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

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Executive Summary of Denmark

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1. General Statement

The information herein is based solely on the author's review of AIJA deal questionnaires for ten randomly selected transactions in which Bech-Bruun has acted to a party as legal adviser, and may not be representative for market practices or standards. The views and opinions expressed in this executive summary are those of the author personally and do not necessarily reflect the opinion or position of Bech-Bruun law firm. The structure of this executive summary follows the template prepared by AIJA as well as the structure of the deal questionnaires.

General comments on the Danish M&A market

Although the Danish M&A market over the past few years has, as most markets, been somewhat adversely affected by the general macroeconomic turbulence, deal activity has been quite high and appears to continue to be on the rise. We currently see many M&A players, private equity firms as well as industrials, looking to do transactions on the Danish market, both on the buy- and sell-side. In particular, it seems that a number of private equity funds with money to spend are looking to Denmark for investment opportunities, at the same time as various existing investments are mature for an exit. Bech-Bruun has assisted on more than 100 share deals in the relevant period (since 1 January 2014) and has for several years been amongst the most active law firms within private M&A in the Nordic region (based on Mergermarket statistics). The demand for professional services on the Danish M&A market remains relatively high and we see many different types of international professional investors and other M&A specialists operating actively in Denmark.

When looking at the Danish M&A market, we see it being largely dominated by Nordic players, as well as various market participants from the rest of Europe and the US. However, we do see a tendency that Danish targets appear to attract an increasing interest from e.g. Asian players. Although this has to date only resulted in a limited number of significant M&A transactions, Bech-Bruun's Chinese desk reports an increasing interest from Chinese investors for both Danish and other European targets.

As a general observation for the past few years (which was not necessarily apparent from our survey), the M&A parties' risk-appetite has been relatively low and the transaction processes have been proving more difficult to complete. This is, inter alia, reflected in the fact that the parties have spent longer time preparing and agreeing the specifics of a transaction in comparison to previously. This has also led to a higher number of tailored deals where sellers have tried to fast-track and negotiate with only, one or a limited amount of selected bidder(s), rather than going for a full–fledged structured sales process.

General observations on deal points from a Danish perspective

There is no specific Danish act or regulation governing the content of transaction agreements in connection with the acquisition of shares in a Danish company. To the contrary, a large degree of non-mandatory rules apply for such transactions, which generally gives the parties a lot of flexibility in structuring deals. The general legal framework is included in various different acts, including in particular the Danish Sales of Goods Act (*Købeloven*), the Danish Companies Act (*Selskabsloven*), the Danish Act on Transfer of Undertakings (*Virksomhedsoverdragelsesloven*), the Danish Competition Act (*Konkurrenceloven*), etc. This legal framework is, to a certain extent, non-mandatory, and it is common that the transaction documentation in Danish deals is quite comprehensive. Historically, Danish M&A transaction documentation has been largely influenced by the US and UK regimes and is generally – with certain exceptions - applying the same principles, purchase price mechanisms, etc. as in those internationally recognized standards.

Specific deal trends

The review of the information regarding the ten transactions reviewed for this survey did not as such reveal any surprising, unusual trends. However, it was a surprise that only one of the transactions included in the survey made use of an insurance solution covering losses incurred as a result of a breach of the warranties or indemnities. We are seeing an increasing appetite on the Danish market from both buyers and sellers to explore this route; in particular in connection with structured auction processes. Bech-Bruun has successfully assisted a number of buyers and sellers in establishing such insurance solutions, which (for many but not all transactions) can prove an efficient way of handling transactional risks and bridging gaps between the parties in the negotiations. Private equity sellers' interest in achieving a clean exit, and thus quicker getting the money out, general market uncertainty, somewhat falling prices for taking out W&I insurance as well as the various M&A players and advisers becoming increasingly comfortable and experienced in implementing the W&I insurance, has meant an increase in the demand in the market in this respect.

2. Summary of Transaction Details

This executive summary report is based on 10 randomly selected transactions in which Bech-Bruun assisted either the seller or the buyer (seven was done by our Copenhagen office and three by our Aarhus office). The transaction value of the ten deals based on enterprise value varied from EUR 6,000,000 as the smallest to EUR 5,266,000,000 for the largest, having an average value of EUR 690,000,000 (EUR 105,000,000 if not including the largest mentioned above).

