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Inhoudsopgave documentatie

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Rechtsleer

Pricing mechanisms in merges and acquisitions: thinking inside the box – Adam Tsao

PRICING MECHANISMS IN MERGERS AND ACQUISITIONS: THINKING INSIDE THE BOX

Adam Tsao*

INTRODUCTION

Where transactions require the delicate management of perfectly imperfect information, simplifying complexity can lead to significant gains in efficiency and effectiveness. The process of merging or acquiring a business is such a transaction. The imprecise art of integrating two companies' histories, cultures, processes, and strategies is intricate. But before companies can integrate their businesses, they must reach an agreement to either buy, sell, or merge. The process leading up to signing and closing includes, among other things, financial due diligence, pricing, and negotiation of terms and covenants. Inevitably, this comes with

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complexities that can lead to wasted time and money.

This Comment focuses on the executory period of M&A transactions. Specifically, it focuses on the pricing process. There are two main methodologies for pricing a deal: (1) the closing accounts mechanism and (2) the locked box mechanism. Through the closing accounts mechanism, parties agree to an enterprise value and then adjust post-closing for actual Cash, Debt, and Working Capital as of the closing date.[1] Through the locked box mechanism, parties agree to an equity price based on historic balance sheets that are fixed at signing.[2] Because the locked box mechanism eliminates the need for post-closing financial adjustments, it can be a more efficient and effective means to price deals.

The locked box mechanism is used widely in the United Kingdom but less frequently in the United States, where the closing accounts mechanism dominates.[3] This Comment argues that the United States should capitalize

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1. *To Lock or Not to Lock: An Introduction to the Locked Box Closing Mechanism*, PRICEWATERHOUSECOOPERS LLP 1, 2 (Sept. 2013), http://download.pwc.com/ie/pubs/2013_an_introduction_to_the_locked_box.pdf [https://perma.cc/Y4TB-XA3A].

2. *Id*. at 3.

3. William G. Lawlor & Eric S. Siegel, *Assessing the Locked Box Approach to Purchase Price Adjustments*, 6 DEAL LAWYERS 1 (Mar.-Apr. 2012), https://www.dechert.com/files/Publication/5c0046f0-600f-4215-b5ac-0829b868326d/Presentation/PublicationAttachment/1289a486-2749-4ed4-9caa-c46abd71412b/deallawyers-updated.pdf [https://perma.cc/6HXK-DUL8] ("Whether the locked box achieves critical mass in the U.S. is yet to be determined, ..."); Samantha McGonigle & Michael Weisser, *Q2 2014 Global Private Equity Update*: Unlocking "Locked Box" Deals, WEIL, GOTSHAL & MANGES LLP: GLOBAL PRIVATE EQUITY WATCH 1 (July 24, 2014), http://privateequity.weil.com/wp-content/uploads/2014/10/Global-PE-Update-1H-2014.pdf [https://perma.cc/3Z4H-3FG6] (stating that the locked box mechanism has been popular in Europe for its simplicity, but slow to catch on in the United States market where it only represents a small minority of deals). *See also* James D. Epstein, *Acquiring European Businesses–Differences Between the U.S. and U.K. Practices*, 5 CORP. & M&A L. (BNA) No. 33, at 12 (Nov. 7, 2011) (comparing the differences between the United States closing accounts mechanism with the United Kingdom locked box mechanism, suggesting the prevalence of each respective mechanism to each region); *CMS European M&A Study 2014*, CMS HASCHE SIGLE 1, 5 (Mar. 2014), http://www.cms-hs.com/newsmedia/publications/pages/default.aspx (follow "Corporate/M&A" hyperlink; then follow "CMS European M&A Study 2014" hyperlink under "Publications M&A"; then follow "Preview – CMS European M&A Study 2014" under "Publication") [https://perma.cc/U3R5-HFM9] (finding that the closing accounts mechanism is used in roughly 85% of United States M&A deals and 43% of United Kingdom M&A deals, suggesting that the locked box mechanism or some other pricing mechanism is used in *15% of United States M&A deals* and *57% of United Kingdom M&A deals*); Sandro de Bernardini & Simon Rootsey, *Popularity of Locked-Box Deals in the UK: Price Certainty, Other Benefits for Buyers*, SKADDEN: INSIGHTS (Sept. 29, 2015), https://www.skadden.com/insights/popularity-locked-box-deals-uk-price-certainty-other-benefits-buyers [https://perma.cc/2X4J-KQ6K] (discussing the rise in locked box deals in the United Kingdom).

on the benefits of the locked box mechanism and use it more frequently.[4] It prevents post-closing disagreements that can frustrate a deal, it is more time and cost efficient, it is simpler, it promotes price certainty, and it increases the number of available pricing mechanisms that parties can use, which can better satisfy party preferences. Because the benefits of the locked box mechanism are generally undisputed, this Comment evaluates possible explanations for the mechanism's lack of popularity in the United States and suggests a means to increase its usage among American parties.

Parts I and II provide an overview and comparison of the two pricing mechanisms. Part III is the heart of this Comment. It begins by evaluating three primary factors that may have prevented the locked box mechanism from gaining popularity in the United States: (1) the volatility of the financial market, (2) the rise of carve-out M&A deals, and (3) the educational and cultural familiarity with the closing accounts mechanism as compared to the locked box mechanism. For reasons that will later be discussed, the United States' lack of familiarity with the locked box mechanism appears to be the most persuasive. Therefore, this Comment suggests structuring the locked box mechanism to conform to the expectations of American companies—namely, by including materially adverse change (MAC) and earnout clauses by default.

I. THE CLOSING ACCOUNTS MECHANISM AND THE LOCKED BOX MECHANISM

A. *Closing Accounts Mechanism*

The closing accounts mechanism ("CAM") has traditionally been the default pricing mechanism for deals around the world.[5] In the CAM, there are two important dates: the sales purchase agreement ("SPA") signing date and the closing date. The parties first agree to an enterprise value for the target company as of the SPA signing date and then adjust this value post-

4. In order to improve processes, whether in law, business, medicine, design, or other fields, the author believes that experimentation and exploration with existing—yet unfamiliar—processes can be insightful and inspiring. For instance, it may be helpful to adapt cross-disciplinary processes to one's research or, as here, adapt cross-cultural M&A mechanisms. *See* Eva Boxenbaum & Julie Battilana, *Importation as Innovation: Transposing Managerial Practices Across Fields*, 3 STRATEGIC ORG. 355, 356 (2005) (defining one process of innovation known as translation, which "occurs when actors adapt a foreign practice to their own . . . context, modifying it or combining it with local practices").

5. Ronan O'Sullivan et al., *Pricing Mechanisms: Locked Box vs Completion Accounts*, PLC MAG., Jan. 25, 2012, at 1; PRICEWATERHOUSECOOPERS, *supra* note 1, at 2.

closing for "actual Cash, Debt, and Working Capital"[6] to derive the equity value.

The enterprise value is determined through an agreed-upon valuation methodology that factors in Cash, Debt, and Working Capital.[7] This calculation is the first step in determining the equity value, which is the actual price the buyer pays to the seller after post-closing adjustments have been made.[8] In some instances, there is an intermediary step where the parties create an estimated calculation of the equity value after signing, but before closing.[9] Then, the buyer makes post-closing adjustments based on the accounting methodologies set forth in the negotiated SPA to determine the equity value.[10] Because the balance sheet that is used for post-closing adjustments is not prepared until after the closing date, the equity value may not be known for several months or years after closing.[11] With the CAM, economic interest and risk pass from the seller to the buyer at closing because this is the point at which the buyer becomes financially responsible for the acquired company.

B. *Locked Box Mechanism*

In the past few years, the locked box mechanism ("LBM") has become a popular alternative to the CAM in the United Kingdom.[12] In the LBM, there are three important dates: the Locked Box Date, the SPA signing date, and the closing date.[13] The parties agree to a fixed equity value for the target company at the SPA signing date.[14] The equity value is calculated based on an agreed-upon historic balance sheet ("Locked Box Balance Sheet"), which is fixed at the pre-signing date (the "Locked Box Date").[15] Between the Locked Box Date and the SPA signing date, the

6. PRICEWATERHOUSECOOPERS, *supra* note 1, at 2.

7. For instance, enterprise value can be calculated with the following equation: "market value of common stock + market value of preferred equity + market value of debt + minority interest – cash and investments." *Enterprise Value*, INVESTOPEDIA, http://www.investopedia.com/terms/e/enterprisevalue.asp [https://perma.cc/TTA3-6R7W] (last visited Mar. 23, 2016).

8. O'Sullivan et al., *supra* note 5, at 2.

9. O'Sullivan et al., *supra* note 5, at 4 ("This use of estimates does not affect the ultimate equity price but attempts (in theory, at least) to ensure that the consideration actually paid by the buyer at completion is a reasonable approximation of the ultimate equity price").

10. O'Sullivan et al., *supra* note 5, at 4.

11. O'Sullivan et al., *supra* note 5, at 5.

12. de Bernardini & Rootsey, *supra* note 3.

13. Please note that these dates are listed in chronological order.

14. PRICEWATERHOUSECOOPERS, *supra* note 1, at 3.

15. PRICEWATERHOUSECOOPERS, *supra* note 1, at 3.

seller performs due diligence on the Locked Box Balance Sheet and projected cash flows to determine the equity value.[16] That equity value is fixed at the SPA signing date and does not get adjusted post-closing.[17] Notice that the LBM does not require a determination of enterprise value because the actual levels of Cash, Debt, and Working Capital are cognizable through the historic Locked Box Balance Sheet.

Because there are no post-closing adjustments, the buyer receives protection from any "Leakage," which is the unpermitted extraction of value from the target business in the form of representations and warranty indemnity ("W&I") insurance and covenants between the Locked Box Date and closing dates.[18] Permitted Leakage is agreed upon in the SPA and may not lead to a reduction in price or trigger any W&I insurance. Unpermitted Leakage includes "dividends (whether actual or deemed), management fees, transfer of assets at an under-value and the waiver of amounts owed/liabilities."[19] Should any unpermitted Leakage occur, the W&I insurance will reimburse the buyer for the loss value exceeding the seller's negotiated liability cap (the maximum amount the seller is responsible for out-of-pocket before insurance kicks in).[20] The W&I provisions in LBM deals are generally more stringent than those in CAM deals because they are the buyer's sole form of protection from any unpermitted Leakage in the target business between the Locked Box Date and closing.[21]

With the LBM, the economic interest and risk transfer from buyer to seller is set at the Locked Box Date, the date at which the historic balance sheet is fixed, because the buyer receives the "benefit of the cash profits generated by the business from that date"[22] and the seller "incurs an opportunity cost as they do not receive payment at the Locked Box Date

16. Jeff Mansfield & Kieren Parker, *M&A Purchase Price Calculations–The Locked Box Mechanism*, ADDISONS 1, 2 (Nov. 13, 2012), http://www.addisonslawyers.com.au/knowledge/assetdoc/c430522a5ccba60f/M&A%20Purchase%20Price%20Calculations%20-%20the%20Locked%20Box%20Mechanism.pdf [https://perma.cc/874A-6Y5C].

17 PRICEWATERHOUSECOOPERS, *supra* note 1, at 3.

18. PRICEWATERHOUSECOOPERS, *supra* note 1, at 5.

19. PRICEWATERHOUSECOOPERS, *supra* note 1, at 5.

20. *Warranty and Indemnity Insurance in UK M&A Deals*, WINSTON & STRAWN LLP: CORP. PRACTICE (July 2015), http://interact.winston.com/reaction/Corporate/ClientBriefingNewsletter/2015/Warranty_Indemnity_Insurance_JUL2015/Warranty_Indemnity_Insurance_JUL2015.pdf [https://perma.cc/22S5-GH65]; Jay Rittberg et al., *M&A in 2015: Reps and Warranties Insurance*, NORTON ROSE FULBRIGHT & AIG 17 (Mar. 26, 2015), http://www.nortonrosefulbright.com/files/20150326-ma-in-2015-reps-and-warranties-insurance-127162.pdf [https://perma.cc/AN62-42QU].

21. Lawlor & Seigel, *supra* note 3, at 2.

22. In effect, the buyer is running the company on behalf of the seller during this period. This idea will be discussed further in subsequent sections.

but instead . . . at Closing."[23] To compensate the seller for this opportunity cost and for not receiving the cash profits between the Locked Box Date and closing, the buyer either pays the seller interest on the equity value or an agreed-upon proxy for profits.[24]

II. THE MECHANISMS COMPARED

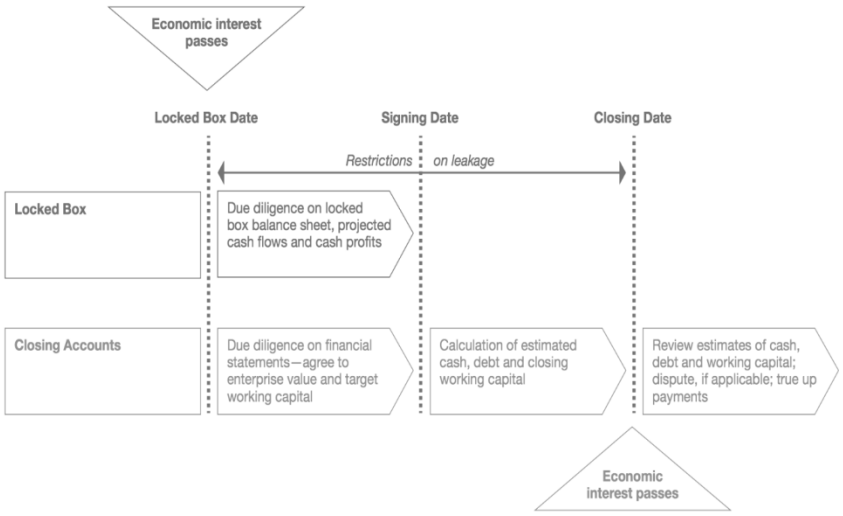

FIGURE 1.[25]

A. *The CAM*

The CAM has the primary benefit of "more accurately captur[ing] changes in the target's valuation between the initial valuation . . . date and the closing date."[26] Because the CAM considers post-closing adjustments, the equity value directly reflects the financial condition of the target business at closing.[27] Additionally, the CAM is known to be buyer-friendly because the seller bears the economic risk until closing and the buyer has control over the post-closing adjustments process (and thus, the ability to renegotiate for a lower equity price).[28] Another benefit of the CAM is its

23. PRICEWATERHOUSECOOPERS, *supra* note 1, at 7.
24. PRICEWATERHOUSECOOPERS, *supra* note 1, at 7.
25. PRICEWATERHOUSECOOPERS, *supra* note 1, at 3 fig.1.
26. Lawlor & Seigel, *supra* note 3, at 2.
27 O'Sullivan et al., *supra* note 5, at 3.
28 O'Sullivan et al., *supra* note 5; PRICEWATERHOUSECOOPERS, *supra* note 1, at 4, 8.

flexibility across multiple deal types, such as strategic, financial, complex carve-out,[29] corporate, and startup deals. This flexibility derives from the CAM's ability to capture an accurate financial snapshot of the target company at closing.

However, the CAM leads to "heavy negotiation" (and potential "manipulation and abuse") between the buyer and seller during the post-closing adjustments period that is "complex, time consuming and expensive."[30] Disputes normally occur over pricing, accounting methods, and/or policies.[31] The buyer has the benefit of conducting due diligence for post-closing adjustments and may take advantage of this opportunity to renegotiate a lower equity price,[32] while the seller may be motivated to exploit loopholes in the post-closing adjustments process by, for instance, "delaying capex to boost cash."[33] These negotiations also require management involvement to agree upon a final purchase price,[34] which diverts their focus from the intricate task of integrating both companies. These drawn-out debates can come at great economic cost to the parties in the form of fees to attorneys, bankers, and accountants.[35] They can also result in significant delays, with disputes lasting anywhere from months[36]

29. McGonigle & Weisser, *supra* note 3, at 3.

30. McGonigle & Weisser, *supra* note 3, at 3.

31. Alexander B. Johnson et al., *Trends in Purchase Price Adjustment Formulations in US, UK and Cross-Border M&A Transactions*, FINANCIER WORLDWIDE (June 2013), http://www.financierworldwide.com/trends-in-purchase-price-adjustment-formulations-in-us-uk-and-cross-border-ma-transactions/#.VvQIHhIrLVo [https://perma.cc/9EV2-26SH].

32. *Lower Due Diligence in M&A Linked to Increase in Deal Success But Lower Premiums*, CASS BUS. SCH., CITY UNIV. LONDON (Nov. 14, 2013), http://www.cass.city.ac.uk/news-and-events/news/2013/november/longer-due-diligence-in-m-and-a-linked-to-increase-in-deal-success-but-lower-premiums [https://perma.cc/KS85-5EHS]. *See also* Jeffrey M. Lipshaw, *Law as Rationalization: Getting Beyond Reason to Business Ethics*, 37 U. TOL. L. REV. 959, 1017 (2006) (discussing an instance where a particular seller had to balance its leverage during post-closing adjustments with its distrust for the buyer's ability to "perform a fair post-closing adjustment").

33. Mansfield & Parker, *supra* note 16, at 2. This can have the effect of artificially raising the value of the target firm because delaying capital expenditures until the merger is complete will only boost cash in the short-term.

34. McGonigle & Weisser, *supra* note 3, at 3.

35. *See* McGonigle & Weisser, *supra* note 3, at 3 (noting how the locked box mechanism eliminates costs associated with negotiating post-closing adjustments); O'Sullivan et al., *supra* note 5, at 5-6 (noting how the locked box mechanism eliminates the costs involved with preparing and reviewing disputes caused by the closing adjustments mechanism); PRICEWATERHOUSECOOPERS, *supra* note 1, at 4 (discussing how the locked box mechanism can result in "potentially significant time and cost savings" because it eliminates post-closing adjustments).

36. Press Release, Jon Greer, New M&A Study Lifts the Curtain on What Happens After Companies Are Sold (Apr. 6, 2011), http://www.businesswire.com/news/home/20110406005612/en/MA-Study-Lifts-Curtain-Companies-Sold [https://perma.cc/MQ3P-LBRS] (finding that disputes last an average of

to years.[37]

Lastly, the CAM is known as a buyer-friendly mechanism because economic interest passes at closing, which may be problematic for the seller.[38] The seller is liable for any possible downturn in the business, which would likely result in a decrease in purchase price. Additionally, the buyer controls the post-closing adjustments process, which gives the seller less control over the final purchase price.[39]

B. *The LBM*

The LBM has four primary benefits. First, the mechanism is more time and cost efficient because there are no risks or expenditures of money or time associated with renegotiating post-closing adjustments.[40] Speed is integral in determining the success of M&A deals,[41] so efficiency gains can materially benefit both parties to a transaction. For instance, the buyer's management team can allocate more time to planning and preparing for the integration of the target company rather than spending their efforts on post-closing adjustments under a CAM deal. Second, the LBM simplifies the SPA agreement because there is no need to negotiate or include complex post-closing calculation formulas.[42] The absence of these processes can further streamline the deal. Third, the fixed priced of the LBM promotes price certainty for both the buyer and seller.[43] This reduces the price uncertainty that a buyer may have with the CAM because there is no concern over the potential need to secure additional capital should the equity value increase beyond the initial enterprise value.[44] This also reduces the price uncertainty from the seller's perspective by eliminating

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eight months).

37. O'Sullivan et al., *supra* note 5, at 4.

38. O'Sullivan et al., *supra* note 5, at 4.

39. O'Sullivan et al., *supra* note 5, at 4.

40. McGonigle & Weisser, *supra* note 3, at 3; O'Sullivan et al., *supra* note 5, at 6. *See* Brian Vickrey et al., *An Introduction to the Locked Box Closing Mechanism: To Lock or Not to Lock,* TRANSACTION ADVISORS (Oct. 2013), https://www.transactionadvisors.com/insights/introduction-locked-box-closing-mechanism [https://perma.cc/9CR3-8GWS] (stating that the locked box mechanism is a good alternative for buyers and sellers looking for ways to reduce the lengthy process of preparing, reviewing, and disputing post-closing adjustments).

41. *See* WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS 472 (Vickie Been et al. eds., 4th ed. 2012) ("Speed is almost always desirable in acquisition transactions. In dynamic markets, the conditions that make an agreement advantageous may suddenly change . . . and . . . it is rational, once a deal is reached, for business people to be impatient to close it").

42. de Bernardini & Rootsey, *supra* note 3.

43. McGonigle & Weisser, *supra* note 3, at 3; O'Sullivan et al., *supra* note 5, at 6.

44. O'Sullivan et al., *supra* note 5, at 5.

concerns over a reduction in equity value through price-chipping post-closing.[45] The fixed price promotes certainty between both parties and allows the buyer and seller to better manage their financial futures. And fourth, the LBM provides an alternative pricing mechanism for companies to structure deals, which may better satisfy buyer and/or seller preferences or may be more effective for particular deal types. For instance, the LBM can be a beneficial tool for private equity sellers where price certainty "allows a PE ["private equity"] seller to make a full distribution to LPs shortly after closing and does not require the buyer to find additional cash to fund any upwards adjustment[.]"[46] This is one of the reasons why private equity firms in the United Kingdom favor the LBM.[47] Additionally, having the ability to choose between the LBM or CAM can help parties better manage market conditions. When markets are stable, parties can default to the efficiency of the LBM by relying on historic balance sheets. On the other hand, when markets are unstable, such as during the financial crisis, parties may opt for the CAM for a real-time snapshot of the target company's value at closing.[48] For corporate strategists, the power of choice is a valuable tool.

The LBM also has its limitations. It is less precise because it does not factor in post-closing adjustments. It is also not typically appropriate for three types of situations: where isolating the historic financial statements of a target business is difficult (e.g., certain types of carve-outs[49] or divestitures); where historic financial statements are limited (e.g., startups); or where the buyer does not trust the seller.[50] The CAM may be more appropriate in complex carve-out deals because the LBM may be difficult to apply "without an anchored balance sheet."[51] This will be discussed in greater detail in a subsequent section, but the main takeaway is that a seller may not be able to effectively isolate the carved-out business unit's financial statements from its other business units. With the CAM, the seller can begin to account for the carved-out business unit's financial

45. PRICEWATERHOUSECOOPERS, *supra* note 1, at 4.

46. McGonigle & Weisser, *supra* note 3, at 3.

47. Lawlor & Siegel, *supra* note 3, at 1.

48. *See* note 85 for a data-driven discussion on how the financial crisis affected the use of the LBM in the United Kingdom.

[49] McGonigle & Weisser, *supra* note 3, at 3.

[50] Mansfield & Parker, *supra* note 16, at 2.

51. PRICEWATERHOUSECOOPERS, *supra* note 1, at 8. For purposes of this Comment, complex carve-out deals refer to situations where a seller is unable to isolate the financial statements of the target business unit from those of its other businesses. For example, assume that Seller has three business units: A, B, and C (note that these are not distinct businesses and that Seller is not a holding company). Buyer contracts with Seller to purchase A, but Seller has not maintained separate financial statements for A, B, and C. As a result, information, such as revenues from A, are combined with revenues from B and C.

information when the agreement is signed and have the financial statements ready at closing for any adjustments. Note, however, that there are a number of carve-out deals where financial statements for individual business units exist. As such, the LBM has been used successfully in many carve-out deals in the United Kingdom.[52] The CAM may also be more appropriate in startup deals because young companies lack the necessary historic financial statements for the LBM, and the CAM allows the buyer to create an accurate snapshot of the company's value at closing. Lastly, in situations where the buyer does not trust the seller, the buyer would want more protection over unpermitted Leakage than W&I insurance. However, barring these three exceptions, the LBM can also be used in a number of deal types like private equity, strategic, corporate, and carve-out deals where an isolated balance sheet exists.[53]

Lastly, where the CAM is generally viewed as a buyer-friendly mechanism, the LBM is generally viewed to be "more seller-friendly"[54] because of its fixed price (and thus an inability for the buyer to renegotiate a lower price post-closing) and the fact that economic risk transfers at the Locked Box Date when the target company is still under seller management.[55] In other words, the buyer bears the risk of any downturn in the target company between the Locked Box Date and closing. The buyer also bears the risk of the seller lacking motivation to maximize the target company's profits between the Locked Box Date and closing because the buyer, and not the seller, is entitled to the target company's profits after the Locked Box Date.[56] Further, the buyer's primary protection from unpermitted Leakage is through carefully negotiated W&I insurance, which historically had been weak. However, in recent years, the W&I industry has strengthened, which has increased buyer confidence.[57]

On the other hand, the LBM also provides certain buyer-friendly benefits. For instance, the seller is not motivated to manipulate any post-closing accounts by delaying capital expenditures to boost cash because the

52. Matthew F. Hermann, *Surveying the Landscape: Worldwide*, 15 M&A J. 1, 8 (Sept. 2014), http://www.freshfields.com/uploadedFiles/SiteWide/Profiles(1)/M/MAJ_v1502.pdf [https://perma.cc/9BUN-KGSY].

53 *Id*.; McGonigle & Weisser, *supra* note 3; Lawlor & Siegel, *supra* note 3, at 1.

54. de Bernardini & Rootsey, *supra* note 3.

55 O'Sullivan et al., *supra* note 5, at 4.

56. Mansfield & Parker, *supra* note 16, at 2.

57. Mergermarket Events, *Sellers See Appeal of "Locked Box" Mechanism–CMS*, YOUTUBE (July 8, 2013), https://www.youtube.com/watch?v=_CSyNcCUydw [https://perma.cc/U2SG-6G3Z] [hereinafter Interview with Mergermarket] (discussing the improved reliability of the W&I market and the reduced premiums of insurance in the United Kingdom); McGonigle & Weisser, *supra* note 3, at 4 (discussing how recent competition in the W&I market has improved the terms and premiums of insurance in the United States).

balance sheet at closing does not affect the equity value.[58] Even though a seller may be motivated to manipulate gaps in the Leakage protections or the representations and warranties set forth in the negotiated SPA, the seller may nevertheless be liable for any extraction of unpermitted Leakage or other value in the target company—W&I insurance aside—because the seller *may* be acting as a legal agent to the buyer between the Locked Box Date and closing.[59] If this is the case, the seller would have fiduciary duties to the buyer and would be subject to the duty of care, duty of loyalty, and good faith. According to one large accounting firm, Leakage claims are not common in practice—at least in the United Kingdom and across Europe.[60] Additionally, the seller assumes the risk of running the target company on behalf of the buyer until closing.[61] The seller does not receive any profits generated, and even though it receives proxy or interest payments for compensation, the payments may be set too low.[62]

In sum, the CAM is a buyer-friendly mechanism that is more accurate but comes at the heavy risk of lengthy and costly debates over post-closing adjustments. The LBM is a seller-friendly mechanism that fixes the purchase price up front, limits disputes over pricing, and is quicker to execute; but, it may not be appropriate for complex carve-out or startup deals. The LBM is a valuable alternative to the CAM due to its efficiency gains and cost savings, and American companies are leaving time and money on the table by not experimenting with the mechanism.

The United States should increasingly use the LBM as an alternative pricing mechanism, and the next section explores possible explanations for why the LBM has not gained popularity in the United States.

C. *Why the LBM has not Become Popular in the United States*

There are a number of complex, interconnected factors that may have prevented the LBM from gaining popularity in the United States. Three factors have been the most influential: (1) the volatility of the financial market, (2) the rise of carve-out M&A deals, and (3) the cultural and

58. Mansfield & Parker, *supra* note 16, at 2.

59. It is unclear whether the seller is considered a de jure agent of the buyer; however, it is briefly suggested so in Mansfield & Parker, *supra* note 16, at 2.

60. PRICEWATERHOUSECOOPERS, *supra* note 1, at 6.

61 *See* PRICEWATERHOUSECOOPERS, *supra* note 1, at 7 (discussing a seller's opportunity cost in running the company between the Locked Box Date and closing).

62. *Purchase Price Adjustment Mechanisms in M&A Transactions – The Locked Box Mechanism*, WINSTON & STRAWN LLP 4 (Nov. 2014), http://winston.com/en/where-we-are/europe/london.html#!/en/thought-leadership/purchase-price-adjustment-mechanisms-in-m-a-transactions-the.html?aj=ov&parent=282&idx=13 [https://perma.cc/3ULS-GHZV].

educational familiarity of the CAM as compared to the LBM in the United States. Before discussing these primary factors, two related inquiries are addressed: whether any explanations can be derived from either the relationship between the LBM and strategic and financial deals[63] or the litigious nature of the United States.

