESENTATION

Not GAAP-Qualified – “all liabilities” (Buyer favorable):

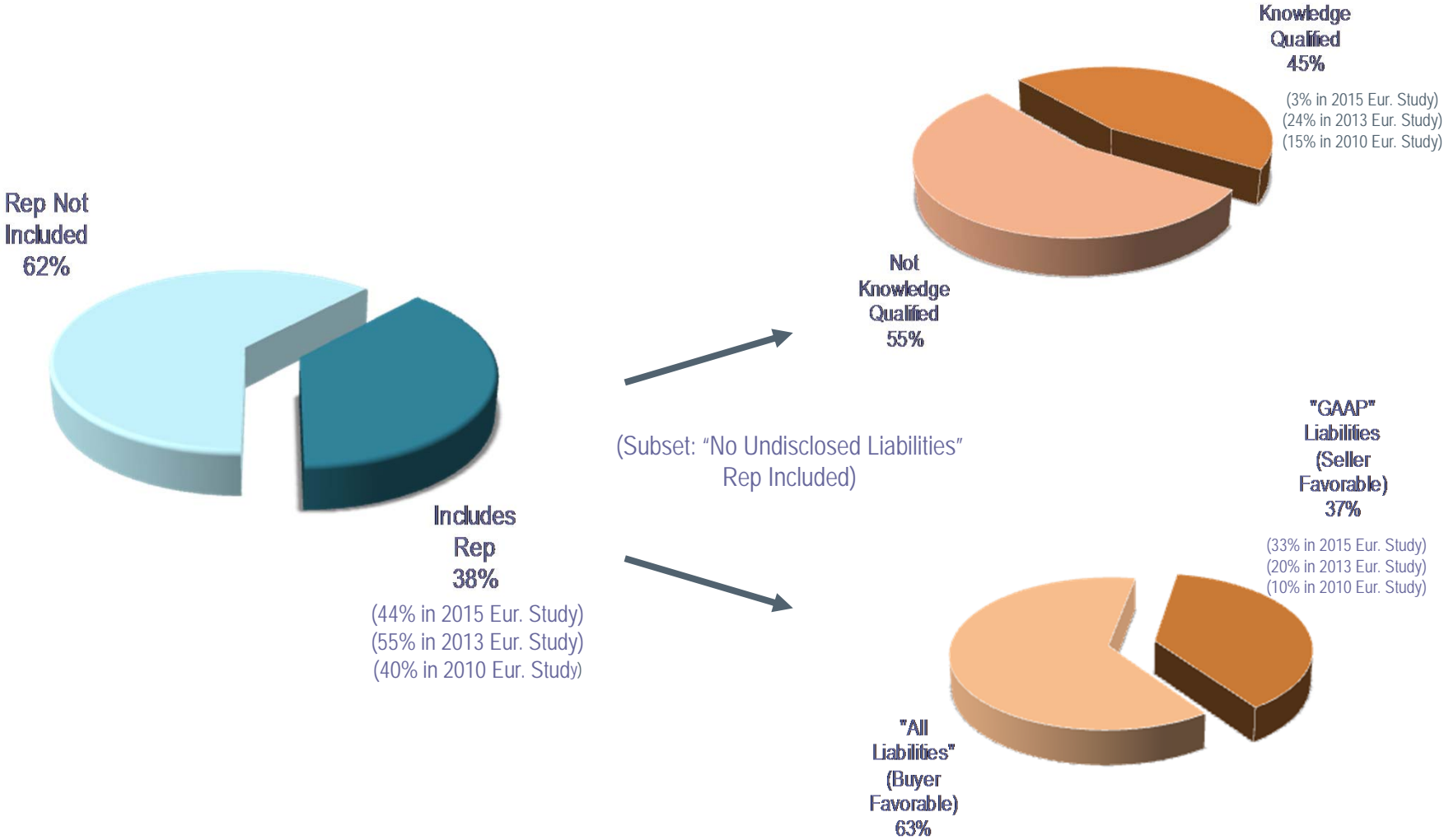
Target has no liability [to the Knowledge of Seller] except for liabilities reflected or reserved against in the financial statements and current liabilities incurred in the ordinary course of business since [date].

GAAP-Qualified (Seller favorable):

Target has no liability [to the Knowledge of Seller] *of the type required to be disclosed under GAAP*, except for liabilities reflected in the [financial statements] and liabilities incurred in the ordinary course of business since [date].



"NO UNDISCLOSED LIABILITIES" REPRESENTATION





“FULL DISCLOSURE” REPRESENTATION

“10b-5” Formulation

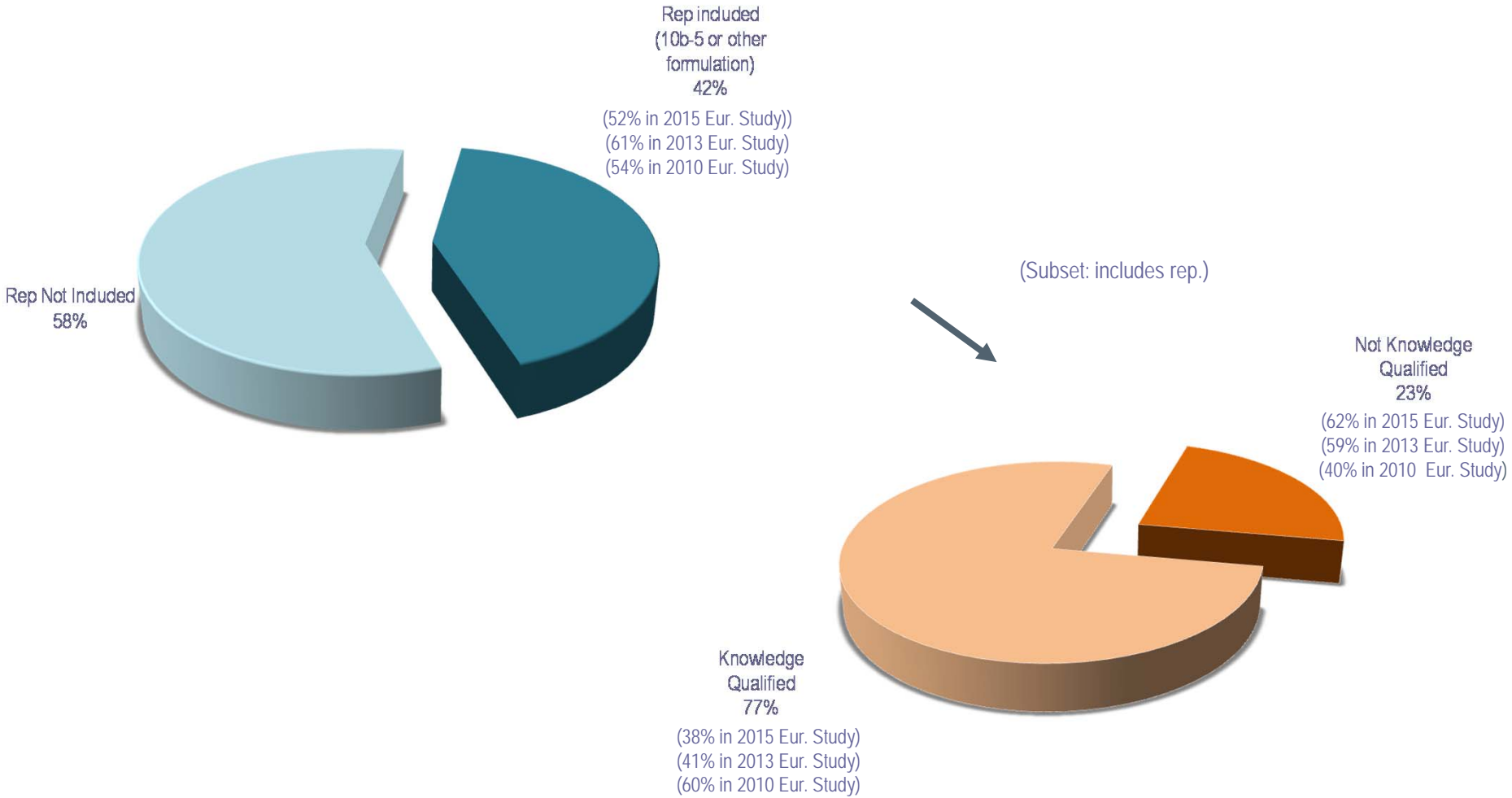
No representation or warranty or other statement made by the Seller contains any untrue statement or omits to state a material fact necessary to make any of them, in the light of the circumstances in which it was made, not misleading.

Full Disclosure Formulation

The Seller has disclosed all information relating to the Target which would be material to a buyer for value of the Shares and all such information is true, accurate and not misleading.



“Full Disclosure” Representation



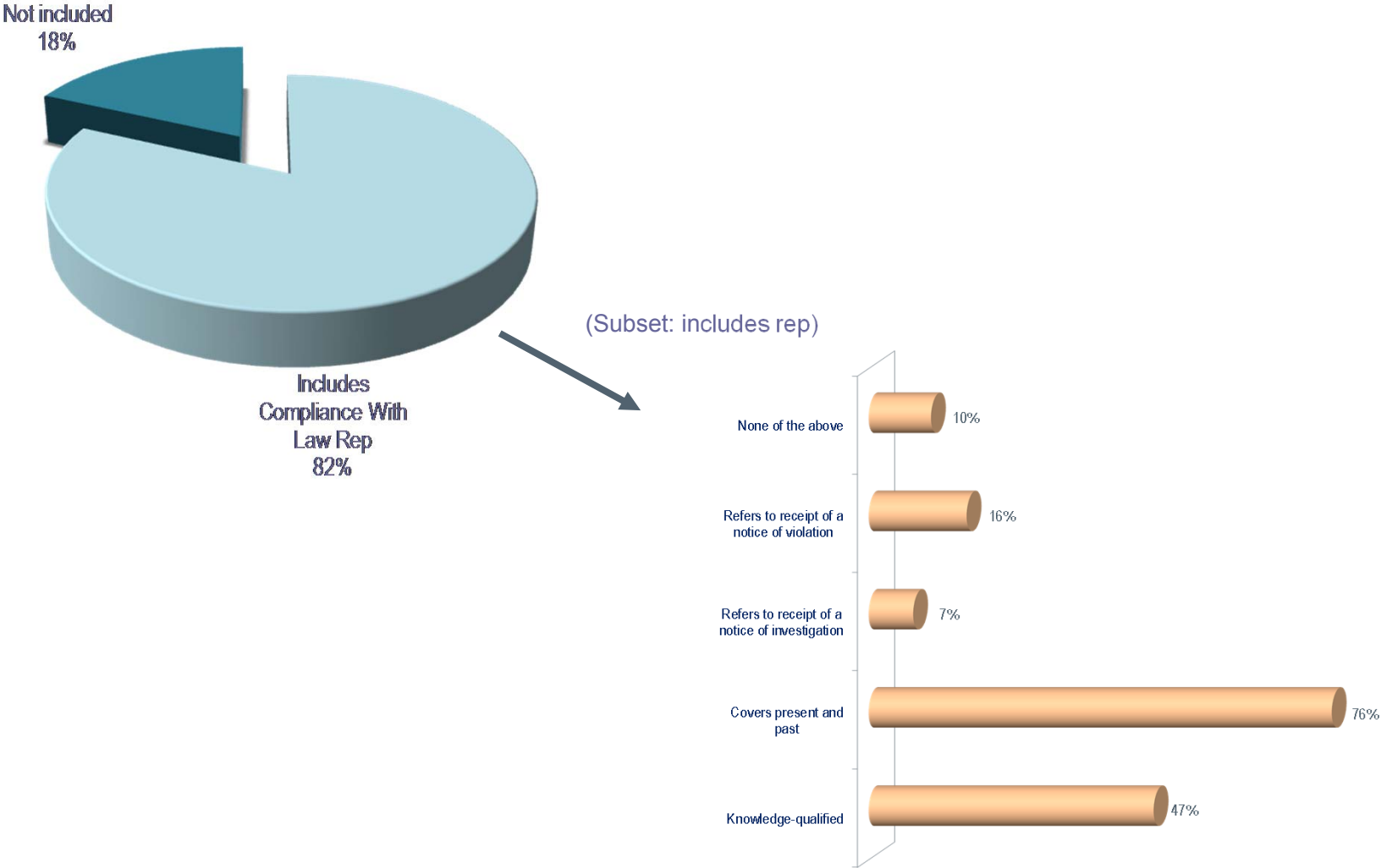


“COMPLIANCE WITH LAW” REPRESENTATION

[To the Sellers' knowledge,] the business of Target [has been and] is being conducted in compliance with applicable law.



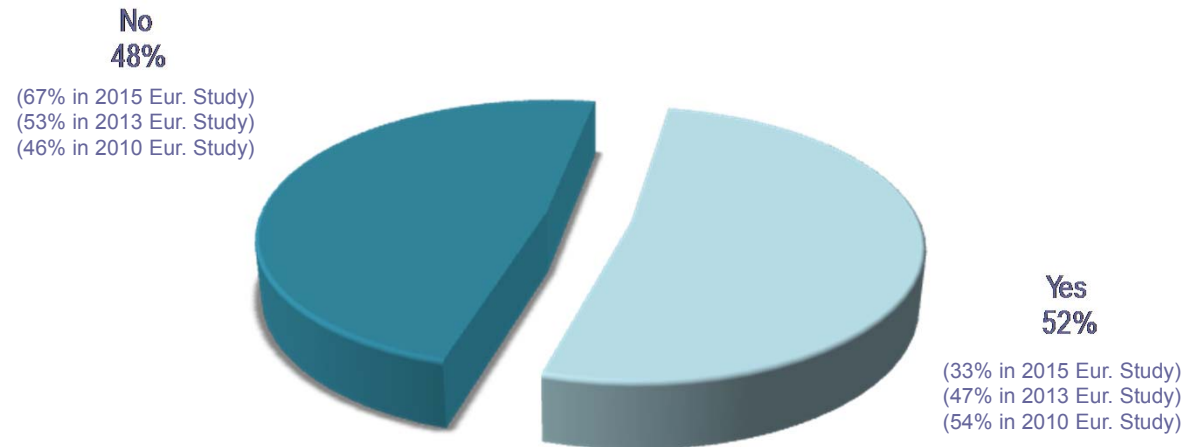
“COMPLIANCE WITH LAW” REPRESENTATION





REPRESENTATIONS IMPLIED BY LAW

Does the agreement specifically exclude representations that are implied by law?*



* Example of representations implied by law: guarantee against hidden defects.



PRIVATE TARGET M&A STUDIES COMPARATIVE DATA RE: REPRESENTATIONS

	US STUDY		EUROPEAN STUDY		
	2014	2016-2017	2013	2015	2017
"Fair Presentation" rep included	99%	99%	91%	88%	86%
- when included, rep was not GAAP-qualified	83%	82%	49%	42%	21%
"No Undisclosed Liabilities" rep included	93%	97%	55%	44%	39%
- when included, rep was not GAAP-qualified	59%	61%	64%	67%	65%
"Full Disclosure" rep included	25%	26%	39%	52%	43%
- when included, rep was not knowledge-qualified	78%	74%	59%	62%	23%
"Compliance with Law" rep included	98%	99%	79%	74%	83%



CONDITIONS TO CLOSING*

* Analysis includes only deals with deferred closings.



“ACCURACY OF REPRESENTATIONS” – WHEN MUST THEY BE ACCURATE?

