



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

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

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### Executive Summary of the Czech Republic

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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

We have reviewed and reported on 9 share deals, the deal values of which range from EUR 1,000,000 to EUR 10,000,000.

As regards the percentage of transferred shares, within almost a half of the reported deals 100% of shares were acquired. On the other hand, the minimum percentage of transferred shares was 30% and the median percentage being 75%.

More than one half of reviewed deals concerned the Target companies with more than 200 employees.

In none of the reviewed transactions any competitive auction has been organized, which is rather surprising. This result might just be caused by the fact that in many cases the sellers organize such auction themselves or through their commercial advisors, however, such information is not given to the legal advisor.

Our survey further showed that in the vast majority of transactions (namely 78%) no letter of intent has been signed. Only 1 out of the 2 signed LoIs contained an exclusivity clause with the exclusivity period of more than 1 month. Further, certain clauses of such LoI (such as exclusivity, term of the LoI, costs, confidentiality etc.) had a binding character. No exclusivity has been stipulated in the second signed LoI, nor did it have binding character.

As regards the data collected within our review regarding due diligence process, we can conclude that in none of the reviewed deals, in which a due diligence has been performed by the vendor, such due diligence report has been disclosed to the buyer. Further, the frequency of virtual vs. physical data rooms is even. Just in a limited number of cases a right to print/copy the data room documents was granted.

When reporting on the forms of consideration, we were quite surprised that in all reviewed deals the purchase price has been paid in cash. In prevailing number of reported transactions the purchase price was fully paid on closing. Rather interesting was to assess that in 2/3 of deals the information on financing of the purchase price is unknown to the legal advisors.

From the reviewed transactions we could infer that the market standard is to have a list of representations & warranties, whereas in 89% we identified standard lists of representations & warranties.

When analyzing the nature of specific indemnifications, it could be concluded that 2/3 thereof relate to tax or accounting issues.

Whilst none of the deals required a merger filing as a condition precedent, consents of third parties were required in 78% of the transactions.

Based on the reported transactions we could generalize that no non-disparagement or non-embarrassment covenants nor any blue pencil clauses are used in share deals. Non-compete clauses were stipulated merely in 22% of the deals.

Further, it is a market standard to have a choice-of-law clause in the SPAs. In the vast majority of reviewed deals the jurisdiction of the courts of the Czech Republic has been chosen. Moreover, in 66% of the transactions a mandatory preliminary

mediation effort has been agreed, which we could consider as an increasing market trend.

The fact that in none of the reported deals formal litigation procedures have been initiated could lead to the conclusion that the contracting parties tend to settle any disputes regarding their rights and obligations via a mutual out-of-court agreement.

Merely in 1 out of 9 reviewed transactions the deal has been referred to us by other AIJA member.

## 2. Summary of Transaction Details

- **Number of deals reported:** 9
  
- **Maximum, minimum and median deal value of deals reported**
  1. Maximum deal value: EUR 10,000,000
  2. Minimum deal value: EUR 1,000,000
  3. Median deal value: EUR 2,500,000
  
- **Maximum, minimum and median percentage of shares acquired in deals reported**
  1. Maximum percentage of shares: 100%
  2. Minimum percentage of shares: 30%
  3. Median percentage of shares: 75%
  
- **General information on relevant industries of reported deals**

In the vast majority of reviewed deals the Target's industry relates to construction or letting of real estate. Merely 3 deals fall under the category of industrial or manufacture. The remaining industry fields (e.g. automotive, energy, consumer goods, financial services etc.) are not represented in the reviewed deals at all.
  
- **General information on Buyers' and Targets' countries of origin**

Concerning the Buyers' and Targets' countries of origin, we could conclude that in 8 out of 9 reported deals both the Buyer as well as the Target are located in the Czech Republic. In 1 case the Buyer originated from Germany.
  