First, the LBM has traditionally been popular in private equity deals and has only recently spread to strategic deals in the United Kingdom.[64] This suggests that a discrepancy over the ratio of private equity deals to strategic deals between the United States and United Kingdom could be insightful. In other words, if there are more private equity than strategic deals in the United Kingdom but the converse is true in the United States, the prevalence of the LBM may be attributable to the distinction in deal type. However, no such discrepancy likely exists. One study suggests that there are significantly more strategic deals than private equity ones in the United States.[65] Another study shows significantly more strategic deals than private equity ones across Europe.[66] This study aggregated data from the United Kingdom, which represented half of the total deal volume analyzed, France, and Germany. Although this is not a perfect proxy because data from two additional countries are included, the general pattern and high proportion of data from the United Kingdom reasonably suggests that there are more strategic than financial deals in the United Kingdom. Thus, it seems likely that there are more strategic than private equity deals in both the United States and, by proxy, the United Kingdom, suggesting that the relationship between the number of strategic and financial deals has not influenced the prevalence of the LBM in the United States.

Second, American companies may have been concerned about using a new pricing mechanism because "working out the kinks" may lead to unwanted litigation over improper execution of the mechanism by, for example, allowing unpermitted Leakage to flow from the target company. However, parties can contract this issue away by including mediation or

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63. Financial deals are backed by private equity firms and will be used synonymously in this Comment.

64. Lawlor & Siegel, *supra* note 3, at 1.

65. *US M&A News and Trends*, FACTSET 4 (July 2016), https://www.factset.com/websitefiles/PDFs/flashwire/flashwire_7.16 [https://perma.cc/N8TV-GDPC]. *See also* Marc Martos-Vila et al., *Financial vs. Strategic Buyers* 1 (Harvard Bus. Sch., Working Paper No. 12-098, 2014), http://www.hbs.edu/faculty/Publication%20Files/12-098_dc44025a-785b-45c5-9d31-60e02f091b7d.pdf [https://perma.cc/QW5H-LDAM] (showing a greater volume of strategic versus financial deals in the United States).

66. *Europe M&A News and Trends*, FACTSET 4 (2nd Quarter 2016), http://www.factset.com/mergerstat_em/europe/Europe_Flashwire_Quarterly.pdf [https://perma.cc/7CX7-CR6C].

alternative dispute resolution in the SPA. Litigation would thus arise only under extenuating circumstances. It is even possible that the LBM would have actually been a way to reduce litigation because there are less financial variables for the parties to dispute. The most contentious aspect of a CAM transaction is handling post-closing adjustments, the point at which parties will attempt to renegotiate the purchase price. This leads to disagreement and potential litigation. With the LBM, the price is fixed at signing, which eliminates the potential for litigation on purchase price, and the primary point of concern is whether there has been any unpermitted Leakage extracted from the target firm, which is protected through W&I insurance—an industry that has strengthened in recent years, providing buyers with more confidence of proper protection in the case of unpermitted Leakage.[67] The ability to require mediation or alternative dispute resolution in place of litigation through the SPA and the idea that the LBM may actually reduce litigation rather than increase it suggest that the litigious nature of the United States may not be a primary cause of the LBM's lack of popularity in the United States.

As these factors do not appear to have had a significant influence over the prevalence of the LBM in the United States, the remaining discussion focuses on the three primary factors that have likely contributed most to the LBM's lack of popularity: the volatility of the financial market, the rise of carve-out M&A deals, and the educational and cultural familiarity with the CAM over the LBM.

First, the volatility of the financial market following the global financial crisis left companies pessimistic about the market. There was a 39.72% drop in the number of United States M&A deals between 2007 (pre-crisis) and 2009 (the year following the crisis that saw the lowest volumes and values of M&A activity), from 11,369 deals in 2007 to 6,853 deals in 2009.[68] In terms of deal value, there was a 54.26% drop from $1.23 trillion in 2007 to $568 billion in 2009.[69] Even though there has been "[c]heap and plentiful capital" since the crisis, "it has been so difficult [for companies] to see the far horizon through the wild waves of market turbulence."[70] Thus, the normal effect of low cost capital in increasing the

67. Interview with Mergermarket, *supra* note 57.

68. *2015 M&A Report*, WILMERHALE 2 (2015), https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/2015-WilmerHale-MA-Report.pdf [https://perma.cc/2JGJ-SW9Y] (citing FactSet Mergers).

69. *Id*.

70. Matthew Hermann, *M&A is Back*, THE M&A JOURNAL 1 (Sept. 2014), http://www.freshfields.com/uploadedFiles/SiteWide/Profiles(1)/M/MAJ_v1502.pdf [https://perma.cc/F23A-4C4V] (citing Rob Kindler, Vice Chairman and Global Head of M&A at Morgan Stanley).

amount of M&A deals was neutralized by uncertainty in the market. Even when the market began to rise in 2013, companies were still concerned with the fluctuations, as "there were daily swings of 500 or 750 points."[71]

With the uncertainty in the market, companies may have been less likely to experiment with new methods of pricing M&A deals following the crisis. However, the market is stabilizing and this possible barrier to the LBM in the United States is dissolving. In 2014, the number of United States M&A deals surpassed pre-crisis levels with 11,425 deals in 2014 compared to 11,369 deals in 2007.[72] The value of United States M&A activity also surpassed pre-crisis levels with $1.6 trillion worth of deals in 2014 compared to $1.2 trillion in 2007 (and $568 billion in 2009).[73] Additionally, buyers now are less concerned about the "macroeconomics of Fed manipulation" that may result in the "stock market . . . suffer[ing] some unforeseen calamity."[74] The "market now welcomes M&A deals with an enthusiasm not seen for some time" and "[s]hareholders now support M&A deals . . . ."[75] The psychology of M&A also supports more deals. CEOs are more confident and have a "renewed energy in M&A" as they no longer have to hold back an "actual launch" because of market uncertainty.[76] It has been said, "If your pal in the same industry is doing a transaction, then it's a good time for you to do a transaction because you won't look silly for being the only guy doing a deal, ... This is always a major part of the psychology of M&A."[77]

The volatile market may have played a significant role in preventing the LBM from gaining popularity in the United States, and the current revitalization in M&A suggests that the market may be well suited for companies to experiment with new ways to drive value like using the LBM in M&A deals.

The second possible barrier is the rise in the carve-out deals in the United States. When a company undertakes a carve-out, it divests one of its business units by selling an equity stake in that business or by spinning the business off into its own.[78] A company may choose to undertake a carve-out for any of the following reasons: to focus the company's attention on a particular business with "greater potential . . . growth," "to

71. *Id*.
72. WILMERHALE, *supra* note 68.
73. *Id*.
74. Hermann, *supra* note 70, at 3 (citing Alan Klein, Co-Administrative Partner at Simpson Thacher).
75. *Id*. at 2.
76. *Id*.
77. *Id*. at 4.
78. *Carve-Out*, INVESTOPEDIA, http://www.investopedia.com/terms/c/carveout.asp [https://perma.cc/Z6FC-X8KB] (last updated 2015).

dispose of non-core businesses," to "[u]nlock [s]hareholder [v]alue," to "[m]anage [c]apital [n]eeds," to "[e]liminate [c]onflicts," or to meet other financial pressures.[79]

The number of carve-out deals valued at over $100 million has been on the rise since 2009[80] and one study found that 39% of corporate respondents will pursue carve-outs as part of their strategy to focus on core assets (up from 31% in 2014).[81] This rise may have played a role in preventing the LBM from gaining popularity in the United States because the mechanism requires historic balance sheets to determine an equity price. For a complex carve-out deal, it may be difficult to isolate the divested business unit's particularized financial data, as distinct from the seller's other business lines.[82] Thus, the LBM may not be the best mechanism to gauge a business's value because it does rely on pricing adjustments.[83]

Although the rise in carve-outs may have played a role in preventing some companies from using the LBM, there is still a greater number of non-carve-out deals in the United States.[84] This means that there are still ample deals where the LBM is appropriate. Moreover, the LBM can still be effective when isolated financial statements for the carved-out business unit exists. For instance, the LBM has spread readily to carve-out deals across Europe.[85] This suggests that its use may only be limited in complex deals.

The third barrier, which is perhaps the most significant, is cultural and educational. The CAM is part of the M&A culture in the United States and the concept of the LBM is novel to the majority of American companies.[86] Companies that have made overseas mergers or acquisitions in the United Kingdom may have a loose familiarity with the LBM, but there has not

79. Michael Flynn et al., *The Art of Carving: Carve-Out Transactions – Sales of Divisions and Subsidiaries*, GIBSON DUNN 10 (Feb. 5, 2015), http://www.gibsondunn.com/publications/Documents/WebcastSlides-Carve-Outs-2.5.2015.pdf [https://perma.cc/LQG9-39FJ].

80. *Id*. at 5.

81. Russell Thomson et al., *M&A Trends Report 2015: Our Annual Comprehensive Look at the M&A Market*, DELOITTE 13 (2015), http://www2.deloitte.com/content/dam/Deloitte/us/Documents/mergers-acqisitions/us-ma-trends-report15-042115.pdf [https://perma.cc/GAQ3-F5KB].

82. McGonigle & Weisser, *supra* note 3, at 2.

83. See footnote 6 for a discussion on why the CAM may be more appropriate for complex carve-out deals.

84. Flynn et al., *supra* note 79, at 5-6.

85. Hermann, *supra* note 52, at 9.

86. *See* McGonigle & Weisser, *supra* note 3, at 2 (stating that the LBM is still not used with any frequency in the United States but that some companies have started using the mechanism after "becoming educated on the pros and cons" of the it).

been a LBM spark in the United States as there has been in the United Kingdom and across Europe.[87] Thus, the rational American company, especially in light of the recent economic environment, would not necessarily experiment with a new M&A pricing mechanism. However, now that the market has improved and the number of M&A deals is reaching pre-crisis 2007 levels, companies may be more willing to experiment with deal structures that can generate more value and facilitate the merger or acquisition process.

This Comment suspects that culture and education is one of the main reasons why the United Kingdom has seen such growth with the LBM. The mechanism has existed there for a number of years prior to gaining popularity.[88] For instance, the LBM was used in approximately 40% of M&A transactions in the United Kingdom in 2007.[89] The use then dramatically dropped following the global financial crisis from 2008 to early 2009, dropping to about 12% of deals.[90] From 2009 to 2010, the LBM reached pre-crisis levels[91] and today is used in approximately 57% of deals in the United Kingdom.[92] In comparison, the LBM is used in only

87. The LBM has also become popular in New Zealand and Australia. Nick Kovacevich, *Trends in M&A*, WYNN WILLIAMS, (Dec. 3, 2015), http://www.wynnwilliams.co.nz/Publications/Articles/Current-Trends-in-M-A [https://perma.cc/7UV5-6Q77]; Mansfield & Parker, *supra* note 16.

88. Mansfield & Parker, *supra* note 16, at 1 (stating that the "locked box mechanism[] rose in popularity in the United Kingdom in the mid-2000's").

89. O'Sullivan et al., *supra* note 5, at 2.

90. O'Sullivan et al., *supra* note 5, at 2. This decline is likely explained by the high levels of economic uncertainty resulting from the financial crisis. Economic risk passes from the seller to the buyer at an earlier date with the LBM than with the CAM. This means that the buyer would absorb any losses in the target following the Locked Box Date without having the ability to adjust the purchase price post-closing. In contrast, economic risk passes from the seller to the buyer at closing with the CAM. This means that the buyer is able to adjust the purchase price post-closing to reflect any losses of the target. During the financial crisis, the value of a firm could drop drastically overnight. Companies in the United Kingdom would have preferred to sacrifice simplicity and efficiency for precision in times of economic uncertainty. Once the market began to stabilize, the LBM began rose to pre-crisis levels just a year later. The LBM and CAM are strategic tools for companies to create value during deal formation, and the companies in the United Kingdom perfectly reflect the benefits of having alternative pricing mechanisms.

91. O'Sullivan et al., *supra* note 5, at 2.

92. *See CMS European M&A Study 2014*, CMS HASCHE SIGLE 5 (2015), http://www.cms-hs.com/Hubbard.FileSystem/files/Publication/43087c2d-6be1-4dd7-acc9-010374c3a216/7483b893-e478-44a4-8fed-f49aa917d8cf/Presentation/PublicationAttachment/0dbf534b-1daa-464a-b13d-1b0eeef47619/MA_Study_2014_ExecutiveSummary.pdf [https://perma.cc/NZ6V-KGW8] (finding that the closing accounts mechanism is used in roughly 85% of United States M&A deals and 43% of United Kingdom M&A deals, suggesting that the locked box mechanism or some other pricing mechanism is used in 15% of United States M&A deals and 57% of United Kingdom M&A deals).

about 15% of deals in the United States.[93]

One justification for the increased use of the LBM in the United Kingdom is that the flight-to-quality assets caused low deal activity, an environment where sellers could better dictate sale terms and rely on the LBM to fix the price of and expedite the deal.[94] This was especially true in private equity deals, and sellers have been able to "resist a shift to the more traditional [CAM] which is perceived as offering a buyer more protection."[95] Additionally, it is important to note that the LBM has spread beyond private equity deals to corporate deals as well, where parties have been able to better tailor the mechanism to their needs.[96]

Following the global financial crisis, the United States market also suffered from low deal activity driven, in part, by a flight-to-quality assets.[97] During this time, the United States and Europe shared similar M&A deal fluctuations post crisis.[98] Where the number of M&A deals in Europe fell by 44.95% during 2007 and 2009 (13,389 deals in 2007 and 7,371 deals in 2009),[99] the United States experienced a 39.72% drop.[100] Where deal value in Europe fell by 72.89% between 2007 and 2009 ($1.4 trillion in 2007 and $379 billion in 2009),[101] the United States experienced a 54.26% drop.[102] If flight-to-quality was the driver for the increased use of the LBM, a parallel phenomenon should have occurred in the United States. However, this was not the case.

This is why the cultural and educational factor was most impactful. Because companies in the United Kingdom were already familiar with the LBM, they could recognize the benefits that came with fixing the price and expediting transactions post crisis. If American companies had this familiarity, they may have also increased their usage of the LBM. But the volatility of the market did not create appropriate conditions for companies to experiment with deal structures that companies were unfamiliar with—

93. *Id*.

94. McGonigle & Weisser, *supra* note 3, at 2. In the context of M&A, flight-to-quality refers to buyers shifting their targets to high-quality, low-risk companies and is the result of uncertainty about the financial markets. By nature, there are less high-quality, low-risk targets than medium- to high-risk ones. Paired with the increased concentration of demand for these targets, the volume of M&A deals during a flight-to-quality market decreases.

95. McGonigle & Weisser, *supra* note 3, at 2.

96. McGonigle & Weisser, *supra* note 3, at 2.

97. *Capital M&A Newsletter: M&A Market Activity Remains Strong Despite Economic Uncertainty*, MACIAS, GINI & O'CONNELL, LLP (2011), http://www.mgocpa.com/idea/capital-ma-newsletter/ [https://perma.cc/E6HS-DBJD].

98. Note that this data compares M&A deals in the United States and Europe generally.

99. WILMERHALE, *supra* note 68, at 3.

100. WILMERHALE, *supra* note 68.

101. WILMERHALE, *supra* note 68, at 3.

102. WILMERHALE, *supra* note 68.

that would have only injected more uncertainty into the chaos. Prudent shareholders and activist investors during this time period may not have been as willing to test new deal structures, but rely instead on structures they were familiar with to reduce risk. Additionally, institutional shareholders represent "more than 70% of the largest 1,000 companies in United States in 2009."[103] Getting them to approve a LBM may have been challenging because savvy institutional shareholders may be more inclined to take the second opportunity to renegotiate a lower price with the CAM. Without being properly educated or having executed an LBM deal before, these institutional shareholders may not have been able to appropriately consider the LBM's efficiency gains and cost savings. On the other hand, there is also high institutional ownership in the United Kingdom and the LBM has continued to remain popular.[104] This suggests that investors in the United Kingdom have not resisted and are comfortable with the benefits of the mechanism. Thus, the cultural unfamiliarity with the LBM is likely the largest factor contributing to its minimal usage in the United States.

With market conditions stabilizing, executives and shareholders favoring M&A transactions, and M&A deal volume increasing, the United States is ready for a new pricing mechanism. Therefore, this Comment addresses what may be the largest hurdle in increasing LBM usage in the United States: the educational and cultural familiarity with the mechanism.

From an educational perspective, this Comment, as a whole, serves to shed light on the LBM. It is difficult to introduce a new system domestically based on international norms. But the more the concept of the LBM is discussed, the more likely a company will experiment with it, and the more frequently the LBM will be used to drive value for companies.

From the cultural perspective, there are noticeable differences between American and British transactions. Specifically, the United States has many more earnout and MAC clauses than the United Kingdom. Earnout clauses appear in roughly 38% of transactions in the United States and only 16% of deals in the United Kingdom,[105] and MAC clauses appear in nearly

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103. Ben W. Heineman, Jr. & Stephen Davis, *Are Institutional Investors Part of the Problem or Part of the Solution?: Key Descriptive and Prescriptive Questions About Shareholders' Role in U.S. Public Equity Markets*, COMM. FOR ECON. DEV. & YALE SCH. OF MGMT. 4 (Oct. 2011), http://web.law.columbia.edu/sites/default/files/microsites/millstein-center/80235_CED_WEB.pdf [https://perma.cc/W279-ALFS].

104. Similar to the United States, the United Kingdom also has high institutional ownership. *See* Serdar Çelik & Mats Isaksson, *Institutional Investors and Ownership Engagement*, OECD J.: FIN. MARKET TRENDS 93, 94 (2013), http://www.oecd.org/corporate/Institutional-investors-ownership-engagement.pdf [https://perma.cc/9944-HW8T] (suggesting that 90% of public equity is held by institutional investors).

105. Interview with Mergermarket, *supra* note 57 (discussing the difference in the

all (93%) transactions in the United States, but are rare in the United Kingdom.[106]

First, earnout clauses are contractual solutions to valuation gaps between the buyer and seller that aid the parties in reaching a deal.[107] They allow a seller to receive additional compensation, or part of the purchase price, by meeting certain economic and non-economic benchmarks post-closing.[108] Economic benchmarks may be based on performance indicators, such as "revenue, EBITDA, EBIT, net profit and cash flow from operating activities."[109] Non-economic benchmarks may be based on "official product approval or licensing, total incoming orders or the number of customers."[110] Earnout clauses require the seller to participate in the success of the firm even after economic interest has transferred.[111] A typical earnout period is between one and five years, but may be longer depending on the specific deal.[112]

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prevalence of earnout clauses between the United States and the United Kingdom).

106. WILMERHALE, *supra* note 68, at 17.

107. *See* Brian JM Quinn, *Putting Your Money Where Your Mouth Is: The Performance of Earnouts in Corporate Acquisitions*, 81 U. CIN. L. REV. 127, 130 (2012) (evaluating two theories behind the motivation for earnouts—the adverse selection theory, which states that earnouts help parties uncover hidden information from sellers, and the uncertainty theory, which states that earnouts manage uncertainty by allocating risk to the seller, thereby helping parties reach an agreement—ultimately finding that the uncertainty theory likely prevails).

108. *Share Purchase Agreements: Purchase Price Mechanisms and Current Trends in Practice*, ERNST & YOUNG 4 (2d ed. 2012), http://www.ey.com/Publication/vwLUAssets/EY_TAS_-_Share_Purchase_Agreements_spring_2012/$FILE/EY-SPA%20brochure-spring-2012_eng.pdf [https://perma.cc/T6E7-HCKY]; *Earnout*, INVESTOPEDIA, http://www.investopedia.com/terms/e/earnout.asp?layout=infini.http://www.ey.com/Publication/vwLUAssets/EY_TAS_-_Share_Purchase_Agreements_spring_2012/$FILE/EY-SPA%20brochure-spring-2012_eng.pdf [https://perma.cc/XFV3-KG3N] (last updated 2015); Erik Lopez, *Introduction to M&A Earnouts*, THE M&A LAWYER BLOG (July 10, 2015), https://www.themalawyer.com/introduction-to-earnouts-in-ma-deals/ [https://perma.cc/QTG7-TN6R].

109. ERNST & YOUNG, *supra* note 108. EBITDA refers to earnings before interest, taxes, depreciation and amortization. *EBITDA – Earnings Before Interest, Taxes, Depreciation and Amortization*, INVESTOPEDIA, http://www.investopedia.com/terms/e/ebitda.asp [https://perma.cc/LJ3L-VRA7] (last visited July 27, 2016). EBIT refers to earnings before interest and tax. *Earnings Before Interest & Tax – EBIT*, INVESTOPEDIA, http://www.investopedia.com/terms/e/ebit.asp [https://perma.cc/RXW5-MNUZ] (last visited July 27, 2016).

110. ERNST & YOUNG, *supra* note 108.

111. ERNST & YOUNG, *supra* note 108, at 2.

112. Paul M. Crimmins et al., *Earn-outs in M&A Transactions: Key Structures and Recent Developments*, 10 THE M&A J. 1, 3 (Oct. 2010), https://www.mayerbrown.com/Files/Publication/5b829276-5f8b-4a5a-ad5f-a492e73d6574/Presentation/PublicationAttachment/a5e9717d-c9d1-4c00-be87-828ef83e4776/Earn-outs_MA.pdf [https://perma.cc/Y5XJ-NSY7].

Financially, earnout clauses can be important in striking a balance between what the buyer and seller believe are reasonable purchase prices; they are "a good way of bridging valuation-gaps and different opinions as to how the target company will develop."[113] For instance, imagine a company that is interested in acquiring a privately-held startup. The founder is optimistic about his business and wants to sell today to acquire more capital to fund his expansion.[114] The founder wants $100 million for the company, but the buyer is not convinced of that value even though it is intrigued by the business. The buyer believes the company is worth around $75 million.[115] To strike a balance of interests between both parties, an earnout clause allows the buyer to pay $50 million up front and up to $50 million contingent on the acquired company meeting certain financial benchmarks. Earnout clauses may be particularly valuable for financial deals where the buyer (i.e. a private equity firm) may not necessarily have the expertise to best manage the acquired company by keeping the sellers interested in the acquired company's short-term performance post-closing.[116] This is not to say that economically-based earnout clauses are any less important for strategic transactions as well, as the earnout can motivate managers and directors from the acquired company to ensure its economic health.

Earnouts with non-economic benchmarks are equally important. For instance, in a strategic transaction, a buyer may be interested in particular purchase orders to expand its influence over a particular geographic market.[117] Striking a deal contingent on the fulfillment of these purchase orders would have a significant impact on the purchase price. Agreeing to an earnout clause helps alleviate disagreements over purchase price because of such non-economic factors, and it structures a more complete transaction.

Moreover, earnout clauses must be drafted carefully as both the buyer and seller have competing incentives. During the earnout phase, the seller wants the acquired company to hit the agreed-upon economic or non-

113. ERNST & YOUNG, *supra* note 103, at 8. *See Paul Crimmins et al., Earnouts in M&A Transactions*, MAYER BROWN 3 (June 22, 2011), https://www.mayerbrown.com/public_docs/06-22-11_CorpSec_Webinar_Earnouts.pdf [https://perma.cc/NPJ9-5G6L] (stating that "[e]arnouts can bridge . . . valuation gap[s] between an optimistic seller and a skeptical buyer").

114. Lopez, *supra* note 108.

115. Lopez, *supra* note 108.

116 Anne Field, *How to Survive an Earnout*, BLOOMBERG (June 20, 2005 12:00 AM), http://www.bloomberg.com/bw/stories/2005-06-19/how-to-survive-an-earnout [https://perma.cc/WK7Q-XE67].

117. *See* ERNST & YOUNG, *supra* note 108 at 4 (noting that incoming orders may be used as a non-economic benchmark).

economic benchmarks so that it can receive the additional payments. The buyer, on the other hand, does not want these benchmarks to be reached in order to minimize its payments to the seller. To address this concern, covenants play an important role in protecting the interests of the parties. For instance, the seller will want to negotiate a covenant that prevents the buyer from diverting revenue from the acquired company that would prevent the benchmark from being met.[118]

Second, a MAC clause[119] is a way for parties to "allocate who will bear the risk" in a transaction should a materially adverse change occur between signing and closing.[120] A MAC clause "is the catchall provision"[121] that "permits an acquirer to refuse to complete the transaction if a material and adverse change, as defined in the acquisition agreement, occurs to an acquiree prior to the time of completion of the acquisition."[122] Buyers may also invoke MAC by "taking advantage of either changed market conditions or adverse events affecting the target company"[123] to renegotiate the deal, which may lead to a lowered price or restructuring.[124] When buyers invoke a MAC clause, sellers have an incentive to settle at a lower price because they do not want to go through the hassle of litigation and because "the seller and its shareholders are typically happy to take the lower premium than risk litigation and an adverse decision resulting in no

118. It is important for the seller to draft these covenants carefully. For instance, a seller would not want to include language requiring the buyer to have "intent" to divert revenues for the purpose of reducing the earnout payments. A seller would prefer to maintain a lower standard and eliminate reference to buyer intent because intent is difficult to prove in litigation. Lazard Tech. Partners, LLC v. Qinetiq N. Am. Operations LLC, 114 A.3d 193, 194 (Del. 2015) (finding that the buyer had not breached the covenant preventing the buyer from "divert[ing] or defer[ing] [revenue] with the intent of reducing . . . the Earn-Out Payment" because the covenant required proof that the buyer acted "with the intent" to reduce the payment—a high standard that the seller failed to prove).

119. Also referred to as a materially adverse event (MAE) clause.

120. Steven Davidoff Solomon, *The MAC Is Back, but Does It Kill a Deal?*, N.Y. TIMES: DEALBOOK (Aug. 23, 2011 3:45 PM), http://dealbook.nytimes.com/2011/08/23/the-big-mac-is-back-but-does-it-kill-a-deal/ [https://perma.cc/23N4-W8AY]. *See also* Robert T. Miller, *The Economics of Deal Risk: Allocating Risk Through MAC Clauses in Business Combination Agreements*, 50 WM. & MARY L. REV. 2007, 2012 (2009) (evaluating how parties use MAC clauses to allocate deal risk based on existing theories of risk like the Gilson and Schwartz Investment Theory and a new theory proposed by the author, Professor Miller).

121. STEVEN M. DAVIDOFF, GODS AT WAR: SHOTGUN TAKEOVERS, GOVERNMENT BY DEAL, AND THE PRIVATE EQUITY IMPLOSION 56 (2009).

122. Steven M. Davidoff, *The Failure of Private Equity*, 82 S. CAL. L. REV. 481, 499 (2009)(internal citation omitted).

123. Solomon, *supra* note 120.

124. Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 YALE L.J. 848, 869 (2010).

deal at all."[125] The buyer is also pushed to settle because it does not want to risk losing litigation (and thus the cost of litigating) and paying the original purchase price.[126] Thus, the MAC clause is actually a powerful "renegotiation tool"[127] rather than a get-out-of-jail-free card, a point reinforced by the rarity of court enforcement.[128]

MAC clauses, like earnouts, must be drafted carefully. They typically "describe (1) what must be materially adversely affected to constitute a MAC and (2) which effects will be disregarded in assessing whether a MAC has occurred."[129] Defining a materially adverse change, in practice, is difficult. The buyer will try to negotiate a broad definition of a materially adverse change to provide "leeway" to get out of a deal.[130] The seller will conversely try to negotiate a narrow definition to shift as much risk as possible on the buyer.[131] Generally, parties should negotiate a definition that specifies particularized conditions that may affect the business and include carve-outs for general changes in the economy or the target's industry—risks that are traditionally born by the buyer.[132] Even though MAC clauses have become rather standardized over the last few years and less time has been spent negotiating over terms,[133] defining materially adverse remains a challenge. For example, Delaware courts, where most MAC clause litigation is brought,[134] have never found a materially adverse change[135] and require such change to be in a "durationally-significant manner," a high standard to meet.[136] However, this understanding still provides little guidance. Is one year enough or must it be two? Even with the challenges in defining materially adverse changes, MAC clauses appear in "virtually all [American] acquisition agreements"[137] and are an important part of agreements in the United States.

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125. Solomon, *supra* note 120.
126. Solomon, *supra* note 120.
127. Solomon, *supra* note 120.
128. Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 715, 738 (Del. Ch. 2008) ("Many commentators have noted that Delaware courts have never found a materially adverse [change] to have occurred in the context of a merger agreement.").
129. Katherine Ashton et al., *MAC Clauses in the UK and U.S.: Much Ado About Nothing?*, DEBEVOISE & PLIMPTON: INSIGHTS & NEWS (2013), http://www.debevoise.com/insights/publications/2013/12/mac-clauses-in-the-uk-and-us———much-ado-abo__ [https://perma.cc/4L7T-KQ7V].
130. DAVIDOFF, *supra* note 121.
131. DAVIDOFF, *supra* note 121.
132. Ashton et al., *supra* note 129.
133. Ashton et al., *supra* note 129.
134. Solomon, *supra* note 120.
135. *Supra* note 128.
136. In re IBP, Inc. S'holders Litig., 789 A.2d 14, 68 (Del. Ch. 2001).
137. Ashton et al., *supra* note 129.

