

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

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Executive Summary of Sweden

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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: 15 January 2016.

1. General Statement

In general we can see an increasing market trend towards the use of M&A Insurances.

2. Summary of Transaction Details

- Number of deals reported: 10
- The Buyers' and Targets' countries of origin were Sweden and Denmark, Netherlands.
- Maximum, minimum and median deal value of deals reported: (1 EUR=10 SEK)
 - o Maximum: 3 978 100 000 SEK (EUR 397 810 000)
 - o Minimum: 42 000 000 SEK (EUR 4 200 000)
 - o Median: 170 000 000 SEK (EUR 17 000 000)
- Maximum, minimum and median percentage of shares acquired in deals reported
 - o Maximum:100 %
 - o Minimum:58 %
 - o Median:100 %
- General information on relevant industries of reported deals
 - o Computer/Software/ IT/ E-commerce, Media, Industrial/Manufacturing, Services, Transportation, Consumer goods and medical
- General information on Buyers' and Targets' countries of origin
 - o Sweden, Denmark, Norway and Netherlands.
- Percentage of deals with targets below/above 200 employees
 - o 3/10 above
 - o 7/10 under
- Percentage of deals with/without auction
 - o 5/10 with
 - o 5/10 without
- General information on the nature of the transactions
 - o Private Equity / Venture Capital vs Industrial / Trade: 4/10
 - o Private Equity / Venture Capital vs Private Equity / Venture Capital: 1/10
 - o Industrial / trade vs Industrial / Trade:4/10
 - o Management Buy Out 1/10

- Sale of a family business

3. Letters of Intent

- Percentage of transactions with LoIs signed/not signed:
 - 6/10 signed
 - 3/10 not signed
 - 1/10 information not available
- 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
 - 80 % exclusivity more than 1 month
 - 20% exclusivity less than 1 month
- Where signed, information on binding character
 - Only certain clauses such as: exclusivity, confidentiality, termination, applicable law, disputes etc.

4. Due Diligence

- Percentage of transactions with/without vendor due diligence
 - 2/10 with
 - 7/10 without
 - 1/10 information not available
- Where a vendor due diligence was performed, percentage of cases where the report was/was not disclosed to the Buyer
 - 100% disclosed
- Percentage of transactions with/without data room
 - 100 %
- Percentage of transactions with virtual data rooms vs. percentage with physical data rooms
 - 100 % virtual data rooms
- Information on who managed/organized the data room
 - Financial advisors to the Sellers, Data Room Provider, Investment banker, Seller
- Information on whether formalized Q&A procedure was followed and whether right to print/copy was granted
 - 100 % was followed with Q/A

- 4/10 not granted
- 2/10 granted
- 4/10 information not available

5. Purchase Agreement

- Transaction
 - Percentage of transactions with simultaneous closings vs. non-simultaneous closings
 - 100 % non-simultaneous closings
 - Information on languages of purchase agreements
 - 6/10 English
 - 4/10 Swedish
- Purchase Price
 - Information on forms of consideration
 - 7/10 Cash
 - 3/10 Cash and Stocks
 - 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)
 - 4/10 without price adjustments
 - 6/10 with price adjustments (closing accounts)
 - Information on payment mechanics (full payment vs. instalments with earn outs, retention by buyer etc.)
 - 3/10 Full payment on closing
 - 2/10 Escrow accounts
 - 1/10 Vendor Loan
 - 1/10 Other (70% payment on closing, 30% after adjustment of annual report)
 - 2/10 Earn-out
 - 1/10 Retention by buyer
 - Information on financing, i.e. use of equity vs. debt (bank, bonds, vendor loans)
 - 5/10 Combination of debt and equity
 - 1/10 Equity
 - 1/10 Bank loan

- 3/10 information not available
- MAC clause
 - Percentage of deals with/without MAC clause
 - 3/10 with
 - 7/10 without
 - Where used, information on MAC clause form, definition and materiality threshold
 - Yes
 - Examples
 - One MAC clause was not defined but had the form of a condition precedent and contains a materiality threshold of SEK 3 000 000.
 - One MAC clause had the definition “material adverse effect on the Group companies financial situation or on the business that is conducted by the group companies.” It didn’t contained a material threshold.
- Reps & Warranties
 - Percentage of deals with/without reps&warranties
 - 100 % with
 - Percentage of deals with/without standard reps&warranties
 - 100 % with
 - Information on length and on repetition of reps&warranties as per closing
 - 100 % extensive
 - 9/10 repeated on closing
 - 1/10 not repeated on closing (only fundamental warranties)
 - Percentage of deals with/without specific indemnifications and nature thereof
 - 5/10 with
 - 5/10 without
 - Nature: VAT, taxes, pension payments, value of real estate, payment from customer, payment of holiday pay.
 - Information on tax warranties vs. tax indemnities
 - 8/10 both tax indemnity and tax warranties
 - 1/10 only tax indemnity and no tax warranties

