



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

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

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Executive Summary of Germany

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1. General Statement

- general market trends in respect of deal points generally: use of W&I Indemnities Insurance coverage becoming more and more standard; still, reps & warranties always firmly negotiated
- other information worthwhile flagging: only transactions could be included in the evaluation that are not highly confidential or of sensitive nature; but the transactions not included in the evaluation do not materially deviate from the results shown in here

2. Summary of Transaction Details

- Number of deals reported: 7
- Maximum deal value of deals reported: USD 200m
- Minimum deal value of deals reported: EUR 8.1m
- Median deal value of deals reported: EUR 55m
- Maximum, minimum and median percentage of shares acquired in deals reported: 100% - 8.15% - 86.88%
- General information on relevant industries of reported deals: Media, Industrial/Manufacturing, Consumer Goods/Food/Retail
- General information on Buyers' and Targets' countries of origin: Targets mostly based in Germany
- Percentage of deals with targets below 200 employees: 29%
- Percentage of deals with auction: 29%
- General information on the nature of the transactions: Private Equity, Industrial

3. Letters of Intent

- Percentage of transactions with LoIs signed: 29%
- Where signed, information on how many contained exclusivity clauses together with information on percentage of LoIs with exclusivity clauses up to/more than 1 month: n/a
- Where signed, information on binding character: n/a

4. Due Diligence

- Percentage of transactions with vendor due diligence: 0%
- Where a vendor due diligence was performed, percentage of cases where the report was disclosed to the Buyer: n/a
- Percentage of transactions with data room: 100%

- Percentage of transactions with virtual data rooms vs. percentage with physical data rooms: 100% - 0%
- Information on who managed/organized the data room: professional data room provider
- Information on whether formalized Q&A procedure was followed and whether right to print/copy was granted: yes in 100% of cases – yes in 100% of cases

5. Purchase Agreement

- Transaction
 - o Percentage of transactions with simultaneous closings vs. non-simultaneous closings: 100% non-simultaneous closings
 - o Information on languages of purchase agreements: 100% English, in one case English and German
- Purchase Price
 - o Information on forms of consideration: cash
 - o 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): 43% purchase price adjustment, 67% locked-box mechanism
 - o Information on payment mechanics (full payment vs. instalments with earn outs, retention by buyer etc.): payment mechanics completely differ and depend on deal structure and parties involved; in PE transactions typically more focused on earn-outs and vendor loans
 - o Information on financing, i.e. use of equity vs. debt (bank, bonds, vendor loans): in PE transactions mix of equity, bank debt, and vendor loans; otherwise equity
- MAC clause
 - o Percentage of deals with MAC clause: 29%
 - o Where used, information on MAC clause form, definition and materiality threshold: closing condition with defined MAC and materiality threshold based on EBIT functions
- Reps & Warranties
 - o Percentage of deals with reps&warranties: 100%
 - o Percentage of deals with standard reps&warranties: 100%
 - o Information on length and on repetition of reps&warranties as per closing: typically only fundamental reps (title, capacity, no insolvency etc.) are given as of signing and closing, and business reps only as of signing
 - o Percentage of deals with specific indemnifications and nature thereof:

- Information on tax warranties vs. tax indemnities: 100% tax warranties & tax indemnities (except in distressed acquisition from insolvency administrator)
- Limitation of liability
 - Information on time limitations in general (percentage of months): 67%
 - Information on specific time limitations (number of months) such as title to shares, capacity, accounts etc.: between 6 and 60 months; fundamental reps (title, capacity, no insolvency etc.) typically 36-60 months
 - Information on individual minimum claim amounts (amount in EUR vs. percentage of purchase price) and the use of deductibles: where standard set of reps included, de minimis and basket is highly negotiated point
 - Information on liability caps (amount in EUR vs. percentage of purchase price): 100% purchase price always maximum cap; for breach of specific reps, a lower cap is oftentimes agreed
 - Information on carve-outs:
- Disclosures
 - Percentage of deals with disclosures: 100%
 - Information on percentage of deals with disclosures against warranties only vs. warranties and specific indemnities: 100% against warranties only
 - Percentage of deals with
 - full data room disclosure: 71%
 - Q&A log: 0%
 - Disclosure letters/schedules: 100%
 - Disclosure of due diligence report: 0%
 - Public information disclosed: 14%
 - Update between signing/closing: 0%

6. Conditions Precedent

- Percentage of deals with merger filings as CP and information on percentage of jurisdictions: 57% - 1-2 jurisdictions
- Percentage of deals with third party consents as CP: 57%
- Percentage of deals with certain funds clause as CP: 0%
- Percentage of deals with the bring-down of warranties as CP: 14%
- Percentage of deals with MAC clause as CP: 29%
- Percentage of deals with seller's legal opinions as CP: 0%
- Percentage of deals with retention of key employees as CP: 14%

- Information on opinion coverage: 0%

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

- Percentage of deals with non-compete clauses and information on duration and the use of liquidated damages clauses: 57% with 24-36 months duration; no liquidated damages
- Percentage of deals with non-solicit clauses and information on duration and the use of liquidated damages clauses: 57% with 24-36 months duration; no liquidated damages
- 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% - in pure German deals, parties "confirm" that German law applies rather than chose German law in order to save notarial costs
- Percentage of deals with jurisdiction clauses: 0%
- Information on jurisdictions chosen: n/a
- Information on arbitration clauses (applicable rules, number of arbitrators, language): ICC or DIS with 1-3 arbitrators
- Percentage of deals with prior mediation obligation: 14%
- Percentage of deals with initiation of formal litigation procedures and information on the grounds (purchase price, reps&warranties or indemnities, other aspects): n/a

9. General Information

- Percentage of deals with cross-border element: 100%
- Names of involved law firms: White & Case, Gleiss Lutz, von Boetticher, Orrick
- Information on whether referrals were made by other AIJA members: n/a

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