Earnout clauses and MAC clauses are important to the culture of M&A deals in the United States, but are less so in the United Kingdom,[138] which may be part of the reason why the LBM has not gained popularity in the United States. However, the LBM can be modified to better meet the expectations of buyers and sellers.[139] Thus, modifying the LBM to reflect transactions in the United States can increase the use of the LBM domestically.

III. MODIFYING THE LBM FOR THE UNITED STATES

The market is ready for a new pricing mechanism. To persuade more American companies to use the LBM and reap the benefits that British companies have been enjoying for years (i.e. time and cost efficiency, price certainty, simplicity, and the ability to better meet party preferences), the mechanism must conform to the cultural deal expectations of American companies. The LBM structure is flexible and has already been modified in the United Kingdom to better meet party preferences.[140] Therefore, the LBM can be adapted for use in the United States, specifically, by structuring in MAC and earnout clauses.

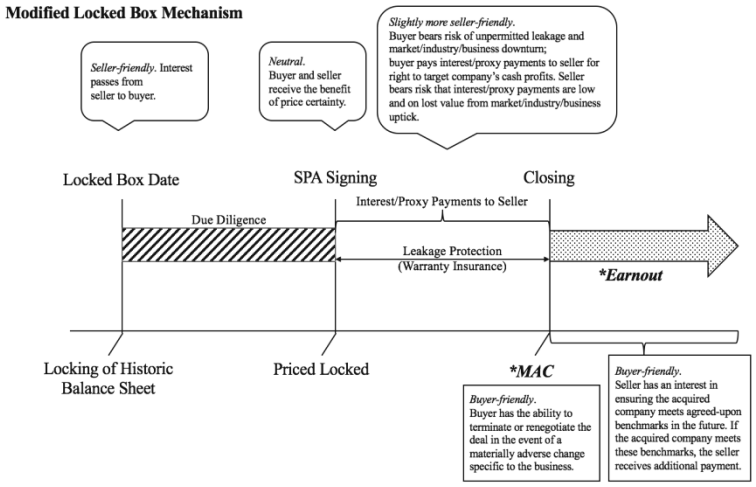


FIGURE 2.[141]

138. CMS HASCHE SIGLE, *supra* note 3, at 5; Interview with Mergermarket, *supra* note 57.
139. McGonigle & Weisser, *supra* note 3, at 2.
140. McGonigle & Weisser, *supra* note 3, at 2.
141. Created by author.

As previously stated, the M&A deals in the United Kingdom rarely have MAC clauses and include earnouts less frequently than in the United States. Structuring the LBM to include these two provisions would better represent transactions in the United States. The foundation of M&A pricing mechanisms in the United States is the CAM, which allows the buyer to make post-closing adjustments to reflect financial changes in the target company. This leaves the control in the buyer's hands, giving the buyer the opportunity to renegotiate a lower purchase price. As a result, the CAM is generally viewed as buyer-friendly.

Because the United States M&A market is accustomed to a buyer-friendly mechanism, buyers may be reluctant to give up control through the use of a seller-friendly mechanism. Even when the flight-to-quality in the United Kingdom likely caused an increase in the use of the LBM, the LBM was not readily adopted in the United States. This left sellers in the United States, who would have had more negotiating power due to the mismatch between the number of buyers and the scarce amount of quality assets they were willing to purchase, with only the ability to negotiate better terms under a CAM rather than allowing them to negotiate a stronger fixed-price position.

To get more parties to use the LBM in the United States, it would seem appropriate to address buyer concerns over the seller-friendly aspects of the LBM. This is where the inclusions of MAC and earnout clauses serve a double purpose: they both structure the LBM to conform to the expectations of American companies and, in doing so, they balance out the seller-friendly nature of the mechanism.

For a buyer, fixing the price at the SPA signing date can be risky. Should the business suffer a downturn between signing and closing, the buyer is unable to adjust the purchase price to reflect the then-current value at closing.[142] Structuring in a MAC clause allows the buyer to walk away from the deal or renegotiate the price should a pre-defined materially adverse change occur to the company. This is an important failsafe and negotiation tool for the buyer and provides the buyer with some leverage. This is not a perfect solution, as non-materially adverse changes that negatively impact the target company will still be borne by the buyer. However, if the target company is performing better after the Locked Box Date, the buyer will reap both the cash profits and the benefit of a lower relative purchase price because it was fixed at signing. As with any choice, there will be tradeoffs. Further, if a buyer in a particular deal values the efficiency of the LBM and does not want the hassle of potential post-

142. See *supra* text accompanying note 90 for a related discussion on the real-world implications of being unable to adjust the purchase price post-closing.

closing adjustment disputes, the MAC clause can be a valuable tool for the buyer to retain more control over the deal—swinging the pendulum a little further away from the seller-friendly end of the spectrum towards the neutral center.

Some argue that the MAC clause is at odds with the theory behind the LBM, which is a possible reason why MAC clauses are rare in the United Kingdom.[143] Because risk passes from the seller to buyer at the Locked Box Date and the buyer is entitled to the cash profits of the target business during the executory period, "it arguably follows that the buyer should bear the risk of a MAC occurring in that period."[144]

The buyer should bear the risk of downturns in the target business during this period, but the buyer should not bear the risk of a materially adverse change occurring. First, typical MAC clauses in the United States carve out downturns in the target business's industry or in the market as a whole. This risk is still borne by the buyer. This makes sense because the buyer receives the benefit of price certainty (i.e. no need to raise additional capital should the purchase price increase,[145] less disputes over post-closing adjustments, less time spent drafting the SPA, etc.) and the benefit of cash profits during the period. If the buyer bore no financial risk of any downturn in the target business, the mechanism would be unfair and no seller would agree to it. This conforms to the classic notion of *caveat emptor*.[146] Second, although the buyer should bear some risk, it should not bear all the risk. If there were no MAC clause in an agreement and the target company underwent a materially adverse change, there could be virtually no value to the target company, and thus, no purpose in the acquisition or merger. The buyer would incur monumental losses in an unfair transaction. As a matter of policy, the MAC clause prevents two companies in an M&A agreement from failing should one party fail. Third, a materially adverse change is rarely found even when a MAC clause is present. Recall that the Delaware courts have *never* found a materially adverse change.[147] Only in dire circumstances will a court find that a MAC has occurred. But this is not a clause without teeth. If a major event happens to the target company, a buyer may use the MAC clause as a renegotiation tool to get to a fairer purchase price. Thus, the MAC clause

143. Ashton et al., *supra* note 129.

144. Ashton et al., *supra* note 129.

145. O'Sullivan et al., *supra* note 5, at 5.

146. *Caveat emptor* translates to "let the buyer beware" and is a commonly referred to adage in contract law. It suggests that the buyer should assume the risk associated with his purchase. *Caveat Emptor*, CORNELL UNIVERSITY LAW SCHOOL, https://www.law.cornell.edu/wex/caveat_emptor [https://perma.cc/5BF2-YL8T] (last visited June 26, 2016).

147. Solomon, *supra* note 120.

protects the buyer or gives the buyer breathing room in extreme cases; the buyer still bears the risk of loss under normal operating conditions.

In addition to including a MAC clause, structuring in an earnout clause can better reflect the expectations of American parties and shift the pendulum even closer toward neutral ground between buyer- and seller-friendliness. The earnout clause provides the buyer with the comfort that the acquired company will trend toward the projections the original purchase price was based off of. This clause keeps the seller honest. The seller may be able to upsell or hide certain weaknesses during negotiation, but the earnout provides additional incentive for the seller to maintain an interest in the progress of the acquired company. The earnout also provides a balance to the price fixing at SPA signing. If a buyer believes the seller is overvaluing the company unreasonably, the buyer can rely on the earnout to structure a fair price for both parties. The buyer would negotiate a lower initial purchase price and pay additional compensation to the seller contingent on the subsequent performance of the acquired company.[148] This shifts more control and assurance to the buyer and can make an upfront fixed price seem more reasonable.

It can be argued that an earnout clause complicates what is supposed to be a simpler pricing mechanism. Where the LBM seeks to reduce disputes based on post-closing adjustments, the earnout can be effectively seen as the same: adjustments to the purchase price are made after closing and disputes may arise over how to calculate or whether certain benchmarks have been met. This may also suggest that the net effect of the earnout clause is the same as having post-closing adjustments: the total cost to purchase a target company is amended based on performance.

This concern does not exist for non-economic benchmarks, where payment is contingent on conditions like licensing or purchase orders being met. This is pretty straightforward because the condition is either met or it is not met. The situation gets complicated when discussing economic benchmarks. There are parallels between the earnout and post-closing adjustments, but these parallels only go so far. First, it is important to consider the potential effects of both post-closing adjustments and earnout clauses. The net effect of post-closing adjustments is more material to the overall transaction than an earnout clause. A dispute over post-closing adjustments can significantly delay a deal because it affects the final closing price of a transaction. A dispute over whether a target company has reached a projected benchmark does not delay a deal because the deal has already closed at a set purchase price. The contingent payments are an opportunity for the seller to receive more money based on the continued

148. See previous example, *supra* page 45.

performance of the acquired business; disputes have nothing to do with whether or not a deal closes. Second, it is true that including an earnout clause adds an extra degree of complexity to the LBM. However, in order to customize the mechanism to meet American expectations, modifications must be made. The LBM, in its simplest form, has not spread across the United States, and American companies are missing out on the benefits the mechanism has to offer. To make the mechanism more appealing to American parties requires a bespoke approach. Modifications will inevitably add a degree of complexity to the LBM template, but the benefits of the mechanism remain the same when compared to a CAM deal that also has an earnout clause, which further complicates an already complex mechanism. And third, I believe that the buyer should work to negotiate a shorter earnout period with the seller unless inappropriate (a short earnout period may not be possible for certain non-economic benchmarks like patent approval). The spirit of the LBM is to facilitate deals. Keeping a seller on the hook for greater than five years is a long time to await potential payment.

An earnout clause may not be appropriate in every deal and it may be more appropriate in certain types of deals than others. For instance, earnouts are especially popular with private equity transactions where the private equity buyer may not have the expertise at the time of purchase to run the company.[149] However, earnouts also exist in strategic deals as well. This discussion does not fix an earnout clause in every modified LBM deal in the United States; it simply suggests that an earnout clause come standard in the agreement. Parties can choose to negotiate the clause out if needed.

A modified LBM for the United States would include both MAC and earnout clauses as standard. This shifts some control back towards the buyer's perspective, making the LBM more neutral rather than seller-friendly. These clauses will make the LBM more reflective of transactions in the United States and provide more comfort to buyers who are accustomed to a more buyer-friendly pricing mechanism. The LBM, as popularized in the United Kingdom, has not become popular in the United States. Hopefully, these suggestions will help companies consider using the modified LBM as a value-creating mechanism in future M&A transactions.

IV. CONCLUSION

The LBM is not used with any frequency in the United States but is

149. Field, *supra* note 116.

popular in the United Kingdom. Many factors have contributed to this discrepancy including unstable market conditions and cultural unfamiliarity with the mechanism. Because the market has stabilized, American companies are well positioned to explore the benefits of the LBM: time and cost efficiency, price certainty, simplicity, and the ability to better meet party preferences. Thus, this Comment sought to familiarize readers with the LBM and suggest modifications to the mechanism that would better meet the expectations of American companies, which will hopefully have the effect of increasing LBM usage in M&A deals in the United States. In an industry steeped in complexity, a method based on efficiency and simplicity can have profound transactional benefits; all that is required is some "in the box" thinking.

Completion mechanisms: Completion Accounts or Locked Box?

Completion mechanisms: Completion Accounts or Locked Box?

The purpose of completion mechanisms

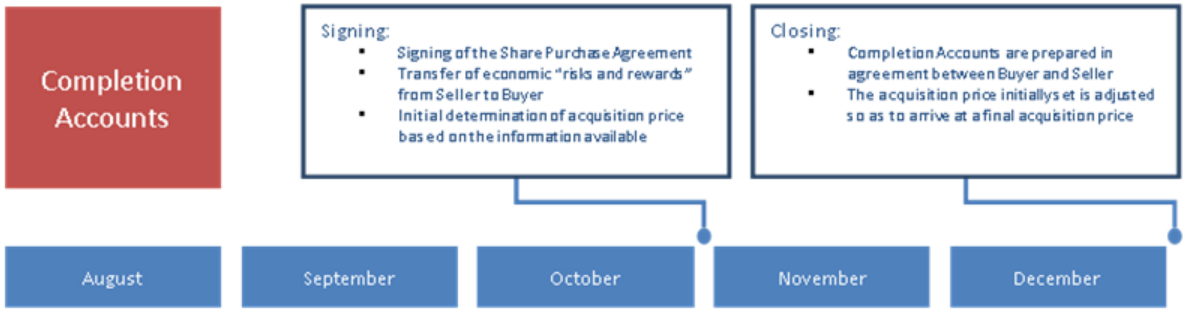
In a transaction, a completion mechanism is used to determine the final acquisition price that the buyer has to pay in order to acquire the shares of the target company.

There is more than one way of doing this and the outcome can be different depending on the mechanism used. There are two widely accepted mechanisms for adjusting the consideration: "**Completion Accounts**" and "**Locked Box**".

Completion Accounts mechanism

In a Completion Accounts scenario, the "initial" acquisition price is defined in the signed Share Purchase Agreement (or SPA). However, the "final" acquisition price is only determined based on the actual balance sheet of the target entity prepared as at the date of completion of the transaction.

As a minimum, the Completion Accounts show the net assets of the acquired business as at the date of completion. Typically, they will comprise a closing balance sheet, and will usually include a profit and loss account showing the results for the period from the latest set of historical financial accounts up to the completion date.



The signed SPA will have to include, amongst others, the following elements:

- The principles according to which the Completion Accounts should be prepared;
- The party (buyer or seller) that will prepare the Completion Accounts;
- Time allowed to prepare the Completion Accounts;

Grant Thornton's research has shown that Completion Accounts are the leading cause of disputes between buyers and sellers. One in ten Completion Accounts result in an expert determination.

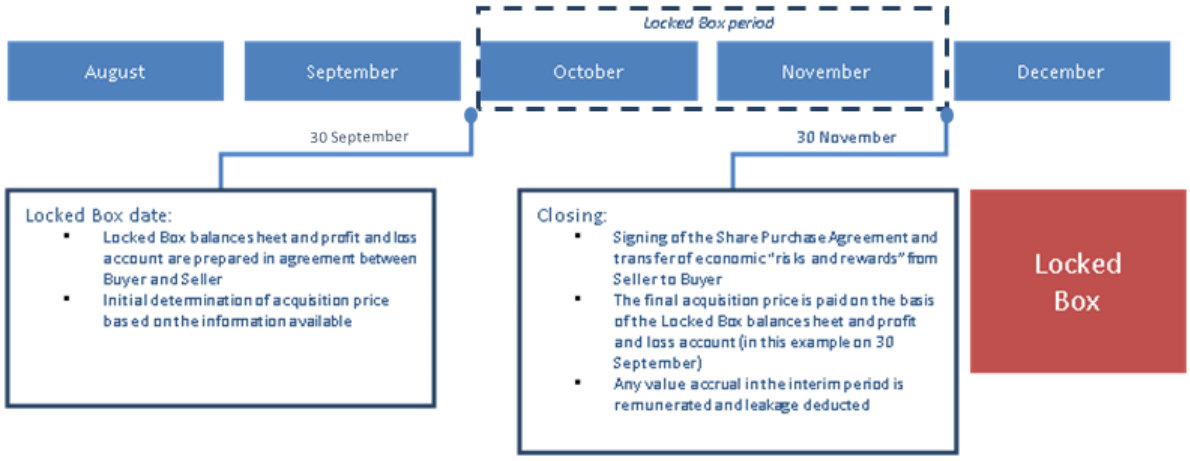
- Time allowed for the other party to validate the Completion Accounts.

Subject to what is set out in the SPA, either party may prepare the draft Completion Accounts and it may be a matter of practicality as to who is best placed to do so given ease of access to accounting records and personnel, and how much time it is reasonable to allow for the preparation of a first draft. It is most common for the buyer to prepare the Completion Accounts, as it is the owner of the business at that time.

A major advantage of Completion Accounts approach is that it provides the possibility of the acquisition price being adjusted on a Euro-for-Euro basis. This simultaneously entails the mechanism's major disadvantage, since major adjustments to the initial acquisition price often lead to time-consuming discussions between the buyer and the seller and generate uncertainty as to whether the takeover will succeed after all.

Locked Box mechanism

With a Locked Box mechanism, the final equity value adjustments are applied to a balance sheet prepared at a date prior to completion, which is termed the 'locked box balance sheet'. Locked boxes are now commonplace in Europe. This may be because locked box mechanisms lend themselves well to multi-bidder sale processes: they avoid time being spent post-transaction on completion mechanisms and bring certainty for both parties on the final equity value at completion.



The term Locked Box refers to a key feature of this type of mechanism, which is that no value is permitted to leave the business between the Locked Box date until completion of the transaction – the 'box' is thereby 'locked'.

The term 'leakage' is used to refer to extractions of value by the seller, such as dividends during the post-locked box period (unless mutually agreed). Such items diminish the balance sheet value in the period between locked box and completion which, if unadjusted, would mean the buyer receiving less value than they have paid for. The buyer will typically receive protection via the SPA against leakage.

A further concept termed 'permitted leakage' is also usually documented in the SPA. The intention of permitted leakage is to carve out certain items from the leakage protection. This covers known leakage both parties are aware of prior to completion, which is then factored into the calculation of the equity value at completion. Permitted leakage can also cover transactions between the business and the sellers such as agreed salary or management fees payable to the seller in this period.

The final important feature of the locked box mechanism is how to deal with the value movement in the balance sheet due to trading between the Locked Box date (i.e. the moment at which the Buyer *de facto* becomes the owner) and the Date of Closing (i.e. the date on which the acquisition price is paid). From a Seller's perspective, they may still be managing the business to generate profit and will have capital tied up until the completion date when the consideration is paid. Sellers may therefore expect to be compensated for this via an upward adjustment to the consideration (assuming the business is profitable). This adjustment is often referred to as the "value accrual".

In practice the cash flow generated by the company in the period between the Locked Box date and the Date of Closing is often taken as a basis for determining the "value accrual". An alternative basis is an interest-based value accrual applied to the equity value using an agreed rate of return to the seller for the post-locked box period.

Grant Thornton's research shows that the Locked Box mechanism is being used increasingly often in acquisitions in Europe, certainly in the case of sales processes involving a number of potential buyers. The advantages of a Locked Box include the savings in terms of the time and effort required for the preparation of Completion Accounts, and a high degree of certainty as to the acquisition price before the Date of Closing.

The date of the Locked Box should be considered carefully. Due to the absence of an adjustment mechanism, a buyer should carry out sufficient due diligence on the Locked Box balance sheet to be comfortable that it is accurate. The Locked Box date should not be too close to the completion date so as to allow time for the seller to prepare it and for the buyer to review it prior to completion. It is also advisable that the Locked Box date is not too far in the past, as this would increase the risk of leakage and the risk of actual profits being materially different from the value accrual. It is generally assumed that a period of two to three months is deemed appropriate.

An advantage of the Locked Box mechanism is the high degree of certainty of the acquisition price between the buyer and the seller, from an early stage in the buy-out plan. On the other hand, this mechanism is not recommended in circumstances where the buyer can only perform limited due diligence, since this mechanism offers few (if any) possibilities of making material adjustments to the acquisition price in the final phase of the buy-out plan.

De earn-out clausule in een overnameovereenkomst van aandelen (04/07/2016)

De earn-out clausule in een overnameovereenkomst van aandelen

04/07/2016

Een earn-out clausule bedingen bij een overnameovereenkomst van aandelen wordt meer en meer een gangbare praktijk.

De earn-out clausule is met name een clausule waarbij een deel van de overnameprijs afhankelijk is van toekomstige resultaten van de onderneming gedurende een bepaalde periode na de overdracht van de aandelen.

Er bestaat geen juridische definitie van 'earn-out' en ook voor het wettelijk kader moet er teruggevallen worden op het algemeen verbintenissenrecht en vennootschapsrecht.

In dit artikel gaan we dieper in op de voor- en nadelen alsook op enkele punten waar bijzonder aandacht moet worden besteed indien men overweegt een earn-out clausule te bedingen.

1. Voordelen

Het bedingen van een dergelijke clausule kan enkele voordelen bieden, zowel voor de koper als voor de verkoper van de aandelen.

a. Voordelen voor de koper

De vergoeding kan dienen om de verkoper ertoe aan te zetten een bepaalde periode actief te blijven binnen de vennootschap met het oog op het behoud van de continuïteit van de vennootschap. Het laat de koper toe om de knowhow van de verkoper in te zetten om de resultaten te maximaliseren, om concurrentie door de verkoper te vermijden en om stabiliteit te verzekeren naar het personeel toe.

Het is ook een vorm van risico-beperking. De koper loopt op deze manier minder risico om een te hoge prijs te betalen in het geval de verkoper de zaken rooskleuriger heeft voorgesteld dan ze werkelijk zijn.

b. Voordelen voor de verkoper

Het is denkbaar dat het ook voor de verkoper gunstig kan zijn om een earn-out clausule te bedingen. In het geval bijvoorbeeld dat de vennootschap net een moeilijke financiële tijd gekend heeft. In zo'n geval zal de voorgestelde prijs niet overeenkomen met de uiteindelijke "echte" waarde van de vennootschap. Dan kan

een earn-out clausule soelaas bieden om de prijs als het ware te spreiden over een langere (en hopelijk meer rooskleurige) periode.

2. Nadelen

Een earn-out clausule kan aanleiding geven tot conflicten doordat de koper en verkoper tegengestelde belangen hebben. Het is mogelijk dat de koper zal trachten de prijs/winsten te drukken terwijl de verkoper eerder zal proberen de prijs/winsten hoog te houden.

De earn-out clausule brengt ook een onzekerheid met zich mee voor de verkoper aangezien hij een deel van de verkoopprijs enkel zal ontvangen bij het behalen van de vooropgestelde doelstelling.

Om potentiële conflicten te vermijden, zal aandacht moeten besteed worden aan de precieze invulling van de clausule in de concrete situatie. Hieronder vindt u de belangrijkste aandachtspunten.

3. Een aantal aandachtspunten

a. De prijs moet bepaald, of minstens bepaalbaar zijn.

De koper en verkoper kunnen een formule opnemen in hun overeenkomst die voorziet in alle mogelijke objectieve elementen op basis waarvan de verschuldigde prijs kan worden bepaald. Het moet dus effectief gaan om objectieve elementen en kan dus niet afhangen van de wil van de koper of verkoper. Om toekomstige conflicten over de prijsbepaling te vermijden is het aangewezen om te voorzien in de aanstelling van een deskundige die terzake een bindende derdenbeslissing kan nemen.

b. Kwalificatie als zuiver potestatieve opschortende voorwaarde.

Een verbintenis die afhangt van een zuiver potestatieve opschortende voorwaarde of met andere woorden een voorwaarde waarvan de realisatie uitsluitend afhangt van de wil van diegene die zich verbonden heeft, is nietig.

De koper en verkoper moeten dus oppassen dat de voorwaarden waaraan de uitbetaling van de earn-out wordt gekoppeld niet gekwalificeerd kunnen worden als potestatief, aangezien de hele verbintenis anders nietig zal zijn.

c. Verhindering van de vervulling van de voorwaarde door de koper

Krachtens artikel 1178 Burg.W. “zal de voorwaarde geacht worden vervuld te zijn, wanneer de schuldenaar die zich onder die voorwaarde verbonden heeft, zelf de vervulling ervan verhinderd heeft.”

Dit betekent in het kader van een earn-out clausule dat indien de earn-out zich niet realiseert, de verkoper nog kan proberen te bewijzen dat het niet vervullen van de voorwaarden aan de koper zelf ligt.

d. De verkoper blijft bestuurder tijdens earn-out periode.

Het mandaat van een bestuurder in een N.V. is op ieder ogenblik en zonder opzeggingstermijn noch voorafgaandelijke motivering herroepbaar door de algemene vergadering. Dit betekent dat het mandaat van een bestuurder ten allen tijde beëndigd kan worden. Dit is ook een element waar rekening mee moet gehouden worden in de overeenkomst.

Er kan eventueel voorzien worden in een sterkmaking vanwege de koper dat de algemene vergadering zijn mandaat als bestuurder niet zal herroepen. Een andere mogelijkheid is een verbintenis van de koper dat hij gedurende de earn-out periode niet zal stemmen voor een herroeping.

De veiligste mogelijkheid lijkt toch om het mandaat van bestuurder te combineren met een managementovereenkomst, wat contractueel meer garanties geeft.

e. Gespreide aandelenoverdracht

De gefaseerde aandelenoverdracht draagt, net als het vorige aandachtspunt, bij tot de verankering van de verkoper in de vennootschap. Een gefaseerde aandelenoverdracht wordt meestal gecombineerd met een optieovereenkomst. Aan de verkoper wordt een putoptie toegekend op het resterende aandelenpakket. De verkoper krijgt hierdoor het recht om tegen een bepaalde prijs de resterende aandelen te verkopen.

Extra aandacht zal moeten besteed worden aan het naleven van art. 32 W.Venn. in het kader van het verbod van leeuwenbeding, waarvoor we verwijzen naar een eerder artikel dat u kan consulteren door hier te klikken. Het Hof van Cassatie heeft immers in 1998 geoordeeld dat het louter dienen van het vennootschapsbelang het criterium is voor het beoordelen van de overeenkomst als een potentieel leeuwenbeding.

4. Besluit

De earn-out clausule vindt steeds meer zijn weg naar overeenkomsten tot de overdracht van aandelen. Het is een ideale manier om verkopers oprecht betrokken te houden bij de evolutie van het bedrijf. De clausule kan er ook voor zorgen dat ondernemingen die het wat moeilijker hebben, toch een correcte prijs voor hun aandelen kunnen bedingen.

Toch zijn er ook belangrijke aandachtspunten. Om conflicten te voorkomen, dient er steeds bijzondere aandacht besteed te worden aan de prijsbepaling voor de earn-out, alsook aan de voorwaarden voor het behalen van de earn-out. Zo mogen

de voorwaarden niet zuiver potestatief zijn (afhangen van de wil van één partij) en mag de earn-out geen verdoken leeuwenbeding zijn. Bovendien dienen zowel de koper als verkoper te goeder trouw de voorwaarden van de earn-out te eerbiedigen.

Zie ook : Peeters Advocaten - Avocats (Mr. Pieter Dierckx , Mr. Leo Peeters , Mrs. Soraya El Kounchar)

[+ http://www.peeters-law.be/documents/analyse-items/98-earn-out.xml?lang=nl]

Is my earn-out compromised by Codid-19?

Is my earn-out compromised by Covid-19?

Due to the corona era, chances are that a recently sold/acquired company will not achieve its financial objectives. In certain cases, this could mean that the conditions for an earn-out might not be (completely) fulfilled, which in turn results in the seller missing out part of the purchase price. Although under Belgian law there might be civil law principles that might help a seller in these cases, a common-sense approach is often recommended.

Earn-out

Within the framework of a transaction, the purchase price is often the most important element for both parties. In practice, it happens that (the payment of) a part of the purchase price is subject to future financial and/or non-financial conditions. This price structure is typically referred to as an 'earn-out'.

Example: Party A was 100% owner of a family business until he decided to sell his company at the beginning of 2019. After weeks of negotiation, the parties, by mid-2019 agreed on an initial price of 25 million euros (locked box, no closing accounts) payable at closing of the deal (which occurred in July 2019). Additionally, the seller is entitled to a variable amount of the purchase price (the earn-out) and should remain on board at least until the end of 2021 as CEO (i.e. non-financial condition). The amount of the earn-out is linked to certain EBITDA targets for FY19, FY20 and FY21 (i.e. financial condition).

In principle, the earn-out mechanism serves to align the interest of both the buyer and the seller. It creates a clear-cut incentive resulting in a win-win situation for both parties.

Covid-19

Due to the outbreak of the Covid-19 virus, it is apparent that, aside from having an unprecedented impact on people's health and their daily lives, inevitable economic consequences are to be expected. It goes without saying that these economic repercussions in most cases will have an impact on the agreed financial earn-out conditions (and perhaps also on the non-financial earn-out conditions).

Can this be rectified?

Parties can always rely on contractual clauses (if any) or (try to) invoke civil law legal principles to rectify a situation. The purpose of invoking civil law legal principles (such as (temporary) force majeure or abuse of rights) could be to extend the period during which certain targets must be achieved. This is not an easy, and highly unpredictable, exercise and will depend on several elements (the nature of the earn-out conditions, the type of company and its activity, the will of the parties, etc.).

