

M&A Index 2010

- In 2007, **contrast** organized a first survey regarding the use in practice of certain typical variables in acquisition agreements. In 2008, the '*Tijdschrift voor Rechtspersoon en Vennootschap*', arguably Belgium's most important corporate law review, published the results of our survey.
- At the end of 2009, our corporate & M&A team repeated the survey based on a more elaborate questionnaire and a larger sample of transactions. The '*Tijdschrift voor Rechtspersoon en Vennootschap*' again published the results of our second survey. The survey was also reported in the Belgian financial press.
- The M&A survey is based on transactions whereby a buyer acquires control over a non-listed Belgian company following a share deal. Our second survey was based on 150 transactions completed in the period 2007-2009 with a total deal value of almost EUR 10 billion. The transactions are divided in three categories: (i) deals with a transaction value of less than EUR 10 million, (ii) transaction values between EUR 10 million and EUR 100 million and (iii) transaction values higher than EUR 100 million. The confidentiality of the reported transactions was at all times guaranteed and fully respected. Participants were not asked to provide names or other details which could prejudice the anonymous character of the inquiry. The questionnaire did however contain a safety measure to avoid double-counting.
- The M&A survey was realized with the cooperation of following investment companies, financial service providers and law firms: Ackermans & Van Haaren, Allen & Overy, Altius, Altra law, Ambos Law, Arts Cleeren & Vennoten, Astrea, Cadanz, Cnockaert Salens, contrast, Curia Advocaten, De Broeck Van Laere Van Camp Coopman Sandra, Declerck Leterme & Partners, Derycke & Vandenberghe Advocaten, Dumont Sablon & Vanheeswijck, Eubelius, Finpartners, Gimv, Goossens Sebreghts Jacquain Advocaten, KPMG Legal Advisers, Laga, Liedekerke, Linklaters, Loyens & Loeff, Monard d'Hulst, Nauta Dutilh, Olislagers & De Creus, Petercam Securities, Simont Braun, Stibbe, Titeca Henry Accountants, Vandelanotte Accountants, Vectis Participaties en VMB Bedrijfsrevisoren.
- This M&A index gives an overview of the most important results, both per transaction category as well as on an aggregated basis.

	Total	Cat. I	Cat. II	Cat. III
1. NATURE OF THE TRANSACTION				
The transaction relates to all shares of the target company.	88 %	87 %	85 %	100 %
The sellers have reinvested in a new holding structure.	17 %	12 %	25 %	6 %
A competitive auction is organized.	22 %	4 %	37 %	47 %
The average number of days between the signing of the letter of intent (if applicable) and the signing of a purchase agreement.	122	110	126	191
The average number of days between the signing of the purchase agreement and closing (if not simultaneous).	46	22	38	108
2. USE OF LETTERS OF INTENT				
A letter of intent is signed before entering into a definitive purchase agreement.	69 %	68 %	75 %	53 %
If yes, in which language is the letter of intent drafted?				
- Dutch	50 %	70 %	34 %	22 %
- English	47 %	26 %	64 %	78 %
- French	3 %	4 %	2 %	0 %
Exclusivity is agreed during the negotiations.	75 %	70 %	84 %	56 %
If yes, duration of the exclusivity period (median, expressed in number of months).	3	3	3	2.5

3. DUE DILIGENCE				
The sellers make available a “vendor due diligence report” to the buyer.	7 %	7 %	3 %	18 %
The sellers make available a data room.	80 %	65 %	93 %	94 %
If yes, in which format?				
- Virtual	21 %	11 %	27 %	31 %
- Physical	78 %	89 %	71 %	69 %
- Both	1 %	0 %	2 %	0 %
The candidate-buyers have a right to make copies of data room documents.	62 %	63 %	65 %	40 %
A formalized Q&A procedure is organized.	50 %	29 %	71 %	76 %
4. PURCHASE AGREEMENT				
Language of the purchase agreement?				
- Dutch	51 %	75 %	34 %	12 %
- English	44 %	19 %	61 %	88 %
- French	5 %	6 %	5 %	0 %