Eight of the ten transactions entailed the transfer of 100 per cent of the shares of the target company, whereas the remaining two entailed the transfer of 48 and 50 per cent of the shares in the target company, respectively.

We have reported on transactions regarding target companies within a variety of different industries, including banking services, energy, retail, transportation, consumer goods, aerospace/defense and manufacturing. 60 per cent of the target companies had more than 200 employees at the time the transactions were completed.

All targets in the transactions were Danish limited companies, with the buyers originating from Denmark (7), Poland (1), China (1) and the US (1).

40 per cent of the deals were completed following a structured sales process, and involved a private equity buyer or seller in 90 per cent of the transactions.

3. Letters of Intent

The majority (six out of nine[1]) of the transactions included in the survey were completed without the parties having signed a letter of intent, memorandum of understanding or a similar preliminary agreement.

A letter of intent was executed in three transactions, two of which awarded the buyer exclusivity (both less than a month). In particular in the fast-track scenarios, where a seller and a buyer will try to reach an agreement before the seller launches a wide auction process, a letter of intent continues to be a popular framework for agreeing exclusivity as well as an aggressive timetable to finalise the deal.

4. Due Diligence

General introduction to the Danish disclosure regime

One deal point where the Danish M&A practice is often distinct from the US and UK standards, is in terms of the disclosure regime. Although not entirely unseen, the concept of a disclosure letter as the seller's only disclosure against the sellers warranties is quite unusual in Danish transactions where a significantly wider disclosure standard is often applied. Thus, the majority of privately negotiated Danish M&A deals operate with a general disclosure regime where the seller's warranties, unless specifically carved-out, will be subject to and qualified by the information disclosed by the seller, including in respect of documentation available in the data room, vendor due diligence reports, etc. Other disclosure points, e.g. to which extent publicly available information or information shared (orally) at meetings by the seller is deemed disclosed against the warranties, is more often subject to the parties' specific negotiations.

[1] *We were not able to retrieve the information for the last transaction.*

Data room disclosure

In light of the general disclosure regime customarily applied in Denmark, most sellers will organize a detailed and comprehensive data room with the assistance of its professional advisers. This is in line with our survey where the seller established a data room in 90 per cent of the transactions.

Practically all data rooms in connection with Danish transactions are made available using virtual platforms, which was the case in all of the transactions where a data room was established. Please note, however, that it is not entirely uncommon that certain sensitive documentation (e.g. management's service contracts, certain customer data, etc.) is only made available in a physical data room in addition to the virtual data room.

It is quite common on the Danish market to use the internationally well-established virtual data room solutions, e.g. Merrill DataSite, Intralink, etc. Furthermore, and in particular for smaller deals, some law firms have their own platforms available in this respect. Bech-Bruun launched such a platform several years ago and we are seeing an increasing demand in this respect. 90 per cent of the transactions in the survey used a formal Q&A procedure in the virtual data room, and a corresponding Q&A log to ensure all information given is deemed "disclosed".

Only 20 per cent of the transactions included in our survey allowed the data room participants to download and/or print documents from the virtual data room. This is a somewhat surprising low number. It seems that there is a tendency on the Danish market to consider on a case-by-case basis whether to allow download- and print access. The seller on one hand needs to protect the value of the target company by ensuring a high degree of confidentiality which may be compromised by a large deal team being able to download and/or print. On the other hand, it is very impractical to review large and complex documents on the screen, and allowing printing and downloading may help the buyer to complete the due diligence in a more swift and expedient manner for the benefit of all parties.

Vendor due diligence reports

Of the ten transactions included in the survey, the seller's professional advisers carried out vendor due diligence in 30 per cent of the transactions, all of which were made available to the bidder(s).

In particular in the context of larger M&A transactions, this number is a bit lower than expected. Sometimes, we see a hybrid with the seller's counsel doing legal due diligence memoranda on behalf of the seller and making them available in the data room. This is particularly relevant when describing complex legal transactions, disputes etc. and will help a buyer's due diligence process.

