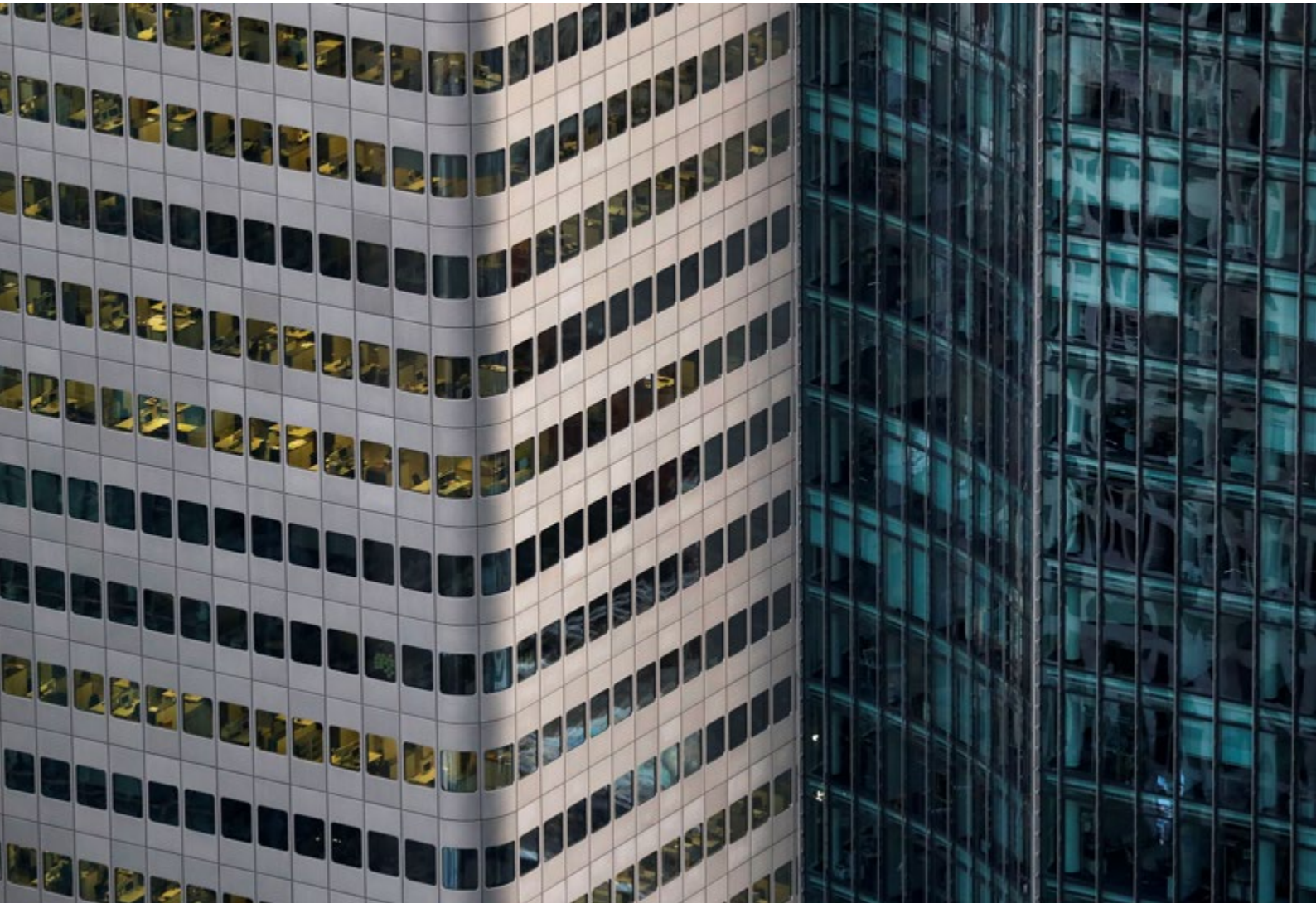


Private M&A Trends

Warranty and indemnity insurance

A report on the use of warranty and indemnity (W&I) insurance in private M&A throughout 2019. The report is based on interviews with leading M&A practitioners, insurance brokers and underwriters, who also comment on the impact of COVID-19.





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Overview

W&I insurance use in private M&A has grown year-on-year for the last five years. It has become part of the fabric of UK private equity (PE) transactions and is increasingly seen on deals with no PE element.

In this report, we look back at 2019 and consider:

- The incidence of W&I insurance across different types and sizes of deal and across sectors (*Increased prevalence of W&I insurance*).
- The effect that continued insurer competition in this specialist insurance market has had on pricing, retentions and coverage (*State of the W&I insurance market and key policy terms*).
- The growth in M&A insurance products complementary to W&I insurance, notably tax liability insurance and contingent legal risk insurance (*Product innovation*).
- A reported increase in notifications and claims under W&I insurance policies (*Increase in notifications and claims*).

We also look at:

- The impact that W&I insurance has had on certain private M&A deals and SPAs (*Impact of W&I insurance on certain deal structures, processes and SPAs*).
- How the W&I and wider M&A insurance proposition has been affected by, and may evolve in response to, the 2019 novel coronavirus disease (COVID-19) outbreak (*The impact of COVID-19*).

This report is based on interviews with representatives of more than 25 law firms, insurance brokers, underwriters, managing general agents and managing general underwriters. We are grateful to those who shared their views and in some cases proprietary data with us.

Readers new to W&I insurance, or feeling the need for a recap, are referred to *Practice note, Warranty and indemnity insurance*. This practice note was restructured in April 2020 by Nicholas Lunn, Head of Southern Europe at Liberty GTS and Vanessa Young, Executive Director in the M&A Transactional Risks Team at Willis Towers Watson, to whom we also express our thanks.

W&I insurance trends and highlights 2019

Deal backdrop

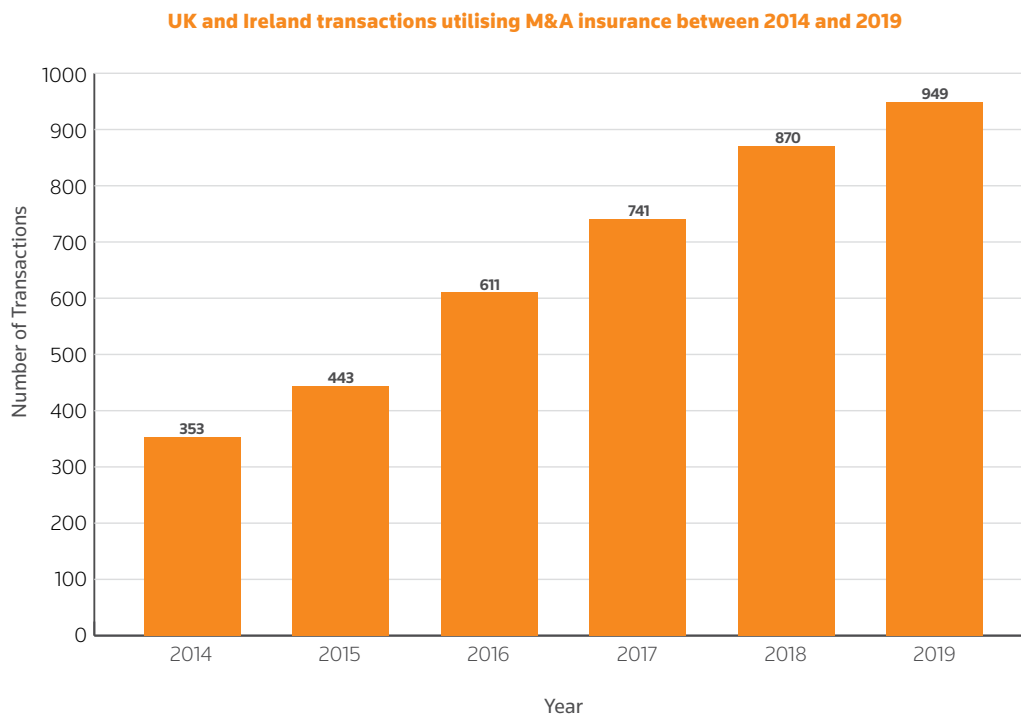
While global M&A in 2019 was slightly down on the previous year in both volume and value (5% and 3% respectively), it remained the fourth best year on record (source: *Refinitiv's Global Mergers & Acquisitions Review Full Year 2019 (Legal advisors)* (January 2020)). PE-backed buyouts accounted for 13% of the total, making it PE's best year since before the financial crisis of 2007-08. The most active sectors were healthcare, technology, and energy and power. On the other hand, M&A activity involving European targets was down 25%. So too was cross-border M&A.