4.1 Payment of the purchase price				
The purchase price is paid in instalments.	37 %	43 %	36 %	24 %
There is a post-closing price adjustment on the basis of closing accounts.	35 %	29 %	41 %	47 %
There are earn-out payments.	35 %	33 %	44 %	6 %
The purchase price is partially paid into an escrow account.	35 %	39 %	32 %	24 %
4.2 Representations and warranties of the sellers				
The purchase agreement contains explicit representations and warranties.	97 %	99 %	97 %	94 %
If yes, the representations and warranties are based on the customary standard list.	89 %	85 %	91 %	94 %
There are separate indemnification mechanisms for specific issues.	49 %	43 %	54 %	65 %
4.3 Disclosures against representations and warranties				
Type of disclosures:				
- data room index/documents (if available)	65 %	42 %	80 %	94 %
- Q&A log (if organised)	53 %	35 %	55 %	77 %
- disclosure schedules/letters	61 %	55 %	76 %	35 %

- due diligence report	7 %	9 %	3 %	12 %
- public information	39 %	30 %	47 %	47 %

4.4 Limitations to indemnification obligations of the sellers				
A general limitation in time applies to the buyer's indemnity claims.	93 %	91 %	95 %	94 %
If yes, what is the duration (median, expressed in number of months)?	24	24	24	18
A specific limitation in time applies to indemnity claims in the following areas:				
- tax	85 %	84 %	88 %	88 %
- social security	69 %	71 %	68 %	59 %
- labor	25 %	29 %	24 %	12 %
- environment	49 %	43 %	58 %	47 %
- criminal matters	10 %	10 %	8 %	18 %
- other	34 %	25 %	46 %	29 %
An individual minimum claim amount is specified (individual <i>de minimis</i> threshold).	71 %	57 %	83 %	82 %
If yes:				
- % in relation to the purchase price (median)	0.08 %	0.29 %	0.06 %	0.05 %
- the individual <i>de minimis</i> threshold operates as a deductible?	23 %	22 %	22 %	31 %

An aggregate minimum claim amount is specified (aggregate <i>de minimis</i> threshold).	79 %	70 %	88 %	88 %
If yes:				
- % in relation to the purchase price (median)	0.76 %	1.22 %	0.74 %	0.33 %
- the aggregate <i>de minimis</i> threshold operates as a deductible?	30 %	34 %	28 %	43 %
The total maximum liability of the sellers is capped.	89 %	83 %	95 %	100 %
If yes, % in relation to the purchase price (median).	25 %	40 %	19 %	11 %
5. CONDITIONS PRECEDENT				
The purchase agreement is subject to conditions precedent.	52 %	36 %	61 %	82 %
If yes, type of condition precedent:				
- merger filing	14 %	0 %	22 %	47 %
- If yes, number of jurisdictions (average)	1	/	1	1
- third party consents	33 %	23 %	39 %	47 %
- bank financing	13 %	14 %	15 %	0 %

6. NON-COMPETITION / NON-SOLICITATION

A non-compete covenant restricts the sellers' activities after closing?	84 %	91 %	81 %	65 %
If yes:				
- duration of the non-compete covenant (median, expressed in number of months)	36	36	36	36
- breach of the non-compete covenant is sanctioned by liquidated damages	62 %	75 %	62 %	27 %
If yes, amount of the liquidated damages per breach (median in EUR)	100 000	100 000	100 000	175 000
A non-solicitation covenant restricts the sellers' activities after closing?	73 %	75 %	71 %	65 %
If yes:				
- duration of the non-solicitation covenant (median, expressed in number of months)	36	36	36	36
- breach of the non-solicitation covenant is sanctioned by liquidated damages	61 %	77 %	63 %	27 %
If yes, amount of the liquidated damages per breach (median in EUR)	100 000	87 500	100 000	100 000

7. JURISDICTION				
The purchase agreement contains a clause regarding dispute resolution.	100 %	100 %	100 %	100 %
If yes:				
- ordinary courts	64 %	81 %	53 %	35 %
- arbitration	36 %	19 %	47 %	65 %
- mandatory preliminary mediation effort	21 %	23 %	22 %	18 %
The buyer has notified indemnification claims based on representations and warranties after closing.	12 %	9 %	12 %	29 %
The parties have initiated a formal litigation procedure/arbitration.	4 %	0 %	7 %	12 %