Single point in time: at closing

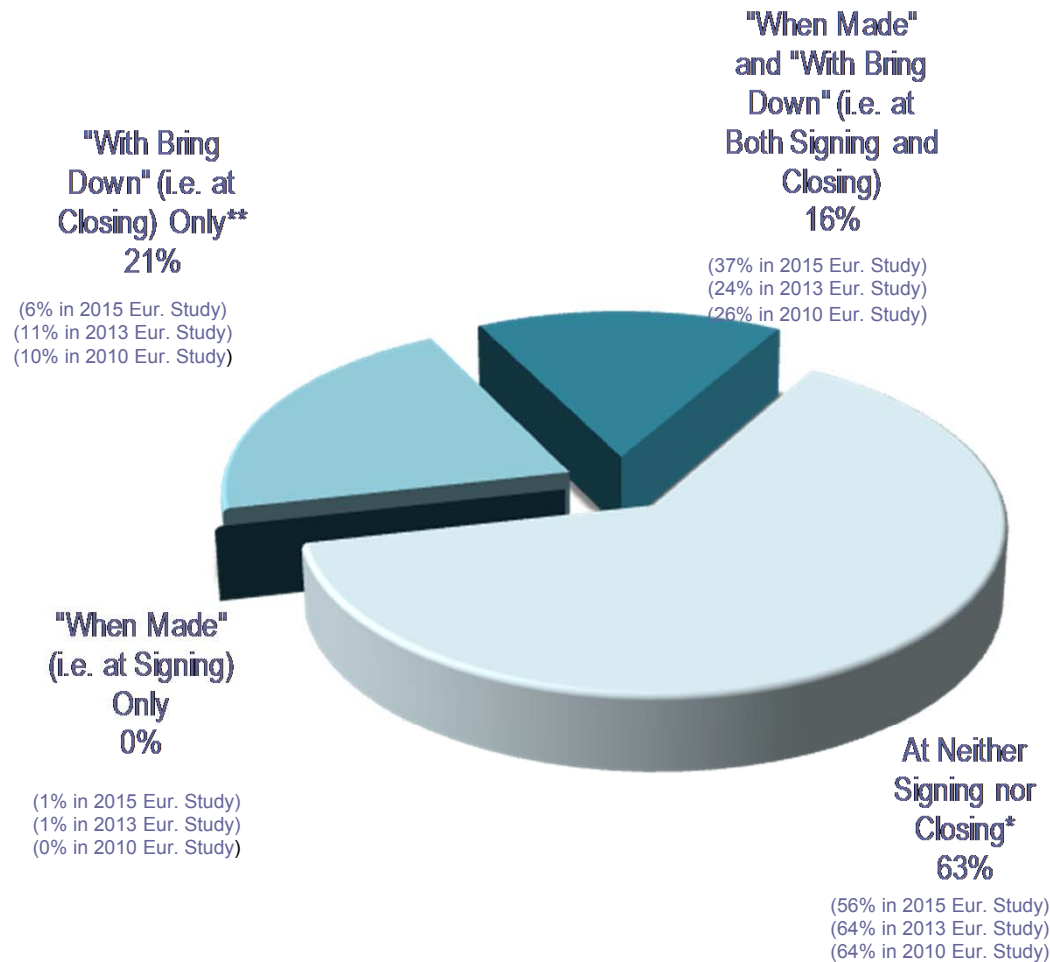
Each of the Seller’s representations and warranties shall have been accurate in all material respects *as of the Closing Date* as if made on the Closing Date.

Two points in time: at signing and at closing

Each of the Seller’s representations and warranties is true and accurate *at the date of this Agreement* and shall be true and accurate *as of the Closing Date* as if made on the Closing Date.



"ACCURACY OF REPRESENTATIONS" – WHEN MUST THEY BE ACCURATE?



• In these cases Buyer's obligation to close is not subject to Seller's representations being accurate and the representations generally serve only as a basis for indemnification.

** Of these deals 20% provided for bring down at closing for only some of the reps.



“ACCURACY OF REPRESENTATIONS” – HOW ACCURATE MUST THEY BE?

Accurate in all respects:

Each of the representations and warranties is true and accurate *in all respects*.

Accurate in all material respects:

Each of the representations and warranties is true and accurate *in all material respects*.

Accurate in all material respects with “double materiality” scrape:

Each of the representations and warranties is true and accurate *in all material respects, it being understood that, for the purposes of determining the accuracy of such representations, all “MAE” qualifications and other materiality qualifications in such representations shall be disregarded.*



“ACCURACY OF REPRESENTATIONS” – HOW ACCURATE MUST THEY BE? (*CONTINUED*)

MAE qualification:

Each of the representations and warranties is true and accurate, *except for inaccuracies of representations or warranties the circumstances giving rise to which, individually or in the aggregate, do not constitute and could not reasonably be expected to have a Material Adverse Effect.*

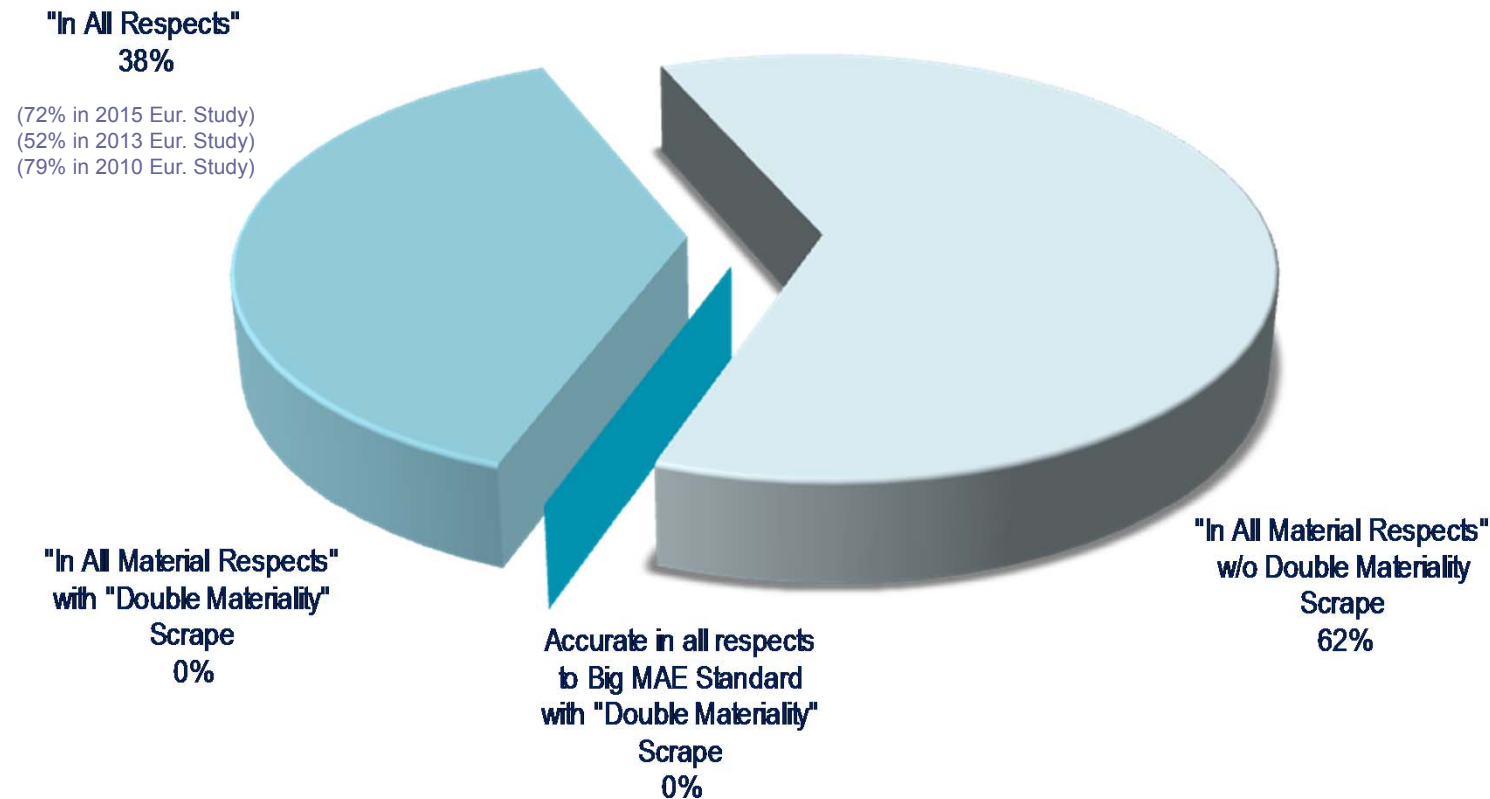
MAE qualification with "double materiality" scrape:

Each of the representations and warranties is true and accurate, *except for inaccuracies of representations the circumstances giving rise to which do not constitute and could not reasonably be expected to result in a MAE, it being understood that for purposes of determining the accuracy of such representations, all "MAE" qualifications and other materiality qualifications contained in such representations shall be disregarded.*



"ACCURACY OF REPRESENTATIONS" – HOW ACCURATE MUST THEY BE?

(Subset: deals for which Buyer's obligation to close is subject to reps being accurate at signing and/or closing)





MATERIAL ADVERSE CHANGE CONDITION*

Stand-Alone:

Since the date of this Agreement there has not been any Material Adverse Change [in respect of the Target]

Back-Door:

“absence of changes” representation

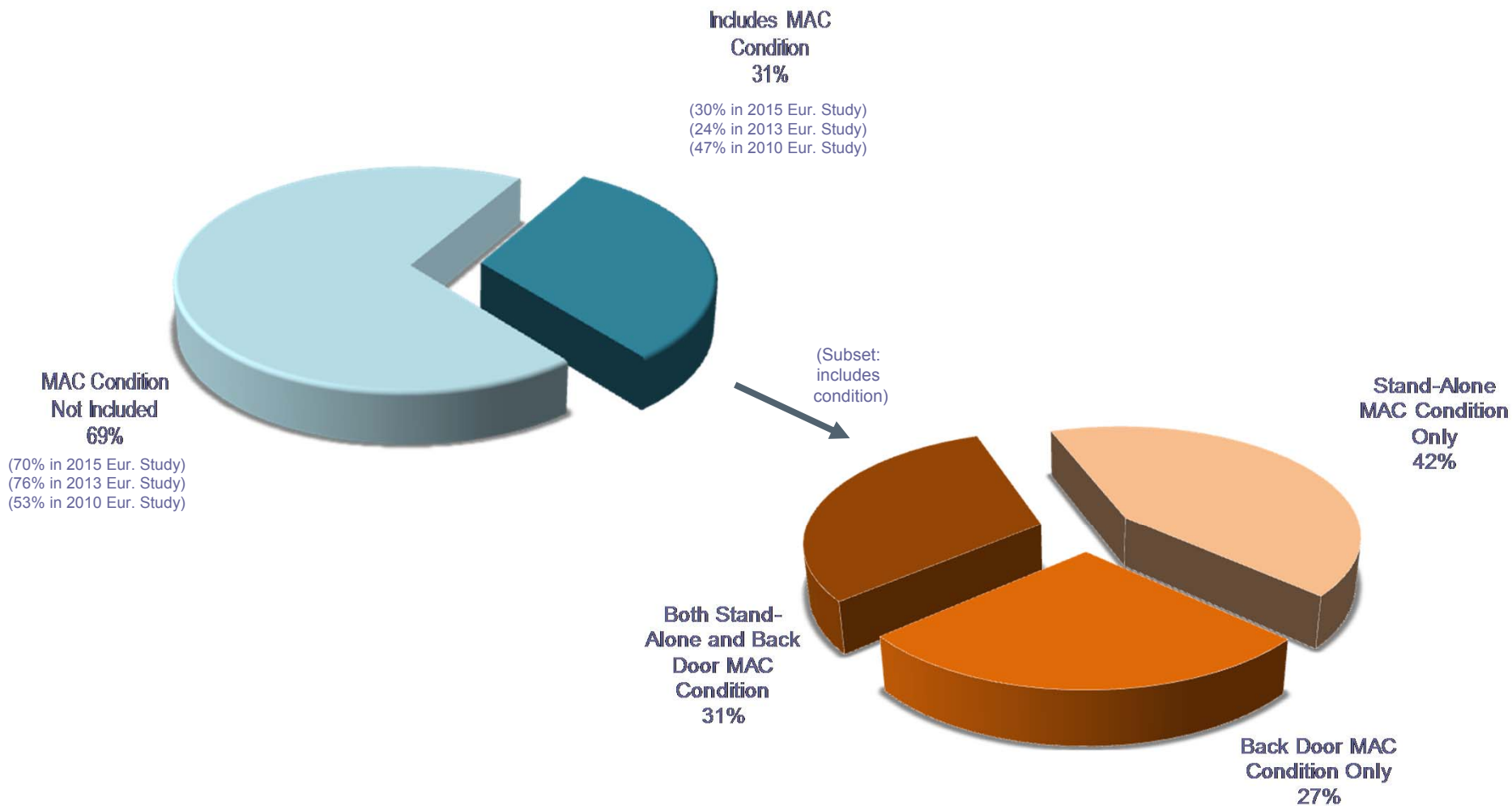
Since the Balance Sheet date, there has not been any Material Adverse Change [in respect of the Target]

plus “bring down” formulation of “accuracy of representations” condition

* In some agreements, instead of referring to the absence of a MAC, the condition may refer to the absence of an event causing a MAE.



MATERIAL ADVERSE CHANGE CONDITION



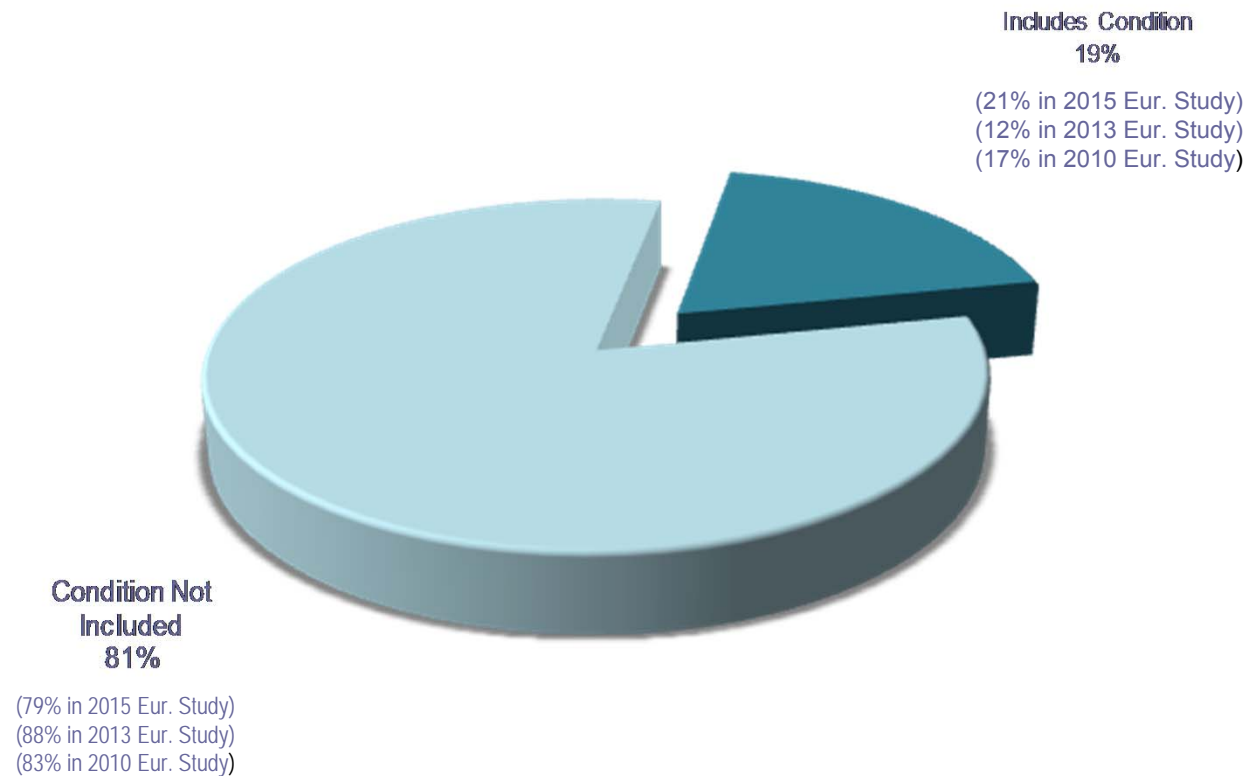


NO LEGAL PROCEEDINGS CHALLENGING THE TRANSACTION

There will not be pending [or threatened] any action, suit, or similar legal proceeding brought by a Governmental Entity [or third party] challenging or seeking to restrain or prohibit the consummation of the Transaction.