5. Purchase Agreement

General remarks

90 per cent of the transactions included in the survey were based on a conditional share sale and purchase agreement with completion being subject to certain conditions being fulfilled, and consequently with a split signing and completion (see regarding conditions precedent in section 6 below).

Furthermore, the transaction documentation in respect of 90 per cent of the transactions included in the survey was in the English language, which is quite common, including in respect of transactions with all-Danish participants.

Purchase Price

The most common purchase price mechanisms in larger M&A deals in Denmark continue to be the application of completion accounts and the locked box mechanism, respectively. Historically, completion accounts have been the preferred route. Very simply put, the buyer will at completion "pay for what he gets", and will have the opportunity to test the determination of the various purchase price components. Applying the locked box mechanism will, as a start, transfer the financial risk to the buyer already as at the date of the balance sheet on which the locked box is based and will as a general point of departure not give the buyer the possibility of any post-completion adjustments of the purchase price should it prove that some of the buyer's assumptions were wrong. Both mechanisms have a number of pros and cons, and it is always a very individual assessment which mechanism is most appropriate for a transaction.

In 60 per cent of the transactions included in the survey, the purchase price was based on completion accounts, whereas the remaining was based on a locked box mechanism.

We do see a slight tendency towards a higher number of locked box mechanisms being applied when determining the purchase price. This may be a sign that it is quite a seller-friendly market, that buyers are becoming more comfortable with the locked box (which of course requires an in-depth due diligence and analysis of the locked-box balance sheet as there is no room for later adjustments) or maybe a desire to avoid any post-completion purchase price disputes.

In terms of payment of the purchase price, 90 per cent of the transactions included in the survey required payment of the purchase price in cash, with only one (ten per cent) requiring the purchase price paid by a combination of cash and shares. Furthermore, 70 per cent of the transactions required payment of the purchase price at completion, one being paid in agreed installments, one being based on an earn-out mechanism and one being paid in cash and vendor loans. This seems to be a fair representation of the Danish market.

In respect of financing of leveraged M&A deals in Denmark, the preferred structure has generally been a combination of equity and senior debt. Although we are seeing

more sophisticated finance structures implemented, this remains the preferred route in today's Danish M&A market.

MAC clauses

Four of the ten transactions included in the survey (40 per cent) included a MAC clause. In all four transactions, the MAC clause was included as a condition precedent (no back-door MACs). Only one had a tailored business specific definition of the MAC, and in all four instances the MAC included a specified monetary materiality threshold.

This number appears relatively high as sellers more often than not seem to succeed in avoiding MACs. Deal certainty remains a top priority for sellers, in particular in structured sales processes, and a MAC is not something that is looked upon kindly by sellers. In a competitive auction process, buyers tend to be quite cautious when proposing a MAC, unless specific reasons call for this need of protection.

Representations and warranties

All transactions included in the survey included what we consider customary representations and warranties by the seller. Furthermore, of these catalogues of warranties, 50 per cent were deemed *extensive* and 50 per cent deemed *limited*. It is quite a subjective assessment whether a set of warranties is extensive or limited and will always depend on the complexity of the target business, the due diligence undertaken, the risks identified, etc.

In 8 of the transactions with a split signing/completion, the representations and warranties were repeated at completion in 6 instances. This is often a negotiation point and it is not uncommon to negotiate this point on a warranty by warranty basis.

Furthermore, 30 per cent of the ten transactions in the survey included specific indemnifications based on findings in the due diligence. This, of course, is a question of whether or not significant risks have in fact been identified and the parties' agreement on how to allocate the risk in respect of such matters. Needless to say, specific indemnities remain most relevant for "low-risk, high-impact" matters where the parties cannot trade off the risk in the purchase price negotiations.

Only one of the transactions in the survey included a tax indemnity. However, as for tax liability, it is quite usual for a seller to remain liable for taxes incurred prior to the completion date (or the locked box balance sheet day, if applicable). This can be done by including a specific tax indemnity in the share sale and purchase agreement, or by way of excluding the tax warranties from the limitations in the seller's warranties (including in respect of disclosure), effectively rendering such tax warranties indemnities. This is also the general picture in the transactions we have reviewed as part of this survey although difficult to put a number on based on the

questionnaires. We note, however, that in 90 per cent of the transactions, the time limitation in respect of the tax warranties was extended to *statutory limitation*.