Increased prevalence of W&I insurance

Rapid growth

In 2019, insurance broker Paragon gathered data from over two dozen carriers specialising in M&A insurance (the terms 'underwriter', 'insurer', 'carrier' and 'market' are used interchangeably in this report) to make an assessment of how large the global M&A insurance market had become. Paragon estimated that worldwide M&A insurance had grown year on year between 2014 and 2018, with a total of 4,355 M&A insurance-backed transactions in 2018 (2014: 1,315) (source: *2018 Mergers & Acquisitions (M&A) & Tax Insurance Global Review* (April 2019)). In the UK and Ireland, Paragon estimated that 870 transactions used M&A insurance in 2018 (2014: 353).

Paragon is in the process of repeating this exercise. According to Brian Hendry, Head of Mergers & Acquisitions at Paragon, responses to date indicate that in 2019 the number of transactions using M&A insurance in the UK and Ireland grew again, by roughly 9%.



Source: based on estimates provided by Paragon Brokers

Our interviews with law firm partners and others specifically on the subject of W&I insurance support a narrative of continued growth or at least stabilisation at high levels in 2019.

Peter Banks, private equity partner at Allen & Overy, notes that “we saw W&I insurance discussed on almost every private equity deal last year, whether by the seller with a view to providing bidders with an option to increase their potential recourse under business warranties or by a buyer as a strategy for maximising its competitive position. In 2019, we saw W&I insurance taken out on the majority of buyouts on which we acted. W&I insurance has become part of the fabric of UK private equity transactions.”

Nor is W&I insurance exclusively a PE product. W&I insurance featured on 23% of the private M&A deals in which Allen & Overy was involved worldwide in 2019 excluding PE exits (UK: 20%) (source: [New strategies for a cooling market](#) (April 2020)). The corresponding figure for PE exits was 62% (2018: 71%) and was higher still in some developed markets.

Addleshaw Goddard saw W&I insurance feature on 19% of its private M&A deals in 2019 and 42% of PE deals (source: *M&A Trends Report 2020*; to access the report, click [here](#)), and add that the figure rose to almost 75% for PE exits.

CMS reported a continued increase in W&I insurance use across Europe in 2019 and particularly in the UK (source: *CMS European M&A Study 2020* (March 2020); to download a preview of the study, click [here](#)). Of 466 European deals on which CMS advised in 2019, 19% involved a W&I insurance policy (2018: 17%). In the UK, that percentage rose to 37% (2018: 32%).

Latham & Watkins reported the use of W&I insurance to be at an all-time high. Of 240 European deals surveyed between July 2017 and June 2019, 35% featured W&I insurance (2016: 13%) (source: *Latham & Watkins Sixth Private M&A Market Study* (see [Minimising and Mitigating Risk in M&A – Trusted Tools and New Solutions](#) (February 2020))). Usage on PE exits reached 48%.

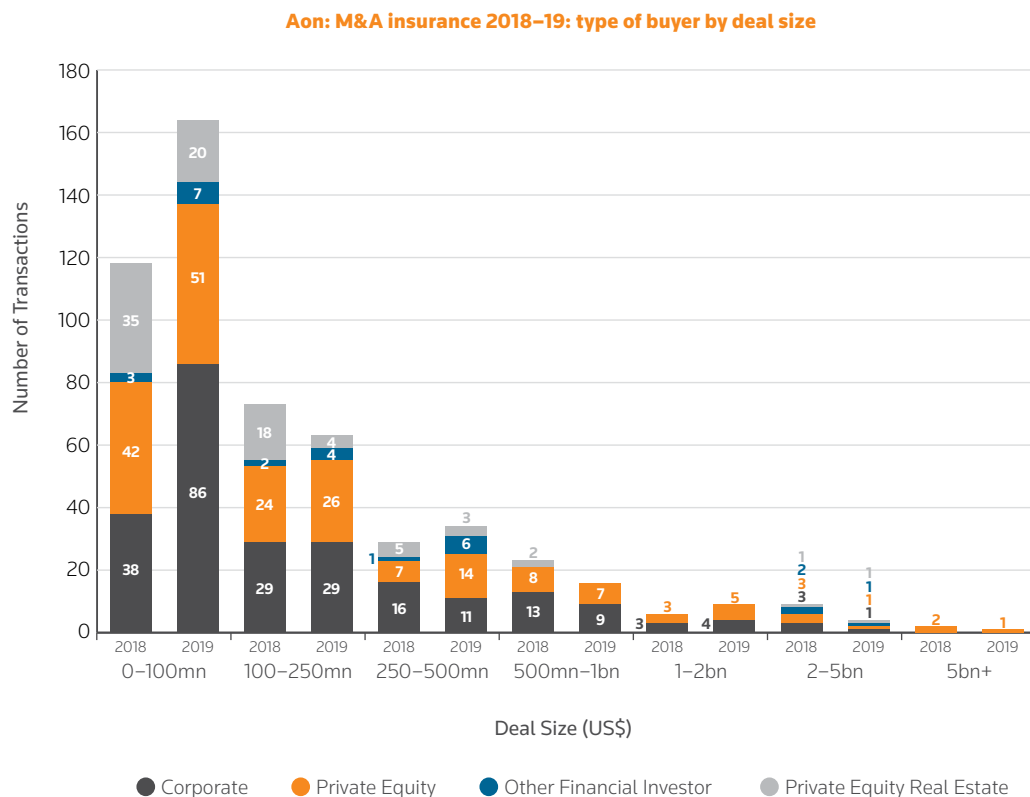
Pinsent Masons, Howden M&A and Arrowpoint Advisory, combining their data in a joint exercise (*PE M&A Report 2020* (June 2020); to access the report, click [here](#)), reported that of 190 UK-led transactions on which they advised in 2019, 51% used W&I insurance (2018: 41%). Usage on PE deals reached 55%.

Any one firm's data is only indicative of its experience, which in turn reflects its client mix and practice area focus. Some firms will be more active than others in certain sectors, for example PE or corporate real estate, where W&I insurance use is ubiquitous. Overall however, the data shared with us suggests that W&I insurance has penetrated the world of private M&A to a striking extent, particularly so for a product that has never been held out as suitable for all deals or a panacea for all deal problems.

Usage by buyer type

PE houses and other specialist investors were early adopters of W&I insurance and remain its heaviest users. "W&I insurance is a product that was designed for private equity, it's perfect for them," comments Neil Nicholson, corporate partner at Dentons.

W&I insurance is not the exclusive domain of the financial investor however, as the following graph, based on EMEA data provided by Aon M&A and Transaction Solutions, shows.



Source: Aon M&A and Transaction Solutions placements data (EMEA)

Anka Taylor, Aon's UK Head of Transaction Solutions, observes of this graph that "as competition for assets continued in 2019 and seller-initiated W&I solutions became more prevalent, corporate clients held their own across most deal size categories in terms of M&A insurance placements in EMEA, following already solid growth in this buyer type from 2016".

Insurance broker Howden M&A saw European corporates' appetite for W&I insurance grow steadily throughout 2019. Over the year, it saw a 31% increase in corporate insureds (source: [Howden M&A Annual Review: 2019 review and 2020 outlook](#) (March 2020)). To Daniel Stock, Executive Director, the increased use by corporates is driven by "a broader awareness of the product and of the benefits that W&I insurance can bring to the M&A process".