This does not mean that one cannot or should not take any other action…

Negotiating and mediation as alternative

It is important to bring the situation into perspective and to proactively engage in discussions with all parties involved. The seller, on the one hand, will want to retain his earn-out compensation and the buyer, on the other hand, will need a motivated CEO (especially in present times where good leadership is required). Neither of the parties is open to initiate a long-lasting legal battle with an unpredictable outcome, as it is unknown how the courts will react to the Covid-19 situation.

From these conversations a settlement/amendment agreement may arise, which could still result in a win-win scenario (e.g. a temporary suspension for achieving the targets and/or an extension of the (management) period imbedded in the earn-out) for both parties.

Your usual contact person at EY Law will be pleased to be at your service should you have any questions or in case you would like to further explore this path.

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The Locked Box: a Completion Mechanism that Can Drive Certainty and Value – Lieven Adams

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The Locked Box: a Completion Mechanism that Can Drive Certainty and Value

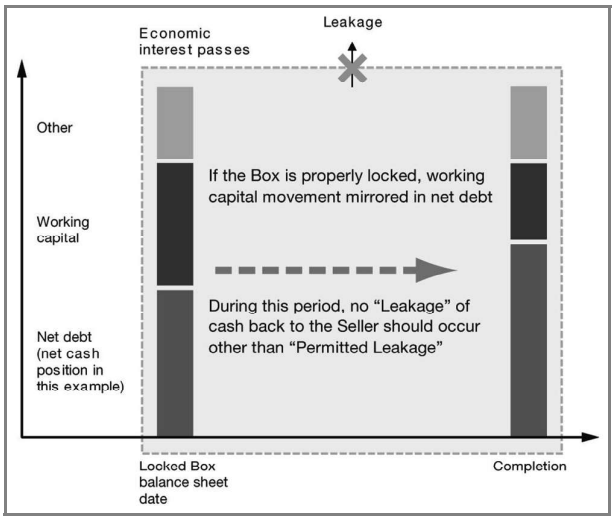
In deals, Buyers will in a lot of cases drive their target business valuation off a maintainable level of EBITDA. As the term suggests, EBITDA is calculated "before any cost related to the financial structuring of the target business". Therefore any debt and/or cash freely available in the business results in an adjustment of the Buyer's valuation. In addition, when using EBITDA as a value driver the Buyer is assuming that the infrastructure to deliver this level of profit is in place. Infrastructure can relate to sufficient working capital as well as tangible operating assets. Therefore, any shortfalls (or indeed excesses from the Seller's viewpoint) against "expected" infrastructure levels need to be addressed in the valuation. Further, the Buyer will want to know that it has the rights to the profit it is paying for and that any indebtedness (in addition to "normal" bank debt) related to historical trading results is at the cost of the Seller. Therefore, the initial valuation driven off EBITDA (or pre-financing cash flows) does not (necessarily) represent the "true" value of the target business. So, a mechanism is needed to move from Enterprise Value to Equity Value. There are the traditional mechanisms with a completion accounts process or a "Locked Box" whereby the Equity Value is known when the deal is signed, without involving completion mechanisms. As some hesitation still prevails regarding the application of Locked Boxes in Belgium, let's try to clarify how the Locked Box process works and what considerations are relevant from either Buyer or Seller side.

In the United Kingdom and other places abroad, dealmakers' use of the Locked Box instead of the more conventional completion mechanisms has become more accepted. In Belgium, the application of Locked Boxes to determine the Equity Value of a deal are not yet that common, but gain ground. The Locked Box is a tool most commonly employed by private equity ("PE") firms and other financial buyers to effect a clean separation at the conclusion of a transaction. Recently, we also observe a greater uptake of the Locked Box by non-financial Buyers. In addition, the Locked Box is viewed as a means of adding certainty to price, and thereby saving time and money associated with prolonged post-acquisition negotiations.

The Locked Box is a simple mechanism designed to remove the requirement for the parties to a deal to prepare and negotiate completion accounts. It does this by basing the mechanism off a historical balance sheet where all items of debt, cash and working capital are known at the date of signing. This contrasts to a standard completion mechanism where the amounts of cash, debt and working capital are not known until after completion.

How Does a Locked Box Work?

The Seller will ask Bidders for a fixed price for the target shares ("Equity Value") based on a known historical balance sheet ("the Locked Box balance sheet"). This Equity Value represents the debt-free and cash-free price after adjustment to reflect external debt and cash in the Locked Box balance sheet, a level of working capital at the Locked Box date compared to the Bidder's assessment of the "normal" level of working capital to be agreed upon by both parties for the purpose of pricing, and some other indebtedness or due diligence findings relating to historical trading results at the cost of the Seller. This Equity Value is then specified in the SPA. There is no post-completion mechanism and no completion accounts are prepared, thereby removing the costly completion accounts process and post-completion price adjustments.



The graph above shows the relationship between working capital and debt in a "proper" locked box transaction.

The Seller warrants that, between the Locked Box balance sheet date and the completion date, no "Leakage" of value from the Target to the Seller will occur (other than Permitted Leakage, as agreed by both parties). Leakage broadly represents cash flows or other value transfers to the benefit of the Seller, such as dividends, management charges, other payments to or for the benefit of other members of the Seller group, waivers of amounts due from the Seller to the Target, etc.

In effect, the Buyer takes over "economic ownership" of the Target from the Locked Box date, before it legally owns the business. The profits or losses made by the Target after the Locked Box balance sheet date will arise to the benefit/detriment of the Buyer. In theory, between the Locked Box balance sheet date and the completion date, if no value can leak out of the Target, any changes in working capital will be balanced by an equal movement in net debt. Therefore, payments in the ordinary course of business are allowed (*e.g.*, staff wages and paying trade creditors). The only other change in net debt should be limited to any cash profits or losses between the Locked Box balance sheet date and the completion date.

As noted above, the cash profits of the business accrue to the benefit of the Buyer. Should the Seller wish to retain the profits between the Locked Box date and the completion date, the Seller should consider making an interest charge (or a "daily profit rate charge") on the Equity Value that will result in a payment by the Buyer in respect of the period between the Locked Box date and the completion date. The Seller would argue that the interest charge reflects the fact that the Equity Value is calculated and economic interest passes at the Locked Box date but the Seller is not paid until Completion. As such, the interest charge compensates the Seller for the opportunity cost ("time value of money") of not having received the cash at the Locked Box date. Buyers will often compare the amount payable under the interest charge to the "cash profits" generated by the business after the Locked Box date (*e.g.*, EBITDA less interest charges, less tax charges, less depreciation or replacement capital expenditures).

At Completion, the Buyer is required to pay the Equity Value plus any interest charge on the Equity Value and eventually to re-finance the debt outstanding at the completion date.

In spite of the seemingly Seller-friendly nature of the Locked Box, the benefits of simplicity can translate into a mutually beneficial arrangement if certain questions are answered by both the Buyer and the Seller.

Seller considerations

- Whether the Locked Box balance sheet is "anchored" (*e.g.*, no carve-out to be done anymore), can be relied upon and can be warranted without inviting litigation – to what extent can the business to be sold be accurately separated from retained operations?
- If the Seller wishes to retain the profits after the Locked Box balance sheet date, what interest rate or daily profit rate should be used?
- What warranties should be given in respect of leakage and the Locked Box balance sheet?

Buyer Considerations

- The Locked Box balance sheet on which the Buyer is making pricing decisions needs to be sufficiently reliable and supported by appropriate warranties;
- The Buyer needs sufficient time and access to management to identify pricing issues in respect of cash, debt, working capital, capital expenditures, and other indebtedness related to historical trading results;
- The possible routes of leakage are comprehensively identified, defined and warranted;
- The business continues to be properly run after the Locked Box balance sheet date;
- Whether to pay an interest charge on Equity Value or whether the profits between the Locked Box date and the completion date have already been factored into the Buyer's assessment of the cash-free, debt-free price;
- Assuming the Buyer has agreed to pay an interest charge on Equity Value, assessing whether the interest charge or daily profit rate due to the Seller is supported

by the results of the business after the Locked Box balance sheet date to counter risk of business deteriorating between locked box date and completion; and

– A Buyer must also consider whether it has the resources and access to information to perform the necessary due diligence on the pre-acquisition balance sheet (*e.g.* sometimes already commitment to price before a Buyer gets exclusivity).

A Locked Box can drive value through simplicity and certainty of price, yielding time and cost savings. However, as noted above there are a number of considerations that both the buyer and the seller must contemplate before executing a transaction.

To conclude: in any transaction, the Sale and Purchase Agreement represents the outcome of key commercial and pricing negotiations. The financial aspects of the SPA are key to ensure that the Buyer is buying (and the Seller is selling) what they expect, for the price they expect and without undue residual risk. All this can be reached not only through the traditional completion accounts mechanism, but also through a Locked Box, if well considered by both Seller and Buyer.

Purchase Price Adjustment Mechanisms in M&A Transactions – The Locked Box Mechanism (Nov 2014)

Corporate Practice

WINSTON & STRAWN LLP

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Purchase Price Adjustment Mechanisms in M&A Transactions – The Locked Box Mechanism

Introduction

The determination of the purchase price in a private M&A transaction is an integral part of the commercial negotiation and, as a result, the sale and purchase agreement (SPA). In the UK, the two approaches normally used for calculating the price of the target business are either a closing balance sheet adjustment or a locked box mechanism. While a closing balance sheet adjustment mechanism may be the most common approach, the locked box mechanism is increasingly becoming the preferred route from a seller's perspective, particularly with private equity or other financial seller's where being able to return value to stakeholders is critical. We are also increasingly seeing locked box mechanisms used on non-UK deals as parties look to avoid the often lengthy process of preparing, reviewing and potentially disputing final price adjustments.

This briefing sets out how the locked box mechanism works, the key benefits and potential pitfalls of using this mechanism, together with some practical considerations to be aware of when using a locked box mechanism.

What is a locked box mechanism?

To illustrate, consider the following common structure for a private M&A transaction:

- the target is acquired on a 'debt free/cash free' basis, where the equity value equals enterprise value less net debt;
- the target is acquired with what the buyer considers to be a normal level of working capital; and
- the enterprise value of the target is determined as a multiple of what the buyer believes to be the target's sustainable earnings, often an EBITDA multiple.

Under a traditional closing balance sheet adjustment, the purchase price is paid as an estimate at closing. The purchase price is then adjusted after closing based on the difference in the working capital[1] of the business between the figure used in determining the estimated purchase price (or some other reference figure) and the actual figure calculated from a special purpose closing balance sheet prepared as at the closing date.

By contrast, if a locked box mechanism is used, the purchase price is calculated and negotiated by reference to a recent historic set of accounts dated prior to the date of signing of the SPA, commonly called the 'locked box date'. As the amount of cash, debt and working capital are therefore known by the parties at the time of signing of the SPA, the agreed price of the target business is fixed and written into the SPA. Consequently, the buyer will have no ability to adjust the purchase price after closing and will have to rely on contractual protections (through warranties, which are usually supported by an indemnity) to ensure no value leaks from the box through to the closing date. A key effect of this approach is that economic exposure (benefit and risk) to the target effectively transfers from the seller to the buyer at the locked box date, rather than at the closing date.

The benefits of a locked box mechanism

The main benefits of a locked box mechanism are:

- the purchase price is fixed at signing – giving the parties price certainty;
- no provisions are required in the SPA to deal with a closing balance sheet, which can be lengthy and heavily negotiated, saving the parties time and costs; and
- the parties are not required to prepare a closing balance sheet and deal with subsequent disputes, again saving time and costs, and allowing management to focus on the target business.

1. Sometimes the adjustment encompasses a movement in the value of all net assets, not just working capital. The extent of the adjustment will depend on the type of business carried on by the target. There may also be an adjustment for any difference in capital expenditure against budget, again depending on the target's business.

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In addition, a locked box approach can make it easier for a seller to compare bids in an auction, as the bidders will be asked to submit a fixed price based on a set of locked box date accounts supplied by the seller in the due diligence information.

Using a locked box mechanism

First and foremost, the buyer needs reliable locked box date accounts to commit to a locked box mechanism. The buyer will not have the chance to test the target's balance sheet through a closing balance sheet, as it would under a closing balance sheet mechanism. Consequently, the buyer will seek accounts that are not out of date at signing, and will want them to have been independently reviewed or audited. Given that it is not possible to adjust the purchase price, a well-advised buyer should also:

- undertake thorough financial due diligence on the locked box date accounts;
- require strong warranties relating to the locked box date accounts; and
- require strong warranties relating to the target's operations and performance since the locked box date.

Under a closing balance sheet approach, the buyer will typically be in control of preparing the closing balance sheet. Usually, this will put the buyer in a strong position to put forward its view of the appropriate value for certain items, like distressed inventory or doubtful debtors. However, with a locked box, the seller is in control of preparing the locked box date accounts. As a result, even after thorough financial due diligence the buyer may still be taking a risk on the value of the assets shown in the locked box date accounts.

A locked box will not provide the buyer with protection from ordinary course changes in the value of the business between the date of the reference accounts and closing. As noted above, once the SPA is signed (assuming no conditionality agreed separately), the buyer takes the economic risk and reward of the business on a retrospective basis from the locked box date until closing. As a result, such a mechanic is unlikely to be acceptable to a buyer where:

- the target business is of a seasonal nature and the values in a closing balance sheet will differ wildly from those in the reference accounts;
- the target business is highly integrated into the operations of the remainder of the seller's business. This will make the definitions around "leakage" extremely difficult as both parties will need to determine, on a case-by-case basis, which of the cash-flows are arms' length/ordinary course and which need to be trapped in the box; or
- there is a long period of time between the reference accounts and closing. This obviously affords a long period in which payments can leak between the target business and the retained group.

Summary of Pros and Cons for a Locked Box Mechanism

Seller	Buyer
Pros • Price certainty • Simplicity – no closing adjustment mechanism • Lower cost – management time not tied up post-closing • Increased control of the process • Easier to compare bids in an auction	**Pros** • Price certainty • Simplicity – no closing adjustment mechanism • Lower cost – management time not tied up post-closing
Cons • Will not get full benefit from operation of target business in interim period • Potential to lose out financially if interest/profit charge for the interim period is set too low	**Cons** • No closing mechanism to exploit • Limited ability to get management on side for post-close disputes • Risk of business deteriorating between locked box date and closing • Need to debate purchase price adjustments earlier, and with potentially less knowledge about the target

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Specific Issues

Leakage and permitted leakage

As mentioned above, a key aspect of a locked box mechanism is that no value leaks from the box through to the closing date. Leakage refers to the seller extracting value from the target in the period from the locked box date to the closing date. The parties will need to identify possible sources of leakage, with the seller's obligations to prevent any leakage usually being backed by a pound-for-pound indemnity.

However, not every transaction between the target and a member of the seller's group will be improper, and the parties will also need to identify possible items of 'permitted leakage'. There is ordinarily no reason why arm's length transactions between the target and the seller's group, which are priced fairly, should not be allowed to continue, at least until closing. Even leakage that is viewed by the buyer as being in excess of fair value or a value shift to the seller may be permitted by the buyer, provided it is visible and certain at signing, and there is a corresponding reduction in the purchase price.

If the target owes shareholder or intra-group loans, expect the buyer to control any increase in these loans during the gap period, not only for possible leakage but also to understand the proposed use of the funds.

Possible sources of 'leakage'	Possible sources of 'permitted leakage'
• Dividends, distributions, and returns of capital • Non-ordinary course intra-group payments • Waivers of rights or claims against members of the seller group or third parties • Changes to any 'permitted' trading arrangements between the target and members of the seller group, or any new arrangements • Transaction costs and expenses incurred by the target and deal bonuses paid to staff	• Items which are pre-agreed and recorded in the SPA, with an appropriate purchase price reduction (e.g., dividend strips) • Remuneration of staff in the ordinary course • 'Permitted' trading arrangements between the target and members of the sellers group • Payments provided for in the locked box account

Interest and profits

Given that the economic interest effectively passes to buyer from the locked box date, the buyer will have the benefit of the cash profits generated by the business from that date. In contrast, the seller incurs an opportunity cost as it does not receive payment at the locked box date but instead receives payment at closing. Accordingly, the seller will usually seek compensation for this. To achieve such compensation, the seller typically demands either:

- an interest charge on the purchase price between the locked box date and closing. This reflects the opportunity cost of the seller not receiving the proceeds from the buyer at the locked box date; or
- a proxy for the profits earned (e.g., daily profit rate) as they will not have been able to extract this from the business since the locked box date up to the closing date.

This charge whether proposed as compensation for the opportunity cost or proxy for profits, typically reflects the expected "cash profits" generated by the target after the locked box date.

Limitations

A locked box mechanism will typically include a time limit on the buyer's ability to bring a leakage claim. This is normally shorter than the warranty claim period in the SPA. Usually, there would be no de-minimis level of claims under the leakage indemnity (in contrast to the position for warranty claims). Whether there should be a cap on recovery for leakage and, if so, at what level, will be a matter of negotiation between the parties.

Conclusion

Locked box mechanisms are a useful alternative to a closing balance sheet approach, particularly for sellers. In the right circumstances, a locked box mechanism can save the parties time and costs, give the seller more certainty and allow the buyer to get on with the business post-closing. Notwithstanding this, locked box mechanisms give rise to their own problems, which means the benefits can be overstated. For these reasons, they are likely to be most useful to sellers seeking a quick sale, or exiting target companies that are sought after and will generate competitive tension through an auction process.

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Firm Overview

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M&A Survey – Bart Bellen en Frank Wijckmans

M&A SURVEY

Bart Bellen en Frank Wijckmans[1]

I. SITUERING VAN HET ONDERZOEK

A. Probleemstelling

In het kader van onderhandelingen met het oog op de overname van een onderneming is er een beperkte reeks van variabelen die nagenoeg steeds aan de orde komen. De eindonderhandelingen spitsen zich niet zelden toe op de uiteindelijke invulling van die variabelen. Als onderhandelingsargument wordt dan vaak gegoocheld met een verwijzing naar het al dan niet gebruikelijke karakter van een welbepaalde invulling van een variabele. Een 'cap' (maximale aansprakelijkheid van de verkopers) in functie van een bepaald percentage van de koopprijs wordt dan bijvoorbeeld als gebruikelijk omschreven of een bepaalde verklaring of garantie wordt omgekeerd als uitermate ongebruikelijk afgedaan. Dit is een vrij steriele doch typische argumentatie waarmee iedere M&A-onderhandelaar wel eens geconfronteerd wordt.

Bij nader inzien blijken dergelijke argumenten echter op geen enkel objectief gegeven te berusten. In België hebben we alvast geen enkele studie gevonden die deze problematiek nader zou hebben onderzocht. De eerlijkheid gebiedt dan ook toe te geven dat de 'gebruiken' waarnaar zo vaak wordt verwezen in onderhandelingen veelal een eerder subjectieve appreciatie van de betrokken onderhandelaar reflecteren, vaak gebaseerd op het toevallige akkoord dat werd bereikt in de meest recente transacties. Er lijkt alvast in België geen onmiddellijk houvast om die vermeende 'gebruiken' te objectiveren.

Het is tegen deze achtergrond dat we het initiatief hebben genomen om de Belgische praktijk aangaande die klassieke variabelen in kaart te brengen. Hiermee willen we een eerste aanzet geven tot het objectiveren van wat gangbaar mag worden genoemd in België.

B. Afbakening van het voorwerp

Het onderzoek werd beperkt tot aandelentransacties met betrekking tot niet-beursgenoteerde Belgische ondernemingen. Met deze beperking wilden we een vertekening van de resultaten vermijden die het gevolg zou kunnen zijn van de vermenging van transactiestructuren (overdracht van aandelen t.o.v. activa) of het al dan niet genoteerd karakter van de betrokken onderneming.

Door het voorwerp van het onderzoek te beperken tot aandelentransacties inzake niet-beursgenoteerde ondernemingen, blijft, ons inziens, een voldoende homogene groep van transacties over om tot zinvolle indicaties te kunnen komen[2].

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1. Advocaten te Brussel (contrast European and Business Law). Met de medewerking van Herlinde BUREZ, Thomas DE CLERCK, Caroline VAN DAELE en Inge MOLDENAERS.
2. Voor doeleinden van deze eerste peiling hebben we dan ook geen verdere onderscheiden gemaakt tussen de onderzochte transacties. Zo werd b.v. buiten beschouwing gelaten of de verkopers (al dan niet rechtstreeks) hebben geherinvesteerd in de doelvennootschap in het kader van een management buy-out, leveraged buy-out of herfinancierings- en herkapitaliseringsoperaties. Een substantiële herinvestering door de belangrijkste managers van de doelvennootschap kan er natuurlijk toe bijdragen dat de koper sneller genoegen neemt met een minder omvattende bescherming in de koop-verkoopovereenkomst. Omdat dergelijke transacties zich echter voordoen in een schier onbeperkt aantal varianten en complexe transactiestructuren, hebben we voor deze peiling gekozen om dergelijke nuances vooralsnog buiten beschouwing te laten.

Ook hebben we aandacht besteed aan de transactiewaarde en werd in de weergave van de resultaten een onderscheid gemaakt telkens als dit criterium relevant gebleken is[3].

C. Methode

Om de nodige basisinformatie ter beschikking te krijgen, hebben we een bevraging georganiseerd bij een reeks vooraanstaande actoren in de Belgische fusie- en overnamepraktijk[4]. Hen werd gevraagd om een gedetailleerde vragenlijst in te vullen, telkens met betrekking tot een staal van 3 tot 5 transacties.

We hebben de deelnemers de keuze gelaten van de betrokken transacties. Wel hebben we aangedrongen dat de transacties voldoende recent zouden zijn en dat ze, naar het oordeel van de participant, als normaal of representatief konden worden beschouwd voor zijn of haar M&A-praktijk[5].

In het licht van het voorgaande moge het duidelijk zijn dat het wetenschappelijke gehalte van onze bevindingen dient te worden gerelativeerd. Echter, zoals hierna zal blijken, kan men voor een aantal variabelen een duidelijke lijn onderscheiden in de onderzoeksresultaten, wat erop wijst dat uit de bevraging een aantal nuttige en relevante conclusies kunnen worden afgeleid. Wat als 'gebruikelijk' mag worden bestempeld, krijgt hierdoor toch enigszins een meer objectieve onderbouwing.

II. DE VOORBEREIDENDE FASE

Met betrekking tot de fase voorafgaand aan de eigenlijke contractsonderhandelingen, werd de bevraging toegespitst op twee klassieke praktijken : de intentiebrief ('letter of intent') en het bedrijfsonderzoek ('due diligence').

A. Gebruik van intentiebrieven (letters of intent)

Een eerste aspect dat werd onderzocht, is het gebruik van al dan niet verbindende voorbereidende afspraken zoals intentiebrieven. In de praktijk gebruikt men verschillende benamingen voor dergelijke voorbereidende afspraken zoals 'intentieverklaring', 'letter of intent', 'memorandum of understanding', 'heads of agreement', 'protocole d'accord' enz. Dergelijke precontractuele afspraken bestaan in tal van varianten; de precieze draagwijdte en juridische kracht ervan moeten geval per geval, op basis van de concrete inhoud, worden bepaald[6].

Verschillende auteurs waarschuwen ervoor dat bijzondere voorzichtigheid is geboden bij het opstellen van dergelijke voorbereidende transactiedocumenten. De ambiguïteit van de intentiebrief schuilt vaak precies in het feit dat de ene partij een document

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3. Concreet werden de onderzochte transacties opgedeeld in drie categorieën : (i) transactiewaarde minder dan 10 miljoen euro, (ii) transactiewaarde tussen 10 miljoen en 100 miljoen euro en (iii) transactiewaarde hoger dan 100 miljoen euro.
4. Het betreft in het bijzonder M&A-specialisten verbonden aan volgende financiële dienstverleners en advocatenkantoren : Altius, Ashurst, CEW, contrast, Deloitte Corporate Finance, Dumon Sablon Van Heeswijck, Eubelius, Fortis Private Equity, Freshfields, Liedekerke, Linklaters, Loyens, Marx Van Ranst en Petercam.
5. De bevraging had in totaal betrekking op een zestigtal transacties. De vertrouwelijkheid van de onderzochte transacties werd ten volle gerespecteerd. De deelnemers werd niet gevraagd om namen of andere details mee te delen die de anonimiteit van de bevraging in het gedrang zouden kunnen brengen. De vragenlijst bevatte wel een beveiliging om dubbeltellingen te vermijden.
6. Over dergelijke voorbereidende overeenkomsten in het algemeen, zie onder meer : M. Bollen, "Precontractuele aansprakelijkheid voor het afspringen van onderhandelingen, in het bijzonder m.b.t. een acquisitieovereenkomst", *T.B.B.R.* 2003, nr. 3, p. 136-160 (142-146); W. Dejonghe en W. Van De Voorde, "Negotiated acquisition", in W. Dejonghe en W. Van De Voorde, *M&A in Belgium*, Den Haag, Kluwer Law International, 2001, p. 60-63; E. Dirix, "Gentlemen's agreements en andere afspraken met onzekere rechtsgevolgen", *R.W.* 1985-1986, p. 2139-2140; U. Draetta, "Precontractual documents in merger or acquisition negotiations", *R.D.A.I.* 1991, nr. 2, p. 229-249; W. Geldof, "Voorcontracten en voorbereidende contracten", in E. Dirix en A. Van Oevelen, *Bijzondere overeenkomsten, artikelsgewijze commentaar met overzicht van rechtsleer en rechtspraak*, Antwerpen, Kluwer Rechtswetenschappen, p. 1-9; G. Schrans, "De progressieve totstandkoming der contracten", *T.P.R.* 1984, p. 16 e.v.; P. Van Hooghten, "Acquisitieovereenkomsten", *D.A.O.R.* 1990, nr. 16, p. 63-65; A. Van Oevelen, "Juridische verhoudingen en aansprakelijkheid bij onderhandelingen over (commerciële) contracten", *D.A.O.R.* 1990, nr. 14, p. 57-63.

wenst te ondertekenen dat hem zo weinig mogelijk bindt, terwijl de andere partij net het tegendeel beoogt[7]. Indien de intentiebrief, naast het eigenlijke voorwerp van de voorgenomen transactie (de aandelen), ook een prijsbepaling of -formule bevat, dient men ook rekening te houden met artikel 1583 van het Burgerlijk Wetboek (hierna "BW"). Artikel 1583 BW bepaalt dat de koop tussen de partijen voltrokken is, en de koper ten aanzien van de verkoper van rechtswege de eigendom verkrijgt, zodra er overeenstemming is omtrent de zaak en de prijs. Daarbij is het irrelevant dat de zaak nog niet is geleverd of de prijs nog niet werd betaald. Het is dus in ieder geval aangewezen om uitdrukkelijk het al dan niet verbindend karakter van de afspraken te bepalen in de intentiebrief.

In de praktijk worden de verbindende afspraken in intentiebrieven doorgaans beperkt tot het vertrouwelijkheidsbeding, de forumkeuze en, eventueel, een periode van exclusiviteit tijdens dewelke de koper en (vooral) de verkoper overeenkomen om geen gesprekken met derden te voeren die het voorwerp van de voorgenomen transactie kunnen beïnvloeden.

In het onderzoek zijn we niet ingegaan op ieder van deze detailaspecten, maar hebben we ons toegespitst op een aantal kernvragen.

Uit de bevraging kan vooreerst worden afgeleid dat in een duidelijke meerderheid van de transacties (75 %) met een intentiebrief werd gewerkt vooraleer een eigenlijke overnameovereenkomst werd gefinaliseerd.

Tevens leert de bevraging dat het uitermate gebruikelijk is dat in deze voorafgaande fase onderhandelingsexclusiviteit wordt bedongen. De grote meerderheid van de intentiebrieven voorzag in een dergelijk exclusiviteitsbeding. Tevens valt op dat onderhandelingsexclusiviteit in een beperkt aantal gevallen werd bedongen zonder dat er een intentiebrief werd getekend[8].

Concreet werd in 72 % van de onderzochte transacties onderhandelingsexclusiviteit bedongen, al dan niet op basis van een intentiebrief.

Uit het voorgaande mag worden afgeleid dat zowel het gebruik van intentiebrieven, als het bedingen van onderhandelingsexclusiviteit, de regel vormen.