Limitations of the seller's liability

The limitations of the seller's liability remain an important issue when negotiating M&A deals in the Danish market. As noted in the introduction, we do see a rise in the appetite for exploring insurance solutions in this respect. However, none of the ten transactions included in the survey implemented such solution.

Time limitations

In terms of time limitations, the seller's liability for the general representations and warranties was limited in time for 24 months (1), 18 months (5), 15 months (1) and 12 months (3). This does not seem off-market and will always have to be seen in light of signing and completion dates (to ensure audit review of the target's accounts).

As noted above, in 90 per cent of the transactions, the time limitation in respect of the tax warranties was extended to *statutory limitation*. 40 per cent of the transactions included specific time limitations in respect of the environmental warranties. Other than these general extensions, it varies quite a lot from transaction to transaction whether the time limitation for specific categories of warranties has been extended.

Individual minimum claims (de minimis)

In addition to the negotiation of time limitation, the question of monetary thresholds (*de minimis*, basket and liability cap) is also a very deal specific negotiation where the specific circumstances will be important, e.g. in respect of the target's general risk profile, the extent of the buyer's due diligence, the parties' negotiation position, etc.

All transactions included in the survey had a *de minimis* threshold in respect of warranty claims, which is not unexpected for transactions on the Danish market. In respect of the level of the *de minimis* threshold in the transactions included in the survey, these were in the range from 0.025 per cent of the purchase price[2] up to 0.2 per cent of the purchase price, with the average being 0.1 per cent of the purchase price. A *de minimis* threshold will often be in the range of 0.1 up to 0.5 per cent of the purchase price. However, this very general principle is subject to the specific target company's business and risk profile and often it is not relevant to discuss market standards without looking at industry, history, etc. In Danish M&A deals, it is not often agreed that a *de minimis* amount is not recovered from DKK one (deductible).

[2] *The purchase prices used to compare the various thresholds herein have not consistently been based on enterprise- or equity value and may thus vary in some of the transactions.*

Aggregate minimum claim (basket)

All transactions included in the survey had a basket provision. In respect of the basket thresholds in the transactions included in the survey, this was in the range of 0.47 per cent of the purchase price up to 1.67 per cent of the purchase price, with the average being 0.9 per cent of the purchase price. An important negotiation point in this respect is whether or not to have a tipping basket (deductible). In 75 per cent of the transactions included in the survey, which have a split signing and closing, the parties had agreed on a tipping basket, i.e. with recovery from DKK one.

Liability cap

The seller's general liability cap in the transactions included in the survey varied from 13 per cent of the purchase price to 25 per cent of the purchase price, with the average being 19 per cent of the purchase price. Currently, sellers tend to succeed in achieving even seller-friendly liability caps (even at occasions as low as 10 per cent of the purchase price). However, this obviously also largely depend on the target company's risk profile, industry, the buyers comfort following due diligence, etc. and it is very difficult to speak of market standards in this respect. As noted, a W&I insurance solution may be the tool to bring parties together on these questions.

Disclosure

As described in section 4 above, it is very common in Danish transactions to use a general disclosure regime where the seller's general representations and warranties (as opposed to any specific indemnities) are subject to and qualified by matters disclosed to the buyer by the seller. 90 per cent of the transactions in the survey included full disclosure against the data room (including the data room Q&A log), whereas one transaction did not allow any disclosure against the warranties. In *addition* to the data room disclosure, some of the transactions had additional documentation included in the disclosure provision, including a specific disclosure letter (3), vendor due diligence reports (3) and public information (5).

In seven of the nine transactions with the disclosure concept, the disclosure was only made against the warranties and not indemnities which is quite common. In two of the transactions included in the survey, the seller was allowed to disclose against the specific indemnities. Depending on the type of specific indemnities agreed, this concept is quite unusual from a Danish perspective.

Update of disclosures

Generally, a buyer will take over the (business) risks of a target company from the seller as from the completion date. Often in Danish transactions, a seller's representations and warranties are given at signing and – to the extent practically possible – deemed repeated at closing. This leaves the risk of any matters which occurs in the period and which constitute a breach of a warranty with the seller.

