

AIJA Deal Points Survey - Market Standards for Share Deals (M&A Commission)

Munich 2016

Executive Summary of BELGIUM

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1. General Statement

- Belgium remains a country with a lot of SME's (at least small & mid-sized based on international business standards) => this is reflected in the deal value of the reported transactions and probably more in general in the M&A activity of AIJA member firms in Belgium;
- Although SME transactions, the sales process and the transaction documentation follows (more or less) international standards;
- (almost) no formal post acquisition litigation in the reported transactions (caveat: some deals are very recent).

2. Summary of Transaction Details

- **Number of deals reported**
 - 9
- **Maximum, minimum and median deal value of deals reported**
 - minimum deal amount is EUR 2,026,031.00
 - maximum deal amount is EUR 57,000,000.00
 - median deal amount is EUR 16,300,000.00
- **Maximum, minimum and median percentage of shares acquired in deals reported**
 - all deals concern the acquisition of 100% of the shares
- **General information on relevant industries of reported deals**
 - in 44% of the reported Belgian transactions, Target's industry was industrial/manufacturing, in 22% of the cases, Target's industry was medical/pharma, the other 33% of the cases concerned leisure, online business/consumer goods, maritime/petroleum
- **General information on Buyers' and Targets' countries of origin**
 - in 67% of the reported Belgian transactions, the Buyer's country of origin was Belgium, the other 33% of the transactions had a Buyer from respectively USA, UK or Luxembourg
 - in all (100%) of the reported Belgian transactions, Target's country of origin was Belgium, of which in 1 case the Target's country of origin was combined Belgium-Netherlands
- **Percentage of deals with targets below/above 200 employees**
 - in 67% of the reported Belgian transactions, the number of Target's employees was below 200 employees
- **Percentage of deals with/without auction**

- in 22% of the reported Belgian transactions, a competitive auction was provided for

- **General information on the nature of the transactions**

- in 44% of the reported Belgian transactions, the deal concerned a transaction between industrial parties; in 44% of the other cases the deal concerned a transaction between private equity and an industrial party; in 11% of the cases, the transaction concerned the acquisition/sale of a family business

3. Letters of Intent

Transactions	1	2	3	4	5	6	7	8	9	Summary
LOI signed:	No	No	yes	Yes	yes	Yes	Yes	No	yes	6/9 or 66,66 %
LOI not signed										3/9 or 33%
Exclusivity	N/A	N/A	Yes	Yes	yes	Yes	Yes	N/A	yes	100%
Exclusivity over 1 month	N/A	N/A	Yes	Yes	yes	Yes	Yes	N/A	yes	100%
Binding character	N/A	N/A	No	no	No	yes	Yes	N/A	yes	50%

The data that was collected shows that in 66.66 % of the transactions that were investigated, an LOI was signed. In each of the transactions where an LOI was signed, exclusivity was granted. The exclusivity that granted was in all those transactions granted for over a month. Hence, in Belgium, all transactions that were investigated and where an LOI was signed had exclusivity periods and in all transactions the exclusivity period lasted longer than one month.

The LOI was binding in 50% of the transactions where an LOI was signed.

4. Due Diligence

Transactions	1	2	3	4	5	6	7	8	9	Summary
Vendor DD	No	No	No	No	No	No	No	No	No	100%
Vendor DD report disclosed	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Vendor DD report not disclosed	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Data Room	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	8/9 or 88.88%
Virtual DR	Yes	Yes	Yes	Yes	Yes	Yes	Yes	N/A	NO	8/9 or 88.88 %
Physical DR	No	No	No	No	No	No	No	N/A	Yes	1/9
Manager of DR	Seller&DR provider	Seller&DR provider	Other: Seller's legal advisor	DR provider	DR Provider	Law firm	Other: CD ROM	N/A	Investment banker	11.11%
Q&A ?	Yes	Yes	No	Yes	Yes	Yes	No	No	No	5/9 or 55.55 % Yes 4/9 or 44.44% NO
Right to Print/Copy	Yes	Yes	Yes	Yes	Yes	Yes (limited)	Yes	N/A	Yes	8/9 or 88.88%

In none of the transactions that were analyzed, a vendor due diligence was carried out.

In 88.88% of the transactions analyzed, a data room was available and in 88.88% of those transactions, the data room was a virtual data room. In one transaction there was no data room available and in one other transaction there was a physical data room. Hence, from the data collected, it is obvious that in the large majority of transactions (almost 90%) a virtual data room was set up.

