

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

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Executive Summary of Germany

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1. General Statement

- In General, in Germany M&A transactions become more and more professional. There is a clear trend that even domestic small cap transactions follow an international standard that has developed during the last ten years. This applies not only to the contract standard but also to the organization of the overall transaction process.

In Germany, W&I Insurances are seen from time-to-time, however have not yet fully captured the market.

As regards the due diligence process, electronic data rooms become more and more standard. Besides professional data room providers (such as Intralinks, Merrill, etc.) also Cloud Solutions are more and more used to make the due diligence data available. In this connection, security concerns and demands are raised by the parties.

Furthermore, the German M&A market becomes more and more international. Foreign companies, either directly or through a German vehicle, are often seen as a party of a transaction. Besides buyers from the US and Great Britain, the number of Asian in particular Chinese companies acquiring a German target increases. The most important target countries for German buyers are the US, Switzerland, Austria and Great Britain.

The deal volume and the character of the parties have a significant impact on the transaction structure. Sales processes related to small cap transactions are usually carried out on exclusive negotiations with the potential buyer. Usually the negotiations are led by the management of the seller directly rather than under involvement of professional M&A advisors. Deals having a volume above EUR 100 million are, in contrast, often structured as private auction under involvement of investment banks or M&A advisors. Furthermore, auction processes are also often seen, if the seller is a private equity fund.

2. Summary of Transaction Details

- The M&A survey comprises the data of three transactions. The deal values of the reported transactions amount from 6 million to 30 million resulting in an average of about 20 million. In all cases, 100% of the shares in the target companies were acquired. The target companies were active in the transportation, consumer goods and medical products industries. All of the targets were located in Germany. In two cases, a family business was sold to an

English buyer. In one case, the Belgic National Railways sold one of its German subsidiaries to a German buyer.

The target companies were of small to medium size, only one of the targets employed more than 200 employees.

All of the reported transactions were of private nature. One transaction was carried out as a private auction process.

3. Letters of Intent

- In all of the reported transactions, a LoI or similar document was signed. Except for the auction process, the LoI in all reported transactions provided for an exclusivity clause. If exclusivity was agreed, the term of the exclusivity clause was more than one month. Except for provisions relating to exclusivity, confidentiality and the governing law, the provisions under LoIs were of non-binding character.

4. Due Diligence

- In none of the reported transactions, a full vendor due diligence was performed. In the transaction that was subject to an auction process, the seller presented a legal fact book comprising the most relevant, mainly corporate and employment related legal information of the targets. This fact book was disclosed to the bidders.

In two of the reported transactions, sellers prepared a virtual data room. In one transaction, the due diligence data was made available as hard copies.

In case of the auction process, the due diligence process was managed by an investment bank. In the other two cases the seller jointly with its law firm organised the data room.

Whereas the auction process included a formalised Q&A procedure, the Q&A process in the two other reported transactions took place in an organised way, but not as formalised procedure. The Q&A process was carried out in parallel to the review of the due diligence data and included also additional information requests.

Whereas in the auction process, the buyer was not granted a printing right, key documents such as articles of association, excerpts from the commercial register, financial statements, etc. were available for printing in the two other cases.

5. Purchase Agreement

a. General Information

In all transactions the SPA followed international standards and provided for a detailed catalogue of reps & warranties as well as a detailed and complex indemnification procedure.

One of the reported transactions was subject to merger clearance by the German merger control authority. Therefore, closing could only take place after merger clearance was obtained. In the two other reported transactions no separate closing was necessary.

As all reported transactions were of cross-border nature, the SPAs were drafted in the English language.

b. Purchase Price

All SPAs provided for a cash consideration as purchase price. In all cases the purchase price was determined on a debt-free/cash-free basis and the SPA provided for closing accounts and a related purchase price adjustment mechanism. In all cases a preliminary purchase price was paid as of closing. In one case buyer retained a sum as security for the price adjustment as well as security for possible warranty claims. In this case, which was a sale of a family business, the SPA also provided for a deferred payment becoming payable if and to the extent the seller being an individual and also holding the office as managing director of the target remained with the target for three years (unless being a good leaver).

