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

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Executive Summary of Poland

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1. General Statement

The survey showed that auction processes are becoming increasingly popular in M&A transactions carried out on the Polish market. This is not very surprising given the fact that they allow the prospective seller to create competitive tension between the potential buyers, which usually maximizes the purchase price, and puts more structure into the process, which in turn may expedite the transaction. Further, the locked-box mechanism is better understood, and parties to M&A transactions in Poland tend to use it more and more often. Clearly, the closing accounts mechanism can be more accurate. However, the benefits of purchase price certainty, as well as the opportunity to end the matter at closing (with no protracted process for preparation of closing accounts, review of and discussion about discussing them, negotiation of modifications and/or possible litigation) are being widely recognised, and stand behind the fact that locked-box mechanisms were used in 40% of the reported deals.

Other interesting findings of the survey and current trends in the market include the following: (i) the increasingly popular use of representation and warranty insurance (interestingly, it is usually the buyer who takes these up in order to induce the seller to give more extensive warranties and/or to possibly extend the duration of the validity periods for warranty claims), (ii) the decreasing use of escrow accounts which, if used at all, it is merely for deposit of price retention amounts and/or to facilitate settlements if third party debt of the target is being repaid at completion, and (iii) MAC clauses are usually heavily negotiated (and fiercely resisted by prospective sellers) but, if accepted, are usually highly specific and include thresholds of materiality.

The survey includes, among other things, such prominent deals as Aviva's acquisition from Innova Capital (private equity) of Expander Advisors, PKN ORLEN's sale of its railway business and assets to PKP Cargo S.A. (the Polish incumbent railway operator), as well as British American Tobacco's acquisition of Chic-group (Poland's biggest e-cigarettes distributor).

[NR to provide a general statement on key findings from the survey, including information on:

- general market trends in respect of deal points generally
- surprising survey results (innovative or unusual deal points)
- groundbreaking or prominent deals covered
- other information worthwhile flagging to the AIJA community]

2. Summary of Transaction Details

- five deals reported;

- maximum deal value: EUR 70,000,000; minimum deal value: EUR 22,685,376.10; median deal value: EUR 45,432,547.03;
- maximum percentage of shares acquired in deals reported: 100%; minimum percentage of shares acquired in deals reported: 51%; median percentage of shares acquired in deals reported: 90.17%;
- Consumer Goods / Food / Retail (2 deals); Computer / Software / IT / E-Commerce (1 deal); Transportation (1 deal), Financial services / Insurance (1 deal);
- in 3 of the reported deals Buyers were from Poland; whereas in 2 the Buyers were from the Great Britain and Poland / Luxembourg respectively. In case of all 5 reported deals targets were Polish companies;
- 80% of the reported deals constituted transactions where targets employed above 200 employees;
- 80% of the reported deals were transactions with auction process;
- out of the reported deals: 40% constituted sale of a family business; 40% constituted Private Equity / Venture Capital vs. Industrial / Trade transactions; and the remaining 20% constituted Industrial / trade vs Industrial / Trade transaction;

3. Letters of Intent

- 40% of the reported deals constituted transactions with LoIs signed;
- 2 of the reported deals (100% of deals with LoIs signed) contained exclusivity clauses with duration longer than 1 month;
- in case of 1 of the reported deals (50% of deals with LoIs signed) the LoI had binding character;

4. Due Diligence

- 60% of the reported deals constituted transactions with vendor due diligence;
- in one of the reported deals (20% of the reported deals) the vendor due diligence report was disclosed to the Buyer;
- 100% of the reported deals constituted transactions with data room;
- 100% of the reported deals constituted transactions with virtual data room;
- data room was managed by the Seller (1 deal); Financial Adviser (2 deals); Financial Adviser / Law firm (1 deal) and the Investment Banker (1 deal);
- 100% of the reported deals constituted transactions with formalized Q&A and in case of 80% of the reported deals permission to print/copy documents available at the data room was granted;

5. Purchase Agreement

- Transaction
  - 20% of the reported deals constituted transactions with simultaneous closings;
  - 80% of the reported deals constituted transactions with the English language share purchase agreement and the remaining 20% constituted transactions with the Polish language share purchase agreement;
- Purchase Price
  - All 5 of the reported deals constituted transactions with cash consideration;
  - 2 of the reported deals (40% of the reported deals) constituted transactions with closing accounts and the remaining 3 of the reported deals were transactions without price adjustment (out of which 2 with use of locked-box);
  - 2 of the reported deals (40% of the reported deals) constituted transactions with full payment of the purchase price on the closing, whereas 1 of the reported deals was a transaction with payment in instalments (where portion of the purchase price was paid into escrow account), 1 of the reported deals was a transaction with payment in instalments (where portion of the purchase price was paid into escrow account) and envisaged earn-out payments, whereas the remaining 1 deal envisaged additional options to purchase and/or sell remaining shares (in this case 49% of the share capital) with a price based on fixed formula;
  - 3 of the reported deals (60% of the reported deals) constituted transactions with equity financing, in case of 1 of the reported deals there was debt financing (bank debt) and in the remaining 1 transaction form of financing is unknown;
- MAC clause
  - 80% of the reported deals constituted transactions without MAC clause;
  - in one of the reported deals where the MAC clause was used it (1) constituted CP (right to walk away); (2) was defined; and (3) contained a materiality threshold;
- Reps & Warranties
  - 100% of the reported deals constituted transactions with reps&warranties;
  - 80% of the reported deals constituted transactions with standard set of reps&warranties;