- **Percentage of deals with targets below/above 200 employees**

1. Below 200 employees: 44%
2. Above 200 employees: 56%

- **Percentage of deals with/without auction**

1. Deals with auction: 0%
2. Deals without auction: 100%

- **General information on the nature of the transactions**

In 3 deals the transaction occurred between Private Equity / Venture Capital vs Industrial / Trade, in 2 further ones Private Equity was involved as well and 3 out of 4 remaining reported deals had Industrial / Trade nature. One deal was concluded between two real estate investors.

### 3. Letters of Intent

- **Percentage of transactions with LoIs signed/not signed**

1. Transactions with signed LoIs: 22%
2. Transactions without signed LoIs: 78%

- **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**

1. Number of exclusivity clauses: 1 out of the 2 signed LoIs
2. Duration of exclusivity: more than 1 month

- **Where signed, information on binding character**

1. Binding character of LoI: 1 out of the 2 signed LoIs
2. Binding character limited to certain clauses of such LoI: such as exclusivity, term of the LoI, costs, confidentiality etc.

### 4. Due Diligence

- **Percentage of transactions with/without vendor due diligence**

1. Transactions with vendor due diligence: 56%

2. Transactions without vendor due diligence: 44%
- **Where a vendor due diligence was performed, percentage of cases where the report was/was not disclosed to the Buyer**
    1. Percentage of cases where the report was disclosed to the Buyer: 0%
    2. Percentage of cases where the report was not disclosed to the Buyer: 100%
  - **Percentage of transactions with/without data room**
    1. With data room: 67%
    2. Without data room: 33%
  - **Percentage of transactions with virtual data rooms vs. percentage with physical data rooms**
    1. Virtual data rooms: 50%
    2. Physical data rooms: 50%
  - **Information on who managed/organized the data room**
    1. Data Room Provider: in 1 case
    2. Law Firm: in 1 case
    3. Seller's commercial advisor: in 1 case
    4. Seller's legal advisor: in 1 case
    5. Seller: in 2 cases
  - **Information on whether formalized Q&A procedure was followed and whether right to print/copy was granted**
    1. Formalized Q&A procedure was followed: in 5 out of 6 deals (in the last case such information is unknown)
    2. Right to print/copy was granted: in 2 out of 6 deals (in one case such information is unknown)

## 5. Purchase Agreement

### Transaction

- **Percentage of transactions with simultaneous closings vs. non-simultaneous closings**
  1. Simultaneous closings: 44%
  2. Non-simultaneous closings: 56%
  
- **Information on languages of purchase agreements**
  1. Czech language: in 4 cases
  2. Czech/English: in 2 cases
  3. English: in 2 cases
  4. German: in 1 case

### **Purchase Price**

- **Information on forms of consideration**
  1. Cash: in 100% of cases
  
- **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)**
  1. Percentage of deals without price adjustments: 22%
  2. Application of locked-box: 0%
  3. Percentage of deals with closing accounts: 78%
  
- **Information on payment mechanics (full payment vs. installments with earn outs, retention by buyer etc.)**
  1. Full payment on closing: 78%
  2. Payment in installments: in 2 cases (i.e. 22%), out of which in 1 case a retention by buyer and payment of a portion of purchase price into escrow account were applied
  
- **Information on financing, i.e. use of equity vs. debt (bank, bonds, vendor loans)**
  1. Use of equity: 11%
  2. Use of combination of debt and equity: 22%
  3. Unknown: 67%



## **MAC clause**

- **Percentage of deals with/without MAC clause**
  1. Deals with MAC clause: 56%
  2. Deals without MAC clause: 44%
  
- **Where used, information on MAC clause form, definition and materiality threshold**
  1. MAC clause form: back-door MAC 80%; condition precedent (right to walk away) 20%
  2. Definition of MAC clause contained: in 40%
  3. Materiality threshold contained: in 80%

## **Reps & Warranties**

- **Percentage of deals with/without reps&warranties**
  1. Deals with reps&warranties: 100%
  2. Deals without reps&warranties: 0%
  