Sometimes, however, a seller will require access to disclose against the warranties in the period between signing and completion, i.e. effectively transferring the risk of any such matters to the buyer already at signing. This is not often seen in Danish M&A transactions, and the seller was not entitled to update the disclosures in the period between signing and completion in any of the transactions included in the survey.

Exclusions

In Danish transactions it is quite common for fundamental warranties (title, capacity, etc.) to be excluded from the sellers' liability limitations (disclosure, time limitations, thresholds, etc.). This was the case in 80 per cent of the transactions included in our survey.

6. Conditions Precedent

90 per cent of the transactions included in the survey were based on a conditional share sale and purchase agreement with completion being subject to certain conditions being fulfilled. Often, the parties will seek to limit the conditions to matters outside the parties' control to achieve a high degree of deal certainty once the agreement is signed. Generally, it is the impression that in particular anti-trust clearance (the Danish merger control regime is based on an EU directive and, consequently, completion of transactions above certain revenue thresholds require merger clearance from the competent authorities) is the single most important condition precedent in Danish M&A transactions, although only used in three of the transactions included in the survey.

Below a list of the questions in the survey with the relevant percentages:

- Percentage of deals with/without merger filings as CP and information on percentage of jurisdictions (30 per cent with, 70 per cent without)
- Percentage of deals with/without third party consents as CP (40 per cent with, 60 per cent without)
- Percentage of deals with/without certain funds clause as CP (20 per cent with, 80 per cent without)
- Percentage of deals with/without the bring-down of warranties as CP (20 per cent with, 80 per cent without)
- Percentage of deals with/without MAC clause as CP (40 per cent with, 60 per cent without)
- Percentage of deals with/without seller's legal opinions as CP (10 per cent with, 90 per cent without)
- Percentage of deals with/without retention of key employees as CP (10 per cent with, 90 per cent without)

The one transaction with a CP regarding legal opinion from seller's legal counsel, the scope of the opinion was a customary corporate status and enforceability opinion. Such opinions are generally not required in Danish transactions and only rarely included as a CP.

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

50 per cent of the transactions included in the survey contain non-competition clauses. The duration varies from 24 months to 36 months, and in all of these instances, any breach of such non-compete clauses will entail payment of liquidated damages.

None of the transactions included in the survey contain non-disparagement covenants or blue pencil clauses. One transaction included in the survey (10 per cent) included a non-embarrassment clause.

8. Governing law & Jurisdiction

All of the transactions included in the survey contain choice-of-law clauses (all Danish Law). It is quite unusual to agree to a different choice-of-law for Danish M&A transactions, however, specific circumstances may of course modify this point of departure.

All of the transactions included in the survey include arbitration as the dispute resolution venue. In 90 per cent of the transactions, the rules of arbitration agreed are those of the Danish Institute of Arbitration (in one instance the parties have agreed Polish arbitration).

30 per cent of the transactions included in the survey contain provisions on a prior mediation obligation before proceeding to arbitrational procedures.

None of the ten transactions included in our survey have (as of this date) resulted in a subsequent dispute between the seller and the buyer that ended in arbitrational proceedings. Of course, discussions regarding e.g. determination of completion accounts, and thus the final purchase price, do from time to time give rise to such disputes. A very low number of such disputes is, however, generally in line with our impression of the development in this respect, i.e. that the number of purchase price disputes are decreasing, in particular disputes that actually make it to arbitration. There may be many explanations to this (positive) trend, one of which may be that we are seeing more locked box purchase price mechanisms than what has historically been the case. Although this mechanism of course raises the requirements to a buyer's detailed due diligence on the relevant locked box balance sheet (as there is not access to post-completion adjustments), this also forces the parties to "battle-out" any potential disagreements up-front.

9. General Information (cross border elements)

40 per cent of the transactions included in the survey included a cross-border element[3].

The parties in the transactions included in the survey were – in addition to Bech-Bruun – represented by other local law firms, including Kromann Reumert, Gorrissen federspiel and Plesner. Furthermore, Linklaters (Poland) assisted on one of the transactions alongside Bech-Bruun.

[3] *This does not necessarily reflect buy- and sell side where several parties are non-Danish.*

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