Belangrijke trends in de M&A praktijk

Bart Bellen – Kristof De Wael

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Programma

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2. Algemene kenmerken van het overnameproces
3. Precontractuele fase
4. Koopovereenkomst
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   - Verklaringen en garanties
   - Procedurele aspecten vrijwaringsmechanisme
   - Beperking van de aansprakelijkheid
   - Specifieke vrijwaringen
   - W&I verzekering
   - Opschortende voorwaarden
   - Niet-concurrentiebeding
5. Conclusie
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Sprekers

Bart Bellen – Partner

Kristof De Wael – Senior associate

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Inleiding – M&A Survey

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1e Survey 2007 | 2e Survey 2009 | 3e Survey 2012 | 4e Survey 2016

Periode 2004 - 2016 → Periode 2016 - 2020 → 5e M&A Survey

500 → **446** deals

± 25 miljard

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Ackermans & van Haaren, AKD Benelux lawyers, Allen & Overy, Altius, Antaxius, Argo, Arvesta, Ashurst, Astrea, Baker McKenzie, Bank Degroof Petercam, BDO Legal, Bright, Cadanz, Capricorn Partners, Clifford Chance, contrast, Creafund, Cresco, Curia, De Bock & Baluwé, Deloitte Legal, Deminor, Derycke & Vandenberghe, DLA Piper, DLPA Advocaten, Dumon Sablon & Vanheeswijck, elegis, Eubelius, Eversheds Sutherland, EY Law, Fibiz Partners, Fieldfisher, Four & Five, Freshfields Bruckhaus Deringer, Gimv, GSJ Advocaten, ING, Intui, Janson, Jones Day, KBC Securities, Korys, KPMG, KPMG Law, Laurius, Liedekerke, Lievens & Co, Linklaters, Litiguard, Loyens & Loeff, Lydian, Malherbe, Mazars, MDP, Monard Law, Moore Corporate Finance, Nelissen Grade, Newton, NOVIUS, Olislaegers & De Creus, Osborne Clarke, PAQT Advocaten, PMV, Portelio, PwC Legal, Quinz, Rooryck & Co, Saffelberg Investments, Schoups, Schuermans advocaten, SDM-Valorum, Simont Braun, Sofindev, Standard Investment, Stibbe, Strelia, Tilia Law, Van Bael & Bellis, Van Olmen & Wynant, Vandelanotte, Vendis Capital, Verhaegen Walravens, Verlinvest, Vervisch, Vobis and Willkie Farr & Gallagher with the support of the BVA

88 Deelnemers

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M&A Survey

Scope

- Share deals - verwerving van controle
- Niet-beursgenoteerde Belgische ondernemingen
- 3 categorieën

Category I	Category II	Category III
< €10 million	€10 million ≤ and < €100 million	≥ €100 million

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Algemene kenmerken van het overnameproces

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Tijdslijn

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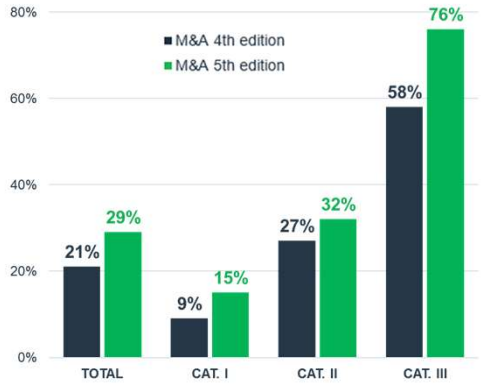
Auction

	Total	Cat. I	Cat. II	Cat. III
A competitive auction is organized	29 %	15 %	32 %	76 %



Impact of auction on:

- Timeline
- Vendor due diligence
- Pricing mechanism
- Cap levels

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Precontractuele fase

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NDA

	Total	Cat. I	Cat. II	Cat. III
A non-disclosure agreement (NDA) is signed at the start of the negotiations	**66 %**	55 %	71 %	95 %
Duration of confidentiality obligation (median, expressed in number of months)	**24 m**	24 m	24 m	24 m
A breach of the confidentiality obligation is punished by liquidated damages	**15 %**	23 %	13 %	3 %

In which language is the NDA drafted?