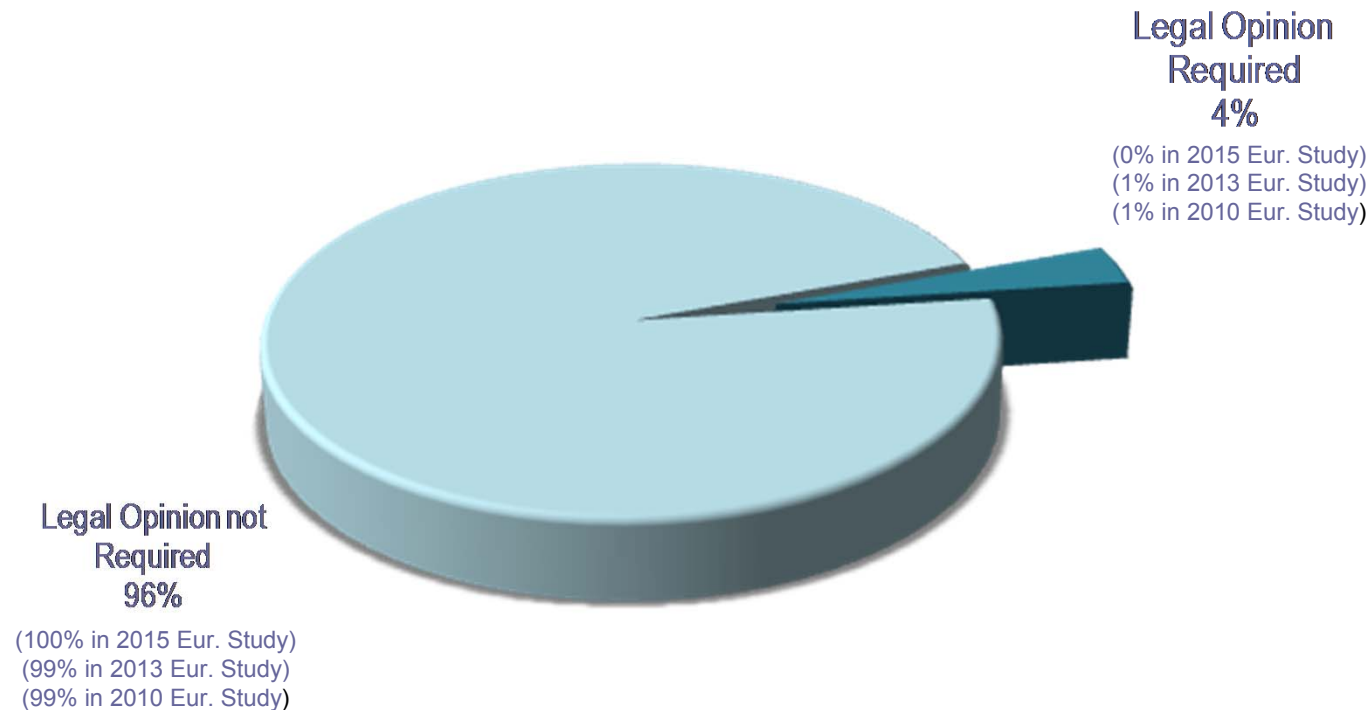


NO LEGAL PROCEEDINGS CHALLENGING THE TRANSACTION





LEGAL OPINIONS (NON-TAX) OF SELLER'S COUNSEL

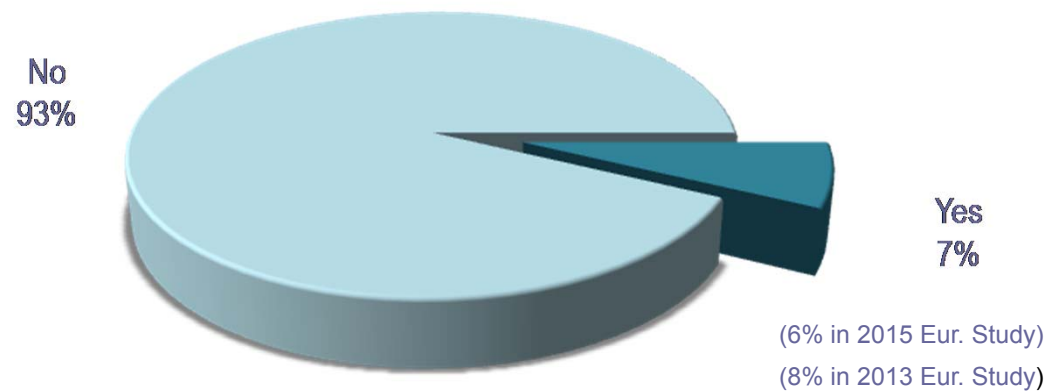


*In these deals opinions were required on corporate status; SPA being valid, binding and enforceable; and share pledge and guaranty agreements.



RETENTION OF EMPLOYEES

Is there a stand-alone "Retention of Employee" condition to closing?





PRIVATE TARGET M&A STUDIES

COMPARATIVE DATA RE: CLOSING CONDITIONS

	2014 US Study	2016-2017 US Study	2015 European Study	2017 European Study
"Accuracy of Representations" Closing Condition included	100%	99%	44%	37%
- Condition applies at signing (i.e. "when made") <u>and</u> at closing (i.e. with "bring down")	63%	66%	37%	16%
- Condition applies only at signing or only at closing	37% all only at closing	33% all only at closing	6% only at closing 1% only at signing	21% all only at closing
MAC Condition ("stand-alone" or "back door") included	91%	92%	30%	31%
"No Legal Proceedings" Condition	86%	69%	21%	19%
Legal Opinion (non-tax) Condition included	11%	7%	0%	3%



INDEMNIFICATION



“SANDBAGGING”

(i.e. ability of Buyer to seek remedy notwithstanding pre-existing knowledge of an inaccuracy or breach)

Benefit-of-the-Bargain / Pro-Sandbagging Provision:

The right of Buyer to indemnification will not be affected by any knowledge acquired or capable of being acquired by Buyer whether before or after the Closing Date with respect to the accuracy or inaccuracy of such representation or warranty.

Anti-Sandbagging Provision:

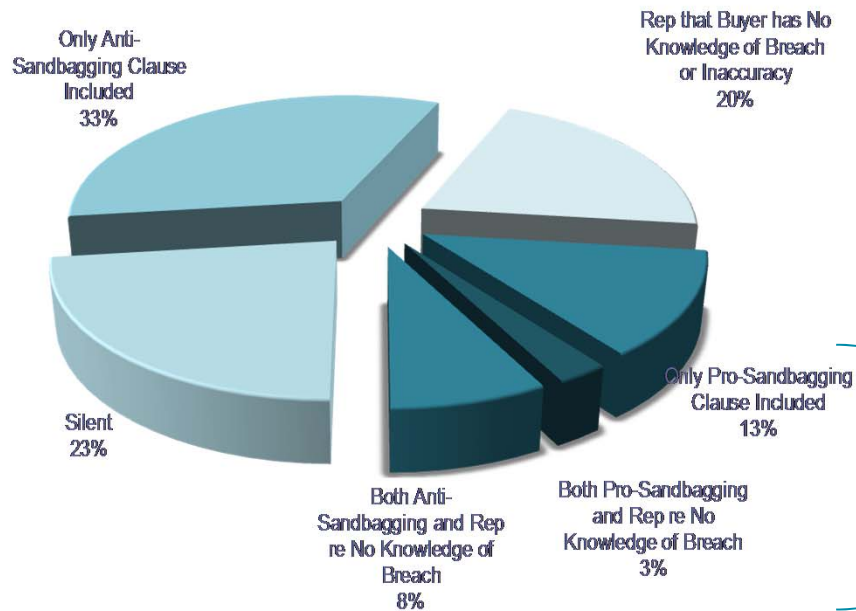
Seller shall not be liable for any Losses resulting from a breach of the Representations and Warranties if Buyer had knowledge of such Seller Breach and/or the facts and/or circumstances giving rise to such Seller Breach before Closing.

Representation by Buyer Provision:

Buyer is not aware of any breach or inaccuracy of any of the Seller’s Warranties or any provision of this Agreement.

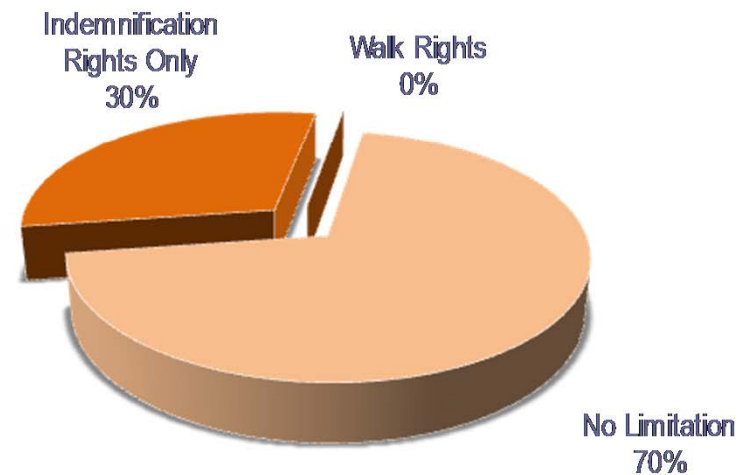


“SANDBAGGING”



(Subset: deals with pro-sandbagging provisions = 16%)

Buyer's rights are limited to:





“NO OTHER REPRESENTATIONS AND WARRANTIES”

“No Other Representations and Warranties”

Except for the representations and warranties contained in [Section __, Target’s representations and warranties] (including the related portions of the Disclosure Schedules), none of Seller, the Target or any other Person *has made or makes any other express or implied representation or warranty, either written or oral*, on behalf of Seller or the Target.

“Non-Reliance”

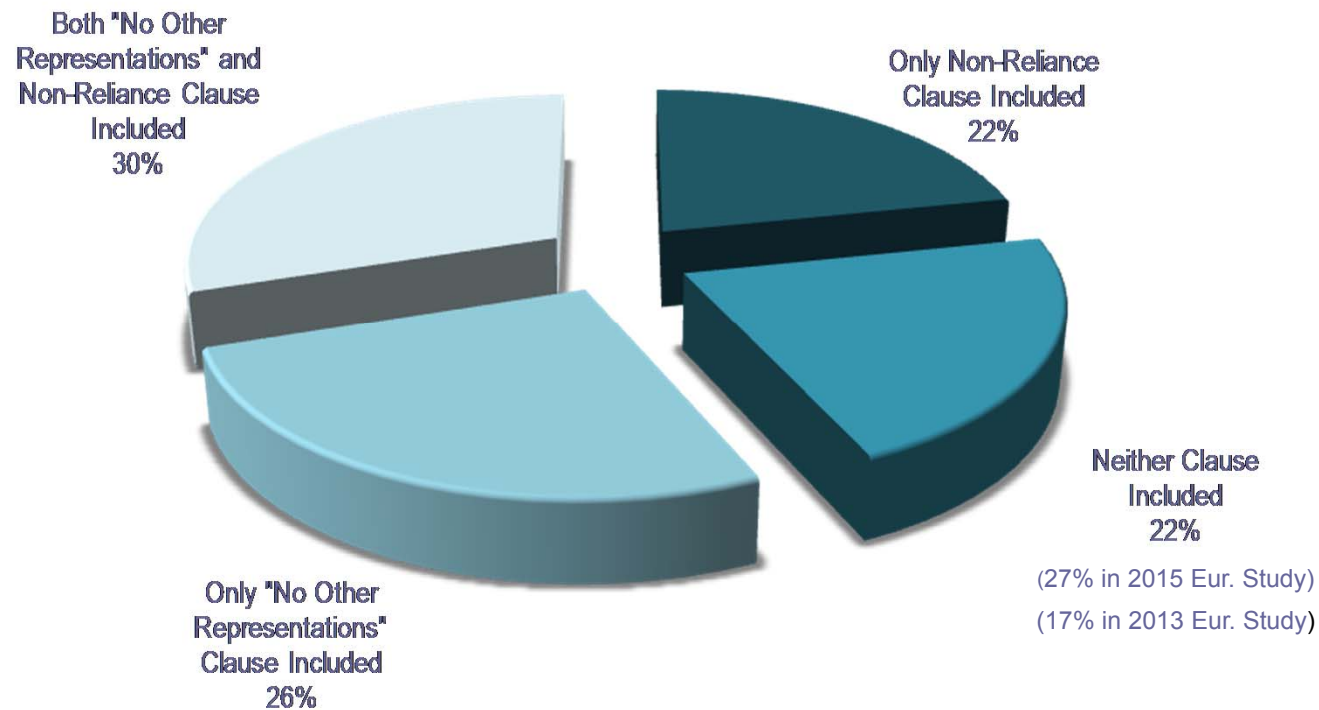
Buyer agrees to purchase and acquire the shares based upon its own inspection, examination and determination with respect thereto as to all matters *and without reliance upon any express or implied representations, warranties or covenants of any nature made by or on behalf of or imputed to Seller, except for the representations, warranties and covenants explicitly given by Seller under this Agreement.*

“No Other Representations and Warranties” with “Non-Reliance”

