

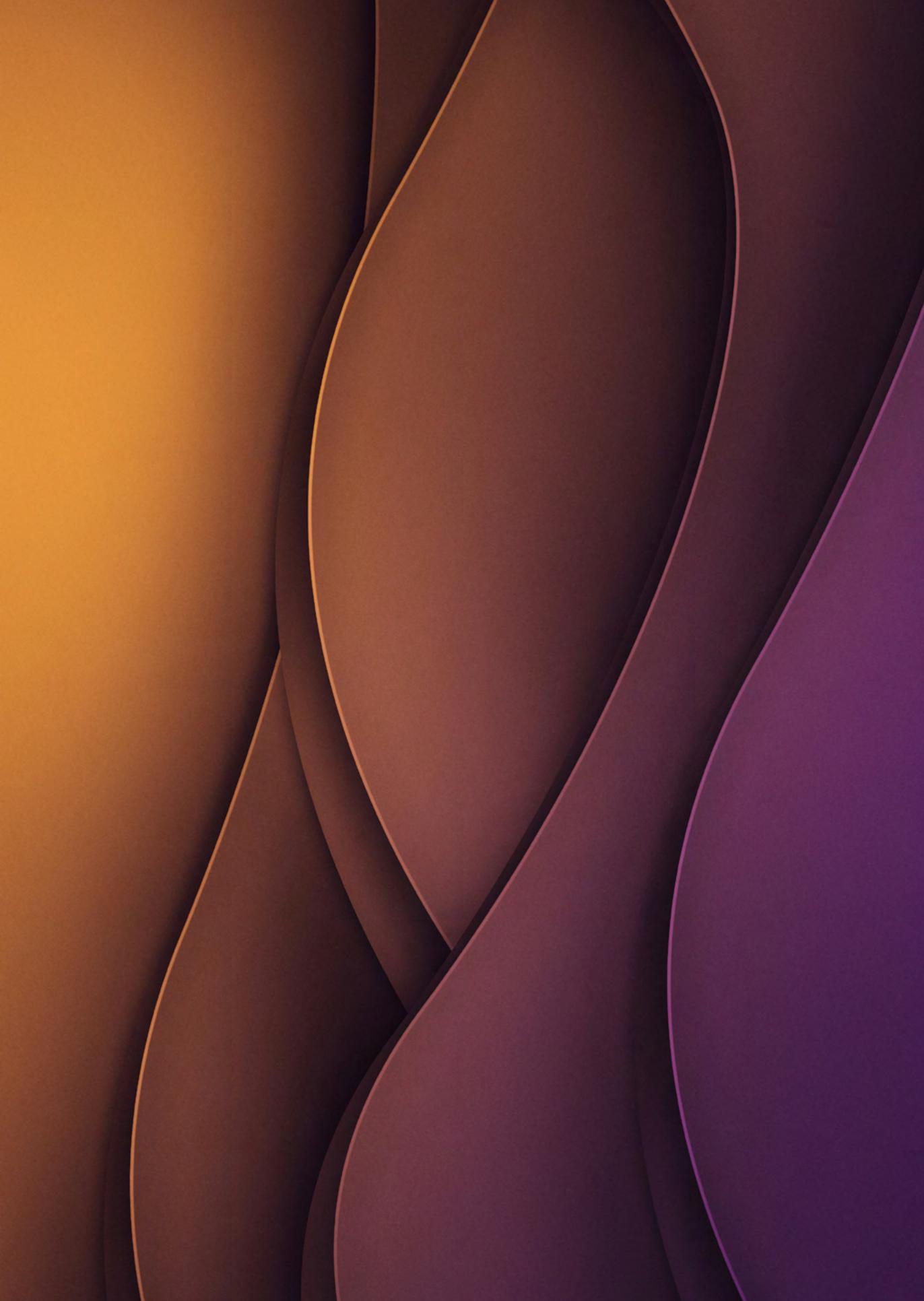


CUATRECASAS

# Market trends in Iberian private equity transactions

2024 EDITION





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# Private equity market outlook in Spain 2023

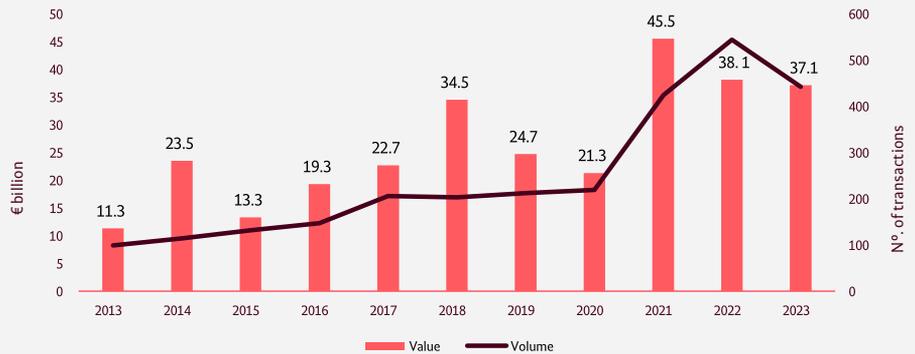
## SPAIN

### General summary of the market

In 2023, the transactional market had a complex year. Despite reaching good numbers, even improving pre-COVID era numbers, both the value of Spanish private equity transactions, and particularly the volume of deals, broke the positive trend and decreased for the first time in recent years.

#### Spanish private equity transactions 2013-2023

(source: Mergermarket)

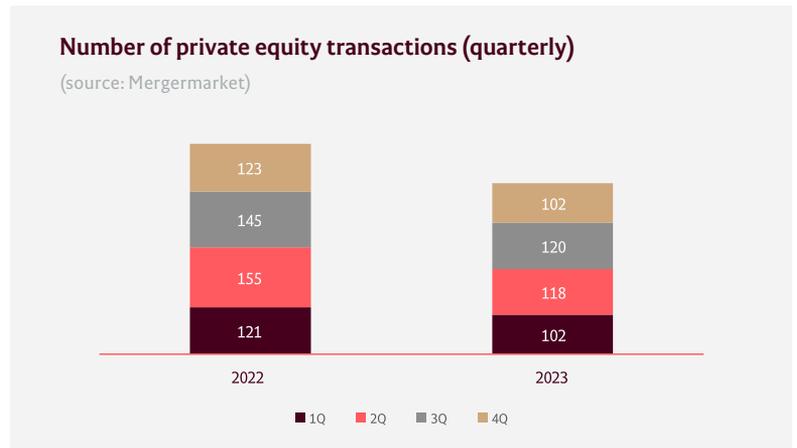


According to data generated by Mergermarket in Spain, 442 private equity transactions were registered in 2023, totaling €37,111 million, representing a -3% decrease in transaction value and a -19% drop in the volume of those transactions.

Other sources such as TTR show the same trend, reporting 389 transactions valued at €22,411 million, which means a decrease of -10% both in value and volume.

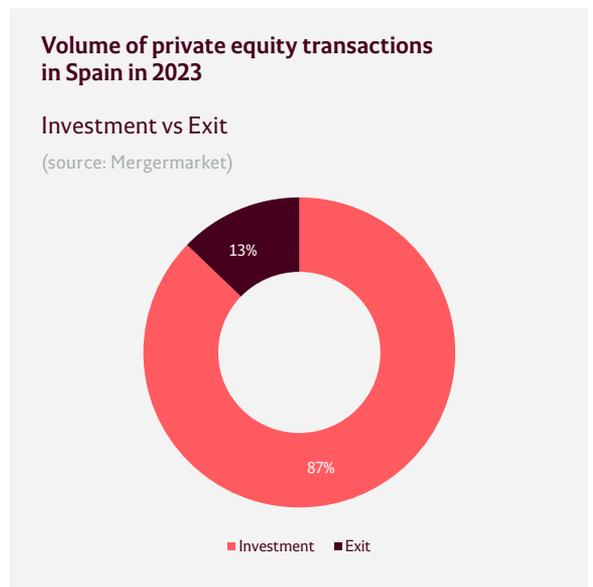
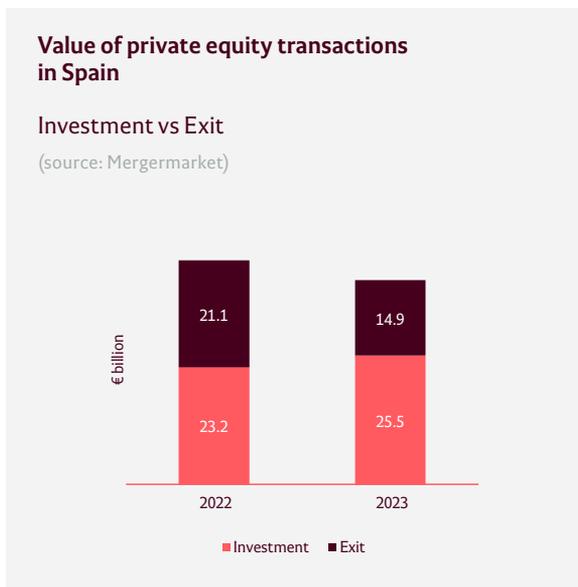


The Spanish private equity market has proved resilient in terms of value, but it has been slowing down gradually in number of transactions in all quarters last year



Meanwhile, in 2023, the value of investments increased compared to the year before (10%), meaning 87% of all transactions in terms of number of deals.