B. Bedrijfsonderzoek (due diligence)

Het bedrijfsonderzoek ('due diligence') neemt vaak een centrale plaats in in het voortraject van een overnametransactie. In een klassiek overnameproces krijgen een kandidaat-koper en zijn adviseurs doorgaans gedurende een bepaalde periode toegang tot geselecteerde vertrouwelijke informatie van de doelvennootschap om zo zelf een inschatting te kunnen maken van de kwaliteit van het vermogen en haar eventuele verborgen passiva (of activa) te onderzoeken[9]. Het bedrijfsonderzoek moet de kandidaat-koper toelaten om de veronderstellingen die werden gehanteerd bij de prijsbepaling te valideren en ook om bijzondere aandachtspunten te identificeren die van belang zijn bij de redactie van de overnameovereenkomst (en in het bijzonder bij de waarborgen die van de verkoper worden gevraagd). In grotere transacties wordt de kandidaat-koper voor het 'due diligence'-onderzoek vaak bijgestaan door een multidisciplinair team bestaande uit eigen gespecialiseerde personeelsleden, financiële adviseurs, busi-

7. P. Van Hooghten, "Acquisitieovereenkomsten", *l.c.*, p. 63.
8. Deze - op het eerste gezicht verrassende - bevinding kan wellicht worden verklaard door het gegeven dat het gebruik van intentiebrieven, als dusdanig, in moderne biedingsprocedures (auctions) vaak overbodig is. De exclusiviteit zal dan immers een voorafbepaald onderdeel zijn van het bod dat de kandidaat-koper verwacht wordt uit te brengen.
9. Voor een basislijst van de juridische informatie die de kandidaat-koper kan interesseren, zie onder meer : P. Van Hooghten, "Acquisitieovereenkomsten", *l.c.*, p. 66 e.v. Over due diligence meer in het algemeen, zie b.v. W. Dejonghe en W. Van De Voorde, *o.c.*, p. 63-66; B. De Vuyst, "Dommages pour manque d'information ou pour information erronée, 'due diligence' et 'data rooms' : la maîtrise des risques', *D.A.O.R.* 2000, nr. 54, p. 80-82; W. Slagter, "Het due diligence-onderzoek", *T.V.V.S.* 1994, p. 225.

ness consultants, technische experts, fiscalisten, juristen en specialisten in milieuaangelegenheden of andere niches (b.v. intellectuele rechten).

In de bevraging werd met betrekking tot dit thema vooral gepeild naar het gebruik van geformaliseerde onderzoeksprocedures. De praktische relevantie van het in kaart brengen van de informele informatie-uitwisseling leek ons immers eerder beperkt. We gaan er immers van uit dat in iedere overnametransactie ook op een meer informele manier informatie wordt uitgewisseld of betrokken bij derden.

De bevraging leert dat het zeer gebruikelijk is om een zogenaamde 'data room' ter beschikking te stellen. Met een 'data room' wordt bedoeld dat de verkoper en zijn adviseurs - soms echter de doelvennootschap zelf - bepaalde vertrouwelijke informatie op één plaats verzamelen en gedurende een afgesproken periode ter beschikking stellen aan potentiële kopers. De data room wordt meestal buiten de doelvennootschap zelf georganiseerd. Men poogt zo om de vertrouwelijkheid van de onderhandelingen ten aanzien van het personeel van de doelvennootschap te beschermen en ook om mogelijke operationele hinder voor de doelvennootschap zo veel als mogelijk te beperken. In de praktijk stelt men bij grotere transacties ook vast dat deze processen steeds vaker elektronisch worden beheerd en de informatie ter beschikking wordt gesteld via het internet in een zogenaamde virtuele data room met beveiligde toegang[10].

In ruim 84 % van de transacties die in de bevraging betrokken waren, werd gebruikgemaakt van een 'data room'-procedure.

Als aanvulling op de informatie die ter beschikking wordt gesteld in de data room, wordt vaak ook een in mindere of meerdere mate geformaliseerde 'Q&A'-(vraag en antwoord) procedure gehanteerd. Dergelijke procedures bieden aan het 'due diligence'-team van de kandidaat-koper de gelegenheid om bijkomende vragen te stellen of bijkomende documenten op te vragen.

In 60 % van de onderzochte transacties werd met een geformaliseerde Q&A-procedure gewerkt.

Doorgaans een gevoelige kwestie is of de kandidaat-koper en zijn adviseurs kopieën zullen mogen nemen van de informatie die in de data room ter beschikking wordt gesteld. Het onderzoek leert dat het nemen van kopieën in het kader van het 'due diligence'-onderzoek veel ruimer wordt toegestaan dan vaak wordt vermoed. In een zeer beperkt aantal transacties (met relatief lagere transactiewaarde) werd het nemen van kopieën zelfs toegestaan ook al was er geen geformaliseerde data room voorzien.

In 56 % van de gerapporteerde transacties werd het nemen van kopieën van documenten van de doelvennootschap toegestaan.

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10. In een volgende bevraging nemen we ons voor om specifiek te polsen naar het gebruik van een zogenaamde 'vendor due diligence'. Deze praktijk wordt soms toegepast door verkopers in het kader van formele biedingsprocedures. De verkoper laat in voorkomend geval bij aanvang van het proces zelf de belangrijkste risico's van de verkochte onderneming analyseren en (bij hypothese) op onafhankelijke en objectieve wijze beschrijven door de door hem aangestelde adviseurs. De uit dit onderzoek voortvloeiende verslagen worden dan ter beschikking gesteld van de kandidaat-kopers. De koper zal zich desgevallend kunnen beroepen op de inhoud van deze verslagen of deze in een meer gevorderd stadium van het overnameproces kunnen onderwerpen aan een bevestigend bedrijfsonderzoek (*confirmatory due diligence*). Een dergelijke aanpak heeft een aantal onmiskenbare voordelen, zeker in het kader van moderne veilingprocedures : zo krijgt de verkochte onderneming in principe slechts te maken met één bedrijfsonderzoek (en niet met opeenvolgende onderzoeken door verschillende kandidaten), de verschillende kandidaat-kopers krijgen op hetzelfde moment identieke informatie ter beschikking wat maximale garanties biedt voor hun gelijke behandeling, een grotere groep kandidaat-kopers is beter geïnformeerd en hoeft toch niet te vrezen voor onnodige kosten wanneer zou blijken dat zij in een later stadium nog afvallen. De verkoper kan dan ook verscheidene kandidaat-bieders in het spel houden en zo lang mogelijk de beslissing uitstellen om aan één kandidaat exclusiviteit toe te kennen zodat de concurrentie tussen de bieders tot in een vergevorderd stadium maximaal kan worden uitgespeeld. Bij welslagen van de transactie kunnen kosten verbonden aan de vendor due diligence ook eenvoudiger worden meegenomen in de financiering van de transactie. Bovendien kan het onderzoek grotendeels voorafgaandelijk gebeuren zodat aanzienlijke besparingen kunnen worden gerealiseerd, in kosten en in tijd, zowel voor de verkoper als voor de kandidaat-kopers en er dus minimale disruptie of verlies van momentum ontstaat in de veiling zelf.

III. DE KOOP-VERKOOPOVEREENKOMST

Het centrale document in elke overnametransactie is de koop-verkoopovereenkomst. Hoewel deze overeenkomst op de meest diverse manieren kan worden geredigeerd, lijkt de meer Angelsaksische aanpak (zelfs voor kleinere transacties) de overhand te hebben. De bevindingen van ons onderzoek worden hierna bijgevolg overeenkomstig deze aanpak besproken.

A. Opschortende voorwaarden

Zeer vaak wordt een overnameovereenkomst onder opschortende voorwaarden gesloten[11]. De vervulling van de opschortende voorwaarden wordt dan op een later tijdstip, na de ondertekening van de overeenkomst, vastgesteld. Dit tijdstip wordt in het jargon doorgaans de 'closing' of 'completion' genoemd[12]. Het is met andere woorden pas op het ogenblik van de closing dat in principe de eigendomsoverdracht van de aandelen en de betaling van de prijs plaatsvindt[13].

In de praktijk vindt men een waaier van mogelijke opschortende voorwaarden terug in koop-verkoopovereenkomsten. Zeer klassiek dient bij grotere transacties bijvoorbeeld te worden gewacht op de goedkeuring van de kartelautoriteiten (de Europese Commissie of één of meer nationale mededingingsautoriteiten)[14]. In afwachting van die goedkeuring voorziet de toepasselijke regelgeving immers doorgaans in een schorsingsplicht. Een transactie implementeren alvorens de vereiste mededingingsrechtelijke goedkeuringen werden bekomen ('jumping the gun'), is sanctioneerbaar. Het bekomen van deze goedkeuringen wordt dan ook om die reden standaard als een opschortende voorwaarde opgenomen.

Andere opschortende voorwaarden die in de praktijk vaak voorkomen zijn : het verkrijgen van bankfinanciering, de ondertekening van bepaalde andere met de transactie gerelateerde documenten (b.v. consultancy-overeenkomsten met de verkopers, leverings- of dienstencontracten tussen de doelvennootschap en de verkopende moedervennootschap, bevestigingen van bepaalde medecontractanten van de doelvennootschap die het recht hebben om een bestaande overeenkomst te beëindigen in geval van een controlewijziging over de doelvennootschap (zgn. 'change of control' bepalingen), enz.).

Bij een koop-verkoop onder opschortende voorwaarden zal de koper dikwijls ook trachten te bedingen dat de doelvennootschap tussen de datum van ondertekening en de vervulling van de opschortende voorwaarden geen belangrijke negatieve evolutie mag hebben gekend (zgn. 'material adverse change' of, in het jargon, de 'MAC'-clausule). Soms wordt een koop-verkoopovereenkomst ook ondertekend onder de

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11. Zie voor een algemene bespreking van de voorwaarde in het verbintenissenrecht bijvoorbeeld : M. VAN QUICKENBORNE, "Voorwaarde", in E. DIRIX en A. VAN OEVELEN, *Bijzondere overeenkomsten. Artikelsgewijze commentaar met overzicht van rechtsleer en rechtspraak*, Antwerpen, Kluwer Rechtswetenschappen, p. 1-160.
12. "Closing" geniet doorgaans de voorkeur van Amerikaans geïnspireerde overeenkomsten; "completion" van de Britse.
13. Wanneer de koop-verkoopovereenkomst onder opschortende voorwaarden wordt ondertekend en de partijen derhalve de bedoeling hebben om de overdracht pas tot stand te doen komen na de vervulling van deze voorwaarden, kan het voorzichtig zijn om de werking van artikel 1179 van het Burgerlijk Wetboek contractueel uitdrukkelijk uit te sluiten. In het andere geval wordt de overeenkomst immers principieel geacht retroactief tot stand te zijn gekomen op de datum van ondertekening.
14. Een transactie zal bijvoorbeeld bij de *Belgische Mededingingsautoriteit* moeten worden aangemeld wanneer (i) de betrokken ondernemingen samen in België een omzet realiseren van meer dan 100 miljoen euro en (ii) minstens twee van de betrokken ondernemingen individueel in België een omzet realiseren van minstens 40 miljoen euro. Transacties die een duurzame wijziging van zeggenschap tot gevolg hebben, dienen bij de *Europese Commissie* te worden aangemeld (i) indien a) de totale omzet die over de gehele wereld door alle betrokken ondernemingen tezamen is behaald, meer dan 5 miljard EUR bedraagt, en b) ten minste twee van de betrokken ondernemingen elk afzonderlijk een totale omzet hebben behaald die meer dan 250 miljoen EUR bedraagt, tenzij elk van de betrokken ondernemingen meer dan twee derde van haar totale omzet binnen de Gemeenschap in een en dezelfde lidstaat behaalt, en tevens (ii) indien a) de totale omzet die over de gehele wereld door alle betrokken ondernemingen tezamen is behaald, meer dan 2,5 miljard EUR bedraagt, b) de totale omzet die door alle betrokken ondernemingen in elk van ten minste drie lidstaten is behaald, meer dan 100 miljoen EUR bedraagt, c) in elk van de drie lidstaten die ten behoeve van letter b) in aanmerking zijn genomen, ten minste twee van de betrokken ondernemingen elk afzonderlijk een totale omzet hebben behaald die meer dan 25 miljoen EUR bedraagt, en d) ten minste twee van de betrokken ondernemingen elk afzonderlijk een totale omzet hebben behaald die meer dan 100 miljoen EUR bedraagt, tenzij elk van de betrokken ondernemingen meer dan twee derde van haar totale omzet binnen de Gemeenschap in een en dezelfde lidstaat behaalt.

opschortende voorwaarde dat een (al dan niet bijkomend) bedrijfsonderzoek bepaalde resultaten zou bevestigen ('confirmatory due diligence'). Het belang van de nauwkeurige formulering van de opschortende voorwaarden kan niet genoeg worden benadrukt.

Het onderzoek wijst uit dat het afhankelijk maken van de overeenkomst van de vervulling van één of meer opschortende voorwaarden, dan wel de onmiddellijke inwerkingtreding bij ondertekening, sterk afhangt van de transactiewaarde. Bij transacties met een waarde lager dan 10 miljoen euro, viel in 56 % van de gevallen de ondertekening samen met de inwerkingtreding. Voor transacties tussen 10 miljoen euro en 100 miljoen euro trad de overeenkomst nog slechts onmiddellijk in werking bij ondertekening in 19 % van de gevallen. Alle transacties met een waarde hoger dan 100 miljoen euro voorzagen in opschortende voorwaarden[15].

B. Prijs en prijsaanpassingsclausules

De prijsbepaling is uiteraard een centraal thema in het kader van de overnameonderhandelingen. De situatie is op dit vlak relatief eenvoudig indien de partijen een welbepaalde prijs afspreken en contractueel bedingen dat deze prijs meteen betaald wordt bij ondertekening of op closing na de vervulling van toepasselijke opschortende voorwaarden.

Vaak gaan er met de structurering van de betaling complexere scenario's gepaard. Het zijn deze scenario's waarnaar in onze bevraging de aandacht is uitgegaan.

Een eerste scenario voorziet in de opstelling van zogeheten 'closing accounts'. Dit zijn rekeningen die doorgaans na de ondertekening worden opgesteld (op een door partijen contractueel vastgelegde 'cut off'-datum, vaak de datum van de closing). Regelmatig wordt erin voorzien dat de overnemer een bepaalde tijd krijgt om deze 'closing accounts' aan een kritisch onderzoek te onderwerpen. Eens er overeenstemming is tussen de partijen aangaande de 'closing accounts' wordt de formule die de partijen met betrekking tot de bepaling van de prijs hebben afgesproken, toegepast op deze 'closing accounts'. Op deze basis wordt de overnameprijs dan gefinaliseerd. Dit kan leiden tot prijscorrecties die nog na de closing tot een verrekening tussen de partijen aanleiding kunnen geven.

Bij de redactie van dergelijke prijsaanpassingsclausules is opnieuw voorzichtigheid geboden. Immers, één van de fundamentele voorwaarden voor de geldigheid van koop-verkoopovereenkomsten is dat het voorwerp van de koop, en in het bijzonder de prijs, bepaald moet zijn of minstens bepaalbaar op basis van objectieve elementen. De bepaling van de prijs mag dus in principe niet afhangen van de wil van één van de partijen of van een uitgesteld akkoord tussen partijen[16]. Vaak wordt in dergelijke clausules de uiteindelijke prijsbepaling toevertrouwd aan een derde-expert voor het geval de koper en de verkoper geen overeenstemming zouden vinden over de 'closing accounts' en de daarop gebaseerde prijsaanpassing[17].

Onze bevraging leert dat procedures voor aanpassing van de prijs op basis van 'closing accounts' meer worden toegepast dan we hadden verwacht. In ruim 35 % van de transacties werd er immers gebruikgemaakt van deze techniek met een prijsaanpassing en verrekening na closing tot mogelijk gevolg.

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15. In dergelijke gevallen is er naar geldend recht immers doorgaans minstens één opschortende voorwaarde, namelijk de goedkeuring of het *nihil obstat* van de bevoegde kartelautoriteiten. Zie voetnoot 14.
16. L. Cornelis, *Algemene theorie van de verbintenis*, Antwerpen, Intersentia, 2000, nr. 103, p. 126.
17. Conform artikel 1592 BW stelt dit geen probleem. Evenwel geldt als voorwaarde dat de derde-expert zijn opdracht aanvaardt en dat hij voldoende objectieve berekeningselementen aantreft die hem toelaten zijn opdracht uit te voeren. Zie onder meer : L. Cornelis, *o.c.*, nr. 102, p. 126; W. Van Gerven, *Verbintenissenrecht. Boekdeel I*, Leuven, Acco, 2001-2002, p. 72-73.

In een tweede scenario wordt de finale prijs deels afhankelijk gemaakt van de toekomstige realisatie van bepaalde objectieven. Een klassiek voorbeeld betreft het behoud van een klantenportefeuille door de overgenomen onderneming gedurende een bepaalde periode (bijvoorbeeld tot 12 of 24 maanden na de overdracht). In de mate dat de bestaande klanten aan het einde van die referentieperiode trouw gebleven zijn aan de overgenomen onderneming, volgt er een bijkomende betaling door de overnemer. Andere voorbeelden zijn het behalen van bepaalde financiële parameters door de doelvennootschap in de eerste jaren volgend op de overname. Dergelijke clausules vindt men vaak terug in situaties waarbij de verkopers na de overname actief betrokken blijven in het management van de doelvennootschap.

Dergelijke nabetalingen van de koopprijs worden vaak omschreven als 'earn-outs'[18].

Onze bevraging leert dat in bijna 10 % van de gerapporteerde transacties van een 'earn out'-formule werd gebruikgemaakt.

Dit is een eerder verrassend resultaat. De 'earn out'-formule vormt immers een positieve aansporing voor de verkopers om ervoor te zorgen dat de waardevolle aspecten van de onderneming (zoals de klantenportefeuille) intact worden overgedragen. In zekere zin kan een dergelijke 'earn out'-formule worden beschouwd als een positievere formulering van het niet-concurrentiebeding. Beide mechanismen kunnen worden aangewend om hetzelfde objectief te bereiken.

IV. VERKLARINGEN EN GARANTIES VAN DE VERKOPER

In een klassieke overnameovereenkomst nemen de verklaringen en garanties van de verkoper een centrale plaats in. Dit mag niet verwonderen. De ontevreden koper van aandelen geniet volgens de klassieke rechtspraak en doctrine immers een zeer beperkte wettelijke bescherming[19].

Bij de verkoop van de totaliteit van de aandelen of een controleparticipatie, hebben de partijen, vanuit economisch oogpunt, de bedoeling om de controle over de onderneming en het onderliggende maatschappelijk vermogen van de doelvennootschap over te dragen. Juridisch gezien blijft het eigenlijke voorwerp van de transactie echter beperkt tot de overgedragen aandelen zelf en strekt het zich niet uit tot het onderliggende maatschappelijke vermogen van de doelvennootschap[20]. De eigen rechtspersoonlijkheid van de doelvennootschap verhindert inderdaad elke uitbreiding van het voorwerp van de transactie tot het onderliggende vermogen.

De drie wettelijke garantieverplichtingen van een verkoper, te weten de verplichtingen tot conforme levering van de overeengekomen zaak[21], tot vrijwaring voor uitwinning[22] en de vrijwaringsverplichting voor verborgen gebreken[23] hebben dan ook principieel enkel betrekking op het onmiddellijke, juridische voorwerp van de transactie (de aandelen) en niet op het onrechtstreekse, economische voorwerp van de transactie (het

18. Zie bijvoorbeeld : P. Della Faille, *Fusions, acquisitions et évaluations d'entreprises. Une approche juridique, économique et financière*, Brussel, Larcier, 2001, p. 182-183.
19. Zie onder meer : P. Van Hooghten, "Dwaling en bedrog bij een overeenkomst tot verkoop van aandelen", noot onder Antwerpen 19 september 1990, *T.R.V.* 1992, p. 100-104; W. Dejonghe en M. Corynen, "De rechtspositie van de overnemer bij de verwerving van een onderneming door acquisitie van aandelen", *V&F* 1997, p. 85-98.
20. Zie bijvoorbeeld : D. Van Gerven, "Bedrog bij de verkoop van aandelen", noot onder Antwerpen 11 februari 2005, *T.R.V.* 2005, 99, 118-119 en de aldaar geciteerde rechtspraak en rechtsleer.
21. Artikel 1603 B.W.
22. Artikel 1626 B.W.
23. Artikel 1641 B.W.

onderliggende vermogen)[24]. Alhoewel verschillende auteurs hebben gepoogd om de klassieke leer ter discussie te stellen[25], blijft deze vooralsnog overeind : het juridische voorwerp van een aandelenoverdracht blijft beperkt tot de overgedragen aandelen zelf en strekt zich niet uit tot het onderliggende vermogen[26].

De koper zal dus noodzakelijkerwijze in de overnameovereenkomst zelf bijkomende garanties dienen te bedingen omtrent de samenstelling van het onderliggende vermogen waarover hij de controle wenst te verwerven.

A. Algemene verklaringen en garanties[27]

Gezien de zeer beperkte wettelijke bescherming van de koper van aandelen, hoeft het niet te verbazen dat in alle (100 %) onderzochte overeenkomsten een uitdrukkelijke opsomming werd opgenomen van bijkomende verklaringen en garanties betreffende het onderliggende vermogen.

Dit sluit niet uit dat in transacties waarin geen professionele ondersteuning voorhanden is, enkel op de wettelijke bescherming wordt teruggevallen. Echter, zodra een overnemer zich professioneel laat begeleiden, is het evident dat er contractuele verklaringen en garanties worden voorzien.

In kringen van M&A-practici circuleren er standaardlijsten van verklaringen en garanties. Deze kunnen van kantoor tot kantoor en adviseur tot adviseur enigszins verschillen, maar spitsen zich in essentie steeds toe op dezelfde punten. De garanties hebben klassiek betrekking op de volgende elementen : (i) de geldige oprichting van de doelvennootschap, (ii) de aandelen en afwezigheid van overdrachtsbeperkingen of andere diluerende effecten, (iii) de afwezigheid van faillissementsvoorwaarden, (iv) een garantie van een referentiebalans waarop de prijs werd gebaseerd en eventueel voorgaande jaarrekeningen, (v) de normale verderzetting van de onderneming sinds de laatst gegarandeerde balansdatum, (vi) de vrije en onbezwaarde titel en goede staat van de activa, (vii) verklaringen in verband met de belangrijkste contracten van de onderneming, (viii) milieurechtelijke aangelegenheden en vergunningen, (ix) fiscale en socialezekerheidsrechtelijke conformiteit en afwezigheid van niet-geprovisioneerde verplichtingen, (x) afwezigheid van geschillen en (xi) verzekeringen.

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24. Zo kan de koper zich beroepen op de waarborg tot vrijwaring voor uitwinning wanneer de aandelen zelf worden uitgewonnen, bijvoorbeeld wanneer de verkoper niet de volle eigendom van de aandelen heeft of deze niet vrij en onbelast werden verkocht. De waarborg beschermt dezelfde koper echter niet wanneer onderdelen van het onderliggende vermogen zelf worden uitgewonnen. In bepaalde gevallen kan een beroep op de leer van de goede trouw nog een corrigerende werking hebben in geval van uitwinning van de cliënteel van de doelvennootschap door de verkopers na de overname, zelfs zonder uitdrukkelijk niet-concurrentiebeding. Zie bijvoorbeeld : M. Wauters, "Garanties bij overdracht van aandelen", *D.A.O.R.* 1997, nr. 44, p. 17-55 (27-32). Op dezelfde wijze kan de koper van aandelen zich beroepen op de wettelijke waarborg voor verborgen gebreken wanneer het probleem betrekking heeft op de aandelen zelf en deze behept zijn met een verborgen gebrek dat ze ongeschikt maakt voor hun gebruikelijke bestemming of het specifieke gebruik waarvoor de koper ze bestemde. Het betreft in het bijzonder het recht om deel te nemen aan, en te stemmen in, de algemene vergadering, het recht om te delen in de winst van de vennootschap, het recht om te delen in het maatschappelijk vermogen zowel tijdens het bestaan als bij de vereffening van de vennootschap. Indien een verborgen gebrek de normale uitoefening van deze rechten verhindert, kan de verkoper tot vrijwaring gehouden zijn wanneer de andere toepassingsvoorwaarden zijn voldaan. Echter, een verminderde waarde van de verkochte aandelen of van het onderliggende vennootschapsvermogen is op zichzelf niet voldoende om de vrijwaringsplicht voor verborgen gebreken te kunnen inroepen. Voor besprekingen van toepassingen van deze waarborgen en wilsgebreken in het kader van aandelenoverdracht, zie b.v. D. Devos, "La notion de vices cachés dans la vente d'actions", noot onder Brussel 20 mei 1987, *T.B.H.* 1988, p. 52-58 ; I. Corbisier, "Des vicissitudes affectant le cas échéant une cession d'actions ou de l'omniprésence discrète de la cause dans une vision contractualiste de l'entreprise", noot onder Luik 1 april 1992, *R.P.S.* 1993, p. 123-167.
25. Zie bijvoorbeeld : S. Van Crombrugge, "De rechtsverhouding tussen de koper en de verkoper van een controleparticipatie", *T.B.H.* 1983, p. 188-222.
26. Zie in dit verband evenwel de beperkte nuancering van de klassieke leer via de gedeeltelijke aanvaarding door het Hof van Cassatie van het "functioneel verborgen gebrek" bij overdrachten van aandelen door professionele verkopers (Cass. 19 juni 1980, *R.W.* 1981-1982, p. 940; Cass. 17 mei 1984, *J.T.* 1984, p. 566). Deze en andere nuanceringen van de klassieke leer worden uitvoerig behandeld in W. Dejonghe, en M. Corynen, *l.c.*, 1997, p. 85-98 (91-94), en in M. Wauters, *l.c.*, p. 33-40.
27. Zie voor besprekingen van de verklaringen en waarborgen in overnameovereenkomsten onder meer : A. Coibion, "Quelques réflections sur les garanties conventionnelles en matière de cession d'actions et sur l'influence de la pratique anglaise", noot onder Brussel 17 mei 2001, *T.B.H.* 2003, p. 864-879; A. Couret en D. Ledouble, *La maîtrise des risques dans les cessions d'actions*, GLN Joly Editions, 1994, 140 p.; P. Leys, "Verklaringen en waarborgen in een Belgische overeenkomst tot overdracht van aandelen", in B. Tilleman en A. Verbeke (ed.), *Actualia Vermogensrecht*, Brugge, Die Keure, 2005, p. 447-456.

Uit de bevraging blijkt dat in bijna 80 % van de gerapporteerde transacties de verklaringen en garanties essentieel overeenstemden met zo'n standaardlijst. Dit impliceert dat in slechts 1 transactie op 5 afwijkende of op de transactie specifiek toegespitste verklaringen en garanties werden voorzien. Deze verhouding is lager dan we hadden geanticipeerd.

B. Uitzonderingen (disclosures)

In aansluiting op het systeem van verklaringen en garanties rijst de klassieke problematiek van de uitzonderingen. Het standaardargument van de verkoper is dat de koper zich toch bezwaarlijk kan beroepen op problemen die hij kende bij het aangaan van de overnameovereenkomst. Omgekeerd stelt de koper dat hij mag uitgaan van de correctheid van de contractueel geboden verklaringen en garanties en dat zijn effectieve kennis van bepaalde problemen in dit kader geen relevantie heeft.

Een en ander heeft geleid tot een contractuele praktijk waarbij uitdrukkelijk wordt voorzien in uitzonderingen op de verklaringen en garanties. Dit maakt dat de koper een beroep kan doen op de verklaringen en garanties tenzij er in de overeenkomst uitdrukkelijke uitzonderingen (de zogeheten 'disclosures') zijn voorzien.

Het onderzoek leert dat in bijna 42 % van de gerapporteerde transacties werd aanvaard dat de data room als een uitzondering gold op de verklaringen en garanties.

In het verlengde van het 'data room'-onderzoek wordt er vaak een systeem van vraag-en-antwoord opgezet. Dit stelt de adviseurs van de koper in staat om bijkomende vragen te stellen die opkomen naar aanleiding van het 'due diligence'-onderzoek.

Uit het onderzoek blijkt dat deze vraag-en-antwoordprocedure in iets meer dan 20 % van de gevallen als een uitzondering op de verklaringen en garanties werd aanvaard[28].

De meest voor de hand liggende methode om uitzonderingen op de verklaringen en garanties te voorzien, is de opstelling van een specifieke uitzonderingslijst of bijlage die wordt gehecht aan de overnameovereenkomst. Men heeft het dan vaak over de 'disclosure letter' of 'disclosure schedules'. Uit de bevraging is gebleken dat deze techniek zeer is ingeburgerd.

In meer dan 70 % van de gerapporteerde transacties werd gebruikgemaakt van de methode van 'disclosures'. De bevraging leert verder dat het in de regel (meer dan 80 %) gaat om zogeheten specifieke disclosures. Hiermee wordt gedoeld op duidelijk gepreciseerde en punctuele uitzonderingen op de verklaringen en garanties.

Tot slot zijn er nog twee interessante invalshoeken met betrekking tot de problematiek van de uitzonderingen of disclosures.