In the two other reported transactions a certain portion of the purchase price was paid on an escrow account serving as security for purchase price adjustments as well as warranty claims.

In two of the reported transactions the buyer was an international group of companies and used group-internal funds to finance the purchase price. In the third case, parts of the purchase price were financed by bank loans.

c. MAC Clause

The SPA providing for a separate closing also contained a MAC clause, providing for a definition and a materiality threshold.

All SPAs contained a catalogue of more or less extensive standard reps & warranties. Two SPAs provided in addition for specific indemnifications, either with respect to pre-merger group restructurings, the carve-out of a business division or assets or with respect to issues identified during the due diligence process.

As regards tax, all SPAs contained tax warranties as well as standard tax indemnities.

d. Limitation of Liability

All SPAs contained limitations of seller's liability deviating from statutory law.

The limitation periods referring to warranties on title of shares and the corporate status of the targets amounted to five/seven years.

Tax related claims of the buyer became, consistent with the standard in Germany, time-barred within 6 months after the tax assessment for the relevant tax and the relevant tax period has become final and binding or 6 months after the final expiration of all relevant statutes of limitation periods for the relevant tax.

Warranty claims related to other warranties were subject to a limitation period of 18 to 30 months.

All of the reported SPAs included de minimis amounts and two thereof also a basket. In all cases only the damages exceeding the basket had to be compensated.

The overall liability caps amounted between 50% and 100% of the purchase price.

e. Disclosures

In all cases reps & warranties were given against disclosure. In all cases damage claims were excluded in case the buyer had knowledge of the underlying facts as of signing.

Information that was truly and fairly disclosed in the data room or the Q&A process was deemed to be known by the buyer. The same applies with respect to information disclosed in the SPA itself or attachments thereto.

In none of the reported transactions, specific disclosure letters were prepared.

In none of the reported transactions a disclosure of the due diligence report was made.

Public information did in all cases not lead to an exclusion of liability, except known by the buyer as of signing.

6. Conditions Precedent

Only one of the reported transactions had a separate signing and closing as merger clearance in Germany was required. In addition to merger clearance, absence of material adverse effects between signing and closing, no material breach of reps & warranties as well as continued employment of the managing director of the target were requested as condition precedent.

In none of the deals third party consents, funds clauses or seller's legal opinions were seen as conditions precedent.

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

All of the reported transactions provided for a non-competition and a non-solicitation clause. In most cases, the non-compete undertaking lasted for 3 years. Only one of three SPAs provided only for a 2 year-period. In all reported transactions non-solicitation undertakings were drafted consistent with the non-compete undertaking.

None of the SPAs provided for a contractual penalty/liquidated damages in case of breach of the non-compete/non-solicitation clause. However, in each case, buyer was given the opportunity to refer a breach to the ordinary courts in order

to apply for an injunction (even if disputes were, in general, referred to arbitration).

Non-disparagement covenants and non-embarrassment covenants as well as blue pencil clauses were not seen in the transactions.

8. Governing law & Jurisdiction

In all transactions the parties agreed to have the SPA governed by German law. In two of three deals, disputes were referred to arbitration under the rules of the German Institution of Arbitration (DIS) providing for three arbitrators. Disputes arising in the third transaction were referred to the jurisdiction of the German ordinary courts.

None of the SPAs provided for an explicit prior mediation obligation.

None of the parties involved of the reported transactions initiated any legal proceedings under the SPA.

9. General Information

All reported transactions were cross border transactions. In all cases, the targets were located in Germany. Two of the three deals had German sellers and English buyers. In the third transaction a Belgian company sold its shares in a German target to a German buyer.

The counter-parties in the reported transactions were represented by the following law firms: Flick Gock Schaumburg, Hofmann Rechtsanwälte, PWC Legal.

Unfortunately, our engagement in the reported transactions did not result out of a referral by another AIJA-member. Nevertheless, I would like to point out that “inbound” and “outbound” AIJA referrals are often seen in my AIJA network.

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