

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

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**Executive Summary of Italy**

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## ***Introductory remarks for National Reporters (NRs)***

Deal points studies are often used by deal practitioners as a resource for market trends when negotiating acquisition agreements. The studies usually present a statistical breakdown of how key provisions are treated in a sample of publicly or otherwise available M&A contracts. The value of the deal points studies is that they give the practitioner a much better sense of M&A drafting trends than she or he could get by doing an own research.

Against this background the M&A Commission has decided to launch an “**AIJA Deal Points Survey**” with the goal to gather and analyze market standards for share deals in various AIJA jurisdictions. The overall objective of the survey is to gain a better understanding of market trends in share deals from the perspective of AIJA members so that we may share the insights with all interested AIJA members and thus improve our knowledge and general fitness when it comes to negotiating deal terms in share deals.

The AIJA Deal Points Survey will be conducted on the basis of the following documents:

- **Questionnaires** in the form as attached hereto as Exhibit 1 to be filled out on a case-by-case basis, i.e. one questionnaire each for each transaction covered;
- **Executive Summaries** in the form as set out hereinafter, with the goal of summarizing the findings from the various questionnaires; and
- **General Report** (to be drafted by the General Reporters) on the basis of the Executive Summaries received from the NRs.

The Questionnaires and the Executive Summaries are to be drafted by all interested NRs, i.e. each NR should fill out Questionnaires and provide an Executive Summary in respect of the information she or he put together in the Questionnaires. It may well be the case (and even desired) that there are several NRs in one and the same jurisdiction where each of them is expected to fill out Questionnaires and an Executive Summary (independently from each other or, if they want, in cooperation with each other). Thus, we are looking to receive numerous Executive Summaries and Questionnaires from NRs even if they are in the same AIJA jurisdiction.

The Questionnaires attached hereto are straight-forward and can be answered within reasonable time. Obviously, the more Questionnaires are filled out, the better the sample for the Executive Summaries will be. However, in order to adopt a reasonable and time-efficient approach, we would expect that each NR covers 3 to 5 transactions, i.e. fills out 3 to 5 Questionnaires and drafts 1 Executive Summary covering the respective Questionnaires, unless NRs team-up and provide an Executive Summary in respect of many more Questionnaires. We leave it up to the NRs whether they want to join efforts or not. NRs with highest number of transactions will win a prize!

The transactions to be covered by the NRs should meet the following criteria:

- Private share deals only (not asset deals)
- Survey is not restricted to certain industries
- Deal value at least EUR 1m
- Closings taken place after 1 January 2014

Please note that the Executive Summaries do not necessitate full sentences everywhere. NRs can e.g. simply insert a number where we ask about the number of transactions which fall into a certain category, or they can provide comments/findings in the form of bullet points.

To sum up, each NR is kindly requested to provide us with a completed Executive Summary together with all copies of the completed Questionnaires (including annexes thereto).

**Deadline for submission: 31 January 2016.**

## 1. General Statement

The majority of the share deals analyzed are deals where target company is an Italian company and in the majority of cases the Buyer is a multinational company or a subsidiary of a multinational, which decided to move its business in Italy purchasing Italian companies.

The target's industries were: service, industrial/manufacturing, media and entertainment, leisure, computer/software. Such diversification granted us an interesting comparative analysis and will grant you a good overview on Italian share deals.

## 2. Summary of Transaction Details

The deals reported were six, each with a different value:

- maximum deal value: 25,000,000.00 EUR;
- minimum deal value: about 2,000,000.00 EUR;
- median deal value: about 10,000,000.00 EUR.

The percentage of shares acquired in deals was 100%, except for a deal whereby the buyer purchased initially 62,5% of the shares, with an option to buy the remaining shares in the next 3 years.

All deals reported regarded targets below 200 employees and for no one of them a competitive auction was organized.

In 4 cases the transaction represented an industrial trade; in one case it was a sale of a family business; in the last case the seller was a private equity/venture capital party selling to industrial operator.

## 3. Letters of Intent

- 100% of transactions with LoIs signed:
  - o 5 out of 6 contained exclusivity clauses lasting more than 1 month;
- The LoIs signed contained certain binding clauses about:
  - o exclusivity (4 out of 6);
  - o confidentiality (4 out of 6);
  - o due diligence (1 out of 6);
  - o costs (3 out of 6);
  - o governing law and jurisdiction (2 out of 6);
  - o miscellanea (1 out of 6);
  - o due diligence (1 out of 6).

## 4. Due Diligence

- 4 out of 6 transactions (66,7%) were closed **without** vendor due diligence;

- in both deals with vendor due diligence the report was disclosed to the Buyer;
- all deals referred to a data room:
  - o in 5 out of 6 deals the data rooms were virtual;
  - o 4 data rooms were managed by the Seller, while 2 were managed by a Data Provider;
- in no deal a formalized Q&A procedure was followed;
- in one due diligence the right to print/make copies was granted.