The decreasing activity in the market could be explained by the number and value of exits, which decreased -30% and -43% respectively.

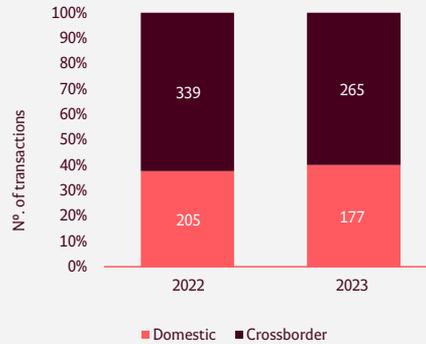


## Source of investment

The market is still led by crossborder transactions, both in number (60%) and value (95%)

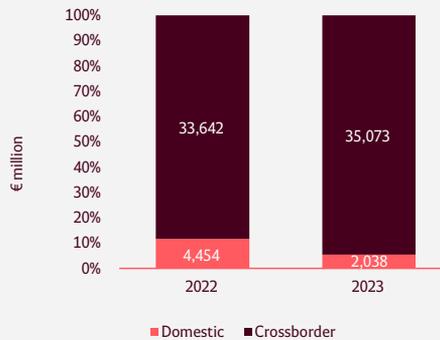
### Source of private equity transactions in Spain (by volume) 2022 vs 2023

(source: Mergermarket)



### Source of private equity transactions in Spain (by value) 2022 vs 2023

(source: Mergermarket)



International investors continue to focus on high-value transactions, while national players participate in lower-value transactions.

US, UK, and France-based private equity investors led inbound transactions in Spain, both in volume and value.

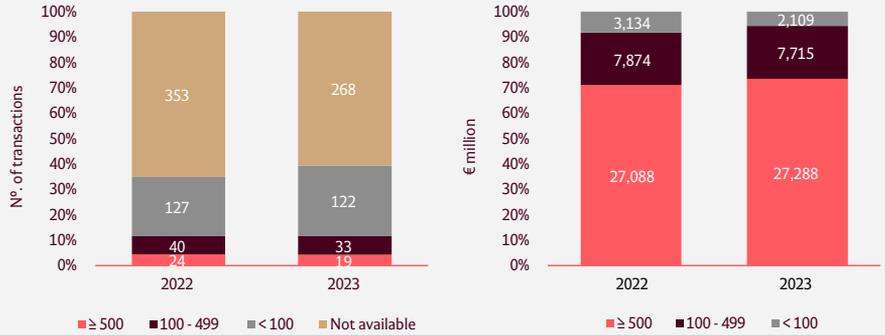


# Type of transactions

## Size

### Size of private equity transactions in Spain 2022 vs 2023

(source: Mergermarket)



## The market decreased in deals of all sizes

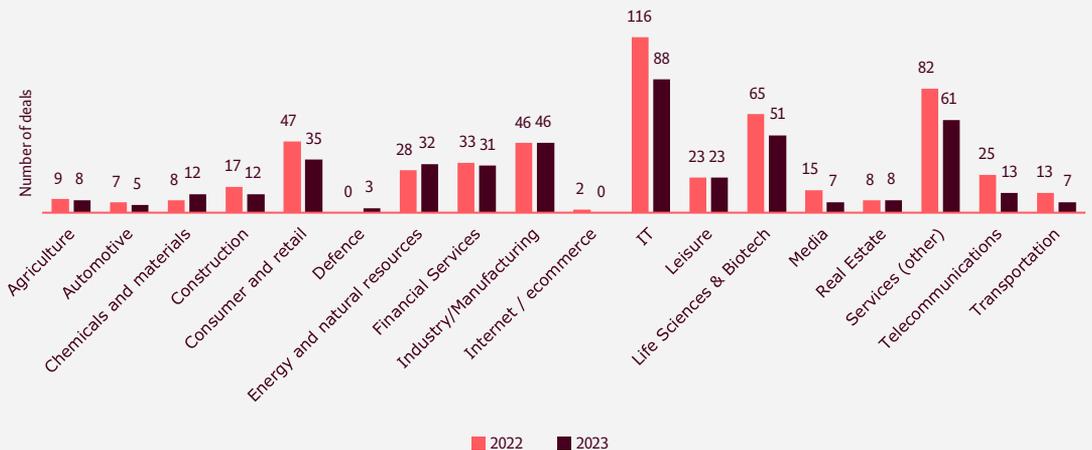
### Industries

The transactions volume by industry continued to be concentrated in the technology sector (the outstanding leader with 20% of private equity transactions), followed by services (14%), life sciences (12%), industry (10%), and retail & consumer (8%).

Only chemicals (+50%) and energy (+14%) grew compared to 2022. However, TMT (-32% as a whole, considering IT, internet, media, and telecoms), transportation (-46%), services (-26%) and retail & consumer (-26%) experienced decreased activity in 2023.

### Target industry

(source: Mergermarket)



# Private equity market outlook in Portugal 2023

## PORTUGAL

### General summary of the market

Unlike in Spain, in 2023, Portugal saw a record year for private equity transactions in terms of aggregate number of deals (volume).

According to data generated by Mergermarket for Portugal, the total volume of private equity transactions reached 130 deals, a 17% increase from 2022, and the aggregate value of these deals also rose, reaching €4.8 billion, a 27% increase from 2022.

Other sources such as TTR show the same trend in terms of volume. However, TTR's conclusions on the trend of the Portuguese market in terms of the value of private equity transactions in 2023 differ from Mergermarket, indicating a 51% drop in value compared to 2022. This discrepancy between the two information agencies could be due to varying criteria for evaluating the primary regions involved in crossborder deals.

However, from the information gathered by Mergermarket, despite fluctuations, the Portuguese market has shown positive trends over the past 10 years. This is demonstrated by the compound annual growth rate (CAGR) of 20% in volume and 35.2% in value. Deal value peaked during 2020 and 2021 but has since dropped to pre-pandemic levels and is now on an upward trend. While deal volume experienced a slight decline between 2021 and 2022 (-5%), it has since rebounded.

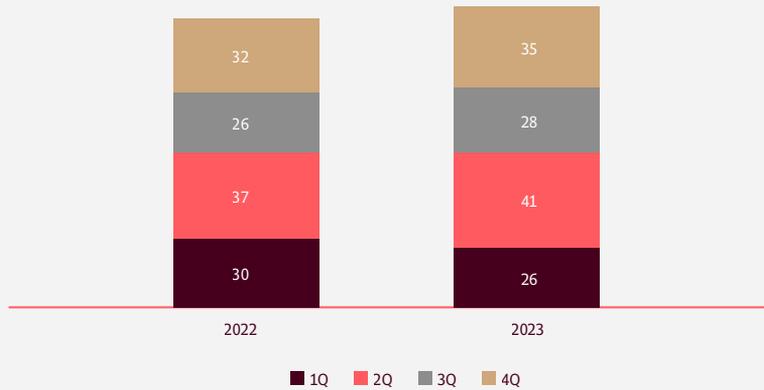
### Portuguese private equity transactions 2013-2023

(source: Mergermarket)



## Number of private equity transactions (quarterly)

(source: Mergermarket)



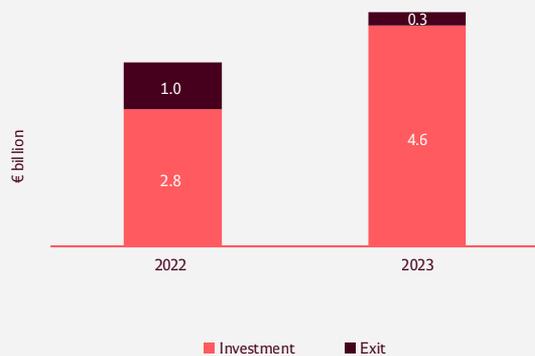
With only four deals in January, the year began somewhat inauspiciously. However, the deal flow picked up in March, with 14 deals, and then reached new peaks in May, June and October, with 16, 17 and 16 deals, respectively. As in previous years, the second and fourth quarters were the busiest, accounting for nearly 60% of the year's total deals.

According to data generated by Mergermarket for Portugal, in 2023, there were 18 exit deals, the same number as the previous year. However, the aggregate value of these deals decreased nearly threefold, from €1 billion to approximately €300 million. In contrast, according to the same source, investment deals increased by 20% in volume and 60% in value compared to the previous year. Specifically, there were 112 private equity deals valued at €4.6 billion. Therefore, the proportion between exits and investments changed slightly, with investments increasing 2 percentage points to 86% of the total deal count.