Vooreerst is er de vraag of het *'due diligence'-rapport* (d.i. het rapport dat door de adviseurs van de koper wordt opgesteld naar aanleiding van het 'data room'-onderzoek of enig ander onderzoek voorafgaand aan de ondertekening van de overnameovereenkomst) als een uitzondering wordt aanvaard op de verklaringen en garanties. De bevraging leert dat dit in iets minder dan 10 % van de transacties het geval was. Dit resultaat is niet zo verwonderlijk gezien het, in onze ervaring, zeker geen gebruikelijke praktijk is om het 'due diligence'-rapport lopende de onderhandelingen mee te delen aan de verkopers. Deze rapporten worden doorgaans trouwens niet opgesteld met

28. Dit percentage dient o.i. evenwel in perspectief te worden geplaatst. Het is in onze ervaring geen standaardpraktijk om aan een klassiek 'data room'-onderzoek een vraag-en-antwoordprocedure te koppelen. Wij gaan er derhalve van uit (doch zullen dit toetsen in de volgende bevraging) dat in het overgrote deel van de gevallen waarin in een vraag-en-antwoordprocedure werd voorzien, de uitkomst hiervan als een uitzondering op de verklaringen en garanties werd aanvaard door de koper.

deze specifieke finaliteit voor ogen en kunnen daardoor slechts zelden in hun oorspronkelijke vorm worden gebruikt als onderdeel van de transactiedocumenten.

Daarnaast rijst de vraag of de koper dient te aanvaarden dat de *publiek beschikbare informatie* als een uitzondering op de verklaringen en garanties geldt. De bevraging leert dat dit in meer dan 44 % van de gerapporteerde transacties het geval was. Anderzijds impliceert dit dat in meer dan de helft van de transacties sprake kon zijn van een inbreuk op de verklaringen en garanties hoewel deze inbreuk perfect achterhaalbaar was voor de koper via publiek beschikbare bronnen.

V. CONTRACTUELE BEPERKINGEN AAN DE VERGOEDINGSPLICHT VAN DE VERKOPER

A. Beperkingen in de tijd

De overnameovereenkomst koppelt de verklaringen en garanties doorgaans aan een specifieke contractueel bepaalde vergoedingsregeling ten behoeve van de koper. Een centrale vraag in de onderhandelingen is hierbij voor hoelang die vergoedingsregeling overeind blijft. Anders gesteld, de vraag is of er een tijdslimiet is waarbinnen de koper zijn vergoedingsaanspraak (op risico van verval van die aanspraak) dient in te dienen. De beperkingen in de tijd vloeien voort uit de contractuele afspraken die de partijen op dit vlak maken. Om die reden werd dit punt eveneens in de bevraging betrokken.

Een eerste zeer opvallende vaststelling op dit vlak is dat nagenoeg alle overnameovereenkomsten die in de bevraging betrokken waren, voorzien in een tijdsbeperking voor de vergoedingsaanspraken. Dit impliceert dat, weliswaar zeer occasioneel, een overnameovereenkomst wordt gesloten waarin geen tijdsbeperkingen werden voorzien.

Meer concreet werd een beperking in de tijd voorzien in 98 % van de gerapporteerde transacties.

Dit resultaat stemt in hoge mate overeen met onze eigen praktijkervaring. In de recente jaren zijn wij eveneens betrokken in een enkele transactie waarin de tegenpartij geen beperking in de tijd van de vergoedingsaanspraken van de koper eiste. Dit is in de huidige Belgische M&A-praktijk echter totaal niet meer gebruikelijk.

In de praktijk stellen we vast dat er vaak wordt voorzien in een algemene regeling en een specifieke regeling. De specifieke regeling bevat een doorgaans langere termijn die geldt voor welbepaalde types van vergoedingsaanspraken.

1. Algemeen

Wat de algemene beperking in de tijd betreft van de contractuele vergoedingsaanspraken, levert de bevraging uitermate duidelijke en interessante resultaten op.

De norm in de Belgische M&A-praktijk lijkt een termijn van 24 maanden (2 jaar) te zijn. Deze tijdsbeperking werd voorzien in meer dan 35 % van de gerapporteerde transacties. Als tweede geldt een beperking tot 18 maanden (ongeveer 25 %) en als derde een limiet van 36 maanden. Minder courant (vierde plaats) is een termijn van 12 maanden. Opmerkelijk is dat een beperking in de tijd van meer dan 36 maanden als zeer uitzonderlijk mag worden omschreven.

2. Bijzondere beperkingen

Voor welbepaalde aanspraken gelden in de praktijk afwijkende (langere) tijdslimieten. De bevraging leert dat dit vooral geldt voor aanspraken gebaseerd op het fiscaal recht, het socialezekerheidsrecht, het arbeidsrecht en het milieurecht. In een eerder beperkt aantal gevallen wordt voorzien in een bijzondere beperking voor een ander rechtsdomein.

Wat de *fiscaliteit* betreft, lijkt de Belgische M&A-praktijk vrij duidelijk gevestigd. In 93 % van de transacties die in de bevraging werden betrokken, werd er een specifieke termijn voorzien voor vergoedingsaanspraken die gebaseerd zijn op inbreuken op het fiscaal recht. In 63 % van de transacties met een specifieke conventionele termijn voor fiscaal geïnspireerde vergoedingsaanspraken, werd deze termijn vastgesteld door verwijzing naar de toepasselijke wettelijke verjaringstermijnen voor fiscale inbreuken (b.v. 'toepasselijke wettelijke verjaringstermijn + 1 maand'). In 37 % van de transacties met een specifieke termijn voor fiscale vergoedingsaanspraken werd gewerkt met een vaste termijn, waarbij deze termijn gemiddeld 58 maanden bedroeg en de mediaan lag op 60 maanden[29].

Inzake de *sociale zekerheid* is de situatie iets minder uitgesproken. In ruim 75 % van de gerapporteerde transacties werd in een specifieke tijdslimiet voorzien. Als een limiet wordt voorzien, wordt hij doorgaans gelijkgeschakeld met de fiscale tijdslimiet[30].

Enigszins verrassend is het resultaat in verband met *inbreuken op het sociaal recht* (andere dan inbreuken op het socialezekerheidsrecht). Slechts in iets meer dan 30 % van de gerapporteerde transacties werd er op dit vlak in een afwijkende tijdslimiet voorzien. In de bepaling van die tijdslimiet is zeer moeilijk een lijn te trekken. In de meeste gevallen lijkt men te hebben verwezen naar de wettelijke verjaringstermijn voor de betrokken sociaalrechtelijke aanspraken (al dan niet verhoogd met een beperkte additionele periode)[31].

Opvallend is dan weer dat *milieurechtelijke inbreuken* vaker aan een specifieke limiet worden onderworpen. Dit is het geval in 42 % van de betrokken transacties. Ook hier geldt echter dat in de gekozen tijdslimieten moeilijk een lijn is te onderkennen. De

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29. Een vaste termijn van 60 maanden lijkt gebaseerd op de uitgebreide aanslagtermijn (voor de inkomstenbelasting) van 5 jaar die van toepassing is in geval van bedrieglijk opzet of opzettelijke inbreuken (artikel 354 W.I.B. '92). Men merkt echter op dat een vaste termijn van 5 jaar in bepaalde gevallen geen rekening houdt met de aanvangsdatum van de fiscale verjaring (nl. de eerste dag van het betrokken *aanslagjaar* en niet van het belastbaar tijdperk zelf). Indien gewerkt wordt met een vaste conventionele verjaringstermijn van 5 jaar zal men evenmin rekening gehouden hebben met de bijzondere aanslagtermijnen van artikel 358 W.I.B. '92 die in bepaalde gevallen in een bijkomende aanslagtermijn van 12 tot 24 maanden voorzien voor specifieke fiscale navorderingen en dit zonder dat bedrieglijk opzet moet worden aangetoond. Het gebruik van vaste conventionele termijnen houdt bovendien evenmin rekening met risico's die verbonden kunnen zijn aan manipulaties die een doorwerkend effect kunnen hebben in latere belastbare tijdperken. Men denke daarbij bijvoorbeeld aan artikel 361 W.I.B. '92 op basis waarvan onderwaarderingen van activa of overwaarderingen van passiva (b.v. onderwaardering van voorraden, goederen in bewerking, bestellingen in uitvoering of overwaardering van niet-invorderbare schulden) een belastbare winst vormen in het belastbaar tijdperk waarop het onderzoek slaat dat deze aan het licht bracht, zonder dat van belang is wanneer deze fiscale latenties zijn ontstaan. Dergelijke fiscale manipulaties "verjaren" dus mogelijk niet binnen de normale fiscale verjaringstermijnen. Afgezien van manipulaties met een doorwerkend effect, kan men in het algemeen stellen dat de belastingadministratie pas na het zevende jaar volgend op een belastbaar tijdperk geen rechtsmiddelen meer heeft om tot taxatie van vermeende inkomsten van het betrokken tijdperk of voorgaande tijdperken over te gaan. Bij een niet-afgebakende termijn die wordt gedefinieerd in functie van de toepasselijke wettelijke verjaringstermijnen, blijft het risico tot die tijd in principe bij de verkoper.
30. Ook hier kan een vaste termijn van 5 jaar worden gelinkt aan de wettelijke vijfjarige verjaringstermijn (vanaf 1 januari 2009 teruggebracht tot 3 jaar - cfr. gewijzigde artikels 39 en 42 RSZ-wet) voor schuldvorderingen van de RSZ op werkgevers (en de hoofdelijk aansprakelijke), voor strafsancties bij niet-naleving van de RSZ-wetgeving en voor invordering van de jaarlijkse bijdrage ten laste van de vennootschappen. Ook hier zal bij gebruik van een vaste conventionele termijn van 5 jaar in bepaalde gevallen geen rekening worden gehouden met de aanvangsdatum van de betrokken verjaringstermijnen (verjaring gaat in de regel pas in op de laatste dag van de maand volgend op het kwartaal waarvoor de bijdragen verschuldigd zijn) of de gevolgen van eventuele collectieve of voortgezette misdrijven (waarbij de verjaring slechts begint te lopen vanaf het ogenblik waarop het misdrijf is voltooid, i.e. vanaf het laatste strafbare feit).
31. In het algemeen verjaren rechtsvorderingen uit een arbeidsovereenkomst één jaar na het einde van de overeenkomst of 5 jaar na het feit waaruit de vordering is ontstaan, zonder dat deze termijn één jaar na het einde van deze overeenkomst mag overschrijden (zie artikel 15 arbeidsovereenkomstenwet). Voor bepaalde vorderingen, die gebaseerd zijn op een van de eigenlijke arbeidsovereenkomst onderscheiden overeenkomst, zal men echter rekening moeten houden met de gemeenrechtelijke verjaringstermijn van 10 jaar (art. 2262*bis* BW), bijvoorbeeld vorderingen gebaseerd op een (pensioen)verzekeringsovereenkomst. Wanneer een inbreuk strafrechtelijk wordt gesanctioneerd, dient men tevens rekening te houden met artikel 26 van de Voorafgaande titel van het Wetboek van strafvordering (dat bepaalt dat de burgerlijke vordering volgend uit een misdrijf niet verjaart vóór de strafvordering). Op deze basis kan de verjaringstermijn in bepaalde gevallen eveneens worden "uitgerokken" wanneer er sprake is van een collectief of voortdurend misdrijf (b.v. herhaalde niet-betaling van het loon of vakantiegeld).

diversiteit is erg groot. Soms wordt opnieuw verwezen naar de wettelijke verjaringstermijn[32]. In andere gevallen gaat het om limieten die kunnen variëren van 18 tot 120 maanden. De situatie is niet erg eenduidig en vanuit dit opzicht vergelijkbaar met de sociaalrechtelijke vergoedingsaanspraken.

Tot slot wordt er in ruim een kwart van de gevallen in een specifieke tijdslimiet voorzien voor andere types van inbreuken. Het meest courante voorbeeld is de problematiek van de eigendom van de betrokken aandelen. Vaak wordt dit punt zelfs helemaal uitgesloten van de algemene contractuele beperking in de tijd. Andere voorbeelden betreffen de problematiek van de onroerende goederen, juridische geschillen, intellectuele eigendomsrechten en inbreuken op welbepaalde technische reglementeringen. Ook hier geldt dat er geen constante te onderkennen is in de gekozen tijdslimieten. Zij lijken in hoge mate *ad hoc* genegotieerd te zijn.

B. 'De minimis'-drempels voor aanspraken op de garanties

Naast de tijdslimieten zijn er ook de financiële limieten die contractueel gesteld worden aan de vergoedingsaanspraken van de koper. Dit is eveneens een deelaspect van de transactie waarover vaak vurig wordt onderhandeld. Vandaar dat de bevraging in enige mate van detail is nagegaan wat op dit stuk als gangbaar in de Belgische M&A-praktijk kan worden bestempeld.

1. Beperking per aanspraak

Een eerste type van beperking is de financiële beperking per aanspraak. Praktisch gezien houdt deze beperking in dat een bepaalde aanspraak maar in aanmerking zal komen voor vergoeding als hij een bepaalde financiële drempel overstijgt. Met aanspraken die de betrokken limiet niet halen, wordt in het kader van de vergoedingsregeling geen rekening gehouden. Toch wel een eerder verrassende vaststelling is dat de beperking per aanspraak ten zeerste is ingeburgerd in de Belgische M&A-praktijk.

In 79 % van de gerapporteerde transacties werd er van deze techniek gebruikgemaakt.

In de bevraging werd verder gecheckt op welk niveau dit minimumbedrag werd vastgeprikt. Om op dit vlak tot nuttige resultaten te komen, is het gepast om een onderscheid te maken op basis van de transactiewaarde.

Voor transacties beneden 10 mln euro was het gemiddelde 0,79 % van de transactiewaarde en zat de mediaan op 0,67 %. Dit gemiddelde en deze mediaan daalden tot respectievelijk 0,33 % en 0,14 % voor transacties met een waarde tussen 10 mln euro en 100 mln euro. Voor transacties boven 100 mln euro was het gemiddelde 0,03 % en de mediaan 0,02 %.

Aansluitend hierbij werd in de bevraging ook nagegaan of dit minimumbedrag werd gezien als een franchise of deductible. Dit is het geval wanneer de vergoedingsaanspraak beperkt wordt tot het bedrag bovenop het minimumbedrag. De bevraging leert dat dit slechts in minder dan een derde van de transacties het geval was. Dit impliceert dat in het merendeel van de transacties het volledige bedrag voor vergoeding in aanmerking kwam op voorwaarde dat de minimumdrempel werd gehaald.

32. Ook in verband met aansprakelijkheden als vervuiler of voortvloeiend uit saneringsverplichtingen op basis van bijvoorbeeld het Vlaams bodemsaneringsdecreet of voor de toepassing van sancties uit bijzondere regelgeving (b.v. afvalstoffendecreet e.d.m.) dient men in het bijzonder rekening te houden met de eventuele voortdurende aard van de mogelijke aansprakelijkheden zolang aan de vervuiling zelf niet is verholpen.

2. Beperking voor alle aanspraken

Een variante op hetzelfde thema betreft de vraag of de totaliteit van de aanspraken samen een bepaalde minimum- of drempelwaarde moet halen alvorens er van vergoeding sprake kan zijn. In dit kader wordt vaak de Engelse term 'aggregate minimum claim' of 'basket' gehanteerd.

Van de techniek van de 'aggregate minimum claim" werd gebruikgemaakt in haast 70 % van de gerapporteerde transacties.

Wat het niveau van dit minimum of die drempel betreft, kan opnieuw best een onderscheid worden gemaakt op basis van de transactiewaarde.

Voor de transacties tot 10 mln euro lag deze gecumuleerde drempel gemiddeld op 0,86 % van de transactiewaarde en was de mediaan 0,56 %. Voor de transacties tussen 10 mln euro en 100 mln euro lag dit respectievelijk op 0,97 % en 0,69 %. Voor de grotere transacties (meer dan 100 mln euro) was het gemiddelde 0,60 % en de mediaan 0,48 %. Deze cijfergegevens leren dat de percentages van de gecumuleerde minimumdrempel minder gerelateerd zijn aan de transactiewaarde, dan de minimumdrempel voor de individuele aanspraken.

Ook in dit kader zijn we nagegaan of de gecumuleerde minimumdrempel als een franchise of deductible werd gehanteerd. Dit bleek het geval te zijn in 38 % van de gerapporteerde transacties.

C. Beperking van de maximale aansprakelijkheid van de verkoper

Waarschijnlijk één van de belangrijkste onderhandelingsthema's (na de prijs) is de maximale aansprakelijkheid van de verkoper. Deze limiet (vaak verwijst men naar het Angelsaksische begrip 'cap') zal immers bepalend zijn voor het uiteindelijke bedrag dat de verkoper (behoudens bedrog[33]) in ieder geval aan de transactie zal overhouden. Ook al kan de koper aantonen dat de door hem geleden schade groter is dan deze limiet, toch zal hij zich tevreden dienen te stellen met een vergoeding die gelijk is aan de contractueel vastgelegde limiet. De maximumlimiet is een courant gebruikte techniek in de Belgische M&A-praktijk.

In 87 % van de gerapporteerde transacties werd in een maximale limiet ('cap') voorzien.

Een en ander neemt niet weg dat we dit percentage nog hoger hadden verwacht. De bevraging leert dat deze limiet of 'cap' doorgaans wordt bepaald als een percentage van de transactiewaarde.

De mediaan voor alle transacties die in de bevraging betrokken waren, ligt op 25 % van de transactiewaarde. Voor de kleinere transacties (tot 10 mln euro) lag de mediaan op 50 %. Dit percentage zakt tot 25 % voor de transacties tussen 10 mln euro en 100 mln euro. Voor de grotere transacties (meer dan 100 mln euro) zakt de mediaan lichtjes tot 23 %.

33. Zie artikel 1116 Burgerlijk Wetboek. Over de invloed van bedrog op de koopovereenkomst of het bedrieglijk verzwijgen van belangrijke informatie en voorbeelden uit de casuïstiek in verband met overnameovereenkomsten : zie bijvoorbeeld M. WAUTERS, *l.c.*, 44-45 en P. VAN HOOGHTEN, "Dwaling en bedrog bij een overeenkomst tot verkoop van aandelen", *l.c.*, 102 en de in deze bijdragen opgenomen verwijzingen. Het kan bij de redactie van de overnameovereenkomst in bepaalde gevallen nuttig zijn om rekening te houden met de beperkte draagwijdte van het wettelijk bedrog-begrip, dat principieel enkel betrekking heeft op de "bedrieglijke kunstgrepen" van een contractspartij bij de totstandkoming van de overeenkomst en enkel aanleiding geeft tot een marginaal toetsingsrecht van de rechter. Behoudens in geval van contractuele uitbreiding van het begrip of garanties in de koopovereenkomst zelf, kan bedrog of fraude binnen de doelvennootschap zelf, die niet het werk is van een contractspartij (maar bijvoorbeeld van het management) of die niet met het oog op de koopovereenkomst werd begaan, op zichzelf genomen geen aanleiding geven tot nietigverklaring (hoofdbedrog) en/of schadevergoeding (incidenteel bedrog).

Interessant is te noteren dat in een aantal gerapporteerde transacties de limiet op de totale transactiewaarde (100 %) werd gelegd. Deze transacties vormen echter duidelijk de uitzondering.

D. Bescherming van vergoedingsaanspraken van de koper

Een koop-verkoopovereenkomst bevat klassiek een aantal mechanismen die de koper van aandelen moeten verzekeren dat hij een verhaalsobject zal hebben wanneer hij later schadevergoeding zou moeten vorderen vanwege de verkopers.

Een eerste betalingsstructuur die de koper beschermt, is deze van de uitgestelde betaling. De afgesproken prijs wordt niet in één betaling (bijvoorbeeld bij de ondertekening of de closing) voldaan aan de verkoper. De verkoper ontvangt doorgaans een eerste betaling bij ondertekening of closing en de verdere schijven worden betaald op tussen partijen afgesproken latere tijdstippen. Deze techniek biedt het voordeel dat, indien er een probleem met de onderneming blijkt te zijn, de koper nog een stuk van de koopprijs onder zich heeft zodat hij zeker is dat hij minstens via dat kanaal vergoed kan worden voor de geleden schade. Deze techniek wordt minder vaak gebruikt dan kon worden verwacht.

In het kader van onze bevraging bleek dat slechts in minder dan 29 % van de transacties werd gebruikgemaakt van het systeem van de uitgestelde betaling of de betaling in schijven.

Een tweede techniek is gebaseerd op het gebruik van de zogeheten 'escrow'-rekening. Dit is een rekening die doorgaans onder dubbele handtekening wordt geopend en waarop een deel van de koopprijs wordt gestort. De partijen voorzien contractueel hoe en waar de 'escrow'-rekening dient te worden geopend, onder welke voorwaarden gelden van deze rekening kunnen worden gehaald en hoe en wanneer de rekening wordt opgeheven. De finaliteit van de 'escrow'-rekening is vergelijkbaar met deze van de uitgestelde betaling. Voor de verkoper biedt zij echter de geruststelling dat de koper de betrokken bedragen effectief dient op tafel te leggen en er dus geen solvabiliteitsrisico rijst voor deze bedragen[34].

Het is opvallend dat van deze techniek in de aan ons gerapporteerde transacties meer wordt gebruikgemaakt dan van de uitgestelde betaling.

Concreet bleek dat in ruim 35 % van de transacties met een 'escrow'-rekening werd gewerkt.

De koper kan bedingen dat de verkoper een vorm van zekerheid of garantie stelt zodat de koper zeker is dat zijn schadevergoedingsaanspraken zullen worden gehonoreerd. Deze zekerheid zal zich dan meestal vertalen in een bankgarantie[35]. De bevraging leert echter dat dit de minst gebruikte techniek is om financieel comfort te bieden aan de koper.

Slechts in 25 % van de gerapporteerde transacties werd van de techniek van de bankgarantie gebruikgemaakt.

De reden voor dit beperkte succes in koop-verkoopsituaties is wellicht de kostprijs van de bankgarantie. In tegenstelling tot de 'escrow'-rekening bijvoorbeeld, kost een bankgarantie alleen geld. Een 'escrow'-rekening heeft het voordeel dat het in escrow

34. Zie voor een bespreking van de 'escrow'-rekening in het kader van M&A bijvoorbeeld : J. Van Lancker, "De Escrow Agreement in het kader van overnameovereenkomsten", *V&F* 1998, p. 137-326.
35. Zie met betrekking tot bankgaranties op afroep onder meer : D. De Marez, "De beoordeling van het beroep op een bankgarantie op eerste (gemotiveerd) verzoek", *A.J.T.* 2000-2001, p. 320-327; en C. Cauffman, "Enige bedenkingen bij de bankgarantie op eerste verzoek", noot onder Bergen 8 april 2002, *T.B.B.R.* 2001, p. 341-347.

geplaatste bedrag voor de ganse duurtijd van de escrow tenminste interesten kan opbrengen die aan de partijen ten goede kunnen komen.

We hebben verder bekeken of er met betrekking tot het gebruik van dit soort technieken een nuttig onderscheid kan worden gemaakt op basis van de transactiewaarde. Hiertoe hebben we geen onderscheid gemaakt tussen de uitgestelde betaling, het gebruik van een 'escrow'-rekening of een vorm van zekerheid of garantie (zoals de bankgarantie). Ieder van deze technieken beoogt immers hetzelfde doel, namelijk het bieden van een zekerheid aan de koper dat zijn schadevergoedingsaanspraken tegenover de verkoper zullen worden gehonoreerd.

Uit de bevraging blijkt eerder verrassend dat de transactiewaarde in dit kader geen doorslaggevend belang heeft. Voor transacties tot een bedrag van 10 mln euro blijkt in ruim 27 % van de gevallen te zijn gebruikgemaakt van één van deze technieken. Dit percentage ligt iets hoger (32 %) voor transacties met een waarde tussen 10 mln en 100 mln euro. Bij de transacties waarvan de waarde 100 mln euro overschreed, daalde dit percentage tot 26 %.

VI. NIET-CONCURRENTIEVERPLICHTINGEN - VERBOD VAN AFWERVING

Een vaak voorkomende vraag van de koper is dat hij beschermd zou worden tegen concurrentie van de verkoper. De vrees bestaat immers dat de dag na de closing de verkoper in een andere context meewerkt aan concurrerende activiteiten en via die weg al de cliënteel afsnoept van de overgenomen onderneming. Om dit risico te ondervangen, voorzien overnameovereenkomsten vaak in een niet-concurrentieverplichting in hoofde van de verkoper[36].

De bevraging leert dat in niet-concurrentieverplichtingen voorzien wordt in haast drie vierde van de gerapporteerde transacties (74 %). Wat de duurtijd van deze verplichting betreft, geldt een mediaan van 36 maanden. Opvallend is tevens dat in 35 % van de gerapporteerde transacties aan de niet-naleving van de niet-concurrentieverplichting een forfaitaire schadevergoeding wordt gekoppeld. In de gerapporteerde transacties gold hiervoor als mediaan een bedrag van 250.000 euro.

Nauw aansluitend bij de niet-concurrentieverplichting is er het niet-afwervingsbeding. Dit beding verbiedt de verkoper om gedurende een zekere periode werknemers en vaak ook consultants of leveranciers van de verkochte onderneming af te werven.

In 67 % van de gerapporteerde transacties was in een niet-afwervingsbeding voorzien in de overnameovereenkomst. Ook hier gold een duurtijd van 36 maanden als mediaan. In 27 % van de gevallen werd hieraan een forfaitaire vergoeding gekoppeld. Op dit vlak gold 250.000 euro klaarblijkelijk als een veelvuldig gebruikt niveau (doch was strikt gezien niet de mediaan).

VII. TOEPASSELIJK RECHT - RECHTSKEUZE

In alle gerapporteerde transacties werd in een uitdrukkelijke rechtskeuze voorzien. In het overgrote deel (92 %) werd Belgisch recht gekozen. Daarnaast kwamen Nederlands, Engels en Amerikaans recht het meeste voor.

36. Voor een bespreking van niet-concurrentieverplichtingen in het kader van aandelentransacties zie onder meer : C. GUYOT, "Les clauses de non-concurrence et de confidentialité dans les cessions d'actifs et d'actions", *D.A.O.R.* 2001, nr. 4, pp. 57-19; N. ULBURGHS, "Het niet-concurrentiebeding in overnameovereenkomsten", *V&F* 1998, p. 99-108.

VIII. BEVOEGDE RECHTBANKEN - ARBITRAGE

Een opvallende vaststelling is dat arbitrage het duidelijk haalt van de gewone rechtbanken op het vlak van de geschillenbeslechting in verband met overnameovereenkomsten[37]. Slechts in 42 % werd uitdrukkelijk geopteerd voor een bepaalde rechtbank, waar in 58 % in arbitrage werd voorzien.

Als Belgische rechtbanken worden gekozen, zal vaak (68 %) Brussel worden aangeduid. Alle andere Belgische rechtbanken zaten onder de 10 %.

Een vergelijkbare situatie treffen we aan bij arbitrage. Daar wordt in de overgrote meerderheid van de gevallen (80 %) geopteerd voor Cepina. In een beperkt aantal gevallen ging het om ad-hocarbitrage op basis van het Belgisch Gerechtelijk Wetboek (art. 1676 e.v.), Uncitral, ICC en het Nederlands Arbitrage Instituut.

Bij de gerapporteerde transacties werd in 54 % van de gevallen het Engels als proceduretaal gekozen. Daarna kwam het Nederlands (35 %) en tot slot het Frans (12 %).

Wat het aantal arbiters betreft, wordt in een overnamekader steevast gekozen voor 3 arbiters. Slechts uitzonderlijk voorzag een gerapporteerde overnameovereenkomst in slechts 1 arbiter.

Tot slot werd nagegaan of er voorafgaand aan de eigenlijke geschillenbeslechting een verplichte mediatie werd voorzien. In 22 % van de gerapporteerde transacties is dit het geval gebleken.

IX. CONCLUSIE

De bevraging heeft tot een relatief duidelijk beeld geleid van de invulling die in de Belgische M&A-praktijk aan de diverse klassieke transactievariabelen wordt gegeven. Hoewel het niet gepast zou zijn om reeds van een echte Belgische M&A-index te spreken (daarvoor was de staalname vermoedelijk nog iets te beperkt) zijn er onmiskenbaar duidelijke tendensen. Met de hulp en medewerking van M&A-specialisten hopen we deze bevraging in de toekomst uitgebreider te herhalen.

37. Voor een algemene bespreking van arbitrage in het kader van overnameovereenkomsten zie bijvoorbeeld B. DEMEULENAERE, "Arbitrale bevoegdheids- en rechtsmachtaspecten in het kader van koop-verkoopovereenkomsten van aandelen", *T.P.R.* 1995, p. 439-463.