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LOI

	Total	Cat. I	Cat. II	Cat. III
A letter of intent or a similar precontractual document (LOI) is signed before entering into a definitive purchase agreement	**77 %**	81 %	80 %	49 %
Exclusivity is agreed in the LOI	**84 %**	85 %	83 %	81 %
Duration of exclusivity period (median, expressed in number of months)	**3 m**	3 m	2,5 m	2 m

In which language is the LOI drafted?

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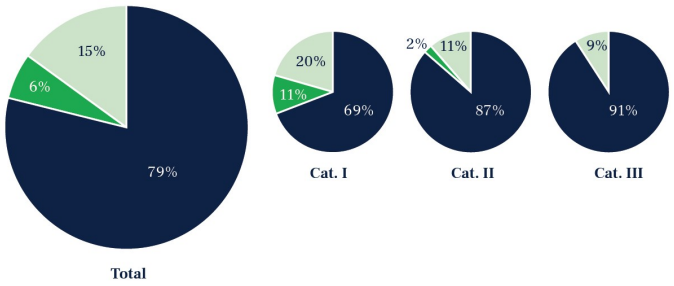
Due Diligence

The seller makes available a data room

If yes, in which format? ■ Virtual ■ Physical ■ Both



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Due Diligence

	Total	Cat. I	Cat. II	Cat. III
Prospective buyers have a right to make copies or download data room documents	**89 %**	92 %	87 %	83 %
A formal Q&A procedure is organized	**78 %**	66 %	87 %	96 %
The seller makes available a vendor due diligence report	**16 %**	6 %	15 %	60 %
Availability of vendor due diligence reports:				
• Auction	**32 %**	3 %	23 %	69 %
• No auction	**10 %**	7 %	12 %	22 %
• Seller is PE/VC investor	**46 %**	22 %	38 %	68 %

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Due diligence

Uitgangspunten

- Onderzoeksplicht koper
  - ➢ Impact due diligence en beroepskennis koper / bijstand professionele adviseurs
    → verstrengde onderzoeksplicht
- Geen algemene informatieverplichting verkoper
  - ➢ Zorgvuldigheidsplicht
- Contractueel kader (*sandbagging / anti-sandbagging*)
- Strenge beoordeling door rechtspraak (M&A Kroniek, *TRV-RPS* 2019, nr. 5, 504-545)

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Due diligence

Beoordeling door de rechtspraak

M&A Kroniek

- Luik 2 april 2015 →
  - R&W aanspraken afgewezen
  - Kennis van de koper (due diligence)
- Kh Brussel 15 oktober 2008
  - Aanspraken afgewezen
  - Beroepsbekwaamheid en professionele adviseurs
- Gent 6 oktober 2008 ><
  - Opzettelijk verkeerde voorstelling door de verkoper aanvaard
  - Misleidende financiële situatie
- Antwerpen 3 december 2007
  - Opzettelijk verkeerde voorstelling door de verkoper afgewezen
  - Due diligence - beroepskennis

Zie ook recente rechtspraak

- Hof van Cassatie:
  - Cass. 11 maart 2019 (bedrog stilzwijgen)
  - Cass. 20 december 2019 (*anti-sandbagging*)
- Luik 1 december 2016

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Koopovereenkomst

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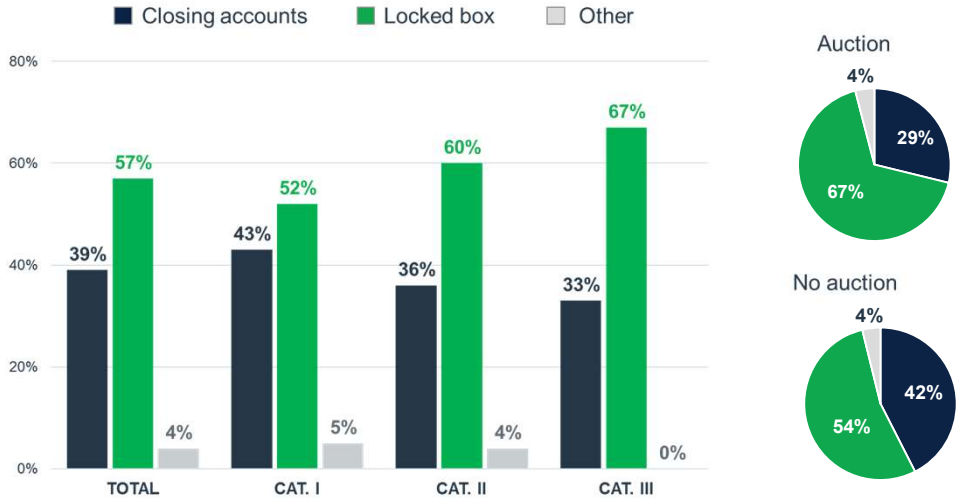
Prijsmechanismen