## Value of private equity transactions in Portugal

### Investment vs Exit

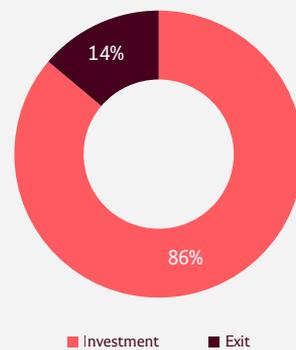
(source: Mergermarket)



## Volume of private equity transactions in Portugal in 2023

### Investment vs Exit

(source: Mergermarket)

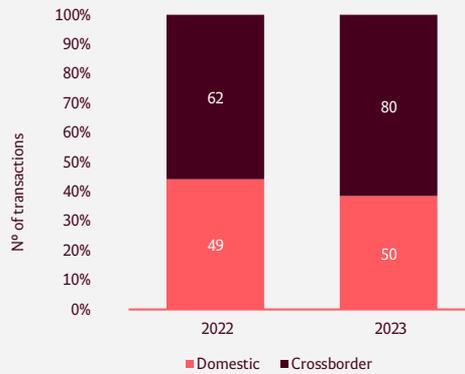


## Source of investment

Despite making up only 62% of the total deal volume in Portugal, crossborder deals accounted for 88% of the total transactional value, which reached €4.2 billion with 80 deals. This indicates that international investors are still driving high-value deals, while national players are participating in lower-value deals.

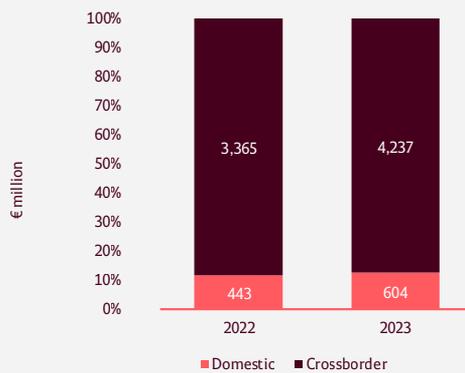
### Source of private equity transactions in Portugal (by volume) 2022 v. 2023

(source: Mergermarket)



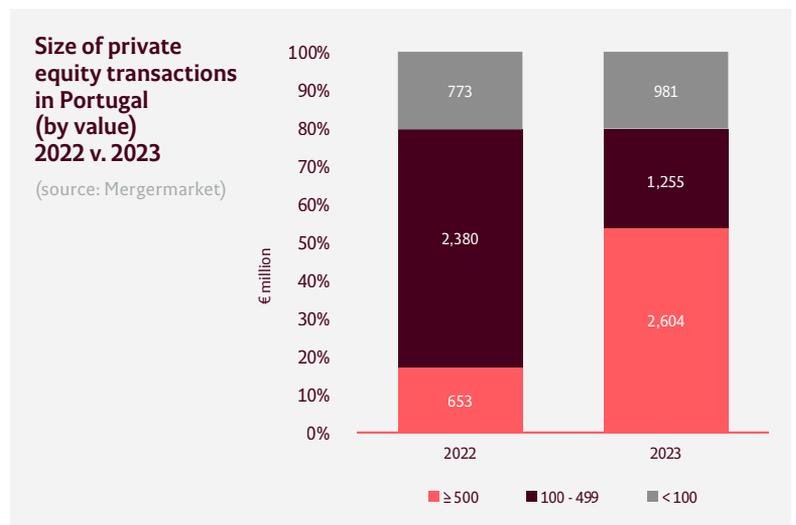
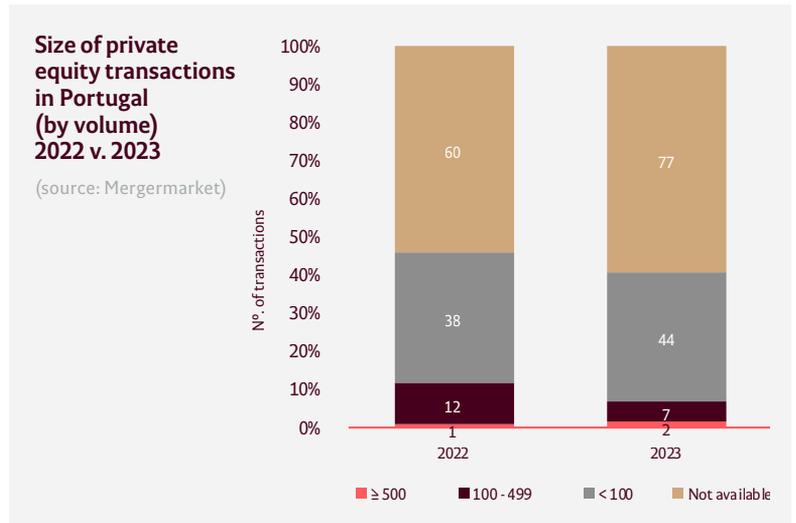
### Source of private equity transactions in Portugal (by value) 2022 v. 2023

(source: Mergermarket)



# Type of transactions

## Size



According to data generated by Mergermarket for Portugal, 59% of private equity deals in Portugal have undisclosed values, making it difficult to analyze the variation in deal sizes. High-end deals are rare in the Portuguese market, with only one in 2022 and two in 2023. However, the value of the two high-end deals in 2023—which exceeded €500 million—was four times higher than the value of the high-end deal from 2022. Both the number and value of mid-market deals decreased. Deals valued at less than €100 million, which accounted for 38 deals in 2022 and 44 deals in 2023, represented 20% of the total transactional value, the same proportion in both years.

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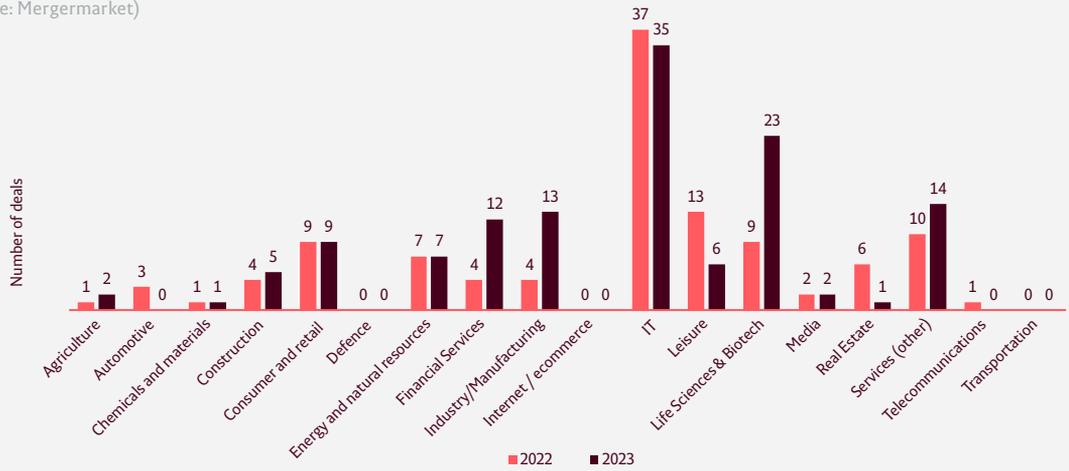
## Industries

According to data generated by Mergermarket for Portugal, the IT sector once again led the way in private equity deals in 2023, with 35 deals, a five-fold increase from 2021. The life sciences and biotechnology sector followed with 23 deals, while services, industry/manufacturing, and financial services secured 14, 13 and 12 deals, respectively. Together, these top five sectors accounted for 75% of all private equity deals in Portugal in 2023. In contrast, the leisure, automotive, and real estate sectors all experienced significant declines in deal volume, with six, three and one deal, respectively. Consumer and retail and energy and natural resources maintained the same volume as the previous year, with nine and seven deals, respectively.



## Target industry

(source: Mergermarket)



# Market trends in Spain and Portugal

## Significant trends in Cuatrecasas deals

This study, an overview of market trends in private equity transactions in Spain and Portugal, analyzes the most significant deals on which Cuatrecasas advised.

The study analyzes 54 private equity deals signed in 2022 and 2023 (38 in Spain and 16 in Portugal) with transaction values over €10 million in Spain and without limitation in Portugal. It does not include venture capital transactions, as they have their own features and market trends. Unless otherwise specified, all the charts include figures for 2022 and 2023.