- 40% of the reported deals constituted transactions with extensive reps&warranties and in case of all of the reported deals reps&warranties had to be repeated at the closing;
- 60% of the reported deals constituted transactions with specific indemnifications (i.e. tax, historic restructuring, data protection, non-compliance, potential / pending litigation; risks connected with certain regulatory proceedings carried out against the target's contractors and risks resulting from specific tax risks related to historic contributions in kind into the target);
- 80% of the reported deals constituted transactions with only tax warranties and no tax indemnity and the remaining 20% of the reported deals envisaged both tax warranties and indemnities;

- Limitation of liability
  - median duration of time limitations of liability: 19,2 months;
  - specific time limitations: title to the shares (60-72 months – 100% of the reported deals); capacity (60-72 months – 80% of the reported deals); tax (60-72 months – 80% of the reported deals); social security (72 months – 40% of the reported deals);
  - individual minimum claim amounts: (1) EUR 45,525 (0.01% of the purchase price), use of deductibles; (2) EUR 27,222 (0.12% of the purchase price), no use of deductibles (3) EUR 1,135 (N/A % of the purchase price), no use of deductibles; (4) N/A; (5) EUR 132,026.13 (N/A % of the purchase price), no use of deductibles;
  - Liability caps: in general all the agreements provided for liability caps in case of breaches of the reps & warranties, ranging from 10 to 40%, and in case of breach of the Title Warrantiesthe liability was extended to 100% of the purchase price ;
  - 1 of the reported deals (25% of the reported deals) provides for specific carve outs for specific indemnifications (specific tax cases and data protection non-compliance), and 1 other deal (25% of the reported deals) envisages that indemnifications may be sought only during 3-5 years period following the closing;
- Disclosures
  - 100% of the reported deals constituted transactions with disclosures only against reps&warranties;
  - Percentage of deals with/without
    - 100% of the reported deals constituted transactions with full data room disclosure;
    - 100% of the reported deals constituted transactions with Q&A log;

- 80% of the reported deals constituted transactions with disclosure letters/schedules;
- 40% of the reported deals constituted transactions with disclosure of due diligence report;
- 40% of the reported deals constituted transactions where public information were considered as disclosed;
- 60% of the reported deals were transactions that envisaged update between signing/closing;

6. Conditions Precedent

- 80% of the reported deals constituted transactions with obligatory merger filings (1 jurisdiction in all cases) as CP;
- 60% of the reported deals constituted transactions with third party consents as CP;
- 100% of the reported deals constituted transactions without certain funds clause as CP;
- 100% of the reported deals constituted transactions without the bring-down of warranties as CP;
- 100% of the reported deals constituted transactions without MAC clause as CP;
- 100% of the reported deals constituted transactions without seller's legal opinions as CP;
- 100% of the reported deals constituted transactions without retention of key employees as CP;

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

- 80% of the reported deals constituted transactions with non-compete clauses (duration of which varied from 36 months in 3 cases and 72 months in one case) and envisaging in three cases liquidated damages for their breach ((1) EUR 10,903,066; (2) EUR 113,578; and (3) EUR 896,476,691 for each breach; or in the event of continuous breach leasing more than 30 days, liquidated damages in the amount of EUR 336,178.76 for each month during which the breach persists);
- 80% of the reported deals constituted transactions with non-solicit clauses (duration of which varied from 36 months in 3 cases and 72 months in one case) and envisaging, in three cases. liquidated damages for their breach ((1) EUR 10,903,066; (2) EUR 113,578; and (3) EUR 896,476,691 for each breach; or in the event of continuous breach leasing more than 30 days, liquidated damages in the amount of EUR 336,178.76 for each month during which the breach persists);

- 80% of the reported deals constituted transactions without non-disparagement covenants;
- 100% of the reported deals constituted transactions without non-embarrassment covenants;
- 100% of the reported deals constituted transactions without blue pencil clauses;

8. Governing law & Jurisdiction

- 100% of the reported deals constituted transactions with choice of law clauses (Polish law as the governing law);
- 100% of the reported deals constituted transactions with jurisdiction clauses;
- Jurisdiction chosen: Polish jurisdiction (100% of the reported deals);
- Arbitration clauses: 3 of the reported deals (in one case - applicable rules: rules of UNCITRAL; number of arbitrators: three; language of arbitration: English; and in other two cases – applicable rules: arbitration rules of the Court of Arbitration at the Polish Confederation of Private Employers Lewiatan; number of arbitrators: three; language of arbitration: English);
- 100% of the reported deals constituted transactions without prior mediation obligation;
- In none of the reported deals any formal (or informal) litigation procedures have been initiated;

9. General Information

- 80% of the reported deals constituted transactions with cross-border element;
- Names of other law firms involved in the reported deals: Weil, Gotshal & Manges sp. k., Rymarz P.; Herbert Smith Freehills LLP (London); Ernst & Young Tałasiewicz i Wspólnicy sp. k.; Allen & Overy sp. k. Pędzich; A.; and Norton Rose Fulbright Piotr Strawa i Wspólnicy sp. k.
- No referrals were made by other AIJA members;

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