



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

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

Munich 2016

Executive Summary of Denmark

Bent Kemplar

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15 January 2015

General Statement

Generally, the reported transactions have been carried out in accordance with standard M&A procedures for private M&A transactions including standard due diligence procedures and a focus on the negotiation of the warranty catalogues.

However, in 66 % of the reported transactions, the parties have agreed to include a warranty & indemnity insurance (W&I Insurance) to mitigate the parties' transaction risks. Until recently, W&I insurance was only rarely used in Danish M&A transactions but due to faster underwriting processes and lower insurance premiums, we see a tendency towards an increased use of W&I insurance in Danish M&A transactions.

1. Summary of Transaction Details

- 3 transactions have been reported.
- The maximum value of the transactions reported was 60,000,000 EUR, the minimum value of the transactions reported was 7,700,000 EUR and the median deal value of the transactions reported was 17,800,000 EUR.
- The maximum percentage of the shares acquired in the transactions reported was 100 %, the minimum percentage of the shares acquired in the transactions reported was 60 % and the median percentage of the shares acquired in transactions reported was 81.7 %.
- The relevant industries of the reported transactions included business intelligence, gaming and medical/pharma.
- All targets were incorporated in Denmark. Buyers were incorporated in Switzerland, USA and Denmark.
- 33 % of the transactions reported included a target with an employee headcount of more than 200.
- 33 % of the transactions reported were processed on the basis of an auction.

2. Letters of Intent

- 66 % of the transactions reported included signed LoIs.
- 100 % of the signed LoIs awarded the buyer with an exclusivity period of more than 1 month.
- 50 % of the LoIs were non-binding, while 50 % of the LoIs were binding with respect to certain clauses including confidentiality and exclusivity.

3. Due Diligence

- None of the reported transactions included vendor due diligence.

- 100 % of the reported transactions included data rooms.
- 100 % of the reported transactions included virtual data rooms.
- 66 % of the virtual data rooms were managed by a data room provider, while 33 % of the virtual data rooms were managed by the seller.
- 100 % of the reported transactions included formal Q/A procedures.
- None of the reported transactions included the right to take copies of the documentation disclosed in the virtual data room.

4. Purchase Agreement

- Transaction
 - a. None of the transactions reported had simultaneously signing and closing.
 - b. 100 % of the share sale and purchase agreements were written in English.
- Purchase Price
 - a. In 100 % of the transactions reported, the purchase price was paid in cash.
 - b. In 100 % of the transactions reported, the purchase price was determined with price adjustment with closing accounts.
 - c. In 66 % of the transactions reported, full payment was paid on closing. In 33 % of the transactions reported, payment was made in instalments by payment of a portion of the purchase price into an escrow account.
 - d. In 33 % of the transactions reported, the purchase price was financed by equity. In 66 % of the transactions reported, the financing method was unknown.
- MAC clause
 - a. None of the transactions reported contained a MAC clause.
- Reps & Warranties
 - a. 100 % of the transactions reported contained representations & warranties.
 - b. 100 % of the transactions reported the representations & warranties were standard.
 - c. In 100 % of the transactions reported the representations & warranties were repeated on closing.
 - d. 66 % of the transactions reported contained specific indemnifications regarding employment law, customer contracts and regulatory risks.

- e. 66 % of the transactions reported included only tax warranties while 33 % of the transactions reported included both tax warranties and tax indemnity.
- Limitation of liability
 - a. In 100 % of the transactions reported, the warranties had a general time limitation of 24 months.
 - b. In 66 % of the transactions reported, the parties included specific time limitations with regard to title to shares, tax and authority. In 33 % of the transactions reported, the specific time limitation was 72 months and in 33 % of the transactions reported, the specific time limitation was 84 months.
 - c. 100 % of the transactions reported included individual claim amounts. In 66 % of the transactions reported the individual claim amount was EUR 33,350, while the individual claim amount in 33 % of the transactions reported was EUR 10,000.
 - d. 100 % of the transactions reported included liability caps. In 66 % of the transactions reported the liability cap was EUR 10,000,000, while the individual claim amount in 33 % of the transactions reported was EUR 3,067,000.
 - e. 66 % of the transactions reported included carve outs for specific indemnifications with respect to the limitation of liability. The carve outs included indemnifications for authority, title to shares, incorporation, wilful misconduct, gross negligence and capitalisation.
- Disclosures
 - a. In 100 % of the transactions reported, disclosures were made against warranties only.
 - b. Percentage of transactions with:
 - full data room disclosure: 100 %
 - Q&A log: 100 %
 - Disclosure letters/schedules: None
 - Disclosure of due diligence report: None
 - Public information disclosed: 33 %
 - Update between signing/closing: 33 %

5. Conditions Precedent

- In 33 % of the transactions reported, a merger filing was required in 1 jurisdiction.
- 100 % of the transactions reported included third party consents as CP.

- None of the transactions reported included a certain funds clause as CP.
- 100 % of the transactions reported included a bring-down of warranties as CP.
- None of the transactions reported included a MAC clause as CP.
- None of the transactions reported included seller's legal opinions as CP.
- None of the transactions reported included a retention of key employees as CP.

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

- 100 % of the transactions reported included non-competition clauses. In 33 % of the transactions reported the duration of the non-competition clause was 36 months after closing and in 33 % of the transactions reported the duration of the non-competition clause was 24 months after closing. In 33 % of the transactions reported the duration of the non-competition clause was 12 months after the ending of the co-ownership of the target.
- 33 % of the non-competition clauses included liquidated damages amounting to EUR 67,000.
- 66 % of the transactions reported included non-solicitation clauses. The duration of the non-solicitation clauses was 6 months and 24 months. 50 % of the non-solicitation clauses included liquidated damages amounting to EUR 67,000.
- None of the transactions reported included non-disparagement covenants of non-embarrassment covenants.
- None of the transactions reported included blue pencil clauses.

7. Governing law & Jurisdiction

- 100 % of the transactions reported included a choice of law clause referring to Danish law.
- 100 % of the transactions reported included arbitration clauses. In 100 % of the transactions reported these arbitration clauses; referred to the procedural rules of the Danish Arbitration Institute, provided for three arbitrators and had English as the language of arbitration.
- None of the transactions reported included a prior mediation obligation.
- In none of the transactions reported, the parties have initiated formal litigation procedures.

8. General Information

- 33 % of the transactions reported had a cross-border element.

- Other lawfirms involved: Plesner and Gorrissen Federspiel.
- None of the transactions was referred to us by other AIJA members.

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