Lockton Transactional Risks also saw an increase in the number of corporate users, whether introducing the product on the sell-side or on the buy-side (source: [Lockton Market Update 2020](#) (January 2020)). In the experience of Harry Blakelock, Partner at Lockton Transactional Risks, "finance directors and general counsels are increasingly aware of the benefits of W&I insurance and, as rates become even more competitive and coverage increases, the product has come to be seen as a more viable option and a tool to enhance competitiveness against PE buyers".

"Most corporates' involvement in using W&I insurance begins when they buy assets that are ultimately owned by investment management firms; primarily private equity, who have been using these policies for many years," explains James Wilson, Head of M&A Insurance at Tysers Insurance Brokers. "They don't initiate their first usage of W&I insurance, however after using it and seeing its benefits, they might initiate it on their next transaction, whether there is a private equity element to it or not. For some, it has become part of their normal risk management process."

Allen & Overy reported that W&I insurance was used in 31% of sales by founders in which the firm was involved in 2019 and 20% of disposals by corporates (2018: 21% and 9% respectively).

Latham & Watkins saw both corporates and PE houses engaging in auction processes, setting expectations early on, usually in process letters, stating that buyers will be required to take out W&I insurance (see [Practice note, Warranty and indemnity insurance: "Stapling" W&I insurance](#)). "While W&I insurance can help bridge the gap between the parties, it is not always the most attractive option for buyers; a large premium, a high de minimis and deductible and large and general gaps in the coverage may, in certain circumstances, effectively result in a double cost to the buyer: paying a high premium and covering the majority of warranty claims itself if there's a high bar for recovery. A buyer should consider requiring a partial or full contribution from the seller towards the premium (given it is a value item for the seller, enabling it to recover 100% of the proceeds free of any warranty claims) or seek recourse against the seller up to the deductible or in respect of those warranties which are not covered by the policy; however, any such requests may see a bidder lose its competitive edge in a sales process. Alternative protections a buyer could consider include the use of escrows, deferred consideration or parent guarantor, although none may be suitable where the seller is a PE house or parent companies are bound by a negative pledge."

Usage relative to deal size

More than ever, it seems, W&I insurance extends to deals both large and small. Marsh JLT Specialty's latest data, [Transactional Risk Insurance 2019: Year in Review](#) (April 2020), shows an increase in the average enterprise value (EV) of W&I insurance-backed deals (W&I deals) across EMEA and a decrease in the median EV, from which it concludes that "the product is now used to support the full spectrum of transactions from the SME segment to large-cap transactions". According to Alastair Lowry, Co-head of UK Transaction Risk, Marsh JLT Specialty, "the emergence of, and competition between, specialist insurers focusing on SMEs mean the product is now economical and efficient at the market's lower end. W&I insurance is also regularly used to facilitate transactions of enterprise values of US\$1 billion and higher evidencing the significant increase in available insurance capacity and insurers' willingness to engage on the largest and most complex transactions."

W&I insurance was purchased on 49% (2018: 38%) of deals larger than EUR100 million on which CMS was involved across Europe in 2019. The percentages for medium-sized deals and smaller deals remained broadly static, at 28% and 7% respectively.

“W&I insurance has become an important corporate governance tool for all transactions, regardless of size,” says Chris Thompson, MD of SME specialist insurer, Acquinex. “The erosion of ‘minimum premiums’ means that deals can be insured for as little as £20,000 premium, compared to minimum premiums of around £100,000 just a few years ago.”

Usage by sector

Research published by Aon M&A and Transaction Solutions suggests that the W&I insurance market in 2019 was relatively agnostic on sector, with policies secured for clients operating across a broad range of sectors (source: *Risk in Review 2019 (EMEA M&A Transaction Solutions)* (December 2019) (Aon report)), the most active being:

- Energy (23%).
- Industrials (21%).
- Real estate (17%).

For CMS, real estate and construction were the most popular sectors across Europe. 30% of their 2019 M&A deals in those sectors featured W&I insurance.

Howden M&A note that in 2019 PE was particularly active in the healthcare and financial services sectors, where it saw a trebling of W&I deal activity. “As insurer competition has increased over the past few years, the more sophisticated providers (those with the ability to underwrite complex transactions involving targets in regulated sectors) have turned to insuring healthcare and financial services deals as a way to counteract declining premiums in other lower-risk sectors.”

These were indeed sectors that had historically been perceived as higher-risk. Matt Foster, corporate partner, Norton Rose Fulbright LLP, notes that there has been growth in the use of W&I in the insurance broking market and some asset management businesses, but for some insurers this remains out of appetite.

Other respondents noted that some sectors or sub-sectors continued to receive more careful scrutiny, with fewer insurers prepared to offer cover on businesses involving, for instance:

- A high degree of regulation or potential consumer exposure.
- Possible reputational issues such as gambling, recreational drugs or the arms trade.

Ultimately, risk appetite across sectors varies from insurer to insurer.

Usage by deal type

W&I insurance is predominantly used on share deals. Although asset deals are insurable, they are far less common in practice.

Sophie O’Connor, corporate partner, Norton Rose Fulbright LLP, notes that “we have seen increased use of W&I insurance in relation to the acquisition of a less than 100% stake and in the case of a minority stake only”.

“Given growing demand of late, W&I insurers are responding to the challenges of underwriting minority stake transactions,” says Simon Tesselment, Chief Broking Officer for Aon M&A and Transaction Solutions, EMEA. “Here the customary buyer diligence and robust seller disclosure processes that normally underpin underwriting are often materially different. We also see insurers potentially approaching general partner-led secondaries deals in a similar way, as PE firms search for creative ways to manage their limited partner base and create liquidity.”

Usage by policy type

The vast majority of W&I insurance policies are buy-side policies (for an explanation of the difference between buy-side and sell-side policies, see [Practice note, Warranty and indemnity insurance: Two types of policy](#)). Insurers, brokers and lawyers typically put the proportion of buy-side policies at in excess of 90% or even 95%.

This does not mean that buyers always pick up the premium (see [Practice note, Warranty and indemnity insurance: Who pays the premium?](#)). In 2019, buyers paid for 76% of the W&I insurance policies purchased on CMS' European deals.

State of the W&I insurance market and key policy terms

The W&I insurance market

Nicholas Lunn, Head of Southern Europe at Liberty GTS and Vanessa Young, Executive Director in the M&A Transactional Risks Team at Willis Towers Watson assess that there are now over 25 insurers in the London W&I insurance market with a combined capacity for a single risk in excess of £1 billion. This compares to a handful of W&I insurers a decade ago and just two 20 years ago.

There has been a trend towards specialisation among M&A insurers, including a focus on SME transactions, real estate, emerging markets and infrastructure. This trend has been accompanied by a growth in the prevalence of markets being able to offer tax liability insurance (see [Tax liability insurance](#)) and brokers who now focus on this product.

Lockton Transactional Risks comments: "As more underwriters enter the market we see continued downward pressure on premiums in the short term especially for asset heavy, less risky transactions. Underwriters continue to compete on premium and coverage positions."

Pricing and retentions

The premium for a W&I insurance policy is in general calculated by reference to the policy limit and is known as the rate on line (for an explanation of this term see [Practice note, Warranty and indemnity insurance: Cost](#)). The rate on line for UK operational businesses in 2019 was typically somewhere between 0.9% and 1.3% of the policy limit purchased. On average, W&I insurance policy limits were between 10% and 30% of target EV.

"Base premium levels came down in 2019," says Daniel Stock at Howden M&A. "But insureds were tending to spend more on policy enhancements or a higher policy limit. The reduction in the rate was often seen as a budget to be spent on better coverage."

There was some evidence of claims starting to impact pricing. Howden M&A point to large deals (those in excess of EUR1 billion EV) exhibiting an average premium rate of 1.6% as against a European average across all deals below that size of 1% in 2019. This, they say, is to be expected given that severe claims are statistically more likely on larger deals (see [Increase in notifications and claims](#)).