- 1/10 only warranties
- Limitation of liability
 - Information on time limitations in general (percentage of months)
 - 12,15, 16, 18, 24 and 60 months
 - Information on specific time limitations (number of months) such as title to shares, capacity, accounts etc.
 - Title to shares: 84 months, 120 months
 - Capacity: 84 months, 120 months, 60 months
 - Accounts: 24 months, 60 months , 36 months, 18 months
 - Tax: 84 months, 2 months (within two months from the date when the taxes have been subject to final decision by the relevant tax authority), 6 months (within six months from the date when the taxes have been subject to final decision by the relevant tax authority).
 - Social security: 24 months
 - Labor: 24 months, 18 months, 60 months
 - Environment: 24 months, 60 months
 - Criminal: 24 months
 - Information on individual minimum claim amounts (amount in EUR vs. percentage of purchase price) and the use of deductibles
 - (1 EUR=10 SEK)
 - 0,1 % of purchase price, SEK 150 000 (15 000 EUR), SEK 75 000 (7 500 EUR), SEK 200 000 (20 000 EUR), SEK 100 000 (10 000 EUR), EUR 2500, EUR 5400, EUR 11000, EUR 100 000.
 - Use of deductibles: 4/10
 - Information on liability caps (amount in EUR vs. percentage of purchase price)
 - SEK 3 000 000 (300 000 EUR), 50 % of purchase price, 10 % of purchase price, SEK 230 000 000 (23 000 000 EUR), 12,5 % of purchase price, 30 % of purchase price, EUR 430 000,
 - Information on carve-outs
 - Nature: payment of holiday pay, ownership and transfer of real estate before closing, VAT, value of real estate, tax depreciation, the absence of certain events, title to shares etc.
- Disclosures

- Percentage of deals with/without disclosures and information on percentage of deals with disclosures against warranties only vs. warranties and specific indemnities
 - 90 % with disclosures
 - 7/10 warranties only
 - 2/10 warranties and specific indemnities
 - 1/10 no disclosure
- Percentage of deals with/without
 - full data room disclosure
 - 100 % with
 - Q&A log
 - 90 % with
 - Disclosure letters/schedules
 - 3/10 with
 - 7/10 without
 - Disclosure of due diligence report
 - 6/10 without
 - 4/10 with
 - Public information disclosed
 - 90 % without
 - Update between signing/closing]
 - 60 % with
 - 40 % without

6. Conditions Precedent

[NR to report on the survey data compiled with respect to conditions precedent, including the following aspects:

- Percentage of deals with/without merger filings as CP and information on percentage of jurisdictions
 - 80 % without
 - 20 % with (one jurisdiction, four jurisdictions)
- Percentage of deals with/without third party consents as CP
 - 3/10 with
 - 7/10 without

- Percentage of deals with/without certain funds clause as CP
 - o 40 % with
 - o 60 % without
- Percentage of deals with/without the bring-down of warranties as CP
 - o 5/10 with
 - o 5/10 without
- Percentage of deals with/without MAC clause as CP
 - o 8/10 without
 - o 2/10 with
- Percentage of deals with/without seller's legal opinions as CP
 - o 2/10 with
 - o 8/10 without
- Percentage of deals with/without retention of key employees as CP
 - o 7/10 without
 - o 3/10 with
- Information on opinion coverage]
 - o corporate status and valid, binding and enforceable nature of agreement

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

[NR to report on the survey data compiled with respect to Non-Competition/Non-Solicitation/Restrictive Covenants, including the following aspects:

- Percentage of deals with/without non-compete clauses and information on duration and the use of liquidated damages clauses
 - o 8/10 with
 - o 2/10 without
 - o Liquidated damages clause: 25 % of purchase price, SEK 2 000 000 (200 000 EUR), SEK 1 000 000 (100 000 EUR), 3 % of purchase price, EUR 500 000, EUR 2700
 - o Duration: 60 months, 36 months, 12 months, 26 months
- Percentage of deals with/without non-solicit clauses and information on duration and the use of liquidated damages clauses
 - o 6/10 with
 - o 4/10 without
 - o Liquidated damages clause: 25 % of purchase price, SEK 2 000 000 (200 000 EUR), SEK 1 000 000 (100 000 EUR), 3 % of purchase price

- Duration: 60 months, 36 months, 12 months, 24 months
- Percentage of deals with/without non-disparagement covenants
 - 10 % with
 - 90 % without
- Percentage of deals with/without non-embarrassment covenants
 - 100 % without
- Percentage of deals with/without blue pencil clauses]
 - 100 % without

8. Governing law & Jurisdiction

[NR to report on the survey data compiled with respect to governing law and jurisdiction, including the following aspects:

- Percentage of deals with/without choice of law clauses and information on jurisdictions chosen
 - 100 % with choice of law clauses
 - 9/10 Sweden
 - 1/10 Denmark
- Percentage of deals with/without jurisdiction clauses
 - 100 % with
- Information on jurisdictions chosen
 - 100 % arbitration
- Information on arbitration clauses (applicable rules, number of arbitrators, language)
 - SCC, Danish Institute of Arbitration, ICC
 - Number of arbitrators: Three, One to three, not mentioned
 - Swedish, English
- Percentage of deals with/without prior mediation obligation
 - 100 % without
- Percentage of deals with/without initiation of formal litigation procedures and information on the grounds (purchase price, reps&warranties or indemnities, other aspects)]
 - 10 % with
 - 90 % without

9. General Information

[NR to report on the survey data compiled with respect to the following aspects:

- Percentage of deals with/without cross-border element
 - o 3/10 with
 - o 7/10 without
- Names of involved law firms
 - o Setterwalls Advokatbyrå AB, Andulf Advokat AB, Gorrissen Federspiel, Plesner, Lett, Roschier, Allen & Overy, Kromann & Reumert, Hamilton Law Firm, Hannes Snellman Law Firm, Vinge, Baumgarten Byström Rooth & Tallavaara Advokater, Gernandt & Danielsson
- Information on whether referrals were made by other AIJA members]
 - o 100 % No

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