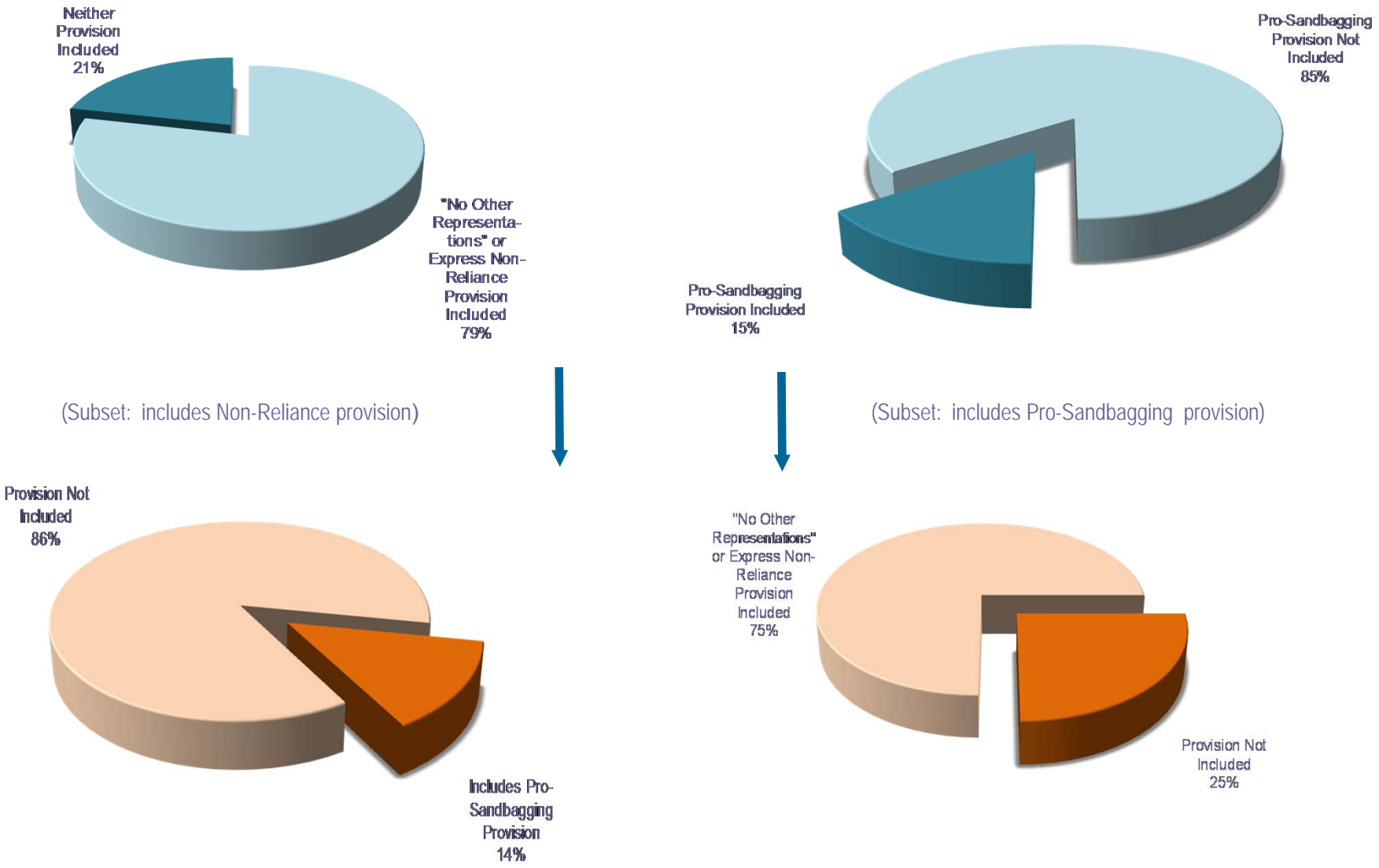
Buyer acknowledges that Target has not made and is not making any representations or warranties whatsoever regarding the subject matter of this Agreement, express or implied, except as provided in Section __, *and that it is not relying and has not relied on any representations or warranties whatsoever regarding the subject matter of this Agreement, express or implied, except for the representations and warranties in Section __.*



"NO OTHER REPRESENTATIONS AND WARRANTIES"/ NON-RELIANCE



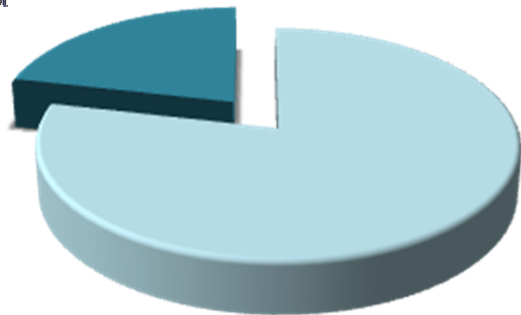
NON-RELIANCE AND "SANDBAGGING" - CORRELATION





NON-RELIANCE AND "FULL-DISCLOSURE" REPRESENTATION* - CORRELATION

"No Other Representations" or Express Non-Reliance Provision Not Included 21%



(Subset: includes Non-Reliance provision)

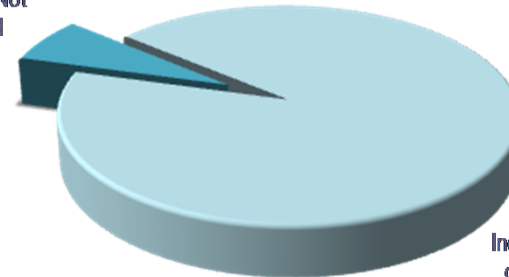


Includes "Full Disclosure" Representation 44%



Representation Not Included 56%

Provision Not Included 7%



Includes Full-disclosure Representation 93%

(Subset: includes "Full Disclosure" Representation)



Provision Not Included 23%

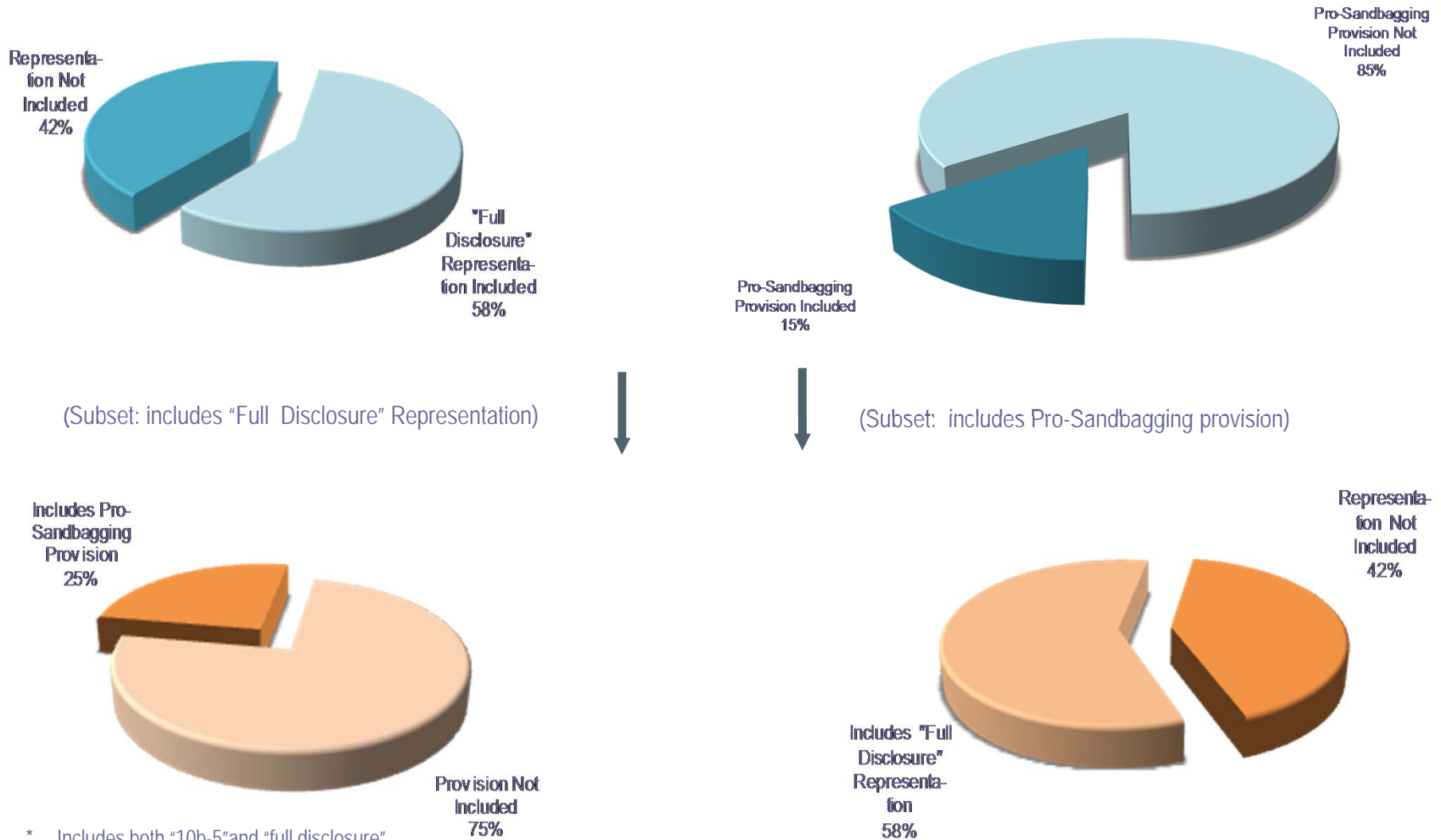


Includes "No Other Reps" or Express Non-Reliance Provision 77%

* Includes both "10b-5" and "full disclosure" formulations.



“Full Disclosure” Representation* and Sandbagging - CORRELATION



* Includes both “10b-5” and “full disclosure” formulations.



SURVIVAL/TIME TO ASSERT CLAIMS

Survival:

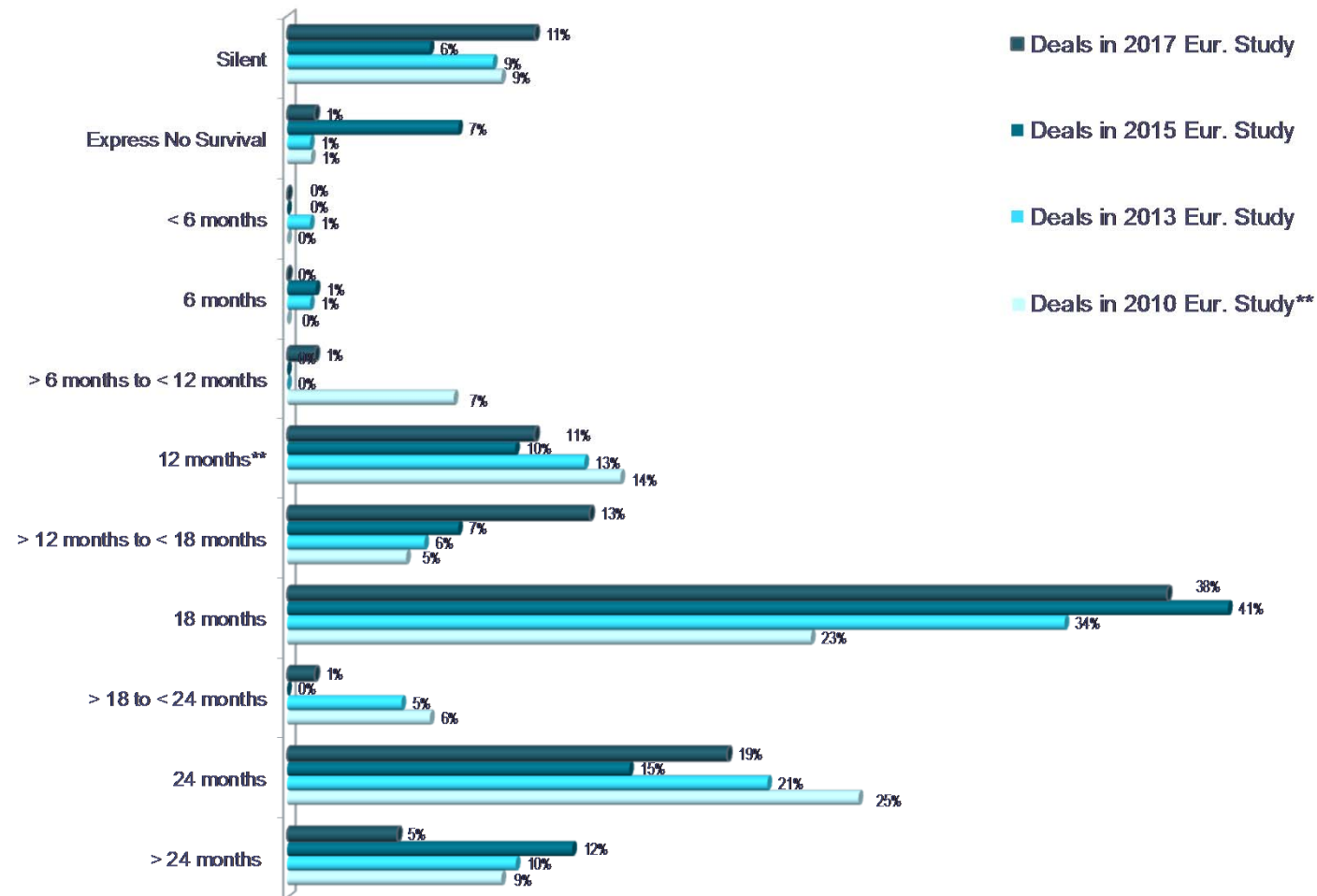
All representations and warranties in this Agreement, the Disclosure Letter and any other certificate or document delivered pursuant to this Agreement will survive the Closing.

Time limitations:

If the Closing occurs, Sellers will have no liability (for indemnification or otherwise) with respect to any representation or warranty, unless on or before _____ Buyer notifies Sellers of a claim specifying the factual basis of that claim in reasonable detail to the extent then known by Buyer.



SURVIVAL/TIME TO ASSERT CLAIMS (generally*)



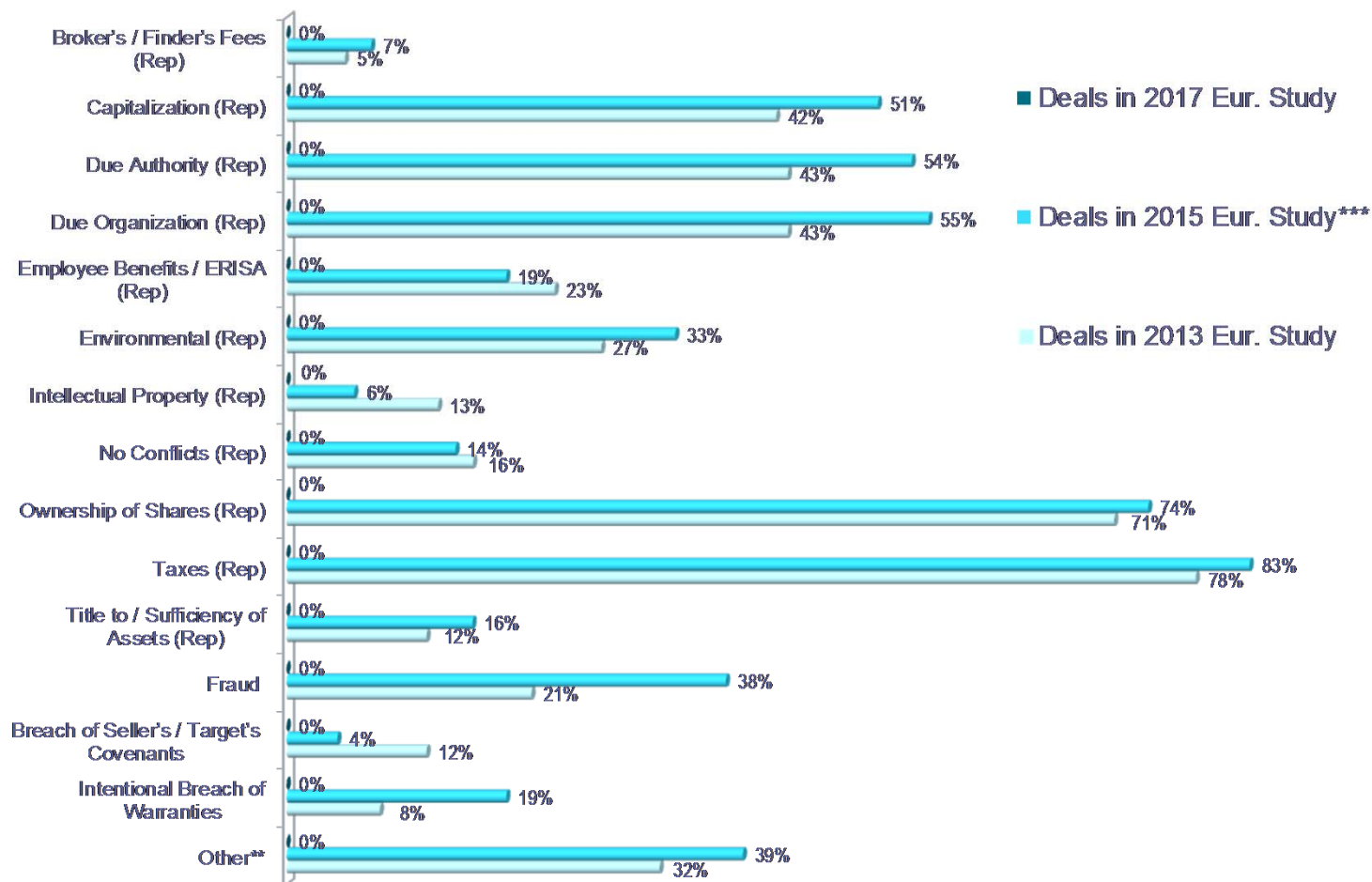
* These periods apply to most representations; certain representations may be carved out from these periods and given other survival periods.

