

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

Munich 2016

Executive Summary of Germany

Martin Viciano, Maïke Sauter

Gleiss Lutz Hootz Hirsch PartmbB Rechtsanwälte, Steuerberater,
Friedrichstraße 71 10117 Berlin //
Lautenschlagerstraße 21, 70173 Stuttgart,
+49 30 800979-175 // +49 711 8997-151,
martin.viciano-gofferje@gleisslutz.com // maïke.sauter@gleisslutz.com

General reporters:

Dr. Hendrik Thies (Friedrich Graf von Westphalen & Partner)
Dr Karim Maïzar (Kellerhals Carrard)
Mr Robrecht Coppens (Loyens & Loeff)

31 January 2016

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

2015 was a good year for M&A in Germany both for deals from Private Equity as well as from industrial players. Valuations continue rising, with mid-market cap deals dominating. You continue to see standardization in the limitations and wraps and warranties sections of the SPAs, at least for mid-market deals. Physical data rooms would be considered an anomaly these days.

2. Summary of Transaction Details

- Number of deals reported: 3
- Maximum, minimum and median deal value of deals reported: between EUR 20 Mio. and EUR 300 Mio.
- Maximum, minimum and median percentage of shares acquired in deals reported: 100%
- General information on relevant industries of reported deals: Media, Leisure, Manufacturing
- General information on Buyers' and Targets' countries of origin: mostly German or European
- Percentage of deals with targets below/above 200 employees: 67% above 200 employees
- Percentage of deals with/without auction: 2/3 deals with auction
- General information on the nature of the transactions: divers backgrounds, divers buyers (PE, Industry)

3. Letters of Intent

- Percentage of transactions with LoIs signed/not signed: 100 % LoIs signed
- 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: 2/3 exclusivity clauses, 1 up to and 1 more than 1 month
- Where signed, information on binding character: 2/3 binding

4. Due Diligence

- Percentage of transactions with/without vendor due diligence: 2/3 without vendor due diligence
- Where a vendor due diligence was performed, percentage of cases where the report was/was not disclosed to the Buyer: 100% not disclosed to Buyer
- Percentage of transactions with/without data room: 100% with data room

- Percentage of transactions with virtual data rooms vs. percentage with physical data rooms: 100% virtual data room
- Information on who managed/organized the data room: 2/3 investment bankers, 1/3 data room providers
- Information on whether formalized Q&A procedure was followed and whether right to print/copy was granted: 100% formalized Q&A procedure, 100% right to print/copy.

5. Purchase Agreement

- Transaction
 - o Percentage of transactions with simultaneous closings vs. non-simultaneous closings: 1/3
 - o Information on languages of purchase agreements: solely English (2), English and German (1)
- Purchase Price
 - o Information on forms of consideration: 100% Cash
 - o 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): Determinations with price adjustments 100%
 - o Information on payment mechanics (full payment vs. instalments with earn outs, retention by buyer etc.): 100% diverse payment mechanics (instalments, retentions by buyer, escrow-account)
 - o Information on financing, i.e. use of equity vs. debt (bank, bonds, vendor loans): 100% equity
- MAC clause
 - o Percentage of deals with/without MAC clause: 2/3 without MAC clause
 - o Where used, information on MAC clause form, definition and materiality threshold: MAC clause form (right to walk away with definition and materiality threshold)
- Reps & Warranties
 - o Percentage of deals with/without reps&warranties: 100% with R&W
 - o Percentage of deals with/without standard reps&warranties: 100% with standard R&W
 - o Information on length and on repetition of reps&warranties as per closing: 100% extensive list of R&W
 - o Percentage of deals with/without specific indemnifications and nature thereof: 100% with specific indemnifications for certain identified risks

- Information on tax warranties vs. tax indemnities: 2/3 both tax warranties and indemnities
- Limitation of liability
 - Information on time limitations in general (percentage of months): 100% - 12 to 18 months
 - Information on specific time limitations (number of months) such as title to shares, capacity, accounts etc.: 100% usually 36 months (title to shares, capacity, tax)
 - Information on individual minimum claim amounts (amount in EUR vs. percentage of purchase price) and the use of deductibles: between EUR 15,000 and 50,000 – 2/3 deductible
 - Information on liability caps (amount in EUR vs. percentage of purchase price): maximum liability caps between EUR 3 and 25 million.
 - Information on carve-outs: 100% carve-outs for standard indemnifications
- Disclosures
 - Percentage of deals with/without disclosures and information on percentage of deals with disclosures against warranties only vs. warranties and specific indemnities: 2/3 warranties only / 1/3 warranties and indemnities
 - Percentage of deals with/without
 - full data room disclosure: 100% with disclosure
 - Q&A log: 2/3 with disclosure
 - Disclosure letters/schedules: 2/3 with disclosure letters/schedules
 - Disclosure of due diligence report: 100% no due diligence report disclosure
 - Public information disclosed: 100% no public information disclosed
 - Update between signing/closing: 2/3 no update

6. Conditions Precedent

- Percentage of deals with/without merger filings as CP and information on percentage of jurisdictions: 2/3 without merger filings as CP
- Percentage of deals with/without third party consents as CP: 2/3 without third party consent
- Percentage of deals with/without certain funds clause as CP: 100% without
- Percentage of deals with/without the bring-down of warranties as CP: 2/3 without bring-down