Across Europe, policy retentions fell substantially across most operational deal sectors in 2019. According to Howden M&A, "while this trend began towards the end of 2018, it was prevalent throughout 2019, with almost all insurers accepting 0.5% of enterprise value as the benchmark deductible for 'difficult' transactions and 0.1-0.25% of enterprise value for 'attractive' transactions. Some buyers however took a >0.5% of enterprise value deductible to save on premium costs or because seller liability under the SPA was >0.5% of enterprise value."

Policy retentions in real estate and renewables deals remained at nil.

Exclusions and enhancements

As Beccy Bothamley, Partner, Mayer Brown, says, "where underwriters are moving on coverage is always of interest to practitioners as that is one of the most important things to our clients and crucial to how we narrow the gap between the liability cover our clients can achieve under an SPA and under the policy."

While exclusions have always been subject to negotiation, underwriters have come under increasing pressure over the last few years, including in 2019, to impose fewer exclusions than the market has historically been comfortable with. In Beccy's experience, "a number of market standard exclusions, that we would have expected on every deal even a year ago, we can now usually negotiate with the underwriters to get them comfortable to remove the exclusion completely or reduce its scope, as the market is increasingly competitive. An example is anti-bribery and corruption, dependent on jurisdiction, and compliance with the GDPR."

Lockton Transactional Risks notes that insurers are showing increasing appetite to remove general exclusions at quotation stage to win work: "While this is seen as a positive we would highlight that despite the best efforts of insurers, often standard exclusions do end up applying due to limitations uncovered in due diligence."

A number of interviewees noted some continuing 'Americanisation' in relation to UK W&I insurance. Chris Halliday, M&A partner at Eversheds Sutherland, comments: "We have seen North American clients who are experienced with US-style Reps and Warranties (R&W) insurance being surprised by some of the limitations and exclusions that are applied to UK W&I insurance policies. They are often used to receiving more comprehensive cover, with a range of policy enhancements, and to paying a higher price for such cover. When looking at European targets, they have been keen to establish whether they could obtain cover that was more akin to R&W insurance." Many interviewees observed that increasingly – often, but not exclusively US – clients are seeking these features on European law-governed deals with a European W&I insurance policy, notwithstanding the additional cost.

The insurer's approach to underwriting is necessarily tailored. Angus Marshall, Practice Leader, Transaction Liability, CFC Underwriting, notes that "the underwriting process needs to be run in the same way as it would be for a domestic US R&W deal including for instance verbal responses to underwriting questions (as opposed to written which is standard in the UK), using previously agreed wordings as a starting point instead of an insurer's template wording and, of course, working US hours. In essence, the entire product and experience needs to be as authentically American as possible, in both style and substance" (see [Practice note, US and UK share purchase agreements: comparing approaches](#)).

Vanessa Young at Willis Towers Watson observes that some London-based underwriters (who also have underwriting operations in the US) incorporate certain US-style features into their policy form as standard (with no corresponding increase in premium for doing so), for example no 'general due diligence reports exclusion' (this exclusion being replaced with a statement in the no claims declaration that all deal team members have reviewed them) and no warranty spreadsheet.

Not all interviewees were equally comfortable with the term 'Americanisation' but its proponents tended to cite the following as examples of US-style coverage items that may be available:

- No general disclosure of data room. In other words, whether or not the SPA follows the European (seller-friendly) practice under which the data room is disclosed against business warranties, the W&I policy can follow the US (buyer-friendly) practice under which the warranties are qualified only by specific disclosures, so long as the sellers or management are willing to provide these specific disclosures. Howden M&A have seen an increase in the number of insurers willing to apply this enhancement, for an additional premium of up to 20%.
- All losses to be calculated on an indemnity basis.
- Nil policy de minimis, usually accompanied by a higher corresponding policy retention.
- Awareness and materiality scrapes (for more information, see [Practice note, Warranty and indemnity insurance: Enhancements to level of protection in W&I insurance policies](#)). In Lockton Transactional Risks' experience:
 - insurers are usually comfortable with offering awareness scrapes for the purpose of the policy for a 10-15% additional premium (or sometimes no additional premium); and
 - some insurers may be willing to scrape the majority of the materiality language in the warranties while keeping the de minimis.

An alternative approach may be to seek R&W insurance in this region. Simon Tesselment, Chief Broking Officer for Aon M&A and Transaction Solutions, EMEA, notes that “through a ‘trans-Atlantic’ panel of insurers in the London market, Aon can access full R&W cover for US clients and non-US clients negotiating deals structured on a US basis, which avoids the need for specific US-style enhancements to be requested on a piecemeal basis”.

As Nicholas Lunn at Liberty GTS says, the willingness of insurers to commit to offer more advanced US-style enhancements for European law-governed deals often hinges on the quality of the data room and extent of the seller’s general and specific disclosure exercise. “The seller’s specific disclosure exercise in particular is a factor which is often beyond the buyer’s control (to which there may be limited visibility until late in the process) but it must still be considered at the outset to avoid disappointment.”

Rich Winborn, Managing Partner at Themis Underwriting, agrees: “There is no better chance of getting comprehensive cover than a thoroughly due diligenced, properly negotiated transaction. Any shortcuts to this approach will erode cover and in that situation, enhancements become less meaningful.”

Jonathan Clarke, Legal Director at DLA Piper UK LLP, also sounds a warning note. “There are many flavours of W&I insurance coverage available nowadays with numerous enhancements. Despite this, buyers may do better to focus on the key issues for them and push these deeper rather than looking for as many ‘bells and whistles’ as possible.”

Product innovation

W&I insurance was designed to cover unknown issues in areas that had been the subject of due diligence, and this in large part remains its scope today. (One exception is affirmative tax cover: cover that some insurers may be willing to provide, within the W&I insurance policy itself, in respect of certain tax items that are labelled as ‘low’ or ‘very low’ risk in the tax due diligence report.)

The broader M&A insurance market has now evolved to provide separate cover for known risks.

Tax liability insurance

Tax liability insurance can help a company reduce or eliminate its exposure to an identified risk of a loss arising from a successful challenge by a tax authority to the expected tax treatment of a proposed or historic transaction or situation (for more information, see [Practice note, Tax liability insurance: dealing with tax risks in M&A and other commercial transactions](#)).

As David McCann, Executive Director at Aon M&A and Transaction Solutions, points out, the practice of insuring tax risks began in the 1980s but in recent years the number of underwriters in EMEA with dedicated tax insurance teams has grown rapidly. “As the number of market participants has increased, we see underwriters attempting to carve out their own niches: some focusing on smaller or larger value risks, others specialising on particular countries or technical issues. In turn, some in the tax advisory world are beginning to make tax insurance one of their own areas of specialism, with particular individuals in the Big 4 and law firms becoming the in-house experts on how, and when, clients should consider using these solutions.”

According to Anjali Anthony, Director of M&A and Head of Tax Insurance at Paragon, the past year has seen rising awareness of the tax insurance product and its use to mitigate identified tax risks. “The higher premiums attached to the tax insurance line as compared to W&I insurance have led carriers to invest in tax expertise, with the number of insurers writing tax policies doubling in 2019. There is now capacity in the markets of up to £1 billion for tax contingent risks.”

With 15 insurers competing for business, Howden M&A report substantial premium reductions across Europe, with low risk tax issues in the core markets frequently priced at under 2% of the policy limit.

The scope and range of insurable tax risks have expanded. Harry Blakelock of Lockton Transactional Risks notes that “we saw a growing appetite for tax risks which were traditionally regarded as ‘overly high risk’ to underwrite but can now be digested and analysed to allow for insurance cover both in and

outside of transactions. Further, tax risks in jurisdictions which were previously considered somewhat unpalatable are increasingly sought after by insurers as competition in the market grows.”