** Data for 2010 do not include one deal in which the survival period was tied to date of buyer's awareness of the breach.



SURVIVAL/TIME TO ASSERT CLAIMS – CARVE-OUTS TO SURVIVAL LIMITATIONS*

(Subset: deals with survival provisions*)



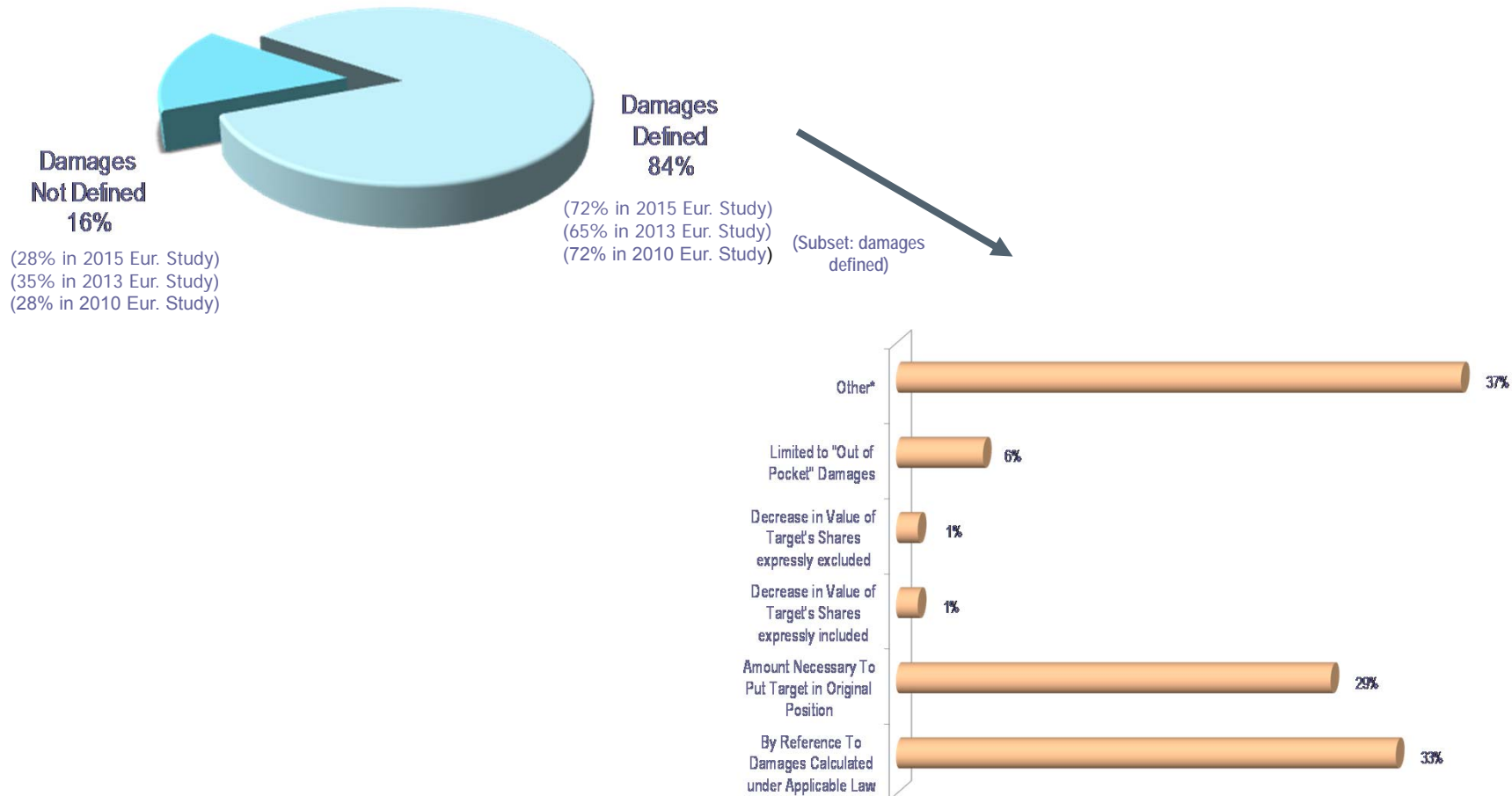
* Representations subject to carve-outs typically have longer survival periods than those applicable to representations generally.

** Examples of other carve-outs: product safety, data protection, willful misconduct and compliance with law.

*** Some data updated..



DEFINITION OF DAMAGES



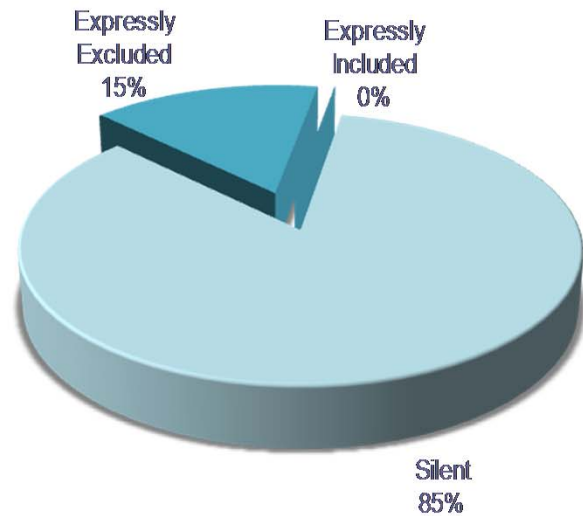
* Examples of other definitions of damages: "euro-for-euro", "loss net of any corresponding benefits", "any loss, damage and expense actually incurred by the relevant Party".



TYPES OF DAMAGES / LOSSES COVERED

(Subset: deals where damages are defined)

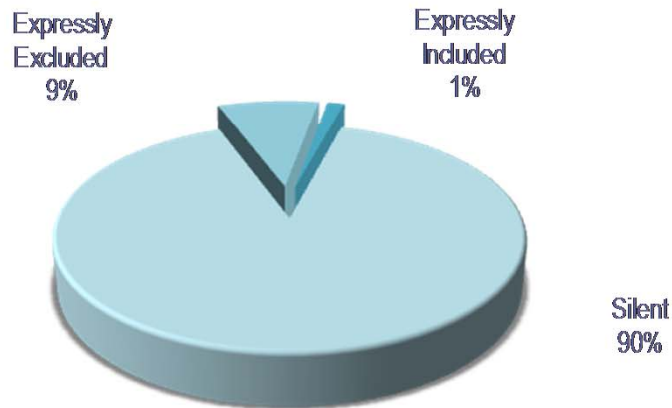
Incidental Damages



Consequential Damages



Punitive Damages





BASKETS

Deductible:

Seller shall not be required to indemnify Buyer for Losses until the aggregate amount of all such Losses exceeds EUR _____ (*the "Deductible"*) in which event Seller shall be responsible *only for Losses exceeding the Deductible*.

Threshold:

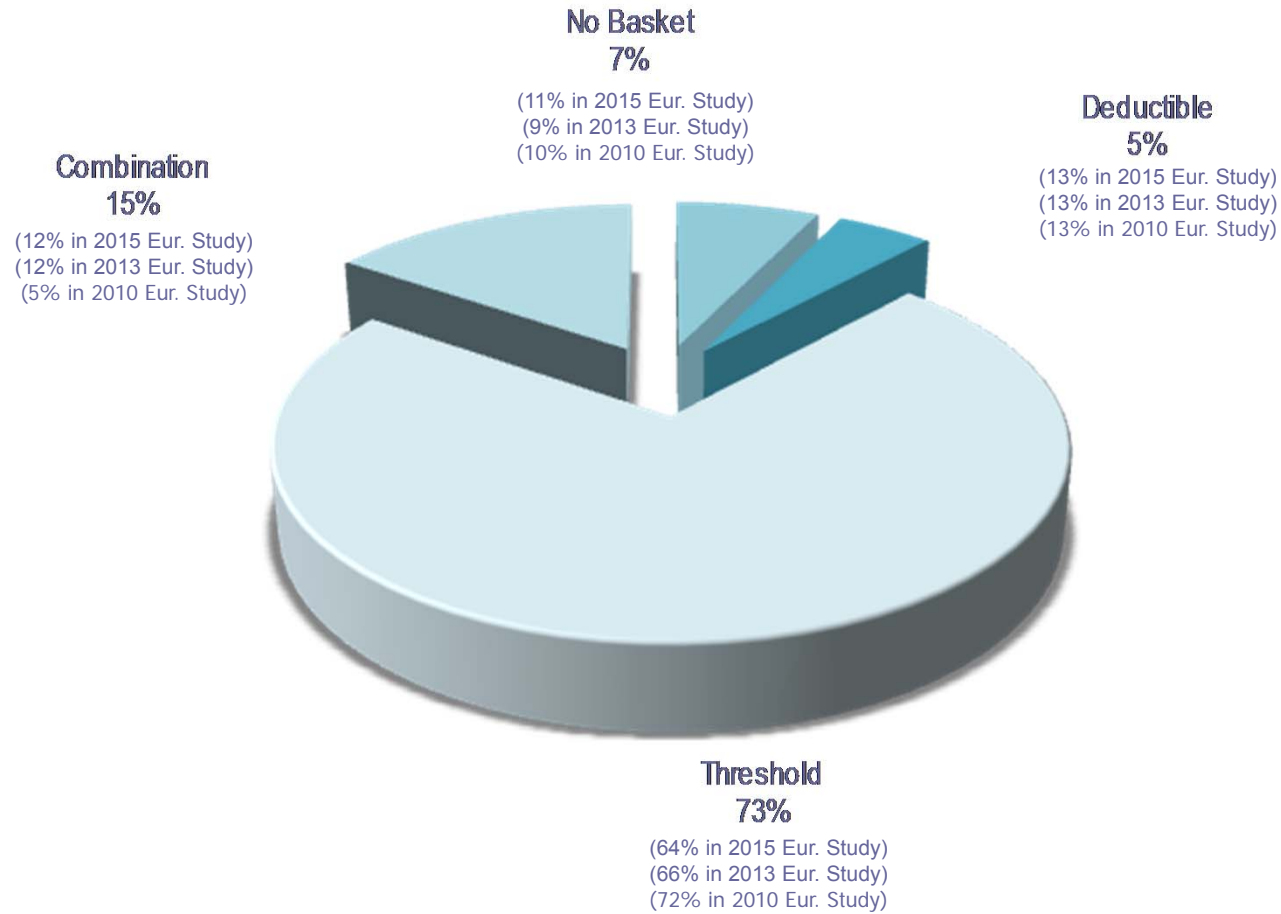
Seller shall not be required to indemnify Buyer for Losses until the aggregate amount of all Losses exceeds EUR _____ (*the "Threshold"*) in which event Seller shall be liable for *the aggregate amount of all Losses and not merely for the excess*.

Combination:

Seller shall not be required to indemnify Buyer for Losses *until the aggregate amount of all such Losses exceeds EUR _____ (the "Threshold")* in which event Seller shall be liable *only for Losses in excess of EUR _____ (the "Deductible")*.



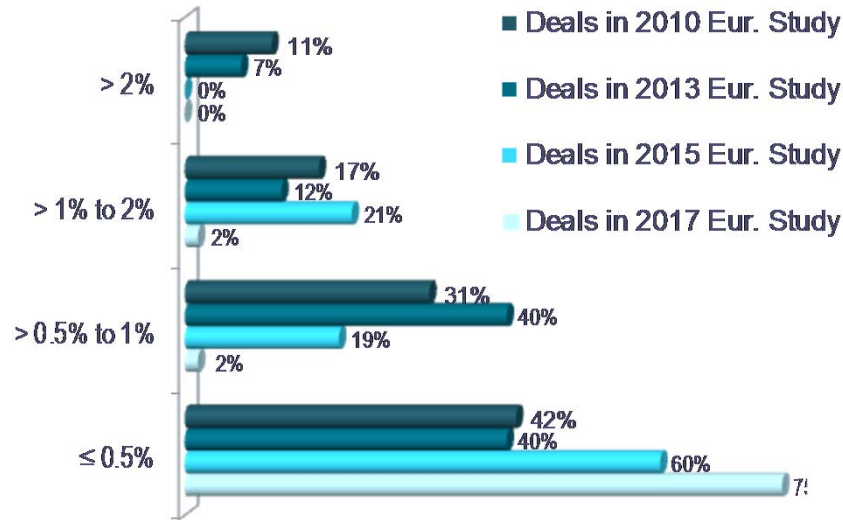
BASKETS



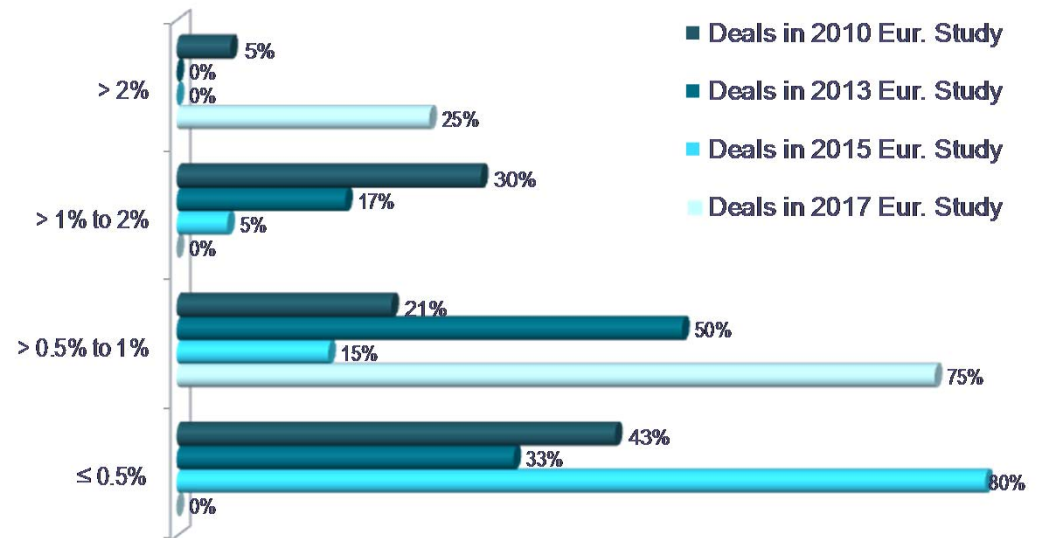


BASKETS AS % OF TRANSACTION VALUE*

(Subset: basket is a threshold)



