



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

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

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Executive Summary of Austria

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1. General Statement

- In order to get balanced results I have reviewed small-, mid- and large-cap transactions (in terms of Austria deal volume standards). The majority of these transactions were cross-border transactions with rather small targets.
- In case that LoIs were used, these are basically of non-binding nature, except for specific clauses, such as in particular exclusivity (if granted) and confidentiality, which however did not relate to the material terms of the respective transaction.
- Specialized M&A adviser are engaged only in transactions with higher deal volumes.
- While the conduct of a due diligence is market standard, vendor due diligences are rarely seen.
- SPAs (in non-distressed transactions) contain extensive lists of reps and warranties. When it comes to limitations of liability, it seems to be market standard to differentiate between reps relating to shares, title, status and capacity, reps relating to operative topics and reps relating to taxes.
- The results of the review suggest that non-competition clauses are always used in connection with non-solicitation clauses.

2. Summary of Transaction Details

- Number of reported deals: 7
- Deal value of reported deals: maximum deal value EUR 220,000,000, minimum deal value 1,900,000 and median deal value 12,900,000.
- Percentage of shares acquired in deals reported: maximum percentage 100%, minimum 20% and median 100%.
- General information on relevant industries of reported deals:
 - Industrial/Manufacturing 1,
 - Consumer Goods/Foods/Retail 2
 - Computer/Software/IT/E-Commerce 2
 - Automotive 1
 - Medical/Pharma 1
- General information on Buyers' and Targets' countries of origin:
 - Buyer:
 - Austria 2
 - Norway/Austria 1
 - Canada, 1

- Germany 1
 - USA 1
 - Netherlands/Switzerland 1
- Target:
 - Austria 5
 - Slovakia 1
 - Belgium 1
- Percentage of deals with targets below 200 employees: 100%
- Percentage of deals without auction: 100%
- Nature of the transactions:
 - Private Equity/Venture Capital vs Industrial/Trade 2,
 - Sales of family business 4
 - Industrial/trade vs Industrial/Trade 6

3. Letters of Intent

- Percentage of transactions with LoIs signed: 70%
- Where signed, 40% of the LoIs contained exclusivity clauses all of which were more than 1 month.
- Only 1 LoI had binding character with regard to certain clauses.

4. Due Diligence

- Percentage of transactions with vendor due diligence: 0%
- Percentage of transactions with data room: 100%
- 70% of the data rooms were virtual data rooms whereas 30% were physical datarooms.
- Data rooms were managed as follows:
 - Law Firm 1
 - Data Room Provider 2
 - Seller 4
- In 2 transactions formalized Q&A procedure was followed and in 5 transactions the right to print/copy was granted.

5. Purchase Agreement

- Transaction
 - Percentage of transactions with simultaneous closings : 30%
 - Languages of purchase agreements: 30% English, 70% German
- Purchase Price
 - Forms of consideration of transactions reviewed: 100% Cash
 - Purchase price determination of transactions reviewed: 70% without price adjustment and use of locked-box, 30% with closing accounts
 - Payment mechanics of transactions reviewed: 30% with escrow account, 15% earn out payments, 55% full payment on closing
 - Financing of transactions reviewed: 45% equity, 55% combination of debt and equity
- MAC clause
 - Percentage of deals with MAC clause: 30%
 - IN all transactions where a MAC clause was used, it was defined and a condition precedent to closing; in 50% of the transactions where used, the MAC clause was subject to a materiality threshold.
- Reps & Warranties
 - Percentage of deals with reps&warranties: 100%
 - Percentage of deals with standard reps&warranties: 100%
 - Information on length and on repetition of reps&warranties as per closing: 100% extensive list
 - Percentage of deals with specific indemnifications and nature thereof: 1 of 7 of the SPAs of the transactions reviewed (i.e. 15%) contained specific indemnifications with regard to labelling, placing on the market and sale of the products distributed by the target.
 - Information on tax warranties vs. tax indemnities: 70% of the SPAs of the transactions reviewed contained only tax warranties whereas 30% contained both tax warranties and tax indemnities.
- Limitation of liability
 - Time limitations in general in the transactions reviewed were in a range from 7 to 36 months.
 - Time limitations for specific topics (such as title to shares, capacity, accounts etc.) range from 7 to 360 months.
 - Individual minimum claim amounts (amount in EUR vs. percentage of purchase price) range from EUR 5,000 to 1,500,000 (equaling a range of 0,04% to 2,6% of the purchase price). In the transactions reviewed there were no deductibles.

- Liability caps range from EUR 125,000 to 220,000,000 (equaling a range of 17,5 to 100% of the purchase price) depending on the nature of the breach).
- 85% of the transactions reviewed contain carve outs.
- Disclosures
 - Percentage of deals with disclosures and information on percentage of deals with disclosures against warranties only vs. warranties and specific indemnities: 70% warranties only, 30% warranties and specific indemnities
 - Percentage of deals with
 - full data room disclosure: 70%
 - Q&A log: 60%
 - Disclosure letters/schedules: 85%
 - Disclosure of due diligence report: 15%
 - Public information disclosed: 0%
 - Update between signing/closing: 0%

6. Conditions Precedent

- Percentage of deals with merger filings as CP and information on percentage of jurisdictions: 30% (1 jurisdiction each)
- Percentage of deals with third party consents as CP: 0%
- Percentage of deals with certain funds clause as CP: 15%
- Percentage of deals with the bring-down of warranties as CP: 15%
- Percentage of deals with MAC clause as CP: 30%
- Percentage of deals with seller's legal opinions as CP: 0%
- Percentage of deals with retention of key employees as CP: 0%

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

- 30% of the SPA of the transactions reviewed contained a non-compete clause which in each case lasted for 36 months. Only in one transaction was a liquidation damage clause used.
- 30% of the SPA of the transactions reviewed contained a non-solicitation clause which in each case lasted for 36 months. Only in one transaction was a liquidation damage clause used.
- Percentage of deals with non-disparagement covenants: 0%

- Percentage of deals with non-embarrassment covenants: 0%
- Percentage of deals with blue pencil clauses: 0%]

8. Governing law & Jurisdiction

- Percentage of deals with choice of law clauses and information on jurisdictions chosen: 100%
- Percentage of deals with jurisdiction clauses: 60%; in each case jurisdiction of the Commercial Court was agreed.
- Information on jurisdictions chosen: 6 of the transactions reviewed (85%) were subject to Austrian law and one transaction was subject to Belgian law (15%).
- Information on arbitration clauses (applicable rules, number of arbitrators, language): 40% contain arbitration clauses under the rules of ICC, CEPANI or Austrian Chamber of Commerce. In each case it was agreed that the proceedings were to be decided by 3 arbitrators and in each case it was agreed that the proceedings were to be held in English language.
- Percentage of deals with prior mediation obligation: 30%
- Percentage of deals with initiation of formal litigation procedures and information on the grounds (purchase price, reps&warranties or indemnities, other aspects): 0%]

9. General Information

- Percentage of deals with cross-border element: 85%
- Names of involved law firms: Hasch & Partner; Tonninger, Schermaier, Mayerhofer und Partner; Stibbe; Travers Smith; Beiten Burkhardt; Held Berdnik Astner & Partner; Kirkland & Ellis
- Information on whether referrals were made by other AIJA members: No referrals by other AIJA members.

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