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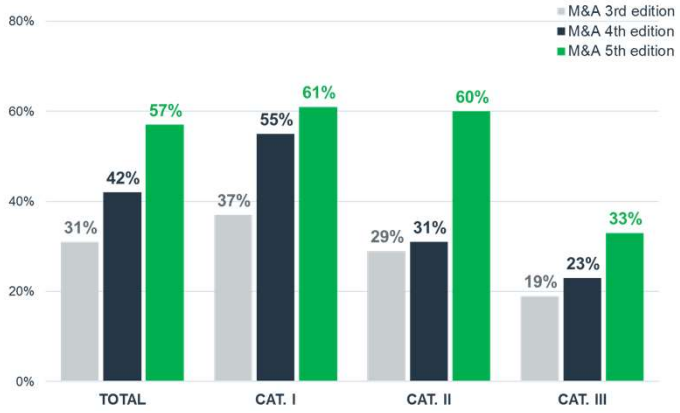
Uitgestelde betalingen

	Total	Cat. I	Cat. II	Cat. III
Payment of the purchase price is deferred	57 %	61 %	60 %	33 %



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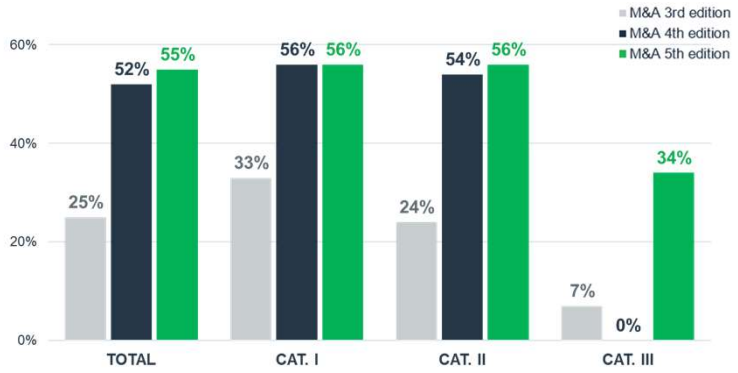
Earn-out

	Total	Cat. I	Cat. II	Cat. III
Deferred payments are based on earn-out mechanism	55 %	56 %	56 %	34 %



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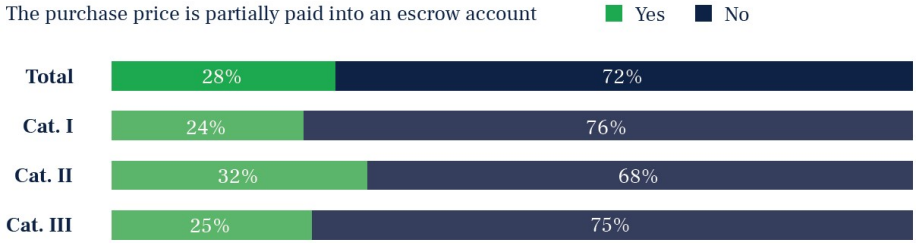
Escrow

The purchase price is partially paid into an escrow account



	Total	Cat. I	Cat. II	Cat. III
% of purchase price paid in escrow				
• Median	**10 %**	10 %	9 %	6 %
• Average	**11 %**	13 %	10 %	7 %

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Contractuele verklaringen en garanties van de verkoper

Uitgangspunten

	Total	Cat. I	Cat. II	Cat. III
The purchase agreement contains representations and warranties	**99 %**	99 %	100 %	100 %
The representations and warranties are based on a standard list	**95 %**	94 %	96 %	96 %

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Verklaringen en garanties

	Total	Cat. I	Cat. II	Cat. III
The representations and warranties include a representation with respect to:				
• The target's accounts	**99 %**	99 %	99 %	98 %
• The target's compliance with laws	**90 %**	96 %	85 %	86 %
• The seller's full and accurate disclosure	**85 %**	90 %	84 %	69 %

	Total	Cat. I	Cat. II	Cat. III
Certain representations and warranties are qualified by the seller's knowledge	**90 %**	86 %	93 %	92 %