		Ja
1.	**GEBRUIK VAN INTENTIEBRIEVEN**	
	Voorafgaand aan de overnameovereenkomst werd een intentiebrief ondertekend.	75 %
2.	**ONDERHANDELINGSEXCLUSIVITEIT**	
	Er werd onderhandelingsexclusiviteit bedongen.	72 %
3.	**DUE DILIGENCE**	
	Er werd gebruikgemaakt van een 'data room'-procedure.	84 %
	Er werd gebruikgemaakt van een geformaliseerde vraag- en antwoordprocedure.	60 %
	De kandidaat overnemers mochten kopieën nemen van documenten uit de data room.	56 %
4.	**OPSCHORTENDE VOORWAARDEN**	
	De overnameovereenkomst bevatte opschortende voorwaarden.	
	- Wanneer de transactiewaarde hoger lag dan 100 mln EUR.	100 %
	- Wanneer de transactiewaarde tussen 10 mln EUR en 100 mln EUR lag.	81 %
	- Wanneer de transactiewaarde minder dan 10 mln EUR bedroeg.	44 %
5.	**PRIJSAANPASSING**	
	De overnameovereenkomst voorzag prijsaanpassing op basis van :	
	- 'closing accounts'.	35 %
	- een 'earn-out'-formule.	10 %
6.	**ALGEMENE VERKLARINGEN EN GARANTIES**	
	In de overnameovereenkomst werden algemene verklaringen en garanties opgenomen.	100 %
	De opgenomen algemene verklaringen en garanties hadden essentieel betrekking op een klassieke standaardlijst.	79 %
7.	**DISCLOSURES**	
	Alle 'data room'-documenten werden opgenomen als disclosure.	42 %
	De documenten opgesteld in het kader van de vraag- en antwoordprocedure werden opgenomen als disclosure.	21 %
	Er werd bij de overnameovereenkomst een 'disclosure letter' of 'disclosure schedules' opgenomen.	70 %
	De overnameovereenkomst voorzag in specifieke disclosures.	81 %
	Het 'due diligence'-rapport werd opgenomen als disclosure.	9 %
	Publieke informatie werd aanvaard als disclosure.	44 %
8.	**BEPERKINGEN VERGOEDINGSPLICHT**	
	De vergoedingsplicht van de verkoper werd op algemene wijze beperkt in de tijd.	98 %
	De vergoedingsplicht van de verkoper met betrekking tot aanspraken in volgende domeinen werd door een andere termijn beperkt :	
	- Fiscaal recht	93 %
	- Sociale zekerheid	75 %
	- Sociaal recht	31 %
	- Milieu	42 %
	- Andere	27 %
	De overnameovereenkomst voorzag een 'de minimis'-drempel per aanspraak.	79 %
	Deze 'de minimis'-drempel werd beschouwd als franchise.	32 %

De overnameovereenkomst voorzag een aggregate 'de minimis'-drempel.	70 %
Deze aggregate 'de minimis'-drempel werd beschouwd als franchise.	38 %
De maximum aansprakelijkheid van de verkoper werd beperkt.	87 %
9. BESCHERMING VERGOEDINGSAANSPRAKEN	
De vergoedingsaanspraken van de koper werden beschermd :	
- via uitgestelde betaling of betaling in schijven.	29 %
- via escrow.	36 %
- via zekerheid of garantie.	25 %
10. NIET-CONCURRENTIE	
De overnameovereenkomst voorzag in een niet-concurrentieverplichting voor de verkopers.	74 %
Een forfaitaire schadevergoeding werd vastgesteld in geval van schending van de niet-concurrentieverplichting.	35 %
De overnameovereenkomst voorzag een niet-afwervingsverplichting voor de verkopers.	67 %
Een forfaitaire schadevergoeding werd voorzien in geval van schending van de niet-afwervingsverplichting.	27 %
11. TOEPASSELIJK RECHT EN BEVOEGD FORUM	
De overnameovereenkomst bepaalde dat het Belgisch recht erop van toepassing is.	92 %
Er werd in arbitrage voorzien voor geschillen die uit, of met betrekking tot, de overnameovereenkomst ontstaan.	58 %
Indien geopteerd werd voor geschillenbeslechting voor de gewone rechtbanken, werd een specifieke rechtbank als bevoegd aangeduid.	42 %
De overnameovereenkomst voorzag in een verplichte voorafgaande mediatieprocedure.	22 %

M&A Survey – 4th edition – Bart Bellen

M&A Survey - 4th edition

Bart Bellen, in collaboration with Eva Alboort, Ine Schockaert, Jesse Docx, Breth Hermans and Inge Moldenaers[1]

I. Introduction

In 2007, 2009 and 2012, we organised Surveys regarding the use of certain typical variables in share purchase agreements that are used for company acquisitions. These M&A Surveys covered deals concluded in the period from 2004 to 2012. The results of our research were published in this law review[2].

Following the third edition of the M&A Survey, we had agreed with the participants to repeat the Survey periodically to ensure that the results remain up-to-date. Accordingly, we have organised a fourth edition of the M&A Survey in 2016, covering the period from 2012 to 2016.

The fourth edition of the M&A Survey was realised with the cooperation of the following investment companies, financial service providers and law firms : Ackermans & van Haaren, Altius, Antaxius, Argo, Argos Soditic, Arts Cleeren & Vennoten, Ashurst, Astrea, Baker McKenzie, Aveve, Bright, Cadanz, Capricorn Venture Partners, Cazimir, Clifford Chance, contrast, Creafund, Cresco, Crowell & Moring, Curia, De Bock & Baluwé, De Wolf, Declerck Leterme & Partners, Deloitte, Deminor, Derycke & Vandenberghe, DLA Piper, Domo Investment Group, Dumon Sablon & Vanheeswijck, Elegis, Eubelius, EY - Cnockaert & Salens, Fieldfisher, Finpartners, Freshfields Bruckhaus Deringer, Gimv, GSJ Advocaten, HVG Advocaten, ING, Intui, Janson Baugniet, Jones Day, K law, KPMG, Laga, Laurius, Law Square, Liedekerke, Linklaters, Loyens & Loeff, Lydian, Marx Van Ranst Vermeersch & Partners, Mazars, McGuireWoods, Mertens & De Paepe, Monard Law, Moore Stephens, NautaDutilh, Olislaegers & De Creus, Peeters Advocaten, Portelio, Quinz, Saffelberg Investments, Schoups, Simont Braun, Stibbe, Strelia, Van Bael & Bellis, van Cutsem Wittamer Marnef & Partners, Vandelanotte, Vervisch, VMB and VWEW. The Belgian Venture Capital & Private Equity Association (www.bva.be) actively supported the Survey.

For the first time, the Survey was conducted in part based on an online application. A total of 376 transactions were reported by the participants. 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. All reported transactions were analysed in detail and verified for internal consistency and anomalies.

After the elimination of non-qualifying transactions and double-counting, exactly 300 deals - representing a total deal value of more than 14.7 billion euros - were included in the M&A Survey. The M&A Survey is based only on transactions whereby a buyer acquires control over a non-listed Belgian company following a share deal. To measure the possible influence of the deal value on the share purchase agreement, the transactions are divided into three categories : (i) deals with a transaction value 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.

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1. With the support of Marijke Roelants, Thijs Herremans, Alexander Tolpe, Sofie Lenaers and Kim Put.
2. B. BELLEN & F. WIJCKMANS, "De nieuwe Belgische M&A-index", *TRV* 2013, 211-232; B. BELLEN & F. WIJCKMANS, "De Belgische M&A-index", *TRV* 2010, 104-116; B. BELLEN & F. WIJCKMANS, "M&A Survey", *TRV* 2008, 113-130. Please refer to the 2008 publication for a more elaborate discussion of the legal context and concepts referred to in this article. For further context, please also refer to B. BELLEN, *Share Purchase Agreements - Belgian Law and Practice*, Antwerp-Cambridge, Intersentia, 2016, 379 p.

Deal value per transaction category	
Category I	< 10 million EUR
Category II	10 million EUR ≤ and < 100 million EUR
Category III	100 million EUR ≤

II. Survey Results

A. General characteristics of the transaction

A first part of the M&A Survey relates to the general characteristics of the transaction and the transaction process.

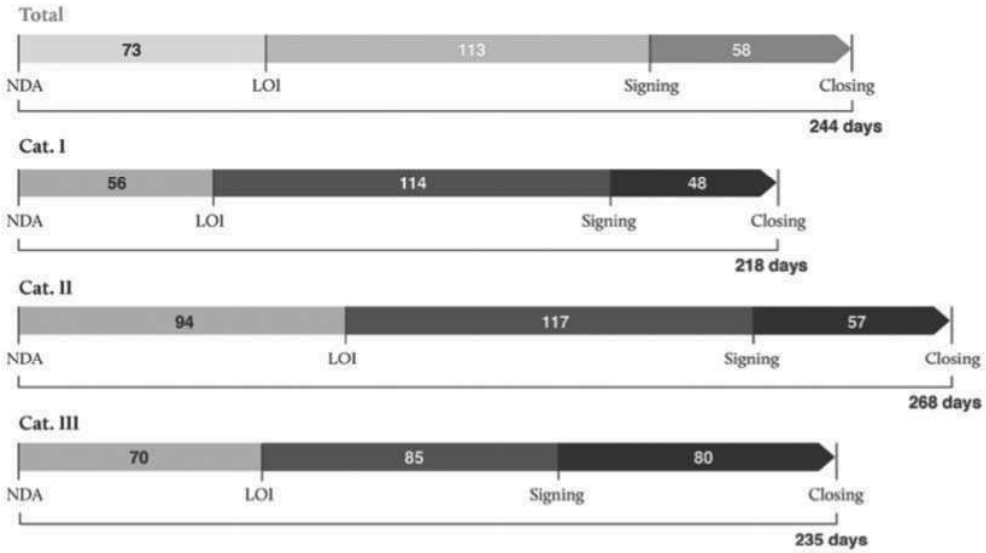
More specifically, the M&A Survey measures whether the control was obtained via the acquisition of all shares of the target company or merely part of the shares. Also, it was examined whether the seller reinvested part of the purchase price in the new structure, for instance, in the context of a leveraged buy-out or management buy-out operation (LBO/MBO). Furthermore, the M&A Survey reviewed whether the transaction was completed after a competitive auction process allowing multiple prospective purchasers to bid for the target company.

	Total	Cat. I	Cat. II	Cat. III
The transaction relates to all shares of the target company	83 %	84 %	80 %	90 %
The seller has reinvested in a new holding structure	18 %	14 %	22 %	26 %
A competitive auction is organised	21 %	9 %	27 %	58 %

These results remain broadly in line with the previous M&A Survey. Most of the reviewed transactions (83 %) related to all shares of the target company. A minority of the transactions (18 %) included a reinvestment by the seller of part of the purchase price.

The M&A Survey confirms that there is a clear link between the deal value and the use of competitive auctions. However, the M&A Survey also shows that, overall, fewer transactions were preceded by a competitive auction in the period 2012-2016, in comparison with the period 2009-2012 which was covered in the previous M&A Survey (21 %, compared with 31 % in the third M&A Survey). This trend can be noticed in all transaction categories, except in category I, where the result remains more or less stable (at 9 %), confirming that the use of competitive auctions remains exceptional in smaller transactions. In category III (dealing with transaction values in excess of EUR 100 million), approximately 6 out of 10 transactions were preceded by a competitive auction. This was the case in almost 3 out of 4 transactions in the period from 2009 to 2012 covered by the third M&A Survey.

Finally, the M&A Survey measured the typical timing of a transaction. More particularly, the number of days was measured between, respectively, the signing of a non-disclosure agreement (if applicable), the signing of a letter of intent (if applicable) and the signing of the acquisition agreement itself, as well as (as the case may be) the number of days between the signing of the acquisition agreement and the completion of the transfer (closing).



On average, a typical acquisition process takes between 7 and 9 months, from the signing of a non-disclosure agreement up to the closing of the transaction.

B. Preparatory stage

1. The use of non-disclosure agreements

It is common practice to sign a non-disclosure agreement (*"vertrouwelijkheidsovereenkomst"/ "accord de confidentialité"*) at the start of the negotiations, especially in larger transactions.

	Total	Cat. I	Cat. II	Cat. III
A non-disclosure agreement (NDA) is signed at the start of the negotiations	58 %	46 %	65 %	96 %

Non-disclosure agreements are typically drafted in English. This is the case in all transaction categories. In the largest transactions, with values in excess of EUR 100 million (category III), all (100%) of the non-disclosure agreements were drawn up in English. In the previous M&A Survey, Dutch or French was still more common in the smaller transactions of category I. The results of the current M&A Survey however suggest that this is no longer the case.

	Total	Cat. I	Cat. II	Cat. III
In which language is the NDA drafted ?				
- English	74 %	58 %	78 %	100 %
- Dutch / French	26 %	42 %	22 %	0 %

The duration of the confidentiality obligation in the non-disclosure agreement is typically 2 years.

	Total	Cat. I	Cat. II	Cat. III
Duration of confidentiality obligation (median, expressed in number of months)	24 m	30 m	24 m	24 m

If the parties enter into a non-disclosure agreement, this preliminary agreement often already contains a non-solicitation covenant (*"niet-afwervingsbeding"/"clause de non-débauchage"*). Around 50 % of all non-disclosure agreements contain such a clause. Pursuant to a non-solicitation covenant, the prospective purchaser undertakes not to approach the employees and/or

important commercial partners of the target company. The duration of the non-solicitation covenant is typically also equal to 2 years from the date of the signing of the non-disclosure agreement. The relevance of imposing such a restriction on the prospective purchaser depends on the nature of the information that is to be exchanged during the negotiations.

	Total	Cat. I	Cat. II	Cat. III
The NDA includes a non-solicitation covenant	50 %	39 %	54 %	68 %
Duration of non-solicitation covenant (median, expressed in number of months)	24 m	24 m	24 m	24 m

The effectiveness and enforceability in practice of the confidentiality obligation and non-solicitation covenant are considerably strengthened if the non-disclosure agreement includes a liquidated damages provision (*"schadebeding"/"clause pénale"*). However, the M&A Survey shows that such contractual penalties are only rarely included in non-disclosure agreements.

	Total	Cat. I	Cat. II	Cat. III
A breach of the confidentiality obligation is punished by liquidated damages	16 %	29 %	8 %	5 %
A breach of the non-solicitation covenant is punished by liquidated damages	18 %	35 %	14 %	0 %

2. The use of letters of intent

The previous M&A Surveys already indicated that negotiations often take place on the basis of a letter of intent (*"intentiebrief"/"lettre d'intention"*) or a similar preparatory document, which is executed prior to signing a final acquisition agreement. The current M&A Survey confirms these findings.

	Total	Cat. I	Cat. II	Cat. III
A letter of intent or a similar preparatory document (LOI) is signed before entering into a definitive purchase agreement	77 %	81 %	77 %	55 %

In a clear majority of the transactions (77 %) preparatory agreements, like a letter of intent or memorandum of understanding, are entered into prior to the signing of the actual acquisition agreement. Consistent with the previous M&A Surveys, the results for the use of letters of intent are less pronounced in the largest transactions (category III). This is explained by the fact that these transactions are often preceded by competitive auctions (see above), which are typically driven by unilateral process letters issued by the seller. In such transaction processes, it is not common for the seller to enter into any preparatory agreement with any of the prospective buyers before a binding acquisition agreement is eventually signed.

Letters of intent are typically drawn up in English. It should be noted in this respect that this conclusion is valid for all transaction categories, except for the smaller transactions of category I where Dutch and French are still more common.

	Total	Cat. I	Cat. II	Cat. III
In which language is the LOI drafted ?				
- English	52 %	39 %	64 %	88 %
- Dutch / French	48 %	61 %	36 %	12 %

The letter of intent will almost always contain a short period of exclusivity. This is the case in 83 % of the reported letters of intent. The duration of the exclusivity period, if any, is typically around 3 months.

	Total	Cat. I	Cat. II	Cat. III
Exclusivity is agreed in the LOI	83 %	87 %	86 %	40 %
Duration of exclusivity period (median, expressed in number of months)	3 m	3 m	3 m	2.5 m

Sometimes, a letter of intent also includes a non-solicitation covenant (*"niet-afwervingsbeding"/"clause de non-débauchage"*). This may be useful if a prior non-disclosure agreement did not yet contain such a clause.

	Total	Cat. I	Cat. II	Cat. III
The LOI includes a non-solicitation covenant	14 %	14 %	15 %	7 %

3. Due diligence

	Total	Cat. I	Cat. II	Cat. III
The seller makes available a data room	94 %	91 %	95 %	100 %
If yes, in which format ?				
- Virtual	66 %	52 %	78 %	87 %
- Physical	17 %	27 %	8 %	3 %
- Both	17 %	21 %	14 %	10 %

The M&A Survey confirms that the buyer's due diligence (*"bedrijfsonderzoek"/"audit d'acquisition"*) is typically organised on the basis of information made available by the seller in a so-called "data room". Compared with the previous Surveys, there is a clear (further) evolution towards the use of "virtual" data rooms on the basis of internet applications with secure access (83 % of all data rooms included a virtual data room, compared with 44 % in the previous M&A Survey). The use of virtual data rooms is now clearly standard practice in all transaction categories, including in smaller transactions. Sometimes, a physical data room is still used (as the case may be in combination with a virtual data room). The advantages of digital applications (organisation of large amounts of information, anonymous and simultaneous access of multiple prospective purchasers, customisation of access rights, phased disclosure of information, control over the information reviewed, etc.) are self-evident in company acquisition processes.

	Total	Cat. I	Cat. II	Cat. III
The prospective buyers have a right to make copies of data room documents	76 %	82 %	72 %	63 %

The previous M&A Surveys already indicated that copying data room documents is often allowed. This result remains surprising but is confirmed once again. The results are even clearer than in the previous M&A Surveys and are valid for all transaction categories. In our opinion, the high percentages can only be explained if the possibility of making copies is limited to selected, non-sensitive documents.

	Total	Cat. I	Cat. II	Cat. III
A formal Q&A procedure is organised	72 %	58 %	82 %	97 %

The M&A Survey suggests that the organisation of a formal question-and-answer (Q&A) process, in addition to the data room, has also become common in all transaction categories. There is a clear positive correlation between the organisation of such Q&A procedures and the deal value. For the largest transactions, a formal Q&A procedure is organised in nearly all transactions. However, even in the smaller transactions with values less than EUR 10 million (category I), a Q&A procedure is organised in almost 6 out of 10 transactions (compared with only 3 out of 10 in the previous M&A Survey).

The use of vendor due diligence reports remains exceptional in all transaction categories, unless the transaction is preceded by a competitive auction. The use of vendor due diligence reports offers particular advantages in such a context, like allowing multiple prospective purchasers to be granted access to the same information at the same time without already having to incur significant transaction costs.

	Total	Cat. I	Cat. II	Cat. III
The seller makes available a vendor due diligence report	15 %	7 %	18 %	41 %
Availability of vendor due diligence reports in auction scenario	46 %	14 %	55 %	56 %

C. The acquisition agreement

1. Language of the acquisition agreement

The previous M&A Surveys showed a breakthrough of English as the *lingua franca* for company acquisitions.

The current M&A Survey confirms these findings. Almost 6 out of 10 acquisition agreements are drafted in the English language.

	Total	Cat. I	Cat. II	Cat. III
Language of the acquisition agreement				
- English	57 %	39 %	69 %	94 %
- Dutch / French	43 %	61 %	31 %	6 %

Especially in larger transactions (categories II and III), the use of English has become the rule rather than the exception. In category II, the results show that the English language is used in almost 7 out of 10 transactions. In the largest transactions (category III), the use of any language other than English is exceptional.

A further breakthrough of the English language can also be seen in smaller transactions (from less than 1 out of 5 transactions in category I in the period from 2006 to 2009 to almost 4 out of 10 transactions in the period from 2012 to 2016).

2. Payment of the purchase price

Another part of the M&A Survey relates to the structure of the purchase price and the payment provisions.

The previous M&A Surveys indicated that the seller receives the entire purchase price immediately upon completion of the transaction in a large majority of the transactions. Although this finding remains valid for a clear majority of the transactions, the results of the current M&A Survey show a noticeable increase in the use of deferred purchase price payments in the period 2012-2016.

	Total	Cat. I	Cat. II	Cat. III
The payment of the purchase price is deferred	42 %	55 %	31 %	23 %

In 42 % of the transactions, the purchase price is paid in one or more instalments (compared to 31 % in the previous M&A Survey period). This development is mainly the result of a significant increase in the use of such purchase price mechanisms in the smaller transactions (more than 55 % of the transactions in category I, compared with 37 % in the previous Survey period).

The deferred part of the purchase price typically represents less than 50 % of the total purchase price and becomes payable between one and three years after the closing of the transaction. The most common deferred payment period was 24 months (17 % of transactions with deferred payments), followed by 36 months (16 %) and 12 months (9 %).

	Total	Cat. I	Cat. II	Cat. III
% of the purchase price that is deferred				
- Average	26 %	31 %	17 %	20 %
- Median	19 %	20 %	12 %	25 %

Deferred amount range (% of purchase price)	Prevalence (%)			
	Total	Cat. I	Cat. II	Cat. III
0 % ≤ 10 %	27 %	19 %	42 %	43 %
10 % ≤ 25 %	41 %	48 %	32 %	14 %
25 % ≤ 50 %	20 %	14 %	26 %	43 %
> 50 %	12 %	19 %	0 %	0 %

The M&A Survey also indicates that the organisation of a competitive auction may help the seller in avoiding a partial deferral of the payment of the purchase price or, if a deferred payment is agreed, in limiting the amount of the deferred payments (allowing the seller to receive a larger percentage of the purchase price upon closing).

	Auction	No auction
The payment of the purchase price is deferred (total result for all transactions)	33 %	45 %

Influence of auction on amount of deferred payments (total result for all transactions)

Deferred amount range (% of purchase price)	Prevalence (%)	
	Auction	No auction
0 % ≤ 10 %	37 %	24 %
10 % ≤ 25 %	32 %	44 %
25 % ≤ 50 %	26 %	18 %
> 50 %	5 %	14 %

	Total	Cat. I	Cat. II	Cat. III
Duration of deferred payment period (median, expressed in number of months)	24 m	27 m	23 m	30 m

When the purchase price is partially deferred and payable after the closing of the transaction, the deferred payments may depend on the future performance of the target company ("earn-out"). This is the case in around half (52 %) of all transactions with deferred payments. In this respect, the current M&A Survey shows a clear increase in the use of earn-out payments as compared to the previous M&A Survey (which showed that only 25 % of deferred payments were based on earn-outs). This evolution is especially noticeable in transaction category I (from 33 % in the previous M&A Survey to 56 % in the current M&A Survey) and in category II (from 24 % to 54 %).

	Total	**Cat. I**	**Cat. II**	**Cat. III**
Deferred amounts are based on earn-out mechanism	52 %	56 %	54 %	0 %

For category III transactions, however, the results remain in line with the previous M&A Surveys, which already indicated that such purchase price structures are exceptional in larger deals. In fact, none of the category III transactions reviewed in the current M&A Survey included earn-out payments. There is indeed a clear (negative) correlation between the deal value and the use of deferred payments generally. The higher the deal value, the less often such purchase price structures are used.

	Total	**Cat. I**	**Cat. II**	**Cat. III**
The purchase price is subject to post-closing adjustments based on closing accounts	39 %	34 %	45 %	38 %
The purchase price is based on a locked-box mechanism	43 %	44 %	40 %	50 %

The acquisition agreement may provide that the purchase price will be adjusted based on "closing accounts" reflecting the precise situation of the target company as at the closing date. The closing accounts are typically drawn up shortly after completion of the transaction, on the basis of an agreed procedure. This technique is used in almost 4 out of 10 transactions. In this respect, however, the results of the current M&A Survey indicate a slight decline in the use of such purchase price mechanisms (from 45 % to 39 % in the current M&A Survey), which is especially noticeable in the largest transactions (from 59 % to 38 % of the category III transactions in the current M&A Survey).

The M&A Survey also measures the use of so-called "locked-box" purchase price mechanisms. In a locked-box scenario, the shares of the target company are sold at closing for a fixed purchase price. The price is determined by the parties upon signing the share purchase agreement on the basis of a historical balance sheet drawn up as at a prior valuation date, *i.e.*, the "locked-box date". After the closing date, the purchase price is not subject to further adjustments, even if the value of the target company has increased or decreased between the locked-box date and the closing date. The agreement will in such a situation typically also include a specific covenant or indemnity preventing value extraction ("leakage") by the sellers between the valuation date and the closing date (*e.g.*, in the form of the payment of dividends, extraordinary management fees, transaction costs or other unauthorised payments by the target company). The M&A Survey shows that locked-box pricing mechanisms are quite commonly used in all transaction categories : between 4 (categories I and II) and 5 (category III) out of 10 transactions were based on a locked-box price.

The use of a joint bank account (escrow account), on which part of the purchase price is blocked temporarily (for example, as a security for potential claims of the purchaser on the basis of the representations and warranties), has decreased compared to the earlier M&A Surveys (30 % compared to 37 % in the previous period). This evolution is valid for all transaction categories. If an escrow account is used, the amount paid in escrow typically represents around 10 % of the purchase price.

	Total	Cat. I	Cat. II	Cat. III
The purchase price is partially paid into an escrow account	30 %	30 %	31 %	26 %
If yes, % of the purchase price paid in escrow (median)	10 %	10 %	10 %	6 %

Escrow amount range (% of purchase price)	Prevalence (%)			
	Total	Cat. I	Cat. II	Cat. III
0 % ≤ 10 %	59 %	52 %	63 %	75 %
10 % ≤ 25 %	35 %	43 %	31 %	13 %
25 % ≤ 50 %	6 %	5 %	6 %	12 %
> 50 %	0 %	0 %	0 %	0 %

The duration of the escrow arrangement typically varies from between 12 and 36 months. The most common escrow duration was 24 months (24 % of the reported escrow arrangements), followed by 36 months (17 %), 12 and 18 months (15 %) and 5 years (10 %).

	Total	Cat. I	Cat. II	Cat. III
Duration of the escrow period (median, expressed in number of months)	24 m	24 m	20,5 m	12 m

The results show a negative correlation between the deal value and the use of escrow arrangements, as well as the percentage of the purchase price paid in escrow and the duration of the escrow period. The higher the deal value, the less often the parties will agree on an escrow and the less significant (relatively speaking) the amount and duration of the escrow will be.

Furthermore, the M&A Survey indicates that the organisation of a competitive auction may help the seller in avoiding an escrow arrangement or, if an escrow arrangement is agreed, in limiting the amount of the purchase price paid into the escrow account (allowing the seller to receive a larger percentage of the purchase price upon closing).

	Auction	No auction
The purchase price is partially paid into an escrow account (total result for all transactions)	25 %	32 %

Influence of auction on escrow amount (total result for all transactions)

Escrow amount range (% of purchase price)	Prevalence (%)	
	Auction	No auction
0 % ≤ 10 %	80 %	54 %
10 % ≤ 25 %	13 %	40 %
25 % ≤ 50 %	7 %	6 %
> 50 %	0 %	0 %

3. Representations and warranties of the seller

As was the case in the previous M&A Survey, all of the acquisition agreements examined (100 %) contain additional representations and warranties (*"verklaringen en garanties"/"déclarations et garanties"*) regarding the target company. The participants in the M&A Survey moreover indicate that these contractual representations and warranties are essentially based on a standard list in more than 9 out of 10 transactions.

	Total	Cat. I	Cat. II	Cat. III
The purchase agreement contains representations and warranties	100 %	100 %	100 %	100 %
The representations and warranties are based on a standard list	91 %	92 %	90 %	87 %

The M&A Survey monitors the use of 3 particular warranties : (i) a warranty regarding the target company's balance sheet, (ii) a general warranty regarding the target company's compliance with legal and regulatory obligations and (iii) a warranty regarding the completeness and accuracy of the information provided to the purchaser.

	Total	Cat. I	Cat. II	Cat. III
The representations and warranties include a representation with respect to :				
- The target company's accounts	96 %	98 %	94 %	97 %
- The target company's compliance with laws	87 %	91 %	83 %	80 %
- The seller's full and accurate disclosure	82 %	87 %	82 %	65 %

These are very clear results which are fully in line with the findings of the previous M&A Survey. A seller of shares must therefore anticipate being expected to give such warranties in the acquisition agreement. Slightly more reticence is perhaps detected in the largest transactions (category III), but such general warranties are nevertheless also common in this transaction category.