One of many reasons for the growth in this product has been the surge in tax legislation littered with anti-avoidance rules. As Aaron Fairhurst, tax partner at CMS, points out, “there has been a steady move by many jurisdictions to counter perceived tax avoidance by relying on the spirit and purpose of the tax law rather than strictly applying the wording of the legislation. This approach has largely been implemented by anti-avoidance provisions which have brought more uncertainty, rather than less, to the taxpayer. The tax insurance product has therefore helped provide certainty where the legislature did not. This lack of clarity, combined with the number of markets competing for business in this space, has resulted in a varied risk appetite among underwriters, each driven by their respective experiences (good or bad). This makes it increasingly likely that you will be able to find the right insurer for a given tax risk.”

Contingent legal risk insurance

Contingent legal risk (CLR) insurance in the private M&A context has also grown. CLR insurance policies are used to transfer legal risks that might otherwise prevent or adversely affect a deal, or which might result in one party bearing a greater exposure than it is commercially comfortable with. The important distinction between CLR insurance policies and W&I insurance policies is that the former cover known legal risks whereas the latter are designed to cover unknown risks. “In most cases,” Gareth Rees, Chief Underwriting Officer at Liberty GTS, says, “the chance of the insured legal risk crystallizing is considered to be low but the loss suffered in the event that it does could be significant.”

Lockton Transactional Risks report that underwriters are increasingly offering terms on known risks covering intellectual property (IP), cyber and environmental risks. “Where an identified risk is causing deadlock on a deal, increasingly the insurance market can find a home for it.”

Specialist M&A insurance broker LIVA notes an increasing concern on buyers’ parts with regard to third party claims which have been made, or might in the future be made, in respect of a target’s IP: “A number of insurers have built specific IP arms within their CLR and W&I insurance practices to address these concerns and provide broad cover for known IP issues. In our experience, cover of this sort, which can be provided by way of CLR insurance, affirmative W&I insurance or IP portfolio insurance, can help buyers and sellers bridge otherwise impassable gaps between their negotiating positions.”

Both buyers and sellers can benefit from CLR (and other known risks) insurance, as Aon’s Head of UK Transaction Solutions, Anka Taylor, points out. “A smart buyer can make its proposal significantly more attractive since, having transferred the known risk in question to the insurance market, its bid becomes unconditional in that respect. Sellers can trade the cost of an insurance solution against the cost of an escrow or even a price chip that the buyer would otherwise have required to address that risk.”

“CLR insurance is an interesting development,” say Latham & Watkins. “Here we see insurance assuming its primary function: addressing a known issue, something which the parties either cannot, or do not want to, deal with themselves and something for which the W&I insurer is also not willing to provide coverage. While such insurance may, at first glance, appear to be the silver bullet in negotiations between the parties on high-value items such as litigation and environmental matters, buyers should be aware that such policies: (a) come with a high price, (b) are in their early stages of development so large claims thereunder have not been tried and tested, (c) may have unexpected gaps in coverage, (d) may require additional, specific top-up diligence to be conducted and/or (e) may not even be available for the risk in question.”

Innovative W&I insurance product features

In addition, as Adam Bogdanor, corporate partner at Bryan Cave Leighton Paisner LLP, says, “the W&I insurance market has over the past few years become increasingly innovative and flexible in offering new product features that benefit policyholders. Examples include new breach cover and synthetic warranty coverage, although their availability depends very much on the circumstances of the particular deal, including its perceived level of risk.”

Taking each in turn:

- **New breach cover.** Under a standard W&I insurance policy, where a buyer acquires actual knowledge of a breach which occurs after exchange but before completion, it has no right of indemnity under the policy. Nor typically would it have any recourse against a seller under the SPA other than to terminate it (depending on how the SPA is drafted). New breach cover could provide an indemnity in such a case.

“The possibility of new breach cover is often discussed with underwriters, but the reality is that it is offered in exceptional cases only,” says Vanessa Young at Willis Towers Watson. “It will only be available for selected deals, as a specific policy sub-limit, in certain jurisdictions and by a limited number of underwriters. Any such new breach cover will only span a relatively short period of time, typically a few weeks, which can be extended at the underwriter’s discretion. Furthermore, such cover incurs an additional premium, typically 10%-20%, which is payable each time the cover period is extended.”

A number of interviewees commented that the COVID-19 pandemic may undermine insurers’ appetite to offer new breach cover.

- **Full synthetic cover.** There is nothing particularly new about synthetic ‘enhancements’ to SPAs in W&I insurance policies, for example extended warranty periods, or tax covenants that appear only in the policy document. Full synthetic policies, however, involving the agreement between insured and insurer of a set of warranties (without the seller or management providing warranties at all) are a different proposition and, while some have been written, they remain rare. As Anka Taylor, Aon’s Head of UK Transaction Solutions, points out, a limited number of insurers are prepared to consider writing fully synthetic W&I insurance policies in the current market. “This is in part because some insurers have reservations about moral hazard and others worry about the increased risk of buyers missing material issues when due diligence is not accompanied by a robust seller disclosure process. Bear in mind that, from an insurer’s perspective, the subrogation rights otherwise available to an insurer in the event of seller fraud under a traditional W&I insurance policy may be absent. On the other hand, for clients the prospect of securing some protection with these structures, where seller warranties might not otherwise be available, is clearly important.” The most common scenarios in which interviewees report full synthetic cover being discussed in EMEA are:
 - Distressed M&A: to enhance the very limited warranties provided by an insolvency practitioner on a sale by a liquidator or administrator though, given the dynamics of such a sale, meaningful buyer due diligence can be a challenge. That said, Anka Taylor says: “Through a tight alignment between the scope of buyer due diligence and the warranties that an insurer is prepared to cover, it is now possible to write warranty statements directly into the W&I policy in appropriate cases. We have seen deals involving distressed sellers where the buyers have carried out extensive due diligence and been able to conduct detailed Q&A which in turn supports a synthetic warranty package.”
 - Public to privates: where feasible in light of applicable legal and regulatory requirements.

Laura Marcelli, Legal Director at DLA Piper, adds that synthetic cover is more expensive than standard W&I insurance and that insurers need to get comfortable around due diligence/Q&A and disclosure. “There will also be the challenge of introducing an appropriate definition of ‘Loss’ in certain distressed circumstances. However, insurers are keen to be able to offer a viable product.”

Increase in notifications and claims

Anecdotal evidence

Interviewees report an increase in both notifications and claims under W&I insurance policies, while recognising that this is what one would expect given the significant increase in usage. Reports differ as to the rate at which policies generate notifications (which appears to vary considerably including by region and deal size).

Statistical evidence

Data made available by AIG covering the years 2011-2017 (see [Taxing times for M&A insurance](#) (June 2019)) suggest that globally:

- 20% of policies see a notification. The Americas are a significant driver of claims notifications, with higher frequencies across all deal sizes, implying a lower notification rate in other regions.
- Claims notification frequency increased to 26% for deals between US\$500 million and US\$1 billion.

Rory O'Broin, M&A Group Counsel at AIG, further notes that "notifications and claims are occurring all over the globe, including severity claims seen in Africa and Asia for example".

The 20% notification rate is broadly supported by Aon's data ([Insurance for M&A: A coming of age and an exciting future ahead](#) (November 2019)).

Simon Radcliffe, Claims Counsel at Liberty GTS (EMEA & APAC regions), stresses that many notifications will be precautionary in nature. "A large number of notifications never develop into a claim under the policy or are in respect of a matter that only erodes the retention. This is especially the case on larger deals."

Statistics made available by Marsh JLT Specialty (see [Transactional Risk Insurance Claims Study, EMEA](#) (July 2019), covering the period from 2009 to Q1 2019, EMEA-wide) suggest that:

- The total number of notifications increased sharply between 2016 and 2018.
- Notifications as a proportion of all policies placed increased over the same period.
- Proportionally, notifications are far more likely to be made on larger deals than smaller ones, with about 17% of deals with an EV of more than US\$1 billion receiving a notification.