The management of the data room was the responsibility of a variety of players in the transaction process. In 50% of the transactions in which a data room was set up, the data room was hosted by a data room provided. In the other half of the transactions we could identify the following parties, among others, as being the host of the data room: Seller's , an investment banker, the legal advisor or a law firm.

A formal Q&A process was set up in a minor majority of the transactions (55.55%). In all of the transactions where a data room was set up, there was a possibility to print and/or copy documents from the data room.

5. Purchase Agreement

- Transaction

- Percentage of transactions with simultaneous closings vs. non-simultaneous closings
 - 33% simultaneous closings
 - 67% non-simultaneous closings
- Information on languages of purchase agreements
 - 44% English language
 - 56% Dutch language

- Purchase Price

- Information on forms of consideration
 - all (100%) reported Belgian transactions provided for a cash consideration
- Information on purchase price determination (percentage of deals without price adjustments, including information on use of locked-box, vs. percentage of deals with closing accounts)
 - 56% of the reported Belgian transactions provided for a purchase price adjustment on the basis of closing accounts
 - 44% of the reported Belgian transactions provided for a fixed purchase price, of which 50% applied a locked box mechanism
- Information on payment mechanics (full payment vs. instalments with earn outs, retention by buyer etc.)
 - no specific trend in Belgium with respect to payment mechanisms; on the basis of the reported Belgian transactions, we see full payment on closing, closing in instalments with payment of earn outs, retention by buyer, granting of vendor loans, and putting part of the purchase price on escrow accounts
 - 33% of the reported Belgian transactions provided for full payment on Closing

- 66% of the reported Belgian transactions provided for a payment in instalments with:
 - 33% of the deals which provided for the granting of a vendor loan
 - 33% of the deals which provided for an escrow account
 - 17% of the deals which provided for a retention by the buyer
 - 17% of the deals which provided for an earn out payment
- Information on financing, i.e. use of equity vs. debt (bank, bonds, vendor loans)
 - 56% of the reported Belgian transactions provided for equity financing
 - 22% of the reported Belgian transactions provided for a combination of debt and equity financing
 - 22% of the reported Belgian transactions provided for pure debt financing, of which part bank debt and part vendor loan
- **MAC clause**
 - Percentage of deals with/without MAC clause
 - 89% of the reported Belgian transactions provided for a MAC clause
 - 11% of the reported Belgian transactions did not provide for a MAC clause
 - Where used, information on MAC clause form, definition and materiality threshold
 - in 75% of the cases, the MAC clause has the form of a CP
 - in 25% of the cases, the MAC clause has the form of a back-door MAC
 - in all (100%) of the cases, the MAC clause is defined
 - in 75% of the cases, the MAC clause provided for a materiality threshold
- **Reps & Warranties**
 - Percentage of deals with/without reps&warranties
 - all (100%) of the reported Belgian transactions provided for reps & warranties
 - Percentage of deals with/without standard reps&warranties

- 89% of the reported Belgian transactions provide for standard reps & warranties
- 11% of the reported Belgian transactions did not provide for standard reps & warranties
- Information on length and on repetition of reps&warranties as per closing
 - 89% of the reported Belgian transactions provide for an extensive list of reps & warranties
 - 11% of the reported Belgian transactions provide a limited list of reps & warranties
 - in 89% of the cases, the reps & warranties are repeated on closing
 - in 11% of the cases, the reps & warranties are not repeated on closing
- Percentage of deals with/without specific indemnifications and nature thereof
 - 78% of the reported Belgian transactions provide for specific indemnities
 - the nature of the specific indemnities varies from transaction to transaction, going from general specific indemnities (all damages), to specific indemnities for environmental or tax matters
 - 22% of the reported Belgian transactions did not provide for specific indemnities
- Information on tax warranties vs. tax indemnities
 - 44% of the reported Belgian transaction provide only for tax warranties
 - 56% of the reported Belgian transactions provide for a combination of tax warranties and tax indemnities
 - none of the reported Belgian transactions provide for pure tax indemnities
- **Limitation of liability**
 - Information on time limitations in general (percentage of months)
 - most (44%) of the reported Belgian cases provide for a time limit of 18 months
 - however, also a time limit of 36 months is quite common (33% of the cases)
 - only 11% of the cases provide for less than 18 months' time limit (16 months), and 11% of the cases provide for 24 months of time limit