(Subset: basket is a deductible)

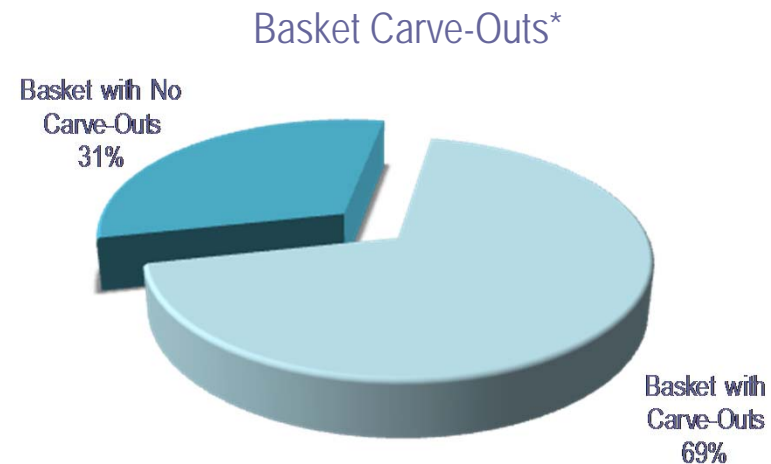
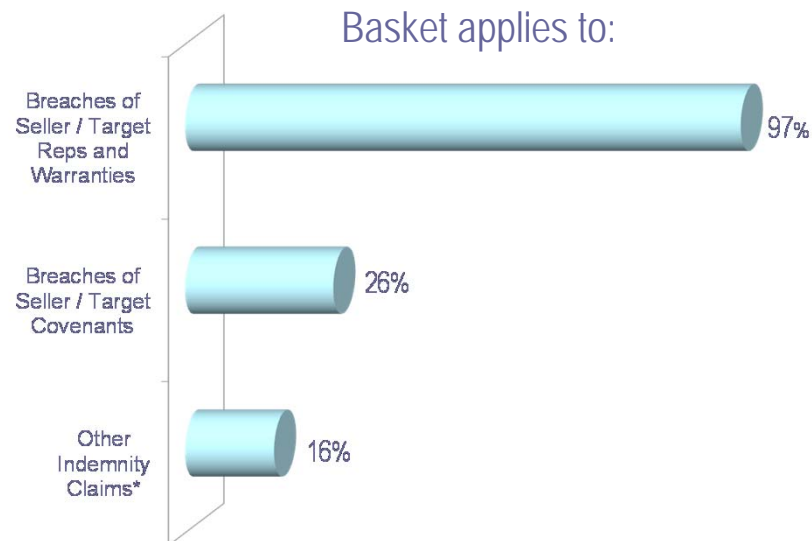


* Data shown are for baskets applicable to total claims and do not include combination threshold/deductible baskets; separate thresholds or deductibles may also apply on a claim-by-claim basis or for breaches of specific representations or covenants.



BASKETS – GENERAL COVERAGE AND CARVE-OUTS

(Subset: deals with baskets)



- Other indemnity claims subject to the basket include specific tax or employment claims and matters relating to accounts receivable.
- Common carve-outs include share ownership and due organization.



BASKETS AS % OF TRANSACTION VALUE

(Statistical Summary)*

Basket Type	Mean	Median	Minimum	Maximum
Deductible	0.85% (0.28% in 2015 Eur. Study) (0.73% in 2013 Eur. Study) (0.97% in 2010 Eur. Study)	0.86% (0.23% in 2015 Eur. Study) (0.92% in 2013 Eur. Study) (0.86% in 2010 Eur. Study)	0.66% (0.18% in 2015 Eur. Study) (0.06% in 2013 Eur. Study) (0.10% in 2010 Eur. Study)	1.00% (1.38% in 2015 Eur. Study) (2.15% in 2013 Eur. Study) (3.75% in 2010 Eur. Study)
Threshold	1.04% (0.48% in 2015 Eur. Study) (0.99% in 2013 Eur. Study) (0.89% in 2010 Eur. Study)	0.89% (0.22% in 2015 Eur. Study) (0.67% in 2013 Eur. Study) (0.66% in 2010 Eur. Study)	0.12% (0.01% in 2015 Eur. Study) (0.06% in 2013 Eur. Study) (0.001% in 2010 Eur. Study)	2.05% (2.00% in 2015 Eur. Study) (7.50% in 2013 Eur. Study) (5.00% in 2010 Eur. Study)
All Baskets (other than combination)	0.99% (0.43% in 2015 Eur. Study) (0.94% in 2013 Eur. Study) (0.90% in 2010 Eur. Study)	0.89% (0.22% in 2015 Eur. Study) (0.78% in 2013 Eur. Study) (0.71% in 2010 Eur. Study)	—	—

* Data for baskets applicable to total claims in deals where these inputs are determinable; carve-outs or separate thresholds or deductibles may also apply on a claim-by-claim basis or for breaches of specific representations or covenants.



“DOUBLE MATERIALITY” SCRAPE

(Materiality Qualification in Representations Disregarded)

Materiality qualification in representations disregarded for all indemnification-related purposes

For purposes of this Article __ (Indemnification), the representations and warranties of Target shall not be deemed qualified by any references to materiality or to Material Adverse Effect.

Materiality qualification in representations disregarded for calculation of damages/losses only

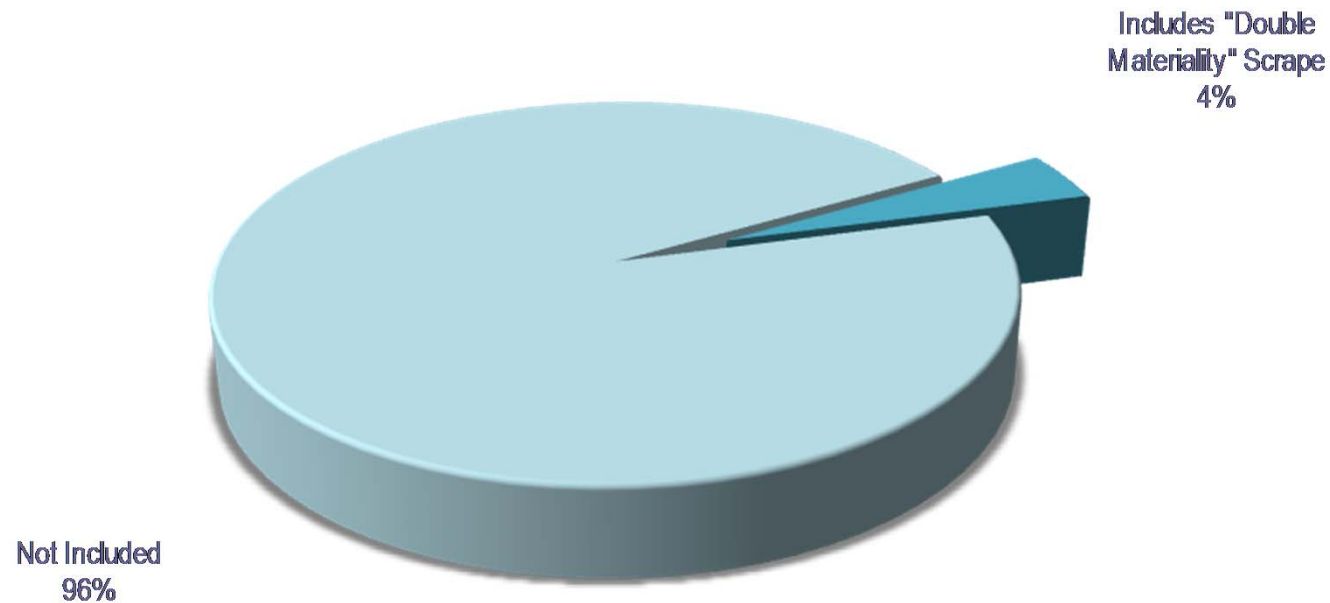
For the sole purpose of determining Losses (and not for determining whether or not any breaches of representations or warranties have occurred), the representations and warranties of the Target shall not be deemed qualified by any references to materiality or to Material Adverse Effect.



"DOUBLE MATERIALITY" SCRAPE

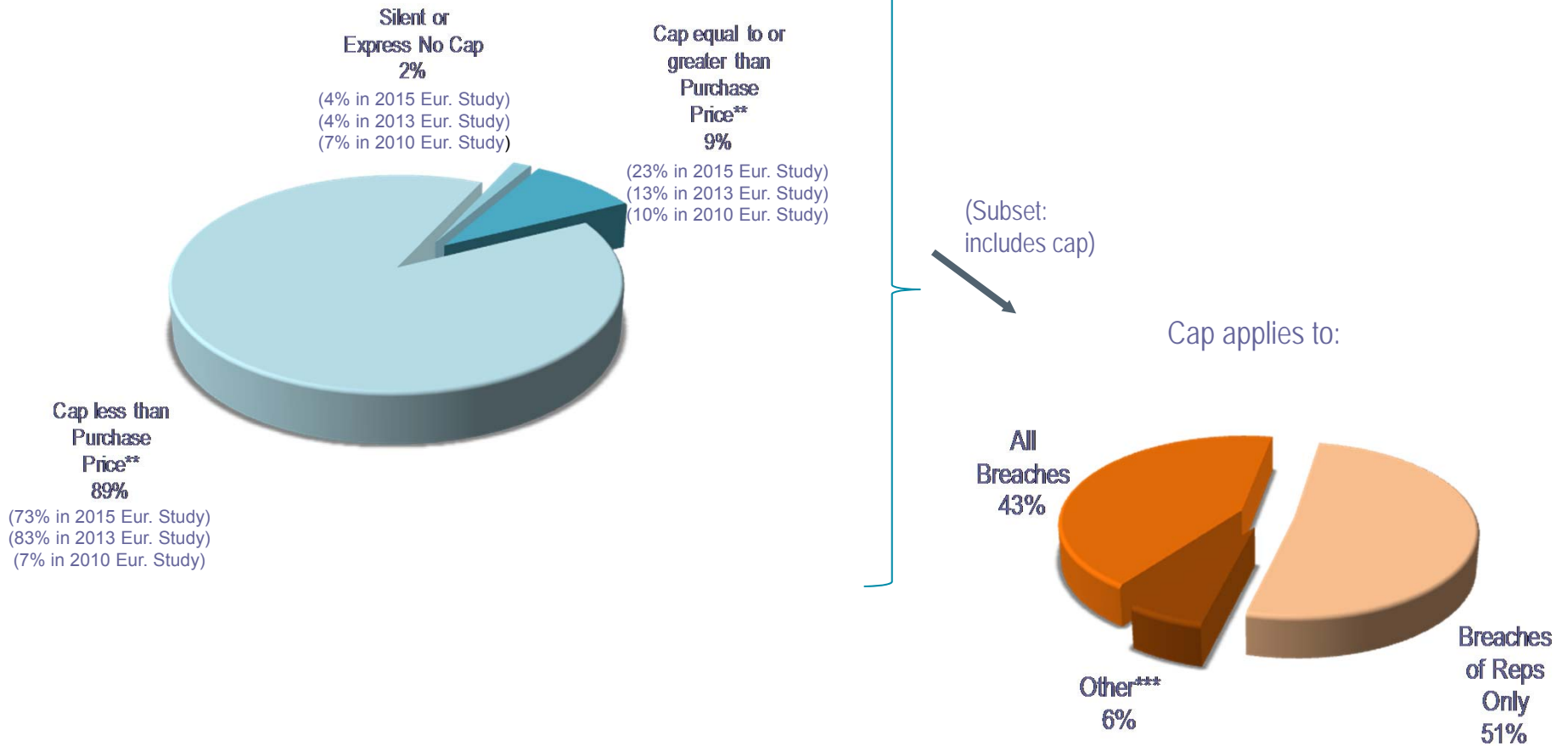
(Materiality Qualification in Reps Disregarded)

(Subset: deals with baskets)





CAPS*



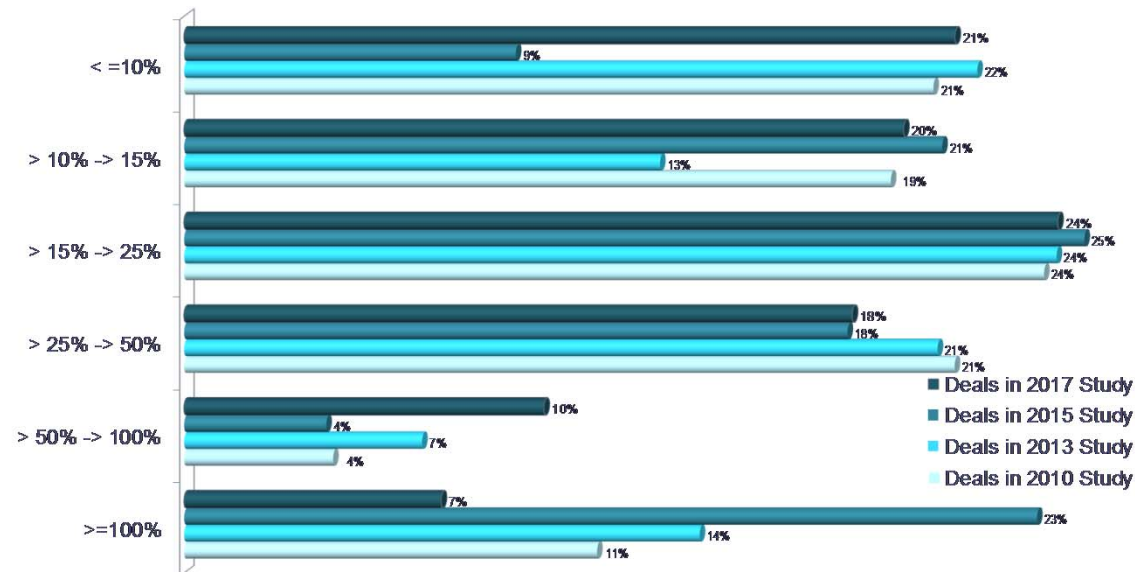
* Data for caps generally applicable to contractual indemnification obligations, excluding deals known to feature R&W insurance; for specific kinds of claims carve-outs or separate caps may apply (see "Cap Carve-Outs", slide 78).
 ** Does not include one deal with a cap with an amount not determinable.
 *** For example, cap applies to breaches of specific representations, indemnifications and/or covenants.