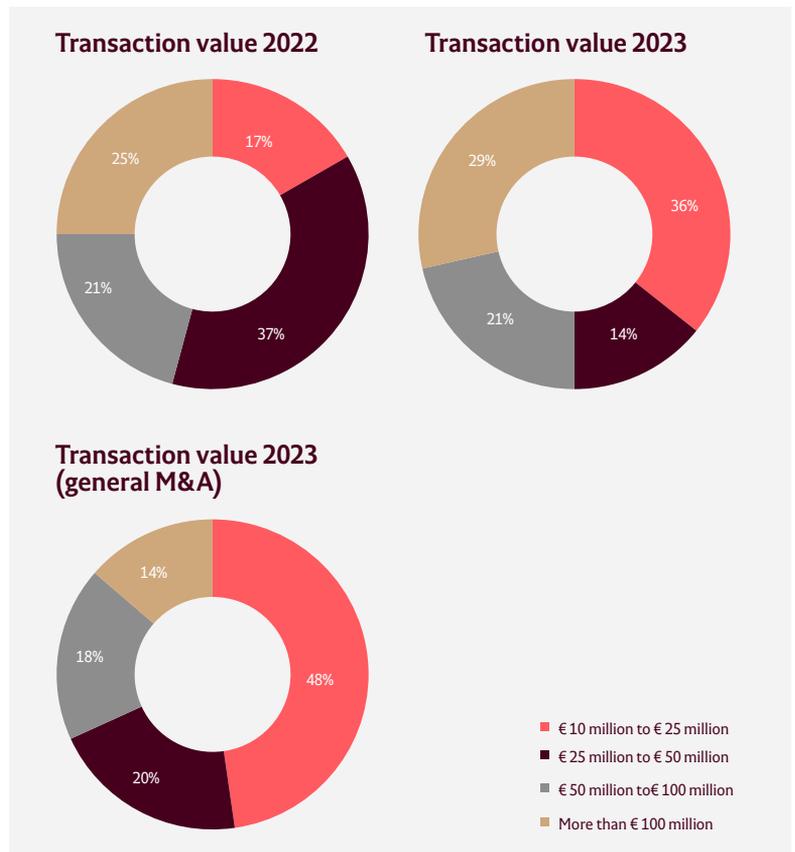
# SPAIN

## Study overview

Generally, the M&A market has experienced a decrease in the number of deals, with investors showing a greater interest in lower-value transactions. This is primarily due to the increased cost of financing, geopolitical uncertainty and inflation.

Despite a record buildup of private equity dry powder in 2023, the number of deals within the private equity sector also decreased considerably within the same period.

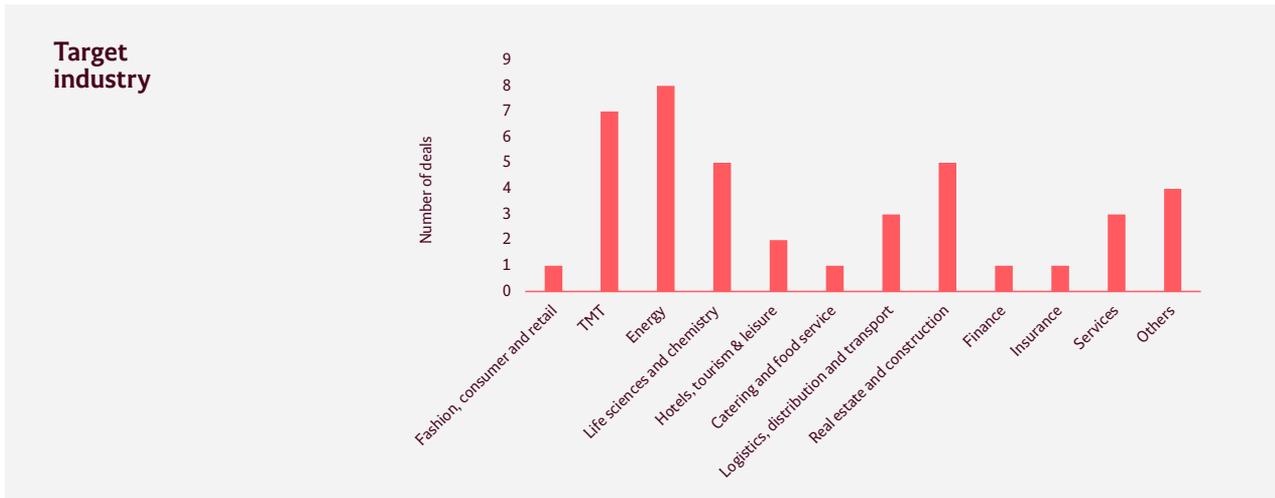
However, comparing the data of the private equity deals with those from all M&A transactions on which we advised during 2023 (including private equity and non-private equity deals), private equity deals have had a higher value on average. In 2023, M&A deals valued between €10 and €25 million accounted for 48% of all transactions, while within the private equity sector, half of the transactions were valued over €50 million and two-thirds over €25 million.



Despite the ongoing uncertainty, there was a slight increase in investor appetite during the final quarter of 2023. This is likely due to the expected stabilization of interest rates. We also noted the narrowing of the gap between seller and buyer on the valuation of target companies, with parties showing more willingness to negotiate.

## The narrowing gap between seller and buyer on the valuation of target companies, along with the expected stabilization of interest rates, indicates a possible reactivation of private equity transactions

As is typical, while investment was highly diversified across various sectors, yet again, the technology, media, and telecommunications (TMT) and energy sectors were particularly active.



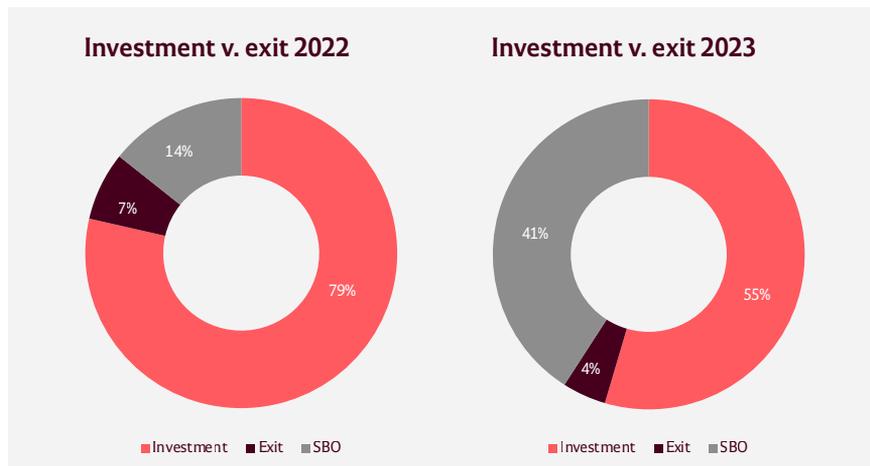
## Private equity funds focused on the energy and TMT sectors

Investments were clearly dominant, representing 93% of the transactions if we consider secondary buyouts (SBOs), where a private equity firm sells its investment to another private equity firm. SBOs experienced significant growth throughout 2022, amounting to more than 40% of the deals, largely due to the high liquidity of funds resulting from the extensive and successful capital-raising processes of recent years.

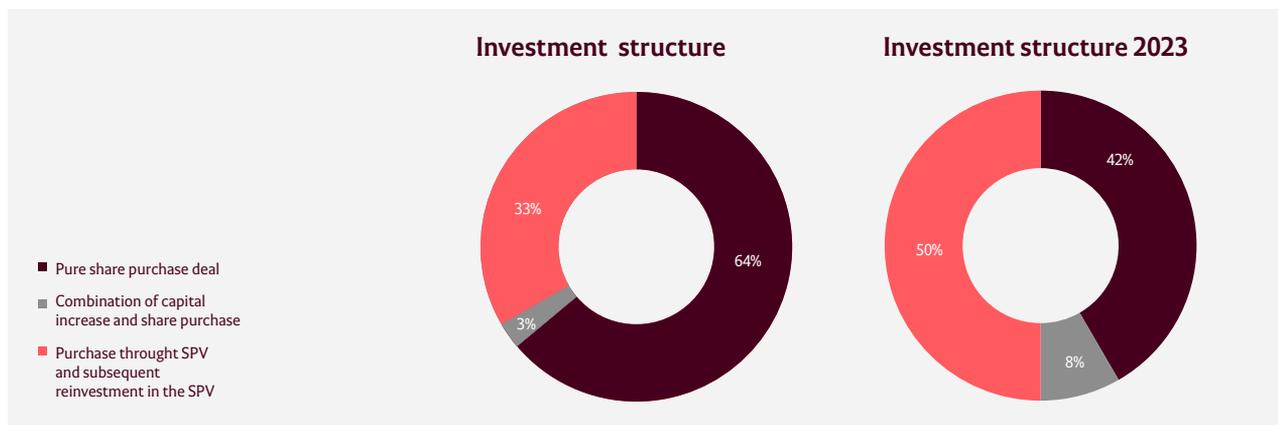
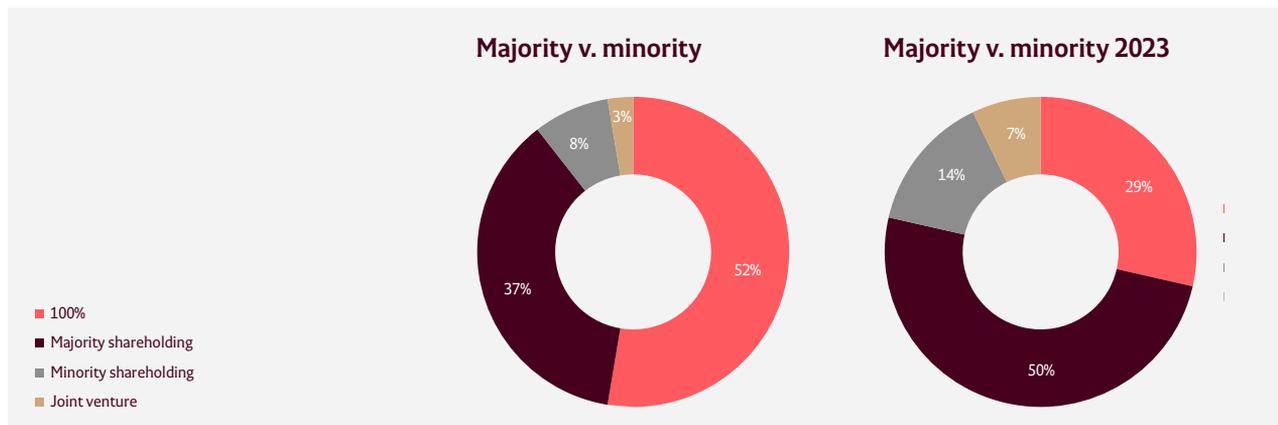
However, their prevalence declined throughout 2023, when almost 80% of the deals were pure investments.