## 5. Purchase Agreement

- Transaction
  - o 83,3% of transactions with simultaneous closings, 16,7% with non-simultaneous closings;
  - o 66,7% of purchase agreements was written in English, 33,3% was written in Italian;
- Purchase Price
  - o in all transactions the form of consideration was cash;
  - o 16,7% of deals (only one) without price adjustments and without use of locked-box, 83,3% of deals with closing accounts;
  - o payment mechanisms:
    - the payment without price adjustment was fully made on closing;
    - three payments were made in instalments with earn outs;
    - two payments were made in instalments through payment of some portion of purchase price into escrow account and, for the rest, through bank wire transfer to Seller's Accounts;
  - o financing:
    - a payment was financed by a combination of debt and equity;
    - a payment was financed by equity;
    - the financing of the other payments is unknown;
- MAC clause
  - o all deals without MAC clause;
- Reps & Warranties
  - o all deals with a set of contractual reps&warranties
  - o 66,7% of deals with standard reps&warranties, 33,3% of deals without;
  - o all deals contained an extensive list of reps&warranties;
  - o in 66,7% of deals reps&warranties were repeated on closing;

- one deal provided specific indemnifications for specific liabilities and risks discovered during the due diligence concerning: taxation, employment, underway proceedings, agreements (license, service production, apprenticeship, loan)
- all deals provided both tax indemnity and tax warranties;
- Limitation of liability
  - Time limitations in general
    - the median limit (66.7%) was 24 months after closing;
    - a limit was higher (60 months);
    - a limit was lower (18 months);
  - Information on specific time limitations
    - title to shares:
      - 66,7% of deals referred to the legal statute of limitations, providing also in two different cases 30 days or 6 months more after its expiry;
      - one deal provided a limit of 24 months;
    - capacity:
      - two deals provided a limit of 24 months;
      - one deal provided a limit of 60 months;
      - two deals referred to the legal statute of limitations;
      - one deal provided a limit of 18 months;
    - accounts:
      - four deals provided a limit of 24 months;
      - one deal provided a limit of 60 months;
      - one deal provided a limit of 18 months;
    - tax:
      - all deals referred to the legal statute of limitations;
    - social security:
      - four deals provided a limit of 24 months;
      - two deals referred to the legal statute of limitations;
    - labor:
      - three deals provided a limit of 24 months;
      - three deals referred to the legal statute of limitations;
    - environment:

- four deals didn't provide a limit in time;
- one deal referred to the legal statute of limitations;
- one deal provided a limit of 60 months;
- criminal:
  - three deals didn't provide a limit in time;
  - one deal referred to the legal statute of limitations;
  - one deal provided a limit of 18 months;
  - one deal provided a limit of 24 months;
- other specific limitations:
  - one deal contained a specific provision (no limit in time) for the liability deriving from any loss arising as a result of fraud or gross negligence;
- individual minimum claim amounts
  - three deals provided the individual claim amount of 10,000.00 EUR;
  - one deal provided the individual claim amount of 25,000.00 EUR;
  - two deals didn't provide an individual claim amount;
  - one deal used the mechanism of deductible;
- aggregate minimum claim amounts
  - one deal didn't provide an aggregate minimum claim amount;
  - one deal provided the aggregate minimum claim amount of 25,000.00 EUR;
  - one deal provided the aggregate minimum claim amount of 125,000.00 EUR;
  - one deal provided the aggregate minimum claim amount of 150,000.00 EUR;
  - two deals provided the aggregate minimum claim amount of 200,000.00 EUR;
- Liability caps
  - 5 out of 6 deals provided a maximum liability between 500,000.00 EUR and 2,500,000.00 EUR;
  - the other deal provided a higher maximum liability, namely 30% of purchase price (about 7,500,000.00 EUR);
- Carve-outs
  - two deals didn't provide carve outs for specific indemnifications;

- the other deals provided carve outs for: breach of fundamental/core warranties, other reps&warranties (taxation, employment claims, compliance with law, intellectual property, regulatory, assets), bad faith or gross negligence;
- Disclosures
  - 33,3% of deals without disclosures;
  - 66,7% of deals with disclosures against warranties and specific indemnities;
  - Percentage of deals:
    - with full data room disclosure (50%)
    - without Q&A log (33,3%)
    - with disclosure of letters/schedules (66,7%)
    - with disclosure of due diligence report (33,3%)
    - without public information disclosed (100%)
    - without update between signing/closing (100%)

## 6. Conditions Precedent

- all deals without merger filings as CP;
- 50% of deals with third party consents as CP;
- 16,7% of deals with certain funds clause as CP;
- 66,7% of deals with the bring-down of warranties as CP;
- all deals without MAC clause as CP;
- all deals without seller's legal opinions as CP (not customary in Italy giving legal opinion for M&A transactions);
- 66,7% of deals with retention of key employees as CP.

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

- Non-Competition Covenant
  - 66,7% of deals had such covenant:
    - the duration of the clause was between 24 months and 50 months;
    - one deal provided specific liquidated damages; in the other case they were included in the purchase price;
    - one deal contained a blue pencil clause;
- Non-Solicitation Covenant
  - 33,3% of deals with such a provision:



- the duration of the clause was 24 months;
  - no specific liquidated damages;
  - no use of a blue pencil clause;
- Non-Disparagement Covenant
  - 16,7% of deals with such a provision;
- Non-Embarrassment Covenant
  - 100% of deals without such a provision.

## 8. Governing law & Jurisdiction

- all deals with choice of law clauses; Law: **Italy**;
- 33,3% of deals with jurisdiction clauses and Courts of Milan;
- 66,7% of deals with arbitration clauses in accordance with Italian law and with the same provisions about:
  - Rules of National and International Arbitration of the Arbitral Chamber of Milan;
  - number of arbitrators: three;
  - language of arbitration: English;
  - residual Courts of Rome or Milan for summary proceedings and for disputes which may not be referred to arbitration.
- all deals without prior mediation obligation.

## 9. General Information

- 66,7% of deals without cross-border element;
- Names of involved law firms
  - Studio Truppa Medici
  - Bianco Besozzi, merged in Pavia & Ansaldo
  - DLA Piper
  - Chiomenti Studio Legale
  - Allen&Overy
  - DLA Piper

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