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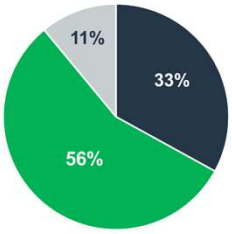
Procedurele aspecten vrijwaringsmechanisme

	Total	Cat. I	Cat. II	Cat. III
The purchase agreement contains a formal claims procedure	**97 %**	96 %	98 %	98 %
If yes, the claim must be notified within a specific time period	**85 %**	83 %	88 %	86 %
• Time period (median in days)	**45**	45	45	30

Consequence if buyer does not respect said timing requirement



- Lapse of buyer's right to claim
- Seller not responsible for addtional damages
- Not specified

Zie Brussel 14 juni 2016

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Procedurele aspecten vrijwaringsmechanisme

	Total	Cat. I	Cat. II	Cat. III
The purchase agreement contains a third-party claims procedure	**91 %**	90 %	94 %	84 %
If yes, the seller can assume control over the claim	**59 %**	50 %	63 %	73 %

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Beperking van de aansprakelijkheid

Tijd

algemeen – specifiek

Bedrag

de minimis – basket - CAP

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Beperkingen in de tijd

General time limitations	Total	Cat. I	Cat. II	Cat. III
A general limitation in time applies to the seller's indemnification obligation	**97 %**	97 %	97 %	100 %
Duration of the general time limitation (median, expressed in number of months)	**24 m**	24 m	24 m	18 m

Specific time limitations	Total	Cat. I	Cat. II	Cat. III
A specific time limitation applies to warranty claims in the following areas:				
• Fundamental representations and warranties	**58 %**	46 %	68 %	73 %
• Tax	**89 %**	85 %	95 %	82 %

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De Minimis

Individual minimum claim amount (*de minimis* threshold) » **88%** of the transactions

	Total	Cat. I	Cat. II	Cat. III
• % in relation to purchase price (median)	**0.11 %**	0.19 %	0.08 %	0.06 %

Aggregate minimum claim amount (basket) » **88%** of the transactions

	Total	Cat. I	Cat. II	Cat. III
• % in relation to purchase price (median)	**0.78 %**	0.97 %	0.63 %	0.60 %

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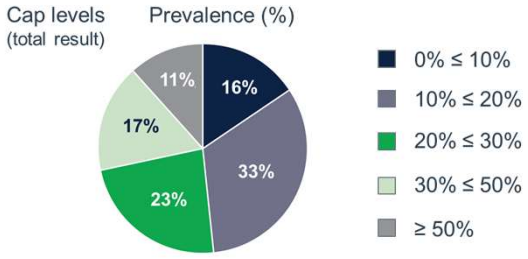
CAP

	Total	Cat. I	Cat. II	Cat. III
The liability of the sellers is capped	**95 %**	92 %	98 %	94 %
If yes, % of cap in relation to purchase price				
• Median	**21 %**	30 %	17 %	14 %



	Total	Cat. I	Cat. II	Cat. III
Certain matters are excluded from the cap	**58 %**	49 %	64 %	83 %

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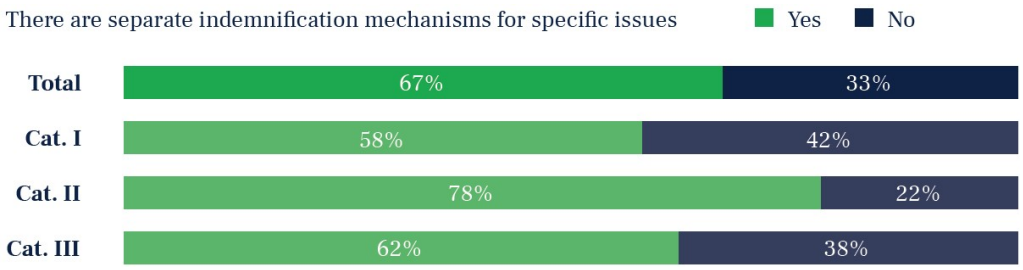
Specifieke vrijwaringen



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Specifieke vrijwaringen

	Total	Cat. I	Cat. II	Cat. III
If yes, such specific indemnities relate to the following matters:				
• Tax	**67 %**	67 %	65 %	70 %
• Ongoing litigation	**29 %**	28 %	30 %	29 %
• Environment	**24 %**	14 %	33 %	26 %
• Existing agreements of target	**25 %**	27 %	24 %	26 %
• Intellectual property	**12 %**	9 %	16 %	7 %
• Labour	**32 %**	42 %	26 %	17 %
• Other	**44 %**	47 %	41 %	44 %