- **Percentage of deals with/without standard reps&warranties**
  1. Deals with standard reps&warranties: 89%
  2. Deals without standard reps&warranties: 11%
  
- **Information on length and on repetition of reps&warranties as per closing**
  1. Length: limited list 33%, extensive list 67%
  2. Repetition as per closing: yes 33.3%, no 44.4%, not applicable due to simultaneous signing and closing 22.2%
  
- **Percentage of deals with/without specific indemnifications and nature thereof**
  1. Specific indemnifications: yes 67%, no 33%
  2. Nature of specific indemnifications: 1/3 tax issues, 1/3 tax and accounting issues and 1/3 special indemnification relating to realization of investment opportunity
  
- **Information on tax warranties vs. tax indemnities**

1. Only tax warranties, no tax indemnity: 22%
2. Only tax indemnity, no tax warranties: 0%
3. Both tax indemnity and tax warranties: 44%
4. No tax indemnity, no tax warranties: 33%

### Limitation of liability

- **Information on time limitations in general (percentage of months)**

1. two provided questionnaires do not contain any information on time limitation; the SPAs do not contain such limitation;
2. seven provided questionnaires contained general information on time limitation in the range of 24 – 120 months depending on particular issues;

- **Information on specific time limitations (number of months) such as title to shares, capacity, accounts etc.**

Time limitations in number of months to:

1. **Title to shares:** range of 24 – 120 months, most likely 48 months
2. **Capacity:** two questionnaires contained time limitation in the range of 24-48 months;
3. **Accounts:** all questionnaires contained time limitation in the range of 48 – 60 months;
4. **Tax:** time limitation in the range of 36 – 60 months, one questionnaire contained time limitation for VAT for 36 months and for other tax matters 96 months;
5. **Social security:** two questionnaires contained limitation in the range of 36 – 48 months, other questionnaires did not contain this information (no limitation was included in SPA)
6. **Labor:** no time limitation included;
7. **Environment:** time limitation only in one questionnaire – 60 months;
8. **Criminal:** in two cases the questionnaires stated "legal statute of limitations";
9. **Other limitations:** depending on particular issues - 24 (other matters covered by representations & warranties) – 120 months (title to real estate).

- **Information on individual minimum claim amounts (amount in EUR vs. percentage of purchase price) and the use of deductibles**

1. EUR 3,700 (0,15% of purchase price)

2. EUR 4,500 (0,3% of purchase price)
  3. EUR 4,500 (0,045% of purchase price)
  4. EUR 50,000 (0,16% of purchase price)
- **Information on liability caps (amount in EUR vs. percentage of purchase price)**
    1. EUR 930,000 (30% of purchase price)
    2. EUR 200,000 (4% of purchase price)
    3. EUR 3,700,000 (100% of purchase price)
    4. EUR 19,800,000 (198% of purchase price) and EUR 2,000,000 (20% of purchase price)
  - **Information on carve-outs**  
 Contained in three questionnaires in total:
    1. in two questionnaires: for the case of fraud by or willful misconduct on the side of the seller, in which cases no limitations of liability shall apply
    2. in one questionnaire: title, insolvency, assets, in which case the maximum liability is 100% of purchase price

## Disclosures

- **Percentage of deals with/without disclosures and information on percentage of deals with disclosures against warranties only vs. warranties and specific indemnities**
  1. Percentage of deals with disclosures: 55%
  2. Percentage of deals without disclosures: 45%
  3. Percentage of deals with disclosures against warranties: 100%
  4. Percentage of deals with warranties and specific indemnities: 0%
- **Percentage of deals with/without full data room disclosure**
  1. With full data room disclosure: 44%
  2. Without full data room disclosure: 56%
- **Percentage of deals with/without Q&A log**
  1. With: 33%