- Information on specific time limitations (number of months) such as title to shares, capacity, accounts etc.
 - 89% of the reported Belgian transactions provide for a specific time limitation for title to shares, of which 25% of the cases do not provide for a time limit, and 37.5% of the cases refer to statute of limitation increased with 3 to 6 months, and 37.5% of the cases provide for a fixed term of 5 to 10 years after closing
 - 44% of the reported Belgian transactions do not provide for a specific time limitation for capacity; the other 56% of the cases provided for a specific time limitation for capacity, which varies from 5 years, to 10 years or no time limit
 - no specific time limitations for accounts
 - 89% of the reported Belgian transactions provide for a specific time limitation for tax (including social security); of which most time limitations refer to the statute of limitations, of which 25% provide for statute of limitations, 25% provide for statute of limitation plus 2 months, 25% provide for statute of limitations plus 6 months, 12.5% provide for statute of limitation plus 3 months and 12.5% for no time limits
 - only 22% of the reported Belgian transactions provide for a specific time limitation for labor, with 11% provide for statute of limitation plus 2 months and 11% provide for statute of limitation plus 6 months
 - only 33% of the reported Belgian transactions provide for a specific time limitation for environmental matters of which 67% of the cases provide for statute of limitations plus 6 months and 33% of the cases provide for 10 years
 - only 11% of the reported Belgian transactions provide for a specific time limitation for criminal matters, in which case a time limit is provided for of 10 years
 - other specific time limitations are in some transactions provided for fraud, money laundering, existence of the company, IP and licenses
- Information on individual minimum claim amounts (amount in EUR vs. percentage of purchase price) and the use of deductibles
 - individual claim amounts vary from EUR 1,000 – EUR 3,000 – EUR 25,000 EUR 50,000 – EUR 75,000; these amounts represent 0.03% to 0.49% of the purchase price; in all cases the individual claim amount is no deductible
 - aggregate claim amounts vary from EUR 5,000 – EUR 25,000 - EUR 50,000 – EUR 125,000 – EUR 150,000 - EUR 400,000;

these amounts represent 0.15% to 2% of the purchase price; in 89% of the cases, the aggregate claim amount is no deductible

- in limited cases, no individual or aggregate claim amount is provided for in the transactional documents
- Information on liability caps (amount in EUR vs. percentage of purchase price)
 - 33% of the cases provided for a max cap of 10% of the purchase price, other max caps are 20% (11% of the cases), 30% (22% of the cases), 40% (11% of the cases), 50% (11% of the cases), or the entire purchase price (11% of the cases)
- Information on carve-outs
 - 67% of the reported Belgian transactions provide for no time and amount limits for specific indemnities
- **Disclosures**
 - Percentage of deals with/without disclosures and information on percentage of deals with disclosures against warranties only vs. warranties and specific indemnities
 - 89% of the reported Belgian transactions provide for disclosures; and in all cases the disclosures are only against the warranties
 - Percentage of deals with disclosure with/without
 - full data room disclosure
 - 62.5% of the cases provide for full data room disclosure
 - Q&A log
 - 62.5% of the cases provide for disclosure of the Q&A log
 - Disclosure letters/schedules
 - 50% of the cases provide for a disclosure letter or schedules, typically in the cases where there is no full data room disclosure
 - Disclosure of due diligence report
 - in none of the cases, there was disclosure of the due diligence report
 - Public information disclosed
 - 50% of the cases provide for disclosure of public information; also disclosure of public information where in principle no disclosures were allowed
 - Update between signing/closing
 - in 50% of the cases, there was an update of the disclosures between signing and closing

6. Conditions Precedent

[NR to report on the survey data compiled with respect to conditions precedent, including the following aspects:

- Percentage of deals with/without merger filings as CP and information on percentage of jurisdictions
 - only 11% of the cases included a merger filing as a CP. No merger filing was required (or at least was not a CP) in the other 89% of the cases. In 100% of the cases where a merger filing was required, the jurisdiction where the filing needed to occur, was Germany.
- Percentage of deals with/without third party consents as CP
 - 22% of the cases included the requirement to obtain third party consents as a CP.
- Percentage of deals with/without certain funds clause as CP
 - 22% of the cases included the requirement for the buyer to obtain bank financing.
- Percentage of deals with/without the bring-down of warranties as CP
 - In none of the cases, the bring-down of warranties was included as a CP.
- Percentage of deals with/without MAC clause as CP
 - 56% of the cases included the absence of a MAC as a CP.
- Percentage of deals with/without seller's legal opinions as CP
 - In none of the cases, obtaining a legal opinion was a CP.
- Percentage of deals with/without retention of key employees as CP
 - In none of the cases, obtaining a retention of key employees-obligation was a CP.
- Information on opinion coverage]
 - N/A