Secondary buyouts saw a significant increase in 2022, but sharply decreased in 2023



When a private equity fund invests, the most common transaction continues to be one in which it buys 100% of the target company's capital stock or takes a majority shareholding through a pure share purchase deal. This contrasts with venture capital transactions, where pure share purchase deals are rare and where the fund usually takes a minority shareholding in the company through a capital increase.



## Roll-over transactions increased significantly during 2023

Throughout 2023, there was a significant increase in the number of deals where a fund took a majority stake, accounting for 50% of the transactions. These deals were almost always structured using a roll-over formula, whereby the private equity fund, instead of buying a majority shareholding directly, buys the target company through a special purpose vehicle (SPV), after which the seller reinvests in the SPV, usually through a capital increase.

This approach is favored due to the ease of regulating the relationships among the shareholders in the vehicle that owns the entire capital of the target company.

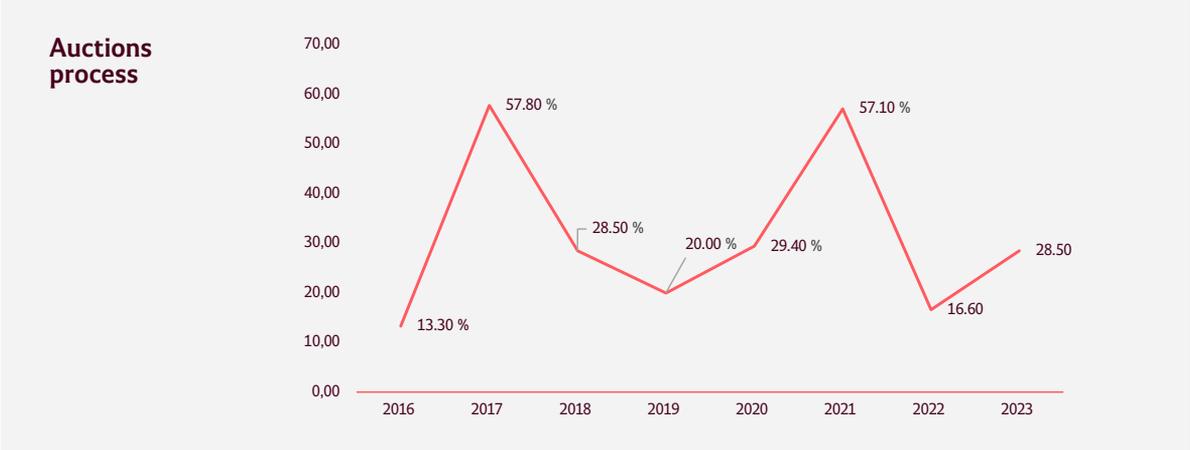
## In 2023, there was a moderate increase in transactions run as auctions

### Deal process

The number of private equity transactions run as auctions increased considerably on previous years, particularly in 2021, when more than half of the transactions were auctions with expedited deadlines due to the pandemic. However, this trend changed dramatically in 2022, when only 17% of the deals were beauty contests with multiple prospective bidders, all within the framework of an SBO process. This decrease was primarily attributed to the uncertainty caused by the war in Ukraine.

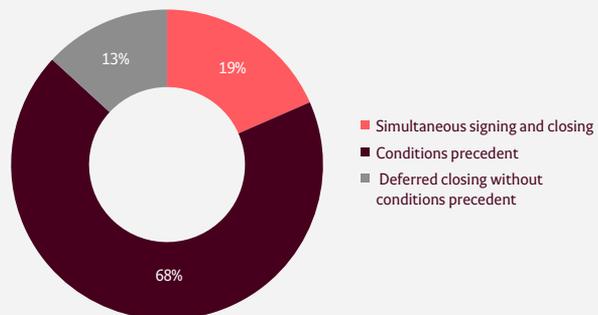


In 2023, this figure increased slightly, returning to more typical figures (almost 30%). However, if we consider only deals valued over €100 million in 2023, 75% of the transactions were beauty contests.



During the first year of the pandemic, there were fewer transactions with conditions precedent (47% in 2020). In our experience, this was probably because, unless conditions precedent were strictly necessary, the uncertain circumstances made parties prefer fast transactions with simultaneous signing and closing. In 2021, transactions with conditions precedent returned to more typical percentages, a trend that continued into 2022, when figures remained similar to those of the previous year. However, in 2023, most deals included conditions precedent, accounting for 80% of them.

### Simultaneous signing and closing v. deferred closing



A wave of economic protectionism driven by strategic interests is reflected in the need, in many cases, to require regulatory authorization for deals with investors from third countries

The current geopolitical situation has led to a paradigm shift, where the emphasis on investment freedom in a globalized world has given way to a more polarized one, which has brought with it a wave of economic protectionism driven by strategic interests. In the M&A market, particularly within the private equity sector, this protectionism is reflected in the need, in many cases, to require regulatory authorization for deals with investors from third countries.

This trend began with foreign direct investments (FDIs). Under certain circumstances, either due to the investor's profile or because the FDI involves a target company operating in a strategic sector, government authorization is now necessary for these transactions. In Europe, sectors such as energy, technology, and infrastructure are markedly active in the current M&A and private equity market, making them areas of particular concern.





Almost all the deals that included a condition precedent did so because of the need for regulatory approval—particularly antitrust clearance—and FDI screening

The market has gradually been internalizing the implementation of a prior authorization system for FDIs. This is especially true for the private equity sector, where a preliminary analysis was needed for most deals involving international parties, given funds' interest in strategic sectors.

This authorization process affects the timeline of transactions. Also, while the Council of Ministers previously approved them with minimal restrictions, it is increasingly establishing conditions for their authorization, such as for carve-out transactions.

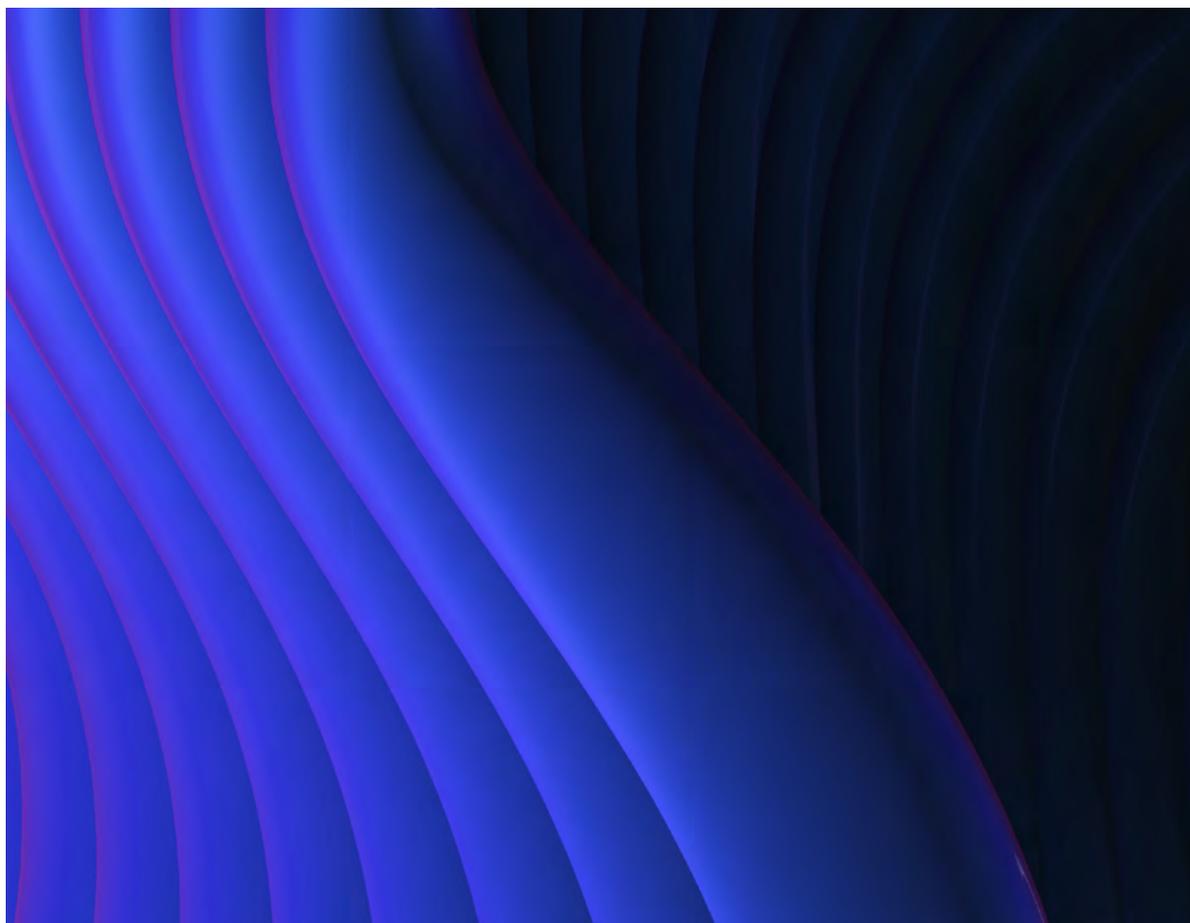
However, in 2023, although many deals still required a preliminary analysis, most transactions did not need a final condition precedent for that purpose.

Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, known as the Foreign Subsidies Regulation (FSR), entered into force on January 12, 2023, with prior notification requirements for obtaining authorization for concentrations applying from October 12, 2023. Consequently, authorization may now have to be obtained from the European Commission if one of the parties involved in an M&A transaction received financial contributions (such as a subsidy) from a third country.

## Hell or high water clauses are increasing

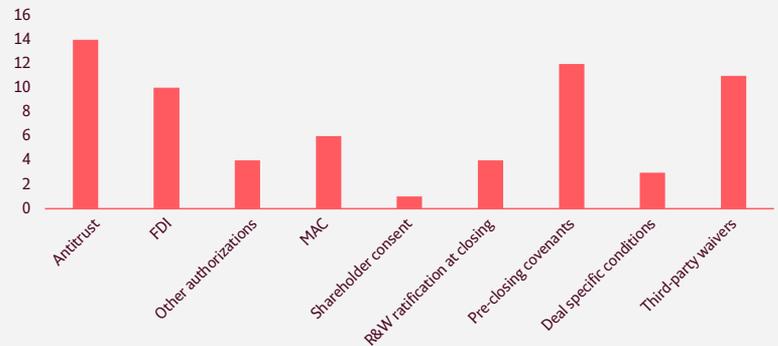
There are also two additional factors to consider. First, the European Commission has expanded the scope of concentration regulations. Therefore, transactions that do not meet thresholds but are considered to have a significant impact on competition—particularly in the digital and pharma sectors—may now need to be notified. Second, the recent Digital Markets Act establishes new regulations for the ex ante regulation and control of the activity of certain digital platforms in the European Union that, due to their size and characteristics, can significantly impact the functioning of the market. The Digital Markets Act requires platform service providers designated as gatekeepers to inform the European Commission of all proposed acquisitions, particularly those affecting data collection.

Before 2020, almost half the transactions requiring regulatory approval included a hell or high water clause. This trend changed in 2020 and 2021, when only around 12.5% of the transactions included them. This percentage rose slightly to 25% in 2022 and to 33% in 2023. Some of these agreements stipulated that the parties must accept the conditions imposed by the authorities, unless they were overly burdensome or exceeded certain limits.



Aside from regulatory approvals, the other two most common conditions precedent were (i) obtaining third-party waivers, such as lenders, suppliers or other parties' consent due to change of control clauses; and (ii) fulfilling pre-closing covenants, which mainly involved executing, terminating, or maintaining certain agreements and carrying out carve-out or carve-in transactions.

### Types of conditions precedent



In 2022 and 2023, around 25% of transactions with deferred closing included a break-up fee and more than 15% a condition subsequent

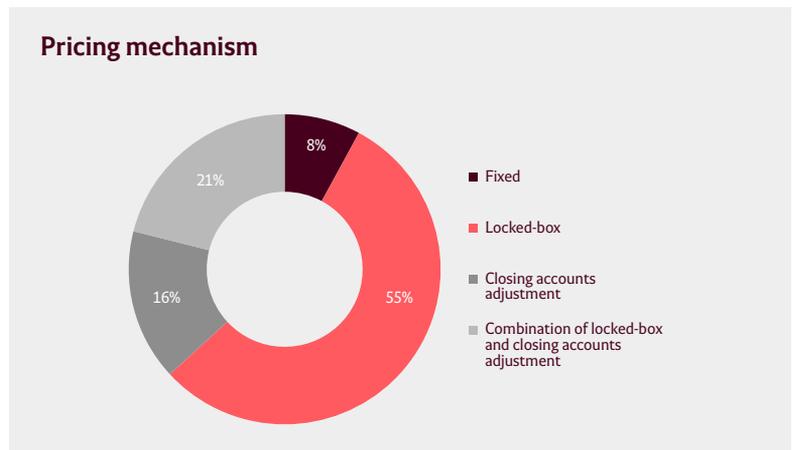
From 2019 to 2021, there was a progressive decrease in the use of break-up fees in case the closing did not occur or the closing obligations were breached (30%, 25% and 0%, respectively). However, in 2022 and 2023, the use of break-up fees rebounded to around 25% of the transactions with deferred closing. The percentage of the purchase price to be paid as a penalty varied, at times reaching 10% or 15%, and other times—more symbolically—being below 1%.

Conditions subsequent used to be uncommon because, once the transaction is closed and the property is transferred, returning to the pre-purchase stage is difficult. However, in 2022 and 2023, more than 15% of the deals included one.

## Consideration and pricing mechanisms

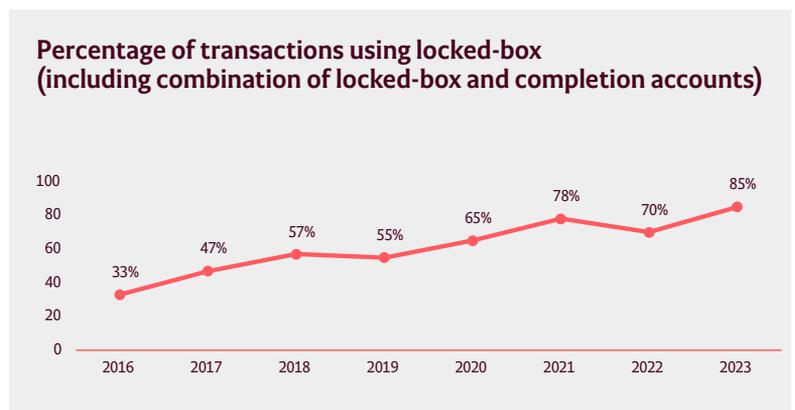
As in traditional private M&A transactions, the completion accounts or closing accounts adjustment and locked-box mechanisms are used most commonly, together with the fixed-price mechanism.

Although the completion accounts and locked-box mechanisms have their pros and cons for both parties, the completion accounts mechanism has been considered buyer friendly, while the locked-box mechanism has been considered seller friendly. However, in recent years, the use of the locked-box mechanism has significantly increased and has been consolidated as the most used pricing mechanism, regardless of whether it is a sell-side or buy-side transaction.



During 2022 and 2023, 55% of transactions used a pure locked-box mechanism, 16% the completion accounts mechanism, 8% the fixed-price mechanism, and 21% a mechanism combining the locked-box and completion accounts mechanisms (mostly in more complex transactions and those of higher value)

**Locked-box mechanism continues to grow and is consolidated again in 2023 as the most used pricing mechanism**



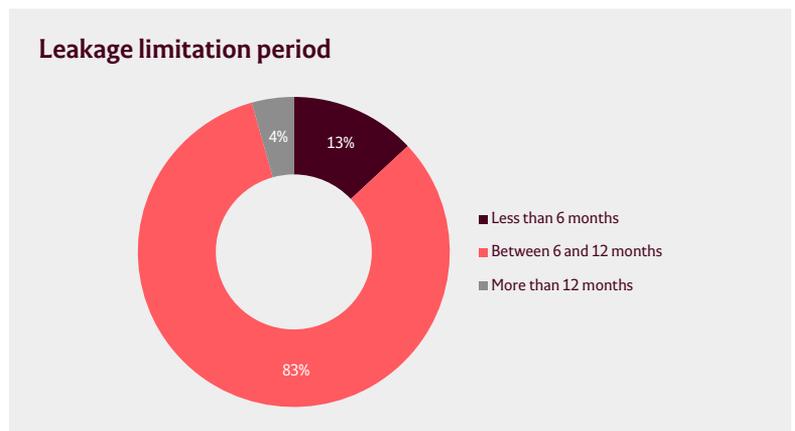
As the financial risk is transferred to the purchaser on the locked-box date within the locked-box mechanism, and because the purchaser can benefit from the profits generated from that date while the price is paid at closing, the seller will try to seek compensation, usually by using equity tickers or ticking fees. Typically, they are structured as a fixed daily amount from the locked-box date or signing date until the closing date, or as a fixed daily rate (usually between 5 and 8% per annum).