While Marsh count the UK as one of five EMEA locations with the most notifications, they put the notification rate in the UK at 10%. This compares to 21% in the Netherlands and Central and Eastern Europe.

Some report an uptick in frequency. Simon Radcliffe points out that insureds are more aware now of how the product works. "They are better-advised and more systematic about assessing whether they may have a claim and, if they think they do, safeguarding it by making a notification. Also we detect a change in attitude. In the past W&I insurance was essentially something that helped solve a deal problem and get a deal over the line. Now it's also seen as something from which an insured can extract value in the future."

More recently, Howden M&A in their 2020 Annual Review disclose:

- A 43% increase in the absolute number of notifications under Howden-brokered M&A policies but a reduction in the rate of notifications, to 14% (2018: 15.9%).
- A fivefold increase in the number of notifications in excess of EUR5 million as against 2017.

Settlements

News of paid claims rarely enters the public domain. However, in April 2019, PE firm FSN Capital and underwriter Liberty GTS announced that FSN Capital had been paid the full W&I insurance limit of EUR50 million under a policy issued by a consortium of 12 insurance underwriters led by a Liberty Mutual affiliate and underwritten by Liberty GTS. The policy related to warranties and indemnities in an SPA by which FSN Capital bought a Danish company called Gram Equipment from another PE firm. The claim was notified in June 2018.

Claims handling

Sam Holland, insurance partner at Gowling WLG, points out that there can sometimes be an expectation gap when it comes to the W&I insurance claims experience. "Buy-side policies are often

sold on the basis that there is no need to bring a warranty claim so policyholders tend to think that an insurance claim will be more straightforward, but the reality is often very different. A policyholder still has to prove that there has been a breach of a covered warranty and must quantify its loss.”

As her colleague, Susannah Fink, says, there can also be significant differences in the way that insurers deal with claims: “Some insurers for example are happy to have a preliminary meeting which can be a really useful way of ensuring that all of the insurer’s concerns are met at an early stage, while others prefer not to discuss the claim at all until they have had chapter and verse.”

Clients increasingly want to know which insurers have a good (or less good) reputation for paying claims. “They are starting to ask who is sitting behind the policy coverage and whether the lead insurer has the ability to bind their capacity providers in a claims scenario,” says James Heller, Senior Associate at Baker & McKenzie. “We have had some significant recoveries for clients on W&I insurance claims but have also experienced some insurers denying or delaying a decision on coverage. This informs our advice to clients at the insurer selection stage; we are always thinking about how to maximise the chances of recovery in a claims scenario.”

“As claim payments become more common in the W&I insurance market, an emphasis on claims handling, from both underwriters and brokers, will be more crucial to the product offering,” says James Wilson, Head of M&A Insurance at Tysers Insurance Brokers. “Clients could start prioritising policy coverage over price.”

Impact of W&I insurance on certain deal structures, processes and SPAs

More than one interviewee described W&I insurance as a disruptor in UK private M&A, changing the deal dynamic and the way certain deals are done and documented.

Impact on certain deal structures and processes

It seems clear that W&I insurance is behind some fundamental developments in deal structure and process:

- **Fewer escrows.** In that one of the goals of W&I insurance, so far as sellers are concerned, is to reduce and ideally eliminate the need for escrows, one would now expect to be seeing fewer of them. Latham & Watkins’ Sixth Private M&A Market Study shows escrows becoming progressively less common across European deals on which the firm acted. Only 17% (2016: 33%) of such deals featured an escrow. Escrows may of course still be appropriate where the seller retains significant liability under an SPA, for example up to the amount of the W&I insurance policy retention or in respect of known risks or other items not covered under the policy.
- **More stapled transactions.** Stapled transactions of one sort or another (see [Practice note, Warranty and indemnity insurance: “Stapling” W&I insurance](#)) have become commonplace. Of 25 senior M&A practitioners based in EMEA in Q3 2019 surveyed in the Aon report, where W&I insurance was used 68% of respondents said that it was used in its stapled form ‘somewhat often’ (50-74% of the time) with another 24% saying ‘very often’ (75-100% of the time). “The key practical point to bear in mind,” says Anka Taylor, Aon’s Head of UK Transaction Solutions, “is that a W&I staple is a process, not simply a component of the SPA workstream: it relies on preparation and good communication across the sell-side advisory team (insurance, corporate finance and legal) so that those interfacing with bidders can articulate and manage the process and expectations”.
- **More nil seller recourse structures.** According to Harry Blakelock of Lockton Transactional Risks, “the market is now willing to accept a ‘nil seller recourse’ position across all transactions, whether institutional, management or corporate sellers, for little to no additional premiums. This does introduce the issue of who ‘wears the risk’ of the policy excess and has meant we have had an

increasing frequency of requests for ‘tipping to nil’ retention options” (see [Practice note, Warranty and indemnity insurance: Interaction with SPA and Policy retention](#)).

- **More management warranty deeds.** The use of W&I insurance has arguably contributed to a proliferation in management warranty deeds, alongside the traditional SPA. In such cases, a financial seller can provide the fundamental warranties under the SPA (historically the only warranties such sellers were willing to provide) but rely on the target’s management team to give the business warranties under a separate management warranty deed.

Brokers (and underwriters) report that they are becoming involved in deals at a far earlier stage. George Apperly of Lockton Transactional Risks recalls that just a few years ago it was common for brokers to be approached late in the deal with a near-final sale agreement and be asked to provide a solution to a specific deal problem that had arisen and blocked the process. “Now we focus a lot of our advice on sell-side advisory structuring work or buy-side pre-SPA preparation, including advice on due diligence scope,” he says, “with parties involving us at an early stage to help them scope the warranty suite from an insurance perspective, assist with drafting (even at the heads of terms stage) and engage underwriters earlier with a view to streamlining the W&I insurance process.”

As already noted, some PE funds who are repeat users of W&I insurance have started pre-negotiating template policy terms with their preferred brokers and insurance markets. “This is not only streamlining the W&I insurance process on their deals,” says James Heller, Senior Associate at Baker & McKenzie, “but is driving better terms across the industry more generally, setting new norms for what is ‘market.’”

A recurrent theme in our interviews was that W&I insurance is forcing practitioners to think in new ways about familiar concepts and tasks:

- **Due diligence.** As Chris Halliday of Eversheds Sutherland explains: “Traditionally, specialist due diligence would identify areas of concern and, where potential risks were identified, given that price reductions and specific indemnities with associated escrow arrangements or parent guarantees are commercially unattractive solutions, recommendations were often made to rely on warranty protection. However, since W&I insurers will typically exclude from cover any matter that is identified as more than a low risk and referenced in this way, specialists have had to adapt their approach to reporting on due diligence issues to ensure that such issues are thoroughly investigated and any potential risks assessed, hopefully to the point where the issue is seen as low risk and therefore avoid becoming the subject of a specific policy exclusion.”
- **Warranties and risk allocation.** Peter Banks, private equity partner at Allen & Overy, observes that in the PE market, buyers have historically viewed the principal purpose of business warranties as being to elicit disclosure. “This is primarily due to the market practice of business warranties being given by incumbent management teams, often qualified by awareness and with small liability caps. W&I insurance has therefore operated as something of an ‘optional extra’ for buyers when acquiring from private equity, allowing part of the risk to be sold to the underwriter, where justifying the premium. However, the picture is different when dealing with corporate or founder sellers. In these transactions, business warranties have historically been viewed as fulfilling the purpose not only of disclosure but also of meaningful risk allocation. As W&I insurance becomes more prevalent in these deals, practitioners and clients are having to recalibrate their view of market norms and the balance of risk between buyer and seller. Buyers are also looking carefully at the coverage gap between the negotiated warranties and the scope of the W&I insurance policy (the latter invariably being subject to a number of general and specific exclusions) and are negotiating hard to narrow this gap as far as possible.”
- **Disclosures.** Where the seller is orchestrating a disclosure process in a nil seller recourse deal, the question of moral hazard naturally arises. “We are seeing the question of moral hazard being reviewed on an ongoing basis to assess any changing behaviour as W&I insurance becomes more common,” says Peter Banks. “At a practical level, to date at least, we have found the quality of disclosure among selling shareholders, even with a negligible liability cap, to remain robust. This is likely to be driven partly by concerns around potential allegations of fraud (in respect of which any

contractual limitations would not apply) as well as the concern of incumbent management teams at pains to create a good impression on their new stakeholders.”