CAP AMOUNTS AS % OF TRANSACTION VALUE

(Subset: deals with determinable cap)

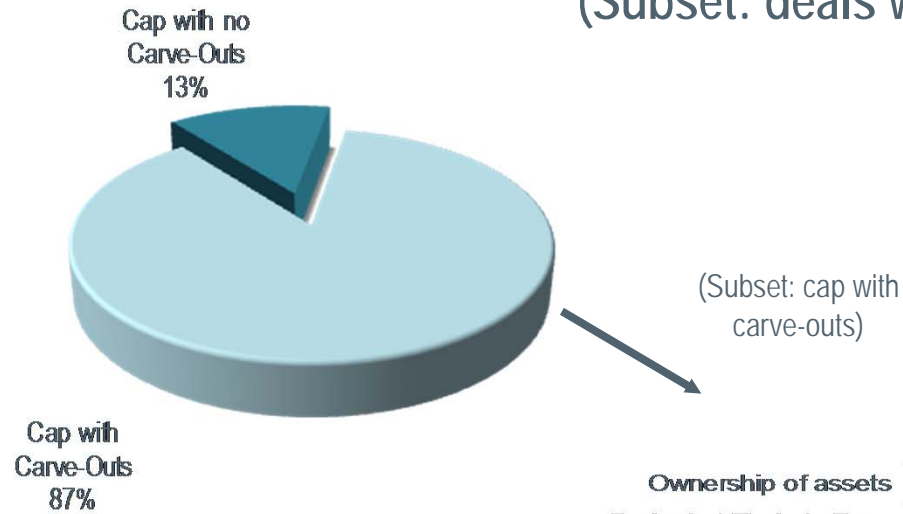
Mean	Median	Minimum	Maximum
28%	19%	1%	100%





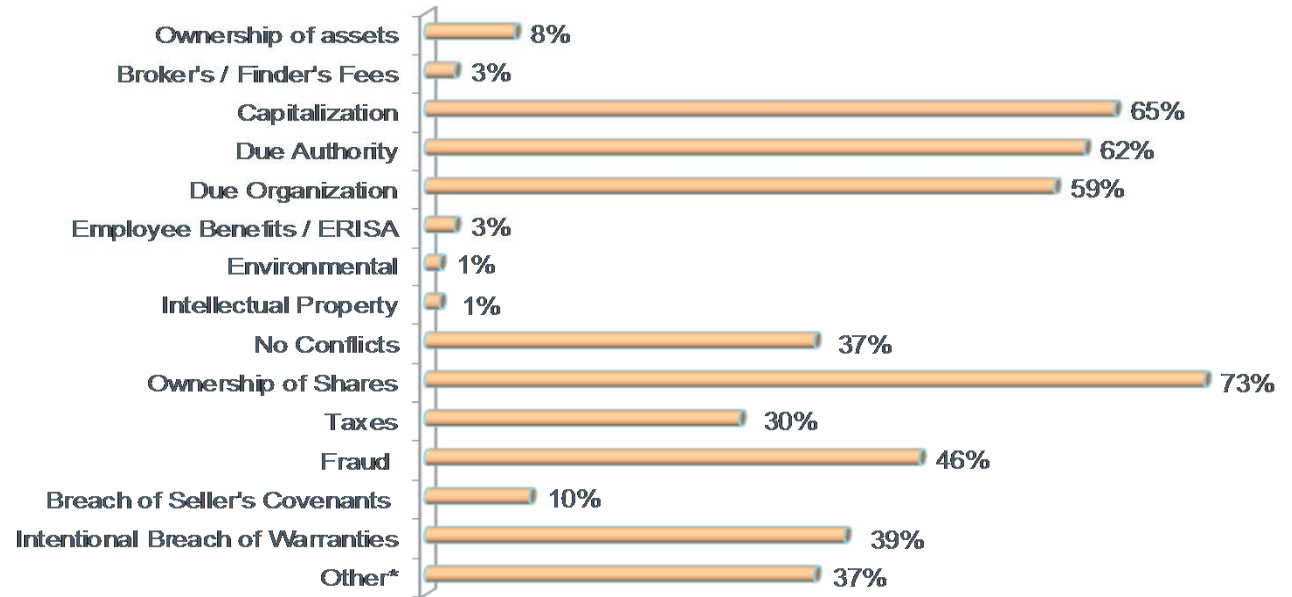
CAP CARVE-OUTS

(Subset: deals with caps)



(Subset: cap with carve-outs)

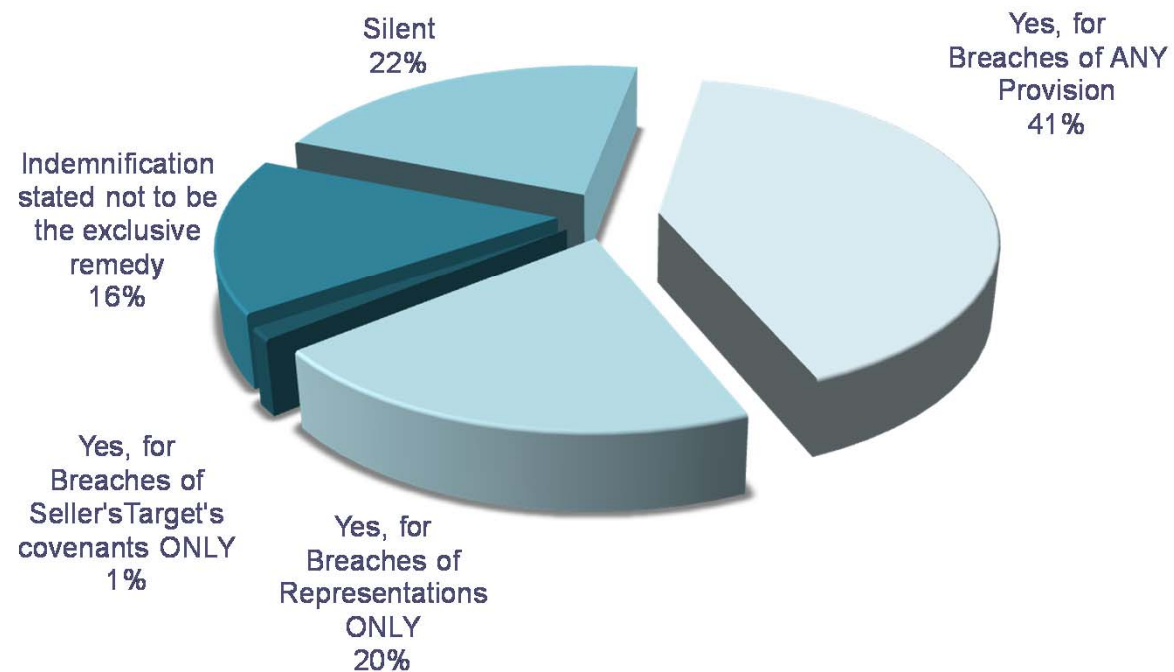
Cap Carve-Outs



* Examples of other carve-outs: product liability, competition-law issues, US-related risks and leakage.



INDEMNIFICATION AS EXCLUSIVE REMEDY*

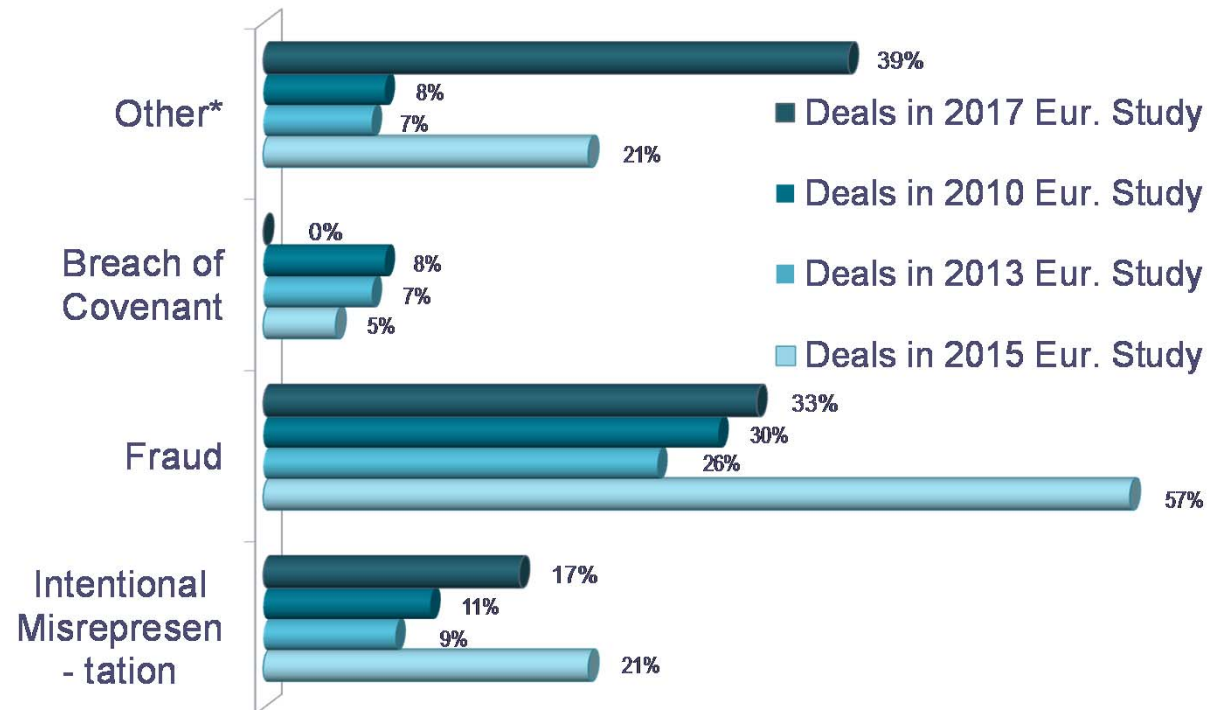


* Indemnification provisions in the agreement provide that they are the sole remedy.



INDEMNIFICATION AS EXCLUSIVE REMEDY – CARVE-OUTS

(Subset: deals with indemnification as exclusive remedy)

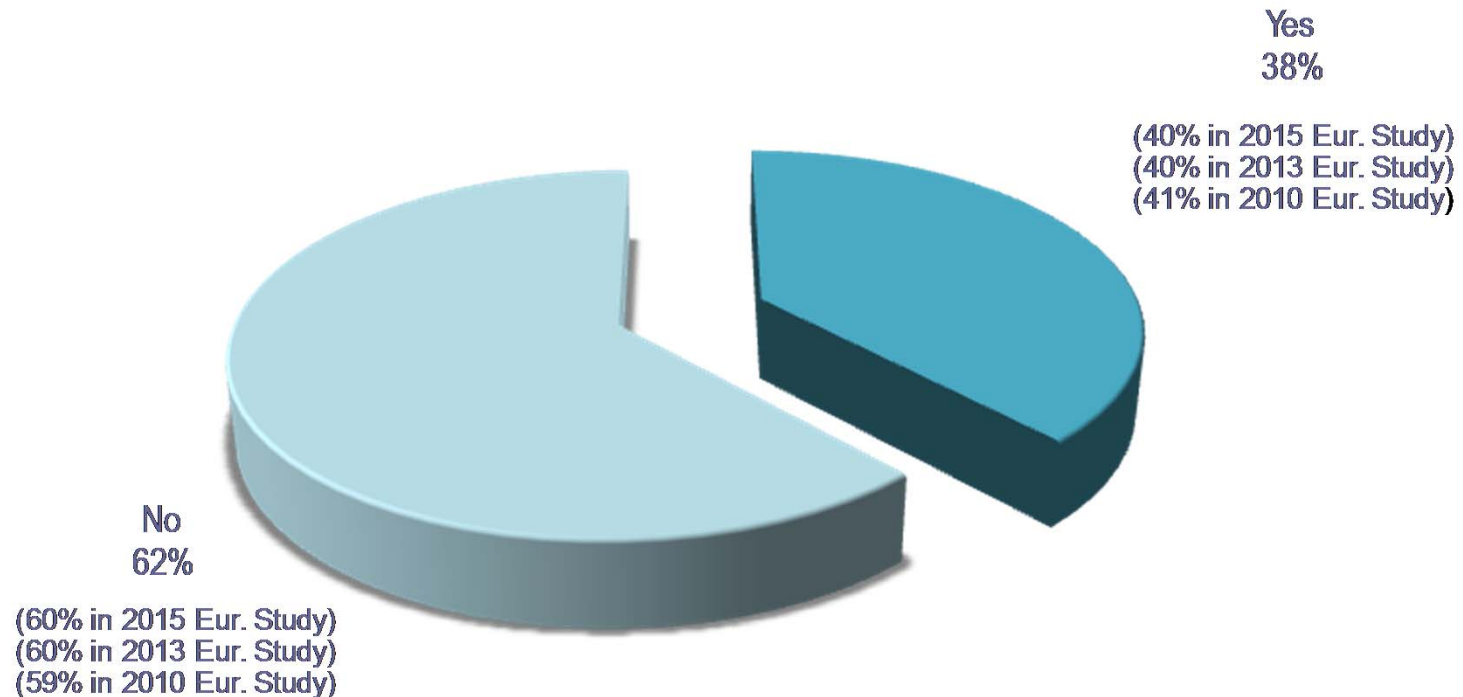


- Examples of other carve-outs: willful misconduct, intentional deception, “fundamental warranties”



RIGHT OF SELLER TO REMEDY A BREACH

Does the agreement include a clause giving Seller an opportunity to remedy its breach before Buyer may institute action?





CONTROL OF DEFENSE AGAINST THIRD-PARTY CLAIMS

Buyer controls defense:

Buyer shall notify Seller of any claim against Target which could give rise to Seller's indemnification obligation. Buyer shall control the defense of such claim and shall inform Seller from time to time of the progress thereof.

Seller's consultation rights:

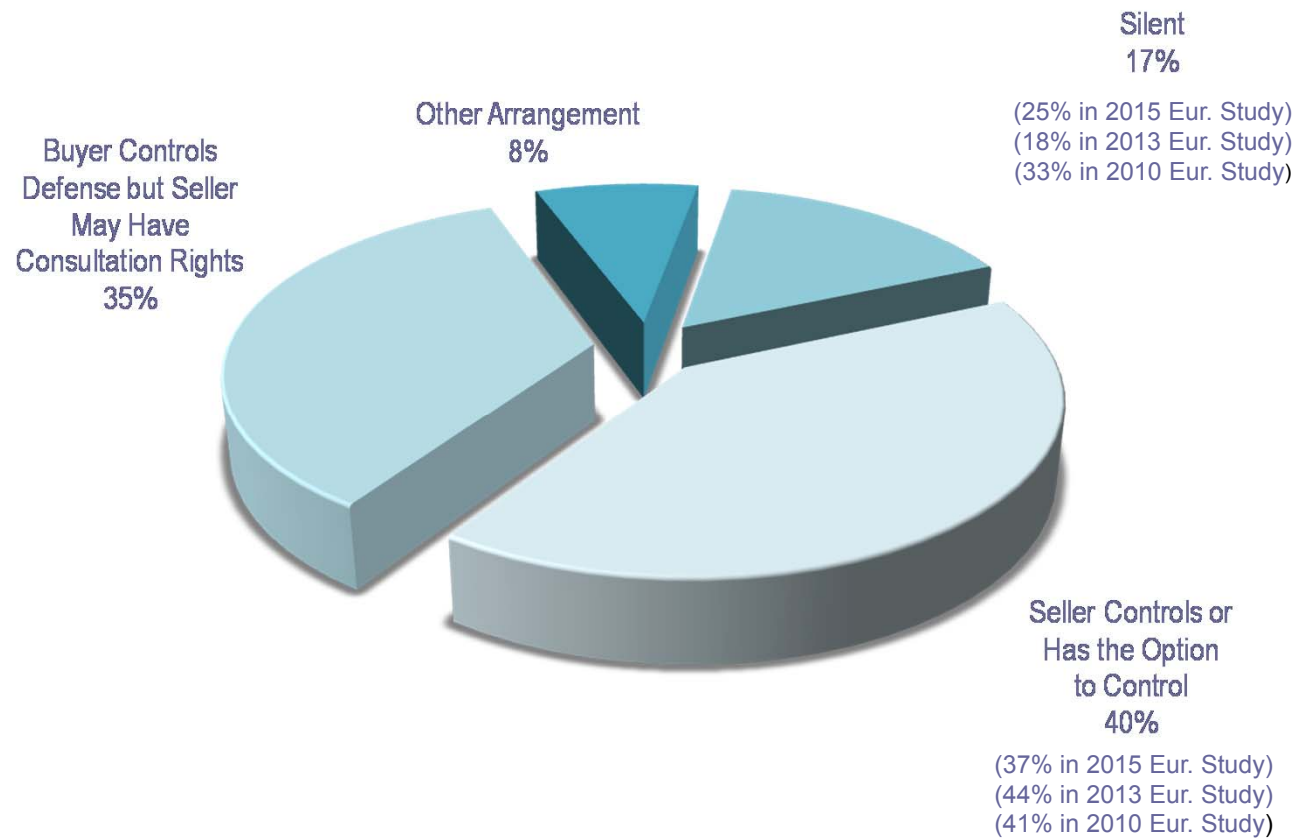
Buyer shall notify Seller of any claim against Target which could give rise to Seller's indemnification obligation and shall consult Seller on any material steps to be taken in defense of any such claim, including prior to any consent to entry of judgment or settlement thereof.