Although negotiating an equity ticker was previously uncommon in Spain, it is increasingly used. In 2021, 27% of locked-box transactions included one, and this trend has continued into 2022 and 2023, with around 31% of them doing so.

The seller's liability under leakage compensation is either capped at the leakage amount effectively received, or expenses and taxes are added. Sometimes, leakage is increased by the agreed interest accrued from the leakage date. While rare until 2022, interest was added to the leakage amount in one-third of the locked-box transactions in 2023.

The most common limitation period is 6 to 12 months. Transactions with a limitation period exceeding 12 months is uncommon.

The use of equity tickers and adding an interest to the leakage amount continues to grow

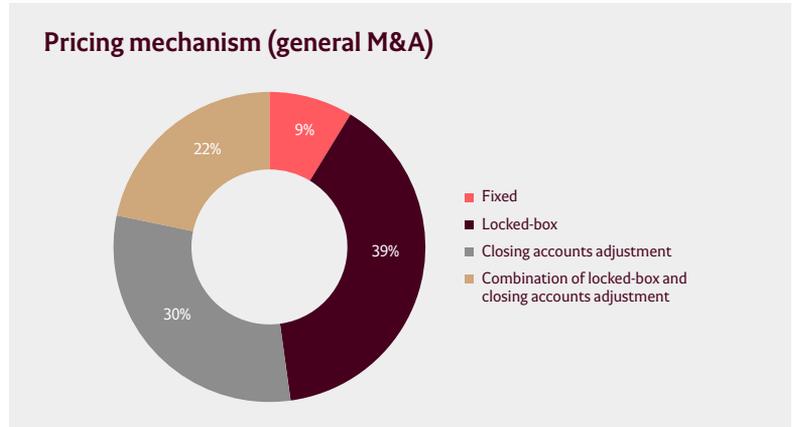


Even though the locked-box mechanism has become the most used pricing mechanism, the completion accounts mechanism was still used in 37% of the deals in 2022 and 2023 (if a combination of locked-box and completion accounts transactions are included), in which net debt and working capital were the most widely used financial parameters for the post-closing adjustment.

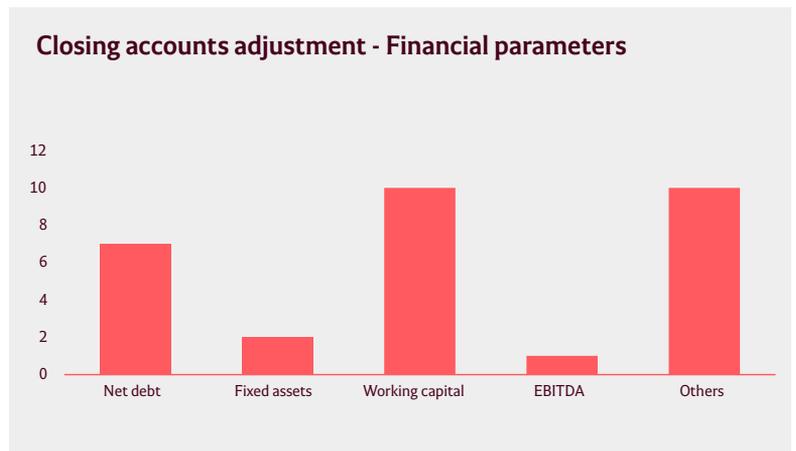
However, in 2023, the use of the completion accounts mechanism decreased considerably and was used in its pure form in one deal only. If a combination of locked-box and completion accounts transactions are considered, this figure rises to 36%.

When comparing the data of all M&A transactions on which we advised throughout 2023, a pure completion accounts mechanism was used in 30% of the deals—however, this figure rises to over 50% if a combined mechanism is included.

In 2023, the use of the completion accounts mechanism was far more prevalent in general M&A transactions than in PE transactions

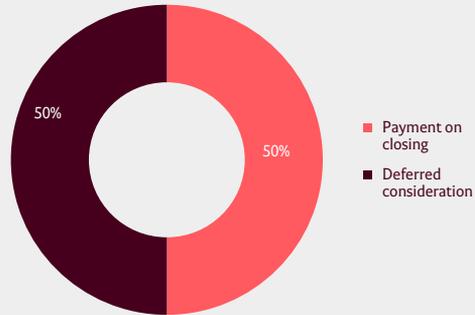


In 2022 and 2023, working capital was used as the financial parameter for the post-closing adjustment in more than 70% of the deals

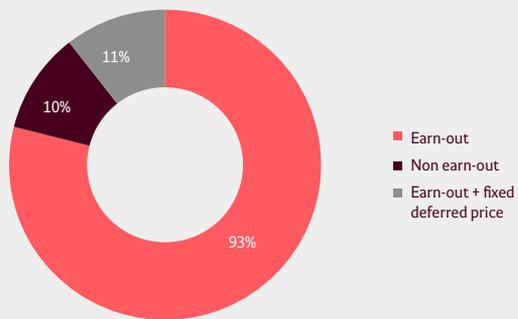


During times of uncertainty, transactions typically include payment of deferred consideration. This was a trend that was clearly observed in both 2022 and 2023, when half of the transactions included it. The use of earn-outs helps parties overcome their differing expectations about a company's future performance, which is particularly important in times of uncertainty. When an earn-out is agreed, in almost 30% of the deals, covenants to protect the seller were included. Most earn-outs are linked to EBITDA or, in general, to the company's benefits.

### Payment on closing v. deferred consideration



### Earn-out



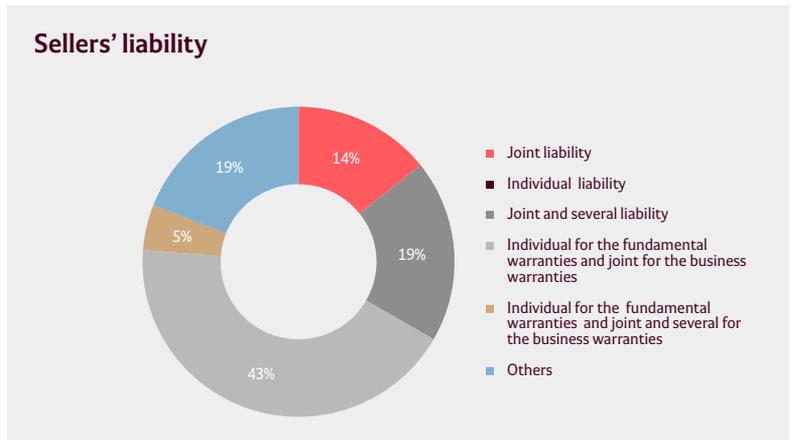
The use of earn-outs continued to increase, as it helps parties overcome their differing expectations about a company's future performance, something that becomes crucial in times of uncertainty

## Warranties

Representations and warranties (R&Ws) are negotiated in share purchase agreements (SPAs) under standard M&A practice. The agreed remedies for a breach of R&Ws are the buyer's only remedies against the seller if fundamental or business warranties are breached.

In 2022 and 2023, when there was more than one seller, in more than 40% of the transactions, their liability was a combination of individual and joint liability (individual for the fundamental warranties and joint for the business warranties). While joint and several liability was hardly seen in 2022, it was agreed in more than 40% of the deals in 2023.

**Unlike previous years, joint and several liability was agreed in more than 40% of the deals in 2023**



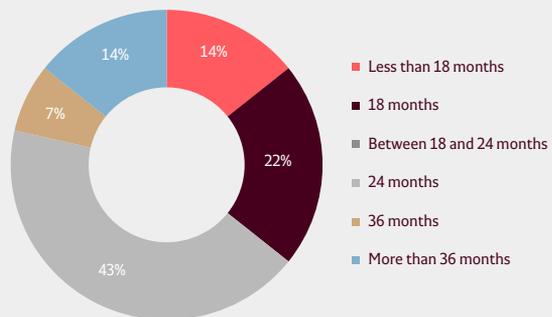
## Warranty limitations

SPAs are usually limited quantitatively and temporally. However, those limits differ depending on whether there is an investment or an exit and whether warranty and indemnity (W&I) insurance is taken out.

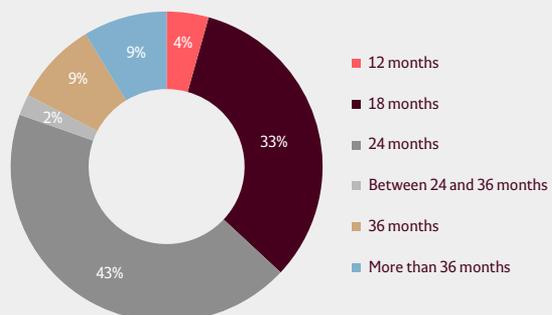
Although in 2018 and 2019 the seller was usually liable for a 24-month period after closing, during 2020 and 2021, an 18-month limitation period became the most used, accounting for 46% of the transactions. This trend continued into 2022, when more than 40% of the transactions used an 18-month period, replacing the longer periods seen in previous years. However, as with general M&A, this trend was reversed in 2023, when a 24-month limitation period was once again the most used.