2. Without: 67%

- **Percentage of deals with/without disclosure letters/schedules**

1. Unknown: 11%

2. Without: 89%

- **Percentage of deals with/without disclosure of due diligence report**

1. With: 11%

2. Without: 89%

- **Public information disclosed** in 55%

- **Update between signing/closing** in 88%

## 6. Conditions Precedent

- **Percentage of deals with/without merger filings as CP and information on percentage of jurisdictions**

1. Deals with merger filings: 0%

2. Deals without merger filings: 100%

- **Percentage of deals with/without third party consents as CP**

1. Deals with consent of third party as CP: 78%

2. Deals without consent of a third party as CP: 22%

- **Percentage of deals with/without certain funds clause as CP**

1. Deals with certain funds clause as CP: 11%

2. Deals without certain funds clause as CP: 89%

- **Percentage of deals with/without the bring-down of warranties as CP**

1. Deals with the bring-down of warranties as CP: 22%

2. Deals without the bring-down of warranties as CP: 78%

- **Percentage of deals with/without MAC clause as CP**
  1. Deals with MAC clause as CP: 22%
  2. Deals without MAC clause as CP: 78%
  
- **Percentage of deals with/without seller's legal opinions as CP**
  1. Deals with seller's legal opinion as CP: 33%
  2. Deals without seller's legal opinion as CP: 67%
  
- **Percentage of deals with/without retention of key employees as CP**
  1. Deals with retention of key employees as CP: 22%
  2. Deals without retention of key employees as CP: 78%

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

- **Percentage of deals with/without non-compete clauses and information on duration and the use of liquidated damages clause**
  1. Deals with non-compete clauses: 22%
  2. Duration: 36 months
  3. Deals without non-compete clauses: 78%
  4. Use of liquidated damages clause: 11%
  
- **Percentage of deals with/without non-solicit clauses and information on duration and the use of liquidated damages clauses**
  1. Deals with non-solicit clauses: 11%
  2. Duration: 36 months
  3. Use of liquidated damages: N/A
  4. Deals without non-solicit clause: 89%
  
- **Percentage of deals with/without non-disparagement covenants**
  1. Deals with non-disparagement covenants: 0%
  2. Deals without non-disparagement covenants: 100%
  
- **Percentage of deals with/without non-embarrassment covenants**

1. Deals with non-embarrassment covenants: 0%
2. Deals without non-embarrassment covenants: 100%

- **Percentage of deals with/without blue pencil clauses**

1. Deals with blue pencil clauses: 0%
2. Deals without blue pencil clauses: 100%

## **8. Governing law & Jurisdiction**

- **Percentage of deals with/without choice of law clauses and information on jurisdictions chosen**

1. Deals with choice of law: 100%
2. Chosen jurisdiction: 11% Federal Republic of Germany, 89% Czech Republic
3. Deals without choice of law: 0%

- **Percentage of deals with/without jurisdiction clauses**

1. Deals with jurisdiction clauses: 100%

- **Information on jurisdictions chosen**

1. Courts of Federal Republic of Germany
2. Courts of the Czech Republic

- **Information on arbitration clauses (applicable rules, number of arbitrators, language)**

1. Applicable rules: Judicial Code under governing law
2. Number of arbitrators: usually 3
3. Language: Czech

- **Percentage of deals with/without prior mediation obligation**

1. Deals with prior mediation obligation: 66%
2. Deals without prior mediation obligation: 33%

- **Percentage of deals with/without initiation of formal litigation procedures and information on the grounds (purchase price, reps&warranties or indemnities, other aspects)**
  1. Deals without initiation of formal litigation procedures: 100%

## **9. General Information**

- **Percentage of deals with/without cross-border element**
  1. Deals with cross–border element: 44%
  
- **Names of involved law firms**
  1. Blaum Dettmers Rabstein
  2. The other law firms involved are not law firms of an AIJA member
  
- **Information on whether referrals were made by other AIJA members**
  1. One transaction has been referred by other AIJA member

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