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W&I verzekering

	Total	Cat. I	Cat. II	Cat. III
A warranty and indemnity insurance policy is entered into	**8 %**	1 %	10 %	27 %

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W&I verzekering

	Total	Cat. I	Cat. II	Cat. III
Parts of the purchase agreement covered by the insurance policy:				
• Representations and warranties	**94 %**	/	94 %	92 %
• Tax indemnity	**34 %**	/	29 %	42 %
• Litigation	**25 %**	/	20 %	27 %
• Other	**3 %**	/	/	8 %

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Opschortende voorwaarden

	Total	Cat. I	Cat. II	Cat. III
The purchase agreement is subject to conditions precedent	**42 %**	26 %	48 %	86 %
The purchase agreement is made subject to the following conditions precedent:				
• Merger filing	**14 %**	3 %	14 %	57 %
If yes, was an EU merger filing made?	**17 %**	/	4 %	32 %
If yes, in how many jurisdictions was a national merger filing made (on average)?	**1**	1	1	2
• Third-party consents	**24 %**	15%	28 %	49 %
• Other regulatory consents	**7 %**	4 %	7 %	24 %
• Approval of buyer's shareholder(s)	**3 %**	3 %	3 %	2 %
• Approvals pursuant to change-of-control clauses	**14 %**	7 %	20 %	24 %
• Waiver or non-exercise of right of first refusal	**5 %**	2 %	6 %	16 %
• Bank financing	**9 %**	6 %	13 %	6%

Zie Ger.EU T-425/18, Altice Europe NV v. Commissie

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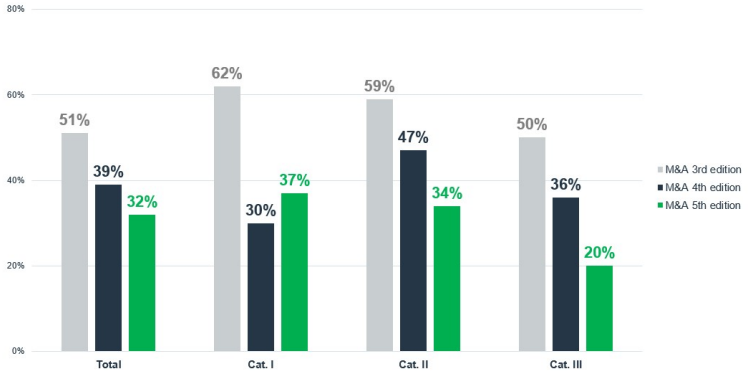
MAC clausules

	Total	Cat. I	Cat. II	Cat. III
Deals with deferred closing including MAC clause	**32 %**	37 %	34 %	20 %



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Niet-concurrentiebeding

A non-compete covenant restricts the seller's activities after closing

	Total	Cat. I	Cat. II	Cat. III
If yes:				
• Duration of non-compete covenant (median, expressed in number of months)	**36 m**	36 m	36 m	36 m
• The non-compete covenant contains a geographical limitation	**94%**	95 %	93 %	91 %

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Niet-concurrentiebeding

- Beperken naar : **voorwerp, duur,** [**geografisch** toepassingsgebied]
- **Zo niet**: ~~absolute nietigheid~~ → partiële nietigheid
  - Cass. 9 september 2019*:* rechter is verplicht om partiële nietigheid uit te spreken als dit in overeenstemming is met (i) de wet; en (ii) de bedoeling van de partijen
  - Zie ook: Cass. 23 januari 2015, Cass. 25 juni 2015, Cass. 14 september 2017, Cass. 4 januari 2019
- Grens: vrijheid van ondernemen (art. II.3 WER (decreet d'Allarde)) en het mededingingsrecht

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Conclusie

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Conclusie

- **Stabiele resultaten** M&A Survey bevestigen robotfoto bedrijfsovername
- Enkele opmerkelijke **evoluties**:
  - Competitieve biedingen
  - Locked-box prijsmechanismen
  - Uitgestelde betalingen
  - MAC clausules
  - W&I verzekering in opmars

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Q&A

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Thank you!

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Voor meer informatie over de M&A Survey, raadpleeg onze website:
https://www.contrast-law.be/en/publications/m-and-a-survey/

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