- Percentage of deals with/without MAC clause as CP: 2/3 without MAC clause as CP
- Percentage of deals with/without seller's legal opinions as CP: 100% without legal opinion
- Percentage of deals with/without retention of key employees as CP: 100% without retention

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 clauses: 2/3 with non-compete between 2 and 10 years
- Percentage of deals with/without non-solicit clauses and information on duration and the use of liquidated damages clauses: 2/3 with non-solicit clauses but 100% without liquidated damages clauses
- Percentage of deals with/without non-disparagement covenants: 100% 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

- Percentage of deals with/without choice of law clauses and information on jurisdictions chosen: 100% choice of law Germany
- Percentage of deals with/without jurisdiction clauses: 100% with jurisdiction clauses
- Information on jurisdictions chosen: Frankfurt or arbitration
- Information on arbitration clauses (applicable rules, number of arbitrators, language): DIS e.V. rules, 3 arbitrators, 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): 100% without initiation of formal litigation procedures

9. General Information

- Percentage of deals with/without cross-border element: 2/3 cross border
- Names of involved law firms: Gleiss Lutz / various other
- Information on whether referrals were made by other AIJA members: 100% no

Please find here some useful information for drafting your report. Following these basic rules will ensure consistency among all our reports as well as a convenient experience for our readers.

STYLES

- There are two different levels of headings you may use. See example below.
- Your body text needs to be Garamond, Size 12.
- If you need to display a list, you may use bullet points or letters in lowercase.
- For the use of footnote, you can use the style available here¹.

- **Headings**

Heading 1, Font: Garamond, Size 14, Bold

Heading 2, Font: Garamond, Size 12, Bold

- **Body text**

Read here your body text in Garamond, Size 12.

- **Lists**

A list can be displayed with letters in lowercase:

- a. Lorem ipsum dolor sit amet, consectetur adipiscing elit, sed do eiusmod tempor incididunt ut labore
- b. et dolore magna aliqua. Ut enim ad minim veniam, quis nostrud exercitation ullamco laboris nisi ut aliquip ex ea commodo consequat.
- c. Duis aute irure dolor in reprehenderit in voluptate velit esse cillum dolore eu fugiat nulla pariatur. Excepteur sint occaecat cupidatat non proident, sunt in culpa qui officia deserunt mollit anim id est laborum.

or with bullet points:

- Lorem ipsum dolor sit amet, consectetur adipiscing elit, sed do eiusmod tempor incididunt ut labore
- et dolore magna aliqua. Ut enim ad minim veniam, quis nostrud exercitation ullamco laboris nisi ut aliquip ex ea commodo consequat.

¹ This is a footnote.

- Duis aute irure dolor in reprehenderit in voluptate velit esse cillum dolore eu fugiat nulla pariatur. Excepteur sint occaecat cupidatat non proident, sunt in culpa qui officia deserunt mollit anim id est laborum.

You can also use indentation to add extra levels to your lists.

- Lorem ipsum dolor sit amet, consectetur adipiscing elit, sed do eiusmod tempor incididunt ut labore
 1. et dolore magna aliqua. Ut enim ad minim veniam, quis nostrud exercitation ullamco laboris nisi ut aliquip ex ea commodo consequat.
 2. Duis aute irure dolor in reprehenderit in voluptate velit esse cillum dolore eu fugiat nulla pariatur. Excepteur sint occaecat cupidatat non proident, sunt in culpa qui officia deserunt mollit anim id est laborum.

BIBLIOGRAPHY

If you add a bibliography at the end of your report, please use the style below.

- Doe, John B. *Conceptual Planning: A Guide to a Better Planet*, 3d ed. Reading, MA: SmithJones, 1996.
- Doe, John B. *Conceptual Testing*, 2d ed. Reading, MA: SmithJones, 1997

NAMING YOUR FILE

When saving your report, please name the document using the following format: "National Report (country).doc". The General Reporter in charge of your session will take care adding the Working session/Workshop reference once this is available.

Example: National Report (France).doc

DISCLAIMER

Please do not forget to include in your report the following disclaimer:

General Reporters, National Reporters and Speakers grant to the Association Internationale des Jeunes Avocats, registered in Belgium (hereinafter : "AIJA") without any financial remuneration licence to the copyright in his/her contribution for AIJA Annual Congress 2015.

AIJA shall have non-exclusive right to print, produce, publish, make available online and distribute the contribution and/or a translation thereof throughout the world during the full term of copyright, including renewals and/or extension, and AIJA shall have the right to interfere with the content of the contribution prior to exercising the granted rights.

The General Reporter, National Reporter and Speaker shall retain the right to republish his/her contribution. The General Reporter, National Reporter and Speaker guarantees

that (i) he/she is the is the sole, owner of the copyrights to his/her contribution and that (ii) his/her contribution does not infringe any rights of any third party and (iii) AIJA by exercising rights granted herein will not infringe any rights of any third party and that (iv) his/her contribution has not been previously published elsewhere, or that if it has been published in whole or in part, any permission necessary to publish it has been obtained and provided to AIJA.