Seller's defense rights:

. . . provided, however, that Seller may at its expense conduct and control, through counsel of its own choosing reasonably acceptable to Buyer, the settlement or defense of such claim, and provided further that Seller shall not consent to entry of judgment or settlement thereof without Buyer's prior written approval.

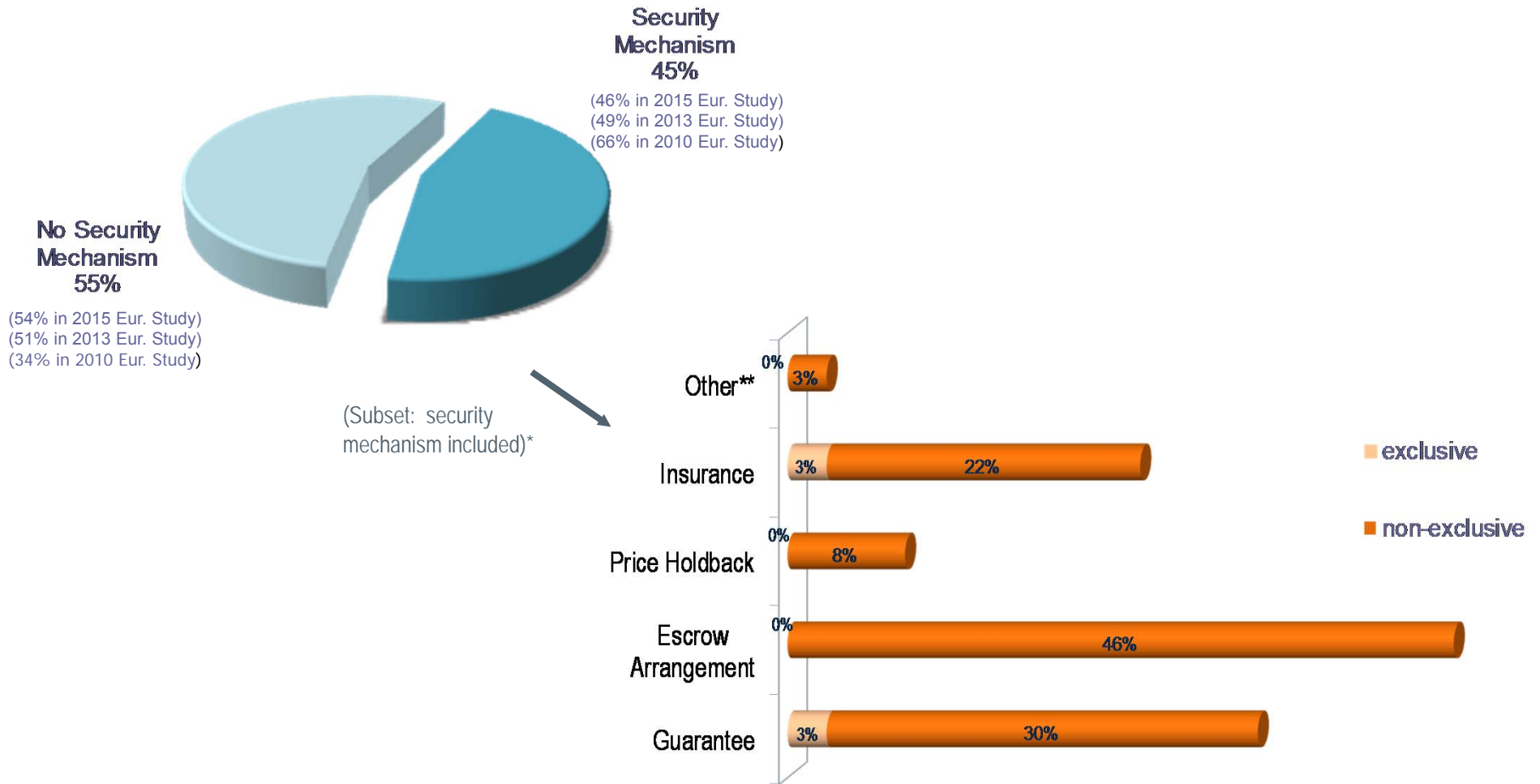


CONTROL OF DEFENSE AGAINST THIRD-PARTY CLAIMS





SECURITY FOR PAYMENT OF SELLER'S INDEMNIFICATION OBLIGATIONS



* Of deals with a security mechanism, 14% had more than one mechanism.

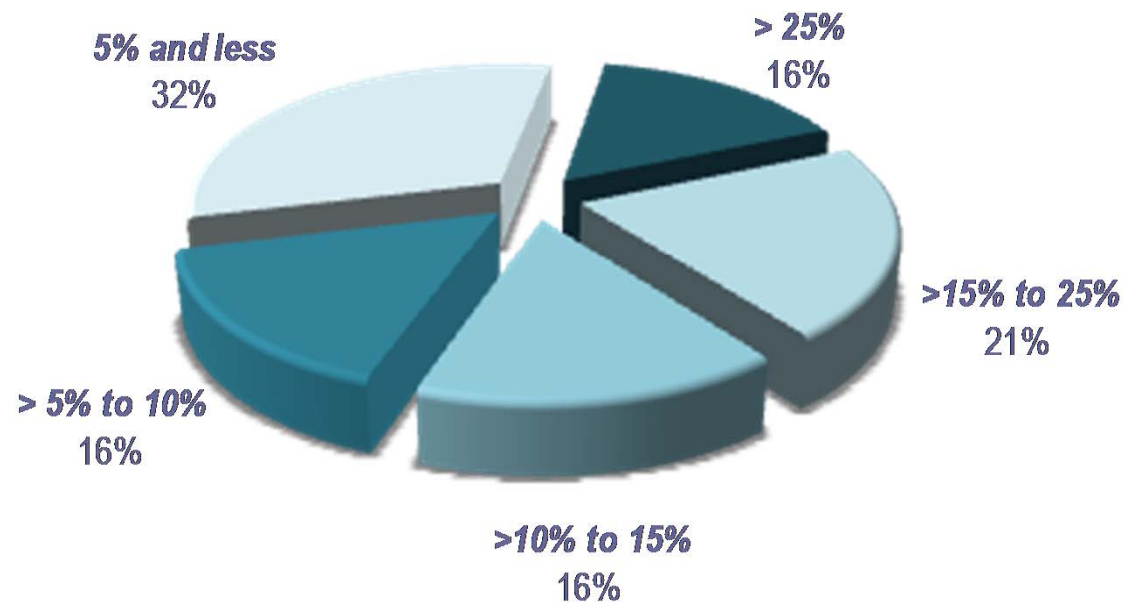
** Examples of other security arrangements: set-off against vendor loan.



ESCROWS/HOLDBACKS AS % OF TRANSACTION VALUE

(Subset: deals with determinable escrows/holdbacks)

Amount of escrow/holdback as % of transaction value





PRIVATE TARGET M&A STUDIES COMPARATIVE DATA RE: INDEMNIFICATION

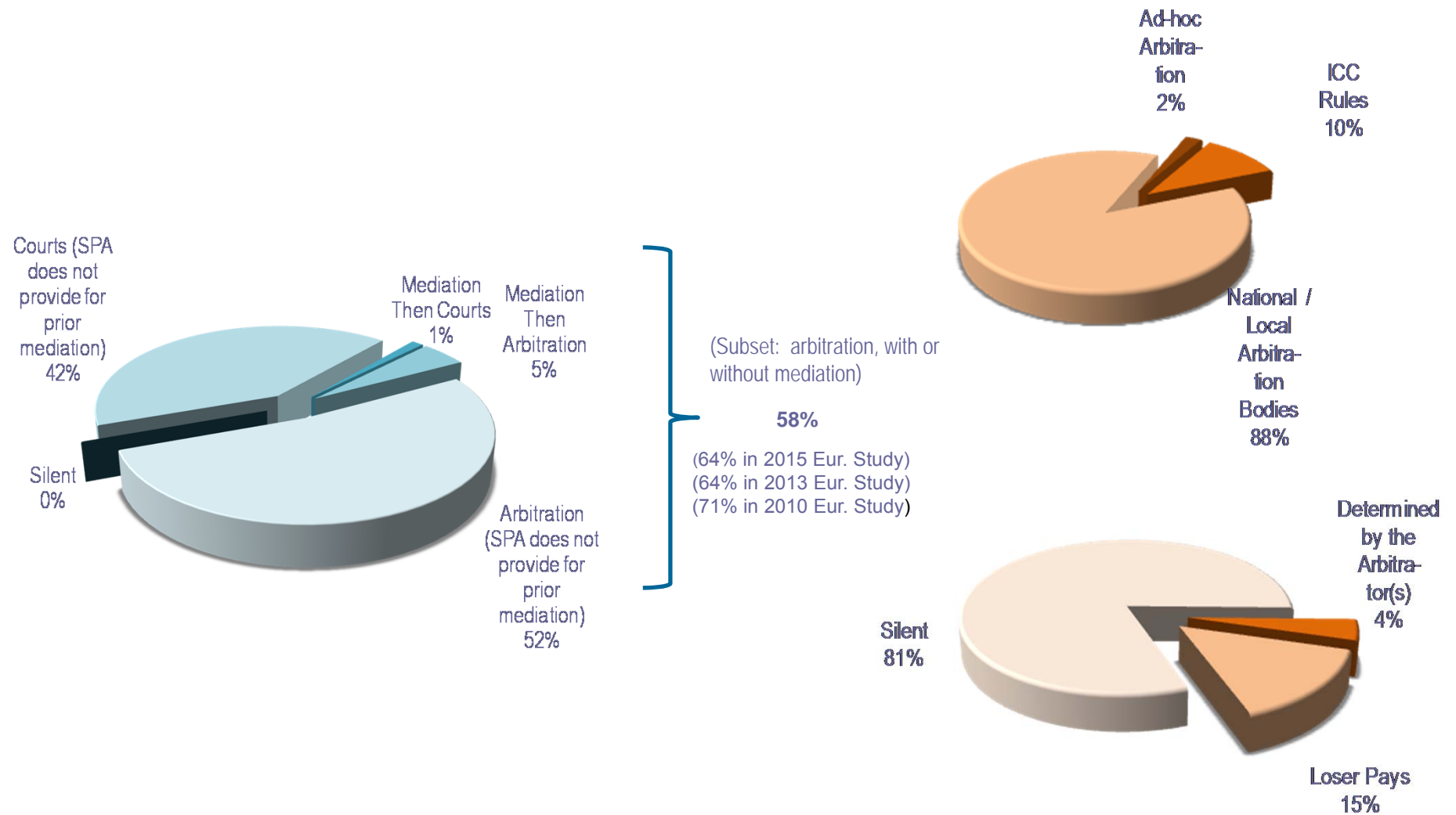
	US Study		European Study	
	2015	2017	2015	2017
Includes Basket	98%	98%	89%	93%
Threshold Basket Only	26%	22%	64%	73%
Combination Threshold Basket and Deductible	7%	2%	12%	15%
Deductible Only	65%	70%	13%	5%
Cap on Indemnification:				
Cap = purchase price	3%	4%	19%	9%
Silent or express statement as to no Cap	0%	0%	4%	2%
Indemnification expressly stated to be exclusive remedy of Buyer (subject to carve-outs)	90%	92%	52%	62%
Includes Benefit-of-the-Bargain/Pro-Sandbagging Provision	35%	42%	22%	15%



DISPUTE RESOLUTION



DISPUTE RESOLUTION MECHANISM



* Does not reflect provisions, if any, in chosen arbitration rules re allocation of expenses.



PRIVATE TARGET M&A STUDIES

COMPARATIVE DATA RE: DISPUTE RESOLUTION

	US Studies				European Studies			
	2015		2017		2015		2017	
Mediation then courts	3%		14%		10%		1%	
Courts (no required mediation)	85%		17%		42%		26%	
Mediation then arbitration	1%		14%		10%		5%	
Arbitration (no mediation requirement)	11%		56%		53%		52%	
Of deals choosing arbitration:								
Arbitral rules applicable	AAA JAMS	64% 36%	AAA JAMS ICC	55% 40% 5%	Local bodies ICC	78% 22%	Local bodies ICC Ad-hoc	88% 10% 12%
Allocation of expenses:								
• by the arbitrator(s)	0%		45%		10%		4%	
• loser pays	42%		30%		4%		15%	
• split evenly or apportioned	58%		15%		4%		0%	
• silent	0%		10%		82%		81%	



Mergers & Acquisitions Committee

"Where the World's Leading Dealmakers Meet"

The Mergers & Acquisitions Committee was founded in the late 1980s and has over 5,000 members, including practitioners from all 50 states, five Canadian provinces, and more than 53 different countries on five continents. The committee is home to the world's leading merger and acquisition (M&A) attorneys and many other deal professionals such as investment bankers, accountants, and consultants. In addition, over ten percent of committee membership includes in-house counsel.

Market Trends Studies

Get state-of-the-art market metrics in negotiated acquisitions with the committee's benchmark studies covering not only U.S. but also Canadian and EU deals. The studies, produced by the committee's M&A Market Trends Subcommittee, have become **essential resources for deal lawyers, investment bankers, corporate dealmakers, PE investors**, and others interested in "what's market" for critical legal deal points in M&A. The committee regularly produces the Private Target Deal Points Study, the Strategic Buyer/Public Target Deal Points Study, the Private Equity Buyer/Public Target Deal Points Study, the Canadian Private Target Deal Points Study, and the Continental Europe Private Target Deal Points Study. The studies, as well as updates (and Update Alerts), are available free of charge to committee members only.

Knowledge and Networking

The committee meets three times a year at the Business Law Section Annual Meeting in September, the Mergers & Acquisitions Committee Meeting in January and the Section Spring Meeting in April. All **materials and resources** used in CLE programs on M&A-related topics presented both at ABA meetings and in other forums are accessible to all members via the Section's **online Content Library**. These programs bring together panels of experienced M&A practitioners from law firms and corporate law departments, as well as those in academia and others outside the legal profession who are experts in their field.

<<< Join the Committee! >>>

Committee membership is FREE for Business Law Section members. For immediate enrollment in the Section and/or Committee go to ambar.org/BLSmergersacquisitions