The transaction is frequently not completed immediately upon signing the acquisition agreement, for example, because the acquisition agreement contains conditions precedent (*"opschortende voorwaarden"/"conditions suspensives"*). If so, the question arises whether the warranties of the seller only apply at signing or whether they are repeated at the occasion of the actual completion of the transaction, when the purchaser acquires ownership of the sold shares and pays the purchase price (closing). The M&A Survey clearly shows that the purchaser may expect that the warranties of the seller will be either made or repeated at closing (82 %).

	Total	Cat. I	Cat. II	Cat. III
In the event that the signing date is different from the closing date, the representations and warranties are valid on :				
- Signing only	18 %	5 %	35 %	17 %
- Closing only	20 %	38 %	12 %	0 %
- Both dates	62 %	57 %	53 %	83 %

The results also show that almost all of the examined acquisition agreements (97 %) contain a contractual procedure governing claims for breaches of the representations and warranties, as well as a specific procedure in the event that the purchaser's claim against the seller relates to a claim made by a third party against the target company ("third-party claims procedure").

	Total	Cat. I	Cat. II	Cat. III
The purchase agreement contains a contractual procedure for claims	97 %	97 %	95 %	100 %
The purchase agreement contains a third-party claims procedure	92 %	93 %	91 %	94 %

Finally, the M&A Survey examines whether the acquisition agreement contains specific indemnities (*"bijzondere vrijwaringsregelingen"/"garanties spécifiques"*) regarding specifically identified issues, in addition to the general representations and warranties of the seller.

	Total	Cat. I	Cat. II	Cat. III
There are separate indemnification mechanisms for specific issues	70 %	66 %	73 %	74 %
If yes, such specific indemnities relate to the following matters :				
- Tax	70 %	65 %	74 %	78 %
- Litigation	32 %	33 %	31 %	30 %
- Environment	26 %	25 %	27 %	26 %
- Leakage	12 %	10 %	13 %	17 %
- Other	49 %	52 %	48 %	43 %

In this respect, the M&A Survey indicates that such separate indemnity mechanisms are becoming increasingly common. A clear majority of the transactions (70 %) contain such specific indemnities, compared with 62 % in the period 2009-2012 and 49 % in the period 2007-2009. This means that the tendency in favour of using separate indemnity mechanisms, which was already apparent from the previous Surveys, has been confirmed in the current Survey period. To a certain extent, this development may involve a negotiation shift, away from the general representations and warranties (which can therefore remain rather standard) and towards a number of tailor-made specific indemnities relating to specifically identified issues. The evolution is particularly visible in category I (from 49 % in the period 2009-2012 to 66 % in the current Survey period) and category III (from 56 % in the period 2009-2012 to 74 % in the current Survey period).

The specific indemnities identified in the M&A Survey related especially to tax matters (70 % of all specific indemnities included a tax indemnity), ongoing litigation (32 %), environmental matters (26 %) and leakage (12 %). Furthermore, 49 % of all specific indemnities included an indemnity for other, deal-specific matters (typically, certain specific due diligence findings).

Around half of all transactions overall (and 6 out of 10 category III transactions) included a separate tax indemnity.

	Total	Cat. I	Cat. II	Cat. III
% of deals including a specific tax indemnity	48 %	42 %	53 %	58 %

The specific indemnities are typically governed by a specific liability regime and are not made subject to the general limitations (*e.g.*, in time and amounts) applicable to claims under the representations and warranties.

	Total	Cat. I	Cat. II	Cat. III
The specific indemnities are governed by a separate liability regime	79 %	76 %	80 %	91 %

4. Exceptions to the representations and warranties of the seller (disclosures)

A traditional topic of the acquisition negotiations relates to the question of whether facts that have been disclosed to the purchaser can still lead to damages on the basis of the seller's representations and warranties. If it is agreed that such disclosed facts will constitute an exception to the representations and warranties, they are referred to as "disclosures".

	Total	Cat. I	Cat. II	Cat. III
Type of disclosures :				
- Data room documents	77 %	69 %	86 %	78 %
- Q&A log	61 %	51 %	72 %	59 %
- Disclosure schedules and/or letters	44 %	41 %	49 %	42 %
- Public information	46 %	37 %	56 %	52 %

Once again, the M&A Survey confirms that, if a data room is made available to the purchaser, it is generally expected that the purchaser also acknowledges having examined the information in the data room and that the purchaser accepts that the information contained in the data room shall be considered to have been "disclosed" against the seller's representations and warranties. In this respect, the M&A Survey indicates an evolution towards the further acceptance of this principle, especially in category I (from 42 % in the period 2007-2009 to 69 % in the current Survey period) and category II (from 80 % in the period 2007-2009 to 86 % in the current Survey period). With respect to category III, the disclosure of the data room clearly remains standard practice (78 %), but the M&A Survey seems to indicate that exceptions to this principle have been more common than in previous periods (22 % compared to only around 5 % in previous Survey periods).

The results and evolution regarding the disclosure of the Q&A log are broadly in line with the findings regarding the disclosure of the data room. If a Q&A process was organised by the seller, it was agreed that the Q&A log would also be considered to have been "disclosed" against the representations and warranties in approximately 6 out of 10 cases. Also in this respect, the M&A Survey indicates an evolution towards the further acceptance of this principle in category I (from 35 % in the period 2007-2009 to 51 % in the current Survey period) and category II (from 55 % in the period 2007-2009 to 72 % in the current Survey period). With respect to category III, the disclosure of the Q&A log is also common (59 %), but the M&A Survey indicates that exceptions to this principle have been much more common than in previous periods (4 out of 10 transactions compared to only 1 or 2 out of 10 in previous Survey periods).

The M&A Survey also measured whether the data room documents are entrusted to an independent third party (*e.g.* a notary public). This technique enables the parties to ensure the integrity of the data room and to organise access to the data room in a neutral and verifiable manner. The results, however, show that this approach is not very common. On average, the data room is entrusted to a third party in only 20 % of the transactions.

	Total	Cat. I	Cat. II	Cat. III
A copy of the data room (if disclosed) is kept in escrow	20 %	14 %	23 %	27 %

The results for the use of disclosure letters or disclosure schedules attached to the acquisition agreement, containing exceptions to the representations and warranties, are mixed. Generally, it appears that there has been a further decline in the use of this technique. The first M&A Survey showed that disclosure letters or disclosure schedules were used in approximately 7 out of 10 transactions. In the previous Survey periods, this number was reduced to respectively 61 % (2007-2009) and 48 % (2009-2012) of the examined transactions. The results of the M&A Survey

show that the use of this technique has further decreased in the current Survey period (to 44 % of the transactions).

With respect to information that is publicly available, and the extent to which it is stipulated that this kind of information constitutes an exception to the representations and warranties, the results remain in line with the previous M&A Surveys. There is also a (limited) positive correlation between this type of disclosure and the deal value : whereas the disclosure of publicly available information is accepted in only 1 out of 3 of the smaller transactions (category I), such a disclosure is accepted in more than half of the larger transactions (categories II and III).

Disclosures are usually given on the date the agreement is signed and do not relate to facts or circumstances arising after that date. If the signing and closing of the agreement do not occur on the same date, the parties may therefore include a mechanism allowing them to update the disclosures between the signing of the acquisition agreement and the closing.

	Total	Cat. I	Cat. II	Cat. III
The disclosures can be updated between signing and closing	12 %	0 %	7 %	33 %

The M&A Survey indicates that such mechanisms are relatively exceptional, however. Only 12 % of the transactions with a deferred closing included a mechanism whereby the seller was allowed to update the disclosures between the signing of the acquisition agreement and the closing of the transaction. In this respect, there is a clear positive correlation between the use of this technique and the deal value : whereas none of the smaller transactions (category I) included a mechanism allowing the parties to update disclosures between the signing and the closing, such mechanisms are included more often in larger transactions (1 out of 3 transactions in category III).

5. Contractual limitations to the seller's indemnification obligation

One of the key aspects of the M&A Survey relates to the limitations of the seller's liability for claims of the purchaser under the representations and warranties.

a. Limitations in time

A first typical contractual limitation is the limitation in time of the seller's indemnification obligation for claims under the representations and warranties.

	Total	Cat. I	Cat. II	Cat. III
A general limitation in time applies to the seller's indemnification obligation	96 %	97 %	96 %	97 %
Duration of the general time limitation (median, expressed in number of months)	24 m	24 m	24 m	18 m

The seller's indemnification obligation is almost always (96 %) made subject to an explicit limitation in time. The general expiry date for claims is typically around 24 months. For the largest transactions (category III), the median duration was 18 months. These results are perfectly in line with the previous M&A Surveys.

The previous M&A Surveys also indicated that acquisition agreements frequently contain separate expiry dates for specific claims, in addition to a general expiry date. The results of the previous Surveys are confirmed in this respect as well.

	Total	Cat. I	Cat. II	Cat. III
A specific time limitation applies to warranty claims in the following areas :				
- Tax	90 %	91 %	90 %	83 %
- Social security	67 %	74 %	57 %	67 %
- Labour	30 %	40 %	23 %	7 %
- Environment	34 %	32 %	37 %	27 %
- Intellectual property	6 %	4 %	6 %	10 %
- Other	39 %	29 %	44 %	64 %

A significant majority of the examined transactions contain a specific contractual expiry date for tax claims (90 %) and claims regarding violations of the social security legislation (67 %). Thirty-four percent of the transactions contain a separate expiry date for claims regarding environmental matters (down from 5 out of 10 transactions in previous M&A Surveys). Other specific expiry dates, for instance with respect to labour law violations or intellectual property, are less common. Furthermore, 39 % of all transactions included additional specific contractual expiry dates for other matters. Very often these include for instance (longer) expiry dates for title warranties (unencumbered ownership of the shares sold) and a wide variety of other deal-specific matters. Around 80 % of the reported "other" expiry dates related to, among other matters, the seller's unencumbered ownership of the shares sold.

The results of the previous M&A Surveys are moreover fully confirmed as to the duration of these specific contractual time limitations.

	Total	Cat. I	Cat. II	Cat. III
Which type of time limitation applies to these warranty claims ?				
Tax				
Time limitation is defined by reference to the applicable legal statute of limitations	88 %	90 %	90 %	72 %
Time limitation is expressed as a fixed number of months	12 %	10 %	10 %	28 %
If a fixed period, what is the duration (median, expressed in number of months)	60 m	60 m	60 m	36 m
Social security				
Time limitation is defined by reference to the applicable legal statute of limitations	89 %	93 %	88 %	75 %
Time limitation is expressed as a fixed number of months	11 %	7 %	12 %	25 %
If a fixed period, what is the duration (median, expressed in number of months)	60 m	60 m	60 m	36 m
Labour				
Time limitation is defined by reference to the applicable legal statute of limitations	90 %	90 %	89 %	100 %
Time limitation is expressed as a fixed number of months	10 %	10 %	11 %	0 %
If a fixed period, what is the duration (median, expressed in number of months)	60 m	60 m	60 m	N/A
Environment				
Time limitation is defined by reference to the applicable legal statute of limitations	57 %	65 %	51%	37 %
Time limitation is expressed as a fixed number of months	43 %	35 %	49 %	63 %
If a fixed period, what is the duration (median, expressed in number of months)	60 m	60 m	60 m	60 m

In 88 % of the transactions with a specific contractual deadline for tax-related damage claims, the deadline was defined by reference to the applicable legal statute of limitations (*"wettelijke verjaringstermijn"/"délai de prescription"*) for tax offences (*e.g.* "applicable statute of limitations + 3 months"). In the other transactions, a fixed time limitation was used, whereby the median duration was 60 months (36 months in category III transactions).

The results are similar for specific contractual time limitations regarding social security matters. If a specific time limitation is agreed for such matters, the deadline is also defined by reference to the applicable legal statute of limitations in 89 % of the cases. If a fixed time limitation is used, this typically coincides with the specific time limitations used for tax matters (60 months in categories I and II and 36 months in category III).

If specific time limitations are agreed in relation to labour matters, such time limitations are also typically defined by reference to the applicable legal statute of limitations (90 % of the transactions with separate time limitations for labour matters).

The results for specific time limitations regarding environmental matters are more ambiguous. About a third of the transactions include a specific time limitation in respect of such claims. A majority (57 %) of these specific time limitations were defined by reference to the applicable statute of limitations. When a fixed time period was agreed, this was typically equal to 5 years in all categories.

b. Limitation of the amount of the indemnification obligation

(i) De minimis thresholds

In addition to a limitation of the seller's indemnification obligation in time, the seller's liability for breaches of representations and warranties is frequently also limited as to the amount.

A first common technique in this respect is introducing a financial threshold for the purchaser's damage claims. Such a *de minimis* threshold can be included per individual damage claim, but can also operate as an aggregate threshold ("basket") for all damage claims taken together. The use of a minimum threshold (both per claim and for all claims together) is common practice.

	Total	**Cat. I**	**Cat. II**	**Cat. III**
An individual minimum claim amount is specified (individual *de minimis* threshold)	82 %	77 %	87 %	87 %
If yes :				
- % in relation to the purchase price (median)	0.13 %	0.22 %	0.10 %	0.07 %
- The threshold operates as a deductible	20 %	22 %	16 %	23 %
An aggregate minimum claim is specified (aggregate *de minimis* threshold)	79 %	75 %	84 %	83 %
If yes :				
- % in relation to the purchase price (median)	0.83 %	1.07 %	0.68 %	0.67 %
- The threshold operates as a deductible	23 %	19 %	21 %	48 %

The amount of the *de minimis* thresholds (calculated as a percentage of the purchase price) is at approximately the same level as recorded in the previous M&A Surveys. The individual minimum threshold per claim typically amounts to approximately 0.1 % of the purchase price (with a slight negative correlation between the level of the threshold and the deal size). The aggregate

threshold for all claims taken together is typically set between 0.7 % and 1 % of the purchase price.

It is clearly unusual to consider these minimum thresholds as deductible amounts. If the purchaser's claim(s) exceed(s) the thresholds, the entire amount of the claim is eligible for indemnification and not just the amount exceeding the thresholds.

(ii) Limitation of the maximum liability (cap)

Negotiations regarding the seller's maximum liability for breaches of representations and warranties, the so-called "cap", are often more difficult.

The results of the M&A Survey regarding the cap are largely in line with the previous M&A Surveys, it being understood that caps appear to have become more aggressive (lower) in the current Survey period.

	Total	**Cat. I**	**Cat. II**	**Cat. III**
The liability of the sellers is capped	92 %	91 %	91 %	97 %
If yes, % of the cap in relation to the purchase price (median)	20 %	29 %	15 %	15 %

Limiting the maximum liability of the seller clearly remains standard in all categories. Such a limitation is not included in the acquisition agreement except in very exceptional cases.

The median amount of the liability cap in proportion to the purchase price has however decreased compared with the previous M&A Surveys (from 25 % in the previous Survey periods to 20 % now). This evolution is especially visible in category I (from 40 % down to 29 %) and category II (from 20 % down to 15 %).

Cap amount range (% of purchase price)	**Prevalence (%)**			
	Total	**Cat. I**	**Cat. II**	**Cat. III**
0 % ≤ 10 %	22 %	9 %	36 %	43 %
10 % ≤ 20 %	29 %	29 %	28 %	43 %
20 % ≤ 30 %	18 %	19 %	17 %	9 %
30 % ≤ 50 %	15 %	22 %	8 %	0 %
> 50 %	16 %	21 %	11 %	5 %

The table above shows that approximately 3 out of 10 caps are in a range between 10 % and 20 % of the purchase price and more than half of all caps are below 20 %. In the larger transactions (categories II and III), approximately 4 out of 10 caps are even below 10 %.

The M&A Survey also shows that the limitation of the seller's liability is significantly influenced by the acquisition process. More specifically, the results indicate that the cap is likely to be lower when the transaction is preceded by a competitive auction.

Influence of auction on cap amount		
Cap range (% of purchase price)	**Prevalence (%)**	
Total	**Auction**	**No auction**
0 % ≤ 10 %	37 %	18 %
10 % ≤ 20 %	35 %	28 %
20 % ≤ 30 %	11 %	20 %
30 % ≤ 50 %	8 %	17 %
> 50 %	9 %	17 %
Cat. I		
0 % ≤ 10 %	15 %	8 %
10 % ≤ 20 %	23 %	29 %
20 % ≤ 30 %	23 %	20 %
30 % ≤ 50 %	23 %	22 %
> 50 %	16 %	21 %
Cat. II		
0 % ≤ 10 %	46 %	31 %
10 % ≤ 20 %	35 %	26 %
20 % ≤ 30 %	4 %	23 %
30 % ≤ 50 %	4 %	10 %
> 50 %	11 %	10 %
Cat. III		
0 % ≤ 10 %	40 %	50 %
10 % ≤ 20 %	47 %	37 %
20 % ≤ 30 %	13 %	0 %
30 % ≤ 50 %	0 %	0 %
> 50 %	0 %	13 %

If the transactions examined are divided into transactions that are completed or not completed following a competitive auction, there is a noticeable impact on the cap level. Agreements that are signed following an auction are clearly more likely to include a low cap. Around 72 % of such agreements included a cap below 20 %, compared to only 46 % of deals that were not preceded by an auction. Thirty-seven percent of the deals that were preceded by a competitive auction even included caps below 10 % of the purchase price. It is thus obvious that the organisation of a competitive auction may allow the seller to optimise both the financial conditions of the transaction as well as the seller's legal position post-closing.

The transactions were also divided into deals whereby the seller reinvested part of the purchase price in a new holding structure and deals without such reinvestment. The results, however, indicate that a reinvestment by the seller has no significant impact on the cap.

6. Warranty and indemnity insurance

Sometimes the parties may seek to cover part of their exposure in relation to the representations and warranties or specific indemnities by entering into a specific "warranty and indemnity" insurance policy.

The M&A Survey indicates that such specialised M&A insurance policies are quite exceptional in a Belgian context. They are only slightly more common in the largest transactions of category III.

	Total	Cat. I	Cat. II	Cat. III
A warranty and indemnity insurance policy is entered into	3 %	0.7 %	3 %	13 %

7. Conditions precedent

The M&A Survey measures whether the transaction is subject to conditions precedent (*"opschortende voorwaarden"/"conditions suspensives"*), or whether the acquisition is completed immediately upon signing of the acquisition agreement.

In this respect, the results of the current M&A Survey are fully in line with the previous M&A Surveys.

	Total	Cat. I	Cat. II	Cat. III
The purchase agreement is subject to conditions precedent	54 %	37 %	67 %	90 %

A majority of the transactions (54 %) are made subject to one or more conditions precedent. The results also show a clear positive correlation between the deal size and the presence of conditions precedent. The largest transactions are almost always signed subject to one or more conditions precedent. This is also logical given that regulatory consents (*e.g.* merger clearance) are often required to complete such deals.

The M&A Survey measures in particular the presence of the following conditions precedent in the acquisition agreement : (i) the obtaining of merger control clearance from competent competition authorities, (ii) the obtaining of other regulatory consents (for example, approval of financial supervisory authorities), (iii) prior consent of third parties in respect of the transfer, and (iv) the purchaser obtaining bank financing.

	Total	Cat. I	Cat. II	Cat. III
The purchase agreement is made subject to the following conditions precedent :				
- Merger filing	17 %	3 %	25 %	52 %
If yes, in how many jurisdictions (average) ?	2	1	1	2
- Other regulatory consents	9 %	3 %	13 %	19 %
- Third-party consents	19 %	15 %	20 %	35 %
- Bank financing	12 %	5 %	19 %	16 %

There is a positive correlation between the deal value and the presence of conditions precedent regarding mandatory filings with competition authorities. This is explained by the applicable legal and regulatory background whereby merger control requirements are triggered by turnover thresholds (which are more likely to be exceeded in larger transactions)[3].

3. A transaction shall be notified to the **Belgian Competition Authority** when (i) the undertakings concerned, taken together, have a total turnover in Belgium of more than EUR 100 million and (ii) at least two of the undertakings concerned each have a turnover of at least EUR 40 million in Belgium. Concentrations/transactions bringing about a lasting change in the control of undertakings, shall be notified to the **European Commission** (i) when a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 billion, and b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State, and also (ii) when a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2.5 billion, b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million, c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million, and d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

There is also a clear connection between the deal value and conditions precedent requiring the prior consent of third parties, *e.g.* the consent of important commercial partners of the target company with agreements that can be terminated as a result of the change-of-control contemplated by the acquisition agreement, or the prior consent of third parties with pre-emption rights with respect to the shares sold.

The M&A Survey confirms that a condition precedent regarding the purchaser's bank financing is rather unusual. Only 1 out of 10 examined transactions was made subject to such a condition.

Finally, the M&A Survey examined to what extent an acquisition agreement that is made subject to conditions precedent also included a so-called "MAC clause". "MAC" stands for "Material Adverse Change" and a MAC clause is typically included as a secondary condition precedent when the acquisition cannot be completed immediately due to other conditions precedent. Such a clause enables the seller to terminate the agreement if there is a significant negative change of circumstances in the period between the signing of the acquisition agreement and the closing of the transaction.

	Total	**Cat. I**	**Cat. II**	**Cat. III**
Deals with deferred closing including MAC clause	39 %	30 %	47 %	36 %

The M&A Survey indicates that a MAC clause is agreed in a minority of the transactions with a deferred closing only. Approximately 4 out of 10 agreements with a deferred closing included a MAC clause. This result represents a decrease compared with the previous Survey period (when approximately half of all agreements with a deferred closing included a MAC clause).

8. Non-compete and non-solicitation clauses

In a share deal, it is advisable to include an explicit non-compete clause (*"niet-concurrentiebeding"/"clause de non-concurrence"*) to protect the target company's business against competing activities of the seller after the closing.

	Total	**Cat. I**	**Cat. II**	**Cat. III**
A non-compete covenant restricts the seller's activities after closing	75 %	79 %	72 %	61 %
If yes :				
- Duration of non-compete covenant (median, expressed in number of months)	36 m	36 m	36 mm	36 mm
- The non-compete covenant contains a geographical limitation	98 %	99 %	96 %	100 %

Approximately 75 % of the acquisition agreements contain a non-compete covenant. This result is completely in line with the results of the previous M&A Surveys. As was the case in the previous M&A Surveys, the use of non-compete clauses remains relatively less common in the largest transactions. However, also in category III, 6 out of 10 of the acquisition agreements contain a non-compete covenant. The need for a non-compete covenant is not always as critical in the larger transactions, due to the fact that the shareholders of very large companies are often involved less directly in the activities and as such, constitute a lesser threat for the business of the target company after closing.

As to the duration of the non-compete covenant, the results of the previous Surveys are confirmed as well. The duration of the non-compete clause is typically three years, throughout all transaction categories. This result has remained stable since the first M&A Survey. The geogra-

phical scope of almost all of the non-compete clauses was also explicitly limited by the contract.

A clear majority of the non-compete covenants are made subject to a contractual penalty in the form of liquidated damages (*"schadebeding"/"clause pénale"*). This is less common for category III transactions only. Such contractual penalty mechanisms are highly recommended to ensure the actual effectiveness of the non-compete clause. The amount of the liquidated damages penalty is typically between EUR 100,000 (category I) and EUR 500,000 (category III).

	Total	**Cat. I**	**Cat. II**	**Cat. III**
A breach of the non-compete covenant is punished by liquidated damages	66 %	75 %	65 %	16 %
If yes :				
- Amount of liquidated damages (median)	150,000 €	100,000 €	250,000 €	500,000 €

In addition to the actual non-compete covenant, acquisition agreements also frequently contain non-solicitation clauses (*"niet-afwervingsbeding"/"clause de non-débauchage"*). These covenants prohibit the seller from hiring away employees and/or attracting important commercial partners of the target company during a specified period after closing.

The results regarding non-solicitation clauses are comparable to the findings regarding non-compete covenants.

	Total	**Cat. I**	**Cat. II**	**Cat. III**
A non-solicitation covenant restricts the seller's activities after closing	73 %	73 %	74 %	74 %
If yes :				
- Duration of non-solicitation covenant (median, expressed in number of months)	36 m	36 m	36 m	24 m
- A breach of the non-solicitation covenant is punished by liquidated damages	63 %	77 %	57 %	17 %
If yes :				
- Amount of liquidated damages (median)	100,000 €	100,000 €	175,000 €	500,000 €

9. Governing law and dispute resolution

Almost all agreements included in the M&A Survey contain an explicit choice of law clause.

It is not surprising that an agreement regarding a Belgian target company is usually governed by Belgian law (94 % of the transactions). However, this should not be taken for granted, as is illustrated by the results for the larger transactions. In the largest transactions of category III, 1 out of 5 agreements were made subject to a foreign legal system, mainly English (UK) laws and, to a lesser extent, the laws of The Netherlands, Luxembourg or the United States or one of its states.

	Total	**Cat. I**	**Cat. II**	**Cat. III**
The purchase agreement is governed by Belgian law	94 %	99 %	91 %	80 %

In addition to an explicit choice-of-law clause, 96% of the acquisition agreements contained a provision regarding dispute resolution between the parties.

	Total	Cat. I	Cat. II	Cat. III
The purchase agreement contains a clause regarding dispute resolution	96 %	98 %	93 %	97 %
If yes :				
- The agreement provides that disputes shall be submitted to the ordinary courts	63 %	78 %	55 %	20 %
If yes, to the Belgian courts ?	97 %	99 %	95 %	67 %
- The agreement provides that disputes shall be submitted to arbitration	37 %	22 %	45 %	80 %

These results confirm the findings of the previous M&A Surveys. Disputes resulting from acquisition agreements are resolved by the ordinary courts in a majority of the cases. However, there is an undeniable tendency towards arbitration, depending on the deal value. In larger transactions, the advantages of arbitration reveal themselves perhaps more obviously. A choice for arbitration enables the parties, inter alia, to submit their dispute to specialists and to conduct proceedings (whether in whole or in part) in another language (*e.g.* English), as a result of which translations and confusion of legal concepts can be avoided.

When the parties agree to submit their disputes to the ordinary courts, they normally agree that the Belgian courts shall be competent (97 %). Only in category III is this again less self-evident. When the acquisition agreement in these transactions provided that disputes shall be submitted to the ordinary courts, the Belgian courts were only referred to in 67 % of the cases. This result is consistent with the findings in the previous M&A Survey and is partly explained by a relatively more common choice for a foreign governing law in these agreements.

For the acquisition agreements containing an arbitration clause, the M&A Survey moreover assessed the parties' selection of a specific arbitration institute and arbitration rules.

	Total	Cat. I	Cat. II	Cat. III
Most common arbitration institutes				
- CEPANI	76 %	88 %	73 %	64 %
- ICC1	3 %	6 %	16 %	18 %
- Belgian judicial code	4 %	3 %	0 %	14 %
- Other	7 %	3 %	11 %	4 %

In a clear majority of the cases (76 %), the arbitration clause refers to the arbitration rules of the Belgian arbitration institute Cepani. The preference for Cepani applies to all transaction categories, although the ICC rules are also frequently used in larger transactions. Exceptionally, ad hoc arbitration on the basis of the Belgian Judicial Code or other arbitration systems may be chosen.

	Total	Cat. I	Cat. II	Cat. III
Language of arbitration proceedings				
- English	81 %	77 %	78 %	90 %
- Dutch / French	17 %	23 %	17 %	10 %
- Other	2 %	0 %	5 %	0 %
Number of arbitrators appointed				
- 1	16 %	27 %	15 %	5 %
- 3	84 %	73 %	85 %	95 %

With respect to the identified arbitration clauses, the M&A Survey also recorded the parties' choice as to the procedural language and composition of the arbitration panel (composed of 3 arbitrators or 1 single arbitrator).

If the parties opt to use arbitration, English was selected as the procedural language in a clear majority of the cases (81 %). There is a slight positive correlation between the deal value and the choice of English as the procedural language. These findings are in line with the results regarding the parties' choice of language for the acquisition agreement itself.

As to the number of arbitrators, parties who submit their agreement to an arbitration clause almost always provide for a procedure with 3 arbitrators (84 % of the cases). The appointment of 1 single arbitrator is rather exceptional, especially in larger transactions.

Finally, the M&A Survey also measures to what extent the acquisition agreement provides for a mandatory mediation procedure (*"bemiddeling"/"médiation"*) prior to the actual dispute resolution. The results confirm that this is not very common. Only 14 % of the reported transactions contain such a prior mediation procedure. This result represents a further decline as compared to the previous M&A Survey.

	Total	**Cat. I**	**Cat. II**	**Cat. III**
The purchase agreement contains a mandatory mediation procedure	14 %	15 %	11 %	17 %

III. Conclusion

With the current M&A Survey, we have now examined Belgian share purchase agreements concluded in the period 2004-2016. Despite fundamental changes in the economic and market conditions since the first edition of the M&A Survey, the results of our research have remained generally stable throughout this extended period. Furthermore, given the number of transactions reviewed and M&A professionals participating in our research, we can conclude that the M&A Survey provides an accurate blueprint of a typical Belgian share purchase agreement.