7. Non-Competition/Non-Solicitation/Restrictive Covenants

[NR to report on the survey data compiled with respect to Non-Competition/Non-Solicitation/Restrictive Covenants, including the following aspects:

- Percentage of deals with/without non-compete clauses and information on duration and the use of liquidated damages clauses
 - In 100% of the cases, a non-compete clause was included. In 78% of the cases, the duration of the non-compete clause was limited to 36 months, and in the remaining 22%, the non-compete clause expires after 60 months.
 - In 88% of the cases where a non-compete clause applies, a liquidated damages clause was included. The amounts of the liquidated damages vary from EUR 5,000 (12.5%) – EUR 100,000 (12.5%) – EUR 200,000 (12.5%)

- EUR 250,000 (12.5%) – EUR 500,000 (37.5%) – EUR 1,000,000 (12.5%). In 50% of the cases where liquidated damages are provided, the amount of the liquidated damages is to be increased with an amount for each day that the infringement continues, more specifically, EUR 1,000 (25%) – EUR 10,000 (25%) – EUR 50,000 (50%).
- Percentage of deals with/without non-solicitation clauses and information on duration and the use of liquidated damages clauses
 - In 88% of the cases, a non-solicitation clause was included. In 62.5% of the cases where a non-solicitation clause was included, the duration of the non-solicitation clause was limited to 36 months, in 25% to 60 months, and in 12.5% to 24 months.
 - In 75% of the cases where a non-solicitation clause applies, a liquidated damages clause was included. The amounts of the liquidated damages vary from EUR 5,000 (16.6%) – EUR 100,000 (16.6%) – EUR 200,000 (16.6%) – EUR 250,000 (16.6%) – EUR 500,000 (33%) – EUR 1,000,000 (12.5%). In 50% of the cases where liquidated damages are provided, the amount of the liquidated damages is to be increased with an amount for each day that the infringement continues, more specifically, EUR 1,000 (33%) – EUR 10,000 (33%) – EUR 50,000 (33%).
- Percentage of deals with/without non-disparagement covenants
 - 12.5% of the cases included a non-disparagement covenant.
- Percentage of deals with/without non-embarrassment covenants
 - 12.5% of the cases included a non-embarrassment covenant.
- Percentage of deals with/without blue pencil clauses]
 - In 66% of the cases where a non-competition clause was included (i.e., 100%), a blue pencil clause was also included in this respect.
 - In 62,5% of the cases where a non-solicitation clause was included (i.e., 88%), a blue pencil clause was also included in this respect.

8. Governing law & Jurisdiction

In all of the deals, a choice of law clause was included in the documentation. In all but one cases, Belgian law was made applicable. In one case (11%), however, the parties chose the laws of the Netherlands.

Jurisdiction clauses were included in 89% of the deals. Antwerp courts were given jurisdiction in 33% of the deals. The other deals included jurisdiction clauses for Ghent (22%), Ghent-Kortrijk (11%), Brussels (11%) and the French speaking court of Brussels (11%). The limited number of deals in which jurisdiction was given to Brussels courts (22%) could be explained by the fact that most reported deals did not

have a cross-border nature, the area in which the parties involved were located, the location of the reporting law firms and/or the court backlogs in Brussels.

The deals show that the popularity of arbitration is still limited in Belgium. The deal that was made subject to the laws of the Netherlands was the only deal (11%) with an arbitration clause (in favour of the Nederlands Arbitrage Instituut). Language of arbitration was English in this deal and a choice for 3 arbitrators was made.

None of the deals included a prior mediation obligation.

In none of the deals formal litigation was initiated so far.

9. General Information

Only 33% of the deal that were reported on concerned cross-border transactions.

Other law firms involved were, Astrea, Eubelius, Elegis Advocaten, West Adocaten (NL), Allen & Overy (NL), Laurius Advocaten, Norton Rose, Clifford Chance, Allen & Overy and Littanie, Haulotte, Watelet et Associés.

None of the deals reported on were referrals made by other AIJA members.

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- c. Duis aute irure dolor in reprehenderit in voluptate velit esse cillum dolore eu fugiat nulla pariatur. Excepteur sint occaecat cupidatat non proident, sunt in culpa qui officia deserunt mollit anim id est laborum.

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BIBLIOGRAPHY

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- Doe, John B. *Conceptual Planning: A Guide to a Better Planet*, 3d ed. Reading, MA: SmithJones, 1996.
- Doe, John B. *Conceptual Testing*, 2d ed. Reading, MA: SmithJones, 1997

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