Impact on SPAs

According to Neil Nicholson at Dentons, even two years ago one would rarely have seen any reference in SPAs to the W&I insurance position. “But in the last 12-18 months things have changed. Now it’s hard-wired in from the onset, and not just on stapled deals.”

Examples include:

- **Nil seller recourse provisions.** In a nil seller recourse scenario, the SPA will need to make it clear that, absent fraud (some SPAs may reference fraudulent misrepresentation, wilful concealment and dishonesty), the buyer’s only recourse under the warranties and indemnities will be under the policy. The policy may even be appended to the SPA. (That the drafting of an SPA in this respect – in particular the definition of “Claim” – needs to be considered carefully is evident from *Flowgroup Plc v Co-Operative Energy Ltd [2019] EWHC 2344 (Comm)*. On the facts of this case the judge held that a £1 cap limited the seller’s liability under the SPA in its entirety, not only under the warranties and tax covenant.)
- **Re-attachment provisions.** In a more nuanced example, the SPA may state that, if the policy does not respond, liability will shift back to the seller and to that extent the £1 cap falls away. While this may be an increasing trend it can, as Aaron Fairhurst at CMS notes, “lead to a very clumsy deal process, where the buyers or their lawyers are negotiating the coverage position with the insurer, but it is ultimately the seller who bears the risk of those matters that are excluded. This is particularly difficult where the exclusions arise from the behaviour of the buyer, for example from the thoroughness of its diligence exercise, rather than fundamental issues with the target business.”
- **Seller limitations.** Our interviews suggest that W&I insurance has had a marked impact on seller limitations, making limitations schedules shorter; making some limitations redundant (including, in certain circumstances, basket provisions); and generally tending to make them more seller-friendly. For example:
 - liability caps: CMS report that 45% of W&I deals had liability caps that were lower than 10% of the purchase price compared to only 10% of uninsured deals. According to Latham & Watkins’ Sixth Private M&A Market Study, 63% of sellers across Europe in 2019 (2014: 41%) limited their liability to less than 20% of equity value. The proportion of deals surveyed that included a nominal cap of £1 or EUR1, with W&I insurance covering liability above that amount, increased to 21%; and
 - general knowledge qualifiers: Marsh JLT Specialty report that in 37% of UK transactions insured by the Marsh team in 2019, general knowledge qualifications were applied to all warranties in the SPA (or warranty deed) with this limitation then being disapplied for the purposes of the W&I insurance policy.

In some cases seller limitations are omitted from the SPA entirely (and must be included in the policy synthetically).

- **Conduct of claims provisions.** Since there will be conduct of claims provisions in the W&I insurance policy as well as in the SPA and tax deed, buyers need to be careful that they are not entering into contractual arrangements in respect of the same subject matter in ways that may conflict.
- **Premium and other costs.** The SPA may state who is to be responsible for the policy premium and other costs.
- **Evidence of policy and subrogation.** The SPA may include an obligation on the buyer to provide evidence to the seller of either the whole W&I insurance policy or the waiver by the insurer of subrogation rights against the seller other than in the event of fraud. It may go further and state that the policy is not to be amended without the consent of the seller.
- **Variation provisions.** In addition to the normal provisions, the SPA may state that it is not to be varied without the W&I insurer’s consent (or at least not so as negatively to impact the insurer).

W&I insurance 2020

Deal backdrop

Global M&A fell by 25% in the first three months of 2020 (source: [Refinitiv's Global Mergers & Acquisitions Review First Quarter 2020](#) (Legal advisors) (April 2020)). It was a mixed picture, however. While M&A activity involving US targets was down 50% (on Q1 2019), activity involving European targets more than doubled. PE-backed buyouts accounted for 15% of the total. The most active sectors were financials, industrials and technology.

No-one doubts that the full economic impact of the COVID-19 outbreak, declared a pandemic on 11 March 2020, remains to be seen. Purely on the M&A side, while it is clear that some live M&A deals did come to fruition, more stalled, were postponed or terminated. As for new deal activity, the picture remains extremely mixed. For a video discussion on this subject, by Gavin Davies, Head of Global M&A practice, Herbert Smith Freehills, see [COVID-19: implications for new M&A deals](#) (with accompanying transcript) (May 2020).

Pre COVID-19 predictions for W&I and M&A insurance

Before the COVID-19 outbreak, our interviewees were predicting the following for 2020:

- **More demand for known risks cover.** Howden M&A were predicting:
 - The increased uptake of tax liability insurance to continue throughout 2020.
 - The use of specific risk environmental insurance policies to increase, with continued uniformity of cover and loss mechanisms emerging as between environmental and W&I insurance products.
 - Greater interest in contingent legal risk and litigation insurance, with falling pricing and a wider array of risks.
- **Increased interest in fully synthetic products.** Aon M&A and Transaction Solutions expected to see an increase in demand for these types of product, especially if the level of corporate insolvencies were to rise.
- **Increased concern over claims.** Numerous interviewees described W&I insurance as a maturing insurance market, carrying the implication that, with more, and possibly more severe, claims, might come hardening rates and coverage restrictions. "If that happens," said one, "we may see some of the capacity not entertaining the risks that they have been taking."

The impact of COVID-19

Evolving situation

As Peter Banks at Allen & Overy says, "the impact of the COVID-19 pandemic is yet to be seen, and with the M&A market dramatically slowing in the near term it may take some time for this to become fully apparent".

Immediate impact

Transactions that had exchanged but not completed before the outbreak took hold were thrown into disarray, with the parties (and especially the buyer) left re-assessing the merits and in some cases the affordability of going ahead, and taking advice on what options they might have to walk away or re-negotiate. For a video discussion of the relevant considerations, by Caroline Rae, Partner, Herbert Smith Freehills, see [COVID-19: implications for live M&A deals](#) (with accompanying transcript) (May 2020).

W&I insurance is not designed to cover systemic risks of the sort that COVID-19 represents: policies typically are based on warranties that are not forward-looking and cover only unknown matters. Nevertheless, due to the disruptions caused by and in response to COVID-19, insurers naturally became more cautious, particularly in sectors most challenged by COVID-19, including hospitality, leisure and travel.

In addition to its immediate impact on deal flow, COVID-19 quickly had an impact on two areas of W&I insurance practice:

- **Due diligence.** Underwriters needed to see that a target’s business resilience and its steps ensuring business continuity had been investigated and been found to be robust. Matt Foster, corporate partner, Norton Rose Fulbright LLP, notes that “as part of the underwriting process, clients should expect increased due diligence around the impact of the virus and lockdown, particularly with respect to workforce and supply chain disruption”. He expected to see an increased focus in the following areas:
 - Financial information, including any extension to the period for sign-off of year-end accounts for 2019.
 - Treatment of employees and operational matters.
 - Contracts diligence, especially on supply chain issues and the review of breach and termination rights arising from COVID-19 circumstances.
 - Compliance with banking covenants, or if any leniency or additional finance had been sought.
 - COVID-19 specific measures, including the extent to which government support had been sought or obtained.
 - More generally, the impact of COVID-19 on key value items that would otherwise have been the focus of diligence, for example IP&IT in the context of a tech company, considering the uptick in cyber security incidents.
- **Exclusions.** Sophie O’Connor, corporate partner, Norton Rose Fulbright LLP, notes that “in immediate response to COVID-19, we saw insurers request that broadly-drawn COVID-19 exclusions be included in W&I insurance policies: difficult for insureds to argue against given the lack of meaningful diligence on the COVID-19 related risks (or, indeed, a full understanding of the related risks) at that point in time.” This grew out of insurers’ nervousness, particularly in connection with deals that had been quite close to signing at the time of the outbreak and in respect of which there had been a push to exchange and/or complete, about whether appropriate levels of diligence had been done or even could be done in the circumstances. However, blanket exclusions soon became controversial. “We quite quickly started to see the breadth of these exclusions be refined, not least as the risks have become better understood,” Sophie says.

Rich Winborn at Themis Underwriting doubted that we would see a uniform approach across the piece. “Some insurers will choose to apply blanket exclusions whilst others may adopt a more nuanced approach. What all insurers really want to know, however, is whether buyers and sellers have considered this exposure. We’re not here to tell market participants how to do their deals. That’s a dangerous road for an insurer to go down. What we do want to know is that the buyer has considered this risk and priced it into the deal. If this cannot be demonstrated, it is likely to have an impact on coverage even from those insurers who are trying to adopt a more tailored approach.”

Sundeep Kapila, corporate partner at Freshfields Bruckhaus Deringer LLP, detects a more recent shift in the debate. “We are now finding that insurers are generally going about this more in the way they would any other market risk and, provided they can be satisfied that the appropriate level of due diligence has been done, they will be pragmatic about not asking for blanket exclusions or at the very least tailoring exclusions to the particular circumstances of the target and particular warranties. We have also heard of insurers being receptive, where they are unable to provide cover because of gaps in due diligence attributable to the lockdown, to agreeing to provide cover post-exchange (or even post-completion) when circumstances have changed and the gaps have been satisfactorily addressed. In our experience, insurers want to be and be seen to be reasonable and pragmatic about this.”

Some expected reduced deal flow to result in increased competition among insurers, with further downward pressure on pricing in the short term, and there is some evidence of this.

Observations on future impact

Our interviewees ventured the following thoughts on an uncertain future:

- Howden M&A notes the potential for the pandemic to dramatically change market dynamics: “With material losses and potential insolvencies around the corner, it may well be the case that insurers tighten up and the terms available to buyers become less favourable.”
- “It is yet to be seen what impact the COVID-19 pandemic will have, if any, on W&I insurance claims,” says Vanessa Young at Willis Towers Watson. “However, many in the W&I insurance market expect to see a rise in claims on existing policies with businesses looking to alleviate losses. If an increase in W&I claims does come to pass, this may result in a premium rate correction and stabilisation in the market.”
- Marsh note heightened points of concern, but add that insurers remain eager to insure new transactions. According to Leo Flindall, Co-head of UK Transaction Risk, Marsh JLT Specialty, “we have not seen any restrictions or withdrawals of insurance capacity from the market so there is a surplus of underwriting bandwidth available, although we have seen reduced underwriter appetite for transactions in the hospitality, leisure and travel industries. We continue to work on a healthy pipeline of ongoing placements and new enquiries, and have found that insurers across the market are engaging proactively to, among other things, maintain premium flows.”
- Brian Hendry at Paragon observes that “insurers’ thoughts are moving to special situations, corporate restructurings, divestiture of non-core operations and the reported US\$1.5 trillion of dry powder held by private equity funds. W&I insurance is expected to play an important role in the management of risk in such transactions particularly as a result of the evolution in policy structures (including £1 caps and synthetic warranty packages) and the underwriting processes that have been developed.”
- According to Aon M&A and Transaction Solutions, W&I insurance and related solutions remain as relevant as ever in the wake of COVID-19, with imaginative structures being embraced by insurers to address a wide variety of circumstances. “Tax liability insurance is one example of this,” says Anka Taylor, “as it continues to evolve to address novel ‘known risk’ situations, including for companies seeking certainty on the government’s eligibility criteria for employee furlough relief and distressed M&A buyers seeking protection from a subsequent creditor challenge. In times when liquidity is at a premium, the ability for clients to flex their financial commitments with surety bonds (a form of insurance guarantee) to enhance payment covenants in M&A, whether in the form of cash confirmation or deferred consideration bonds, can be key.”
- Many predicted that, were we to see more distressed M&A post COVID-19, we would also see an uptick in synthetic W&I insurance cover. A number of interviewees alluded to bespoke products having been or being worked up to address these factors.
- As the market recovers, there will be questions over whether what emerges is a seller’s or a buyer’s market. “My sense is that we are likely to see buyers taking back a greater degree of control,” says Sam Holland at Gowling WLG. “We had already seen a growing trend of sellers being asked to stand behind warranties. This pattern is set to continue with COVID-19 but in addition, we may see a greater use of affirmative cover for known risks and higher limits as buyers take a more risk-averse approach.” Some interviewees predicted a greater use of completion accounts, earn-outs and MAC clauses; in the W&I insurance context, some predicted retrenchment to established carriers.
- Chris Halliday of Eversheds Sutherland remarks that: “New trends will emerge, but the desire for transacting parties to mitigate risk wherever possible will likely remain constant. If the insurance market can continue to provide good cover at reasonable rates, W&I insurance is well placed to retain and enhance its position as a key transaction facilitation tool.”
- Rich Winborn at Themis Underwriting senses pent-up demand, not least because there remains money to deploy with a significant number of very well-run businesses perhaps looking undervalued and successful businesses that have struggled with short-term cash flow. “Yes, there will be lots of

uncertainty but there will also be plenty of opportunities. While insurance cannot make a bad deal good, it can help bridge the gap between a buyer and a seller and help bring certainty to the deal completing. One thing is for sure, everyone will have to adapt, both insurers and insureds.”

Note on data and comparability

- (a) A distinction is made for the purposes of this report between W&I insurance and transactional risks or M&A insurance. The latter expressions include not only W&I insurance but also complementary insurance products such as tax liability insurance and contingent legal risk insurance.
- (b) Most organisations that report on W&I or M&A insurance do so on a global or EMEA- or Europe-wide basis (rather than in relation to the UK alone), and some in currencies other than sterling. It is not always possible to isolate references to W&I insurance from those relating to M&A insurance.

Practical Law Resources

Private M&A

A selection of Practical Law's private M&A resources available to subscribers:

- *A toolkit for private share acquisitions*
- *Checklist, Drafting a share purchase agreement*
- *Standard document, Share purchase agreement: single corporate seller: simultaneous exchange and completion*
- *Practice note, Share purchases: overview*
- *Checklist, Seller warranties and limitations on liability: commonly negotiated issues: share purchases*
- *Checklist, Seller warranties and limitations on liability: commonly negotiated issues: business purchases*

Insurance

A selection of Practical Law's insurance resources available to subscribers:

- *Practice note, Warranty and indemnity insurance*
- *Article, Common issues in structuring insurance solutions for M&A transactions*
- *Practice note, Tax liability insurance: dealing with tax risks in M&A and other commercial transactions*
- *Practice note, Insurance contract law: general principles*
- *Sector note, Insurers and reinsurers: industry overview*
- *Sector note, Insurers and reinsurers: terminology guide*
- *Sector note, Insurers and reinsurers: Case tracker*

COVID-19

A selection of Practical Law's COVID-19 resources available to subscribers:

- *Practice note, COVID-19: corporate FAQs*
- *Practice note, COVID-19: electronic signatures, digital signatures and e-signing platforms FAQs*
- *Practice note, COVID-19: questions for an accountant*
- *Article, COVID-19 and M&A: key issues between signing and completion*
- *Tracker, COVID-19: What's Market: risk factors and disclosures (UK): tracker*
- *Tracker, COVID-19: What's Market AGMs: announcements, notice and annual report disclosures (UK): tracker*
- *Tracker, COVID-19: corporate aspects tracker*
- *Video, COVID-19: electronic signatures*
- *Video, COVID-19: implications for new M&A deals*
- *Video, COVID-19: implications for live M&A deals*

Meet the teams

The Corporate M&A and Insurance teams are made up of former practising lawyers with significant experience in leading law firms and legal departments.

Here are some of our team members:



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