In 2023, the trend shifted back to longer seller liability periods, with the 24-month period agreed in over 40% of the deals

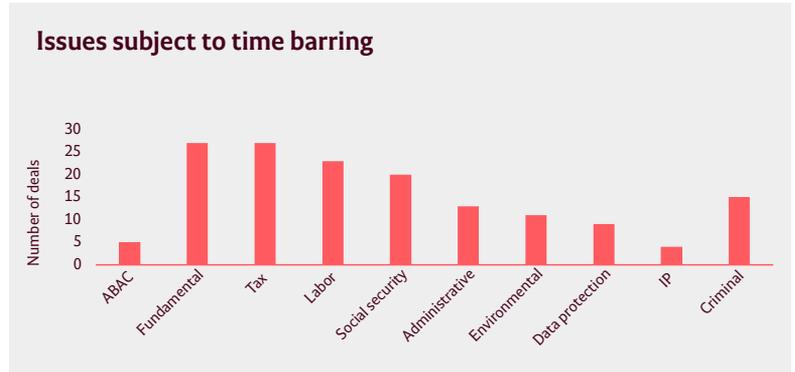
### Limitation period 2023



### Limitation period (general M&A)



Subjecting specific issues to time barring as provided by law or regulations is common practice, mainly in tax, criminal, labor and social security matters, as well as damages related to the breach of a fundamental warranty. However, it is also common in environmental, administrative, data protection, intellectual property, and anti-corruption matters (ABAC).



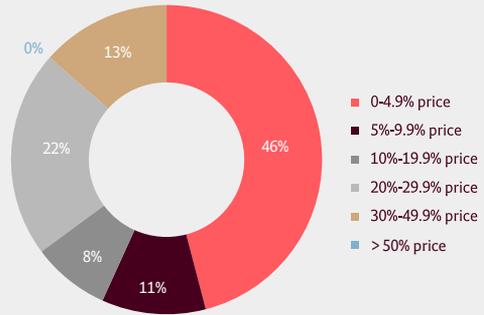
**There are usually upper and lower limits on monetary limitations.**

Liability for business warranties was generally capped at almost (always under 50% of the purchase price in 2022 and 2023), in contrast to fundamental warranties, which were usually limited to the purchase price (74%) or not limited at all (21%). In 2022 and 2023, the most common liability cap for business warranties was between 20% and 30% of the purchase price. This is without considering clean exits, which have increased considerably over the past few years.

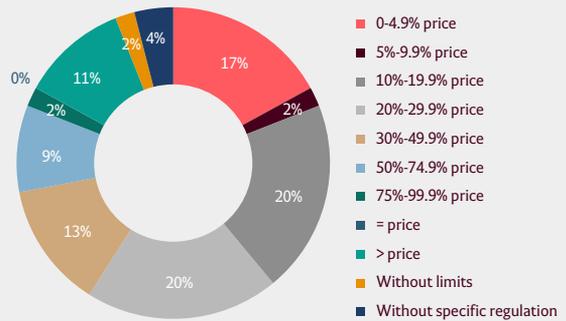
**Excluding clean exits, since 2020, the most used liability cap for business warranties is between 20% and 30% of the purchase price**



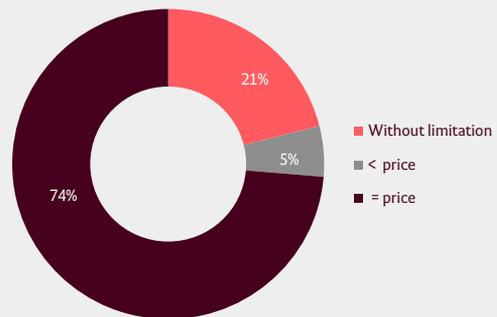
### Liability caps Business warranties



### Liability caps Business warranties (general M&A)



### Liability caps Fundamental warranties



## In exits or SBO transactions, the private equity fund was not held liable for breach of business or tax warranties

In 2022 and 2023, the pre-2021 trend returned regarding exits or SBO transactions. In most cases, private equity funds were not held liable for breach of business or tax warranties due to the agreement of a W&I insurance. Alternatively, the liability was capped at less than 1% of the purchase price without the agreement of a W&I insurance. While this practice had been common before 2021, that year saw it happening in only 40% of the transactions.

Another trend gaining traction in clean W&I insurance transactions is for the seller—usually a private equity fund—to only grant and only be liable for fundamental warranties in the SPA. Business and tax warranties are provided in a separate document known as the management warranty deed, which is executed between the target management (as warrantors) and the buyer. This is because private equity funds, being financial investors, consider that the management team is better placed to grant business warranties that accurately reflect the day-to-day running of the company, even if the management team's liability is often capped at a symbolic €1 in the management warranty deed.

## The granting of business and tax warranties through a management warranty deed is gaining traction

As usual, in all transactions in which private equity funds invested, either industrial sellers granted business and tax warranties, or W&I insurance was agreed.

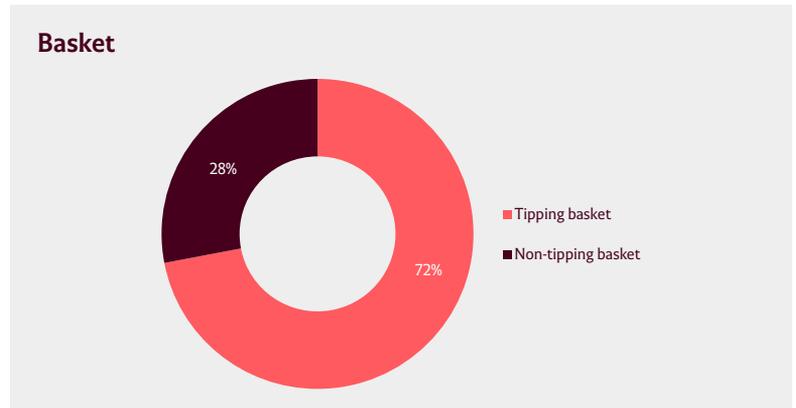
Regarding lower limits (and excluding W&I insurance transactions), (i) the seller was not usually obliged to indemnify for losses if each loss, considered individually, was less than a certain amount (*de minimis* exclusion or *de minimis* amount); and (ii) almost all deals included a basket or threshold. In these cases, the seller is not liable for damages unless the aggregate amount of the claim, together with all the claims (each over the *de minimis* amount), exceeds the basket/threshold amount.

Tipping baskets were seen in most transactions, meaning the seller is liable for the entire amount and not merely for the excess if the aggregate of claims exceeds the basket amount—72% took the form of tipping baskets and 28% of non-tipping baskets.

The basket/threshold amount is still usually below 1% of the purchase price, averaging 0.27% for non-tipping baskets (where the seller is liable only for the excess) and 0.5% for tipping baskets (where the seller is liable



for the whole amount). The *de minimis* amount was significantly lower in 2020, at an average of 0.02%, compared to an average of 0.118% in 2021; however, it decreased again to an average of 0.05% in 2022 and 0.044% in 2023. Typically, when a *de minimis* amount is agreed, the series of claims arising from facts, natures or circumstances that are substantially the same can be accumulated.



### Buyer's knowledge

In Spain, the impact of a buyer's actual or deemed knowledge on claims for breach of warranties is usually negotiated under SPAs. More than 95% of the SPAs stated whether the buyer's knowledge of an inaccuracy in R&Ws limits the seller's liability for breach of warranties. Of this 97.3%, in 68% of transactions, the buyer's knowledge excluded or limited the seller's liability. The other 32% of transactions did not include limitations on the buyer's remedies if the buyer was previously aware of an inaccuracy or breach.

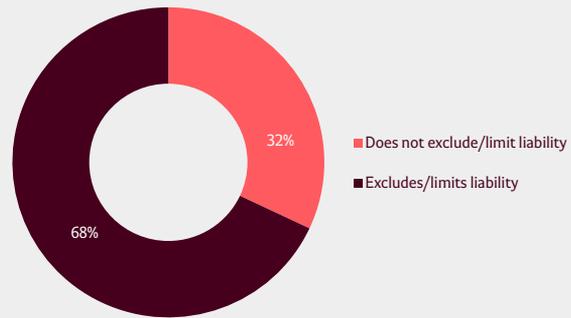
Although in previous years the percentage of the so-called pro-sandbagging clauses (not excluding liability) versus anti-sandbagging clauses (excluding liability) was more or less the same (with anti-sandbagging clauses being slightly more common), the difference has since become more pronounced in favor of anti-sandbagging clauses.

An anti-sandbagging clause is sometimes included, but only as regards to the information "fairly disclosed" to the purchaser in the due diligence materials.

When the private equity fund sells, an anti-sandbagging clause was almost always agreed.

Since 2021, more transactions have included an antisandbagging clause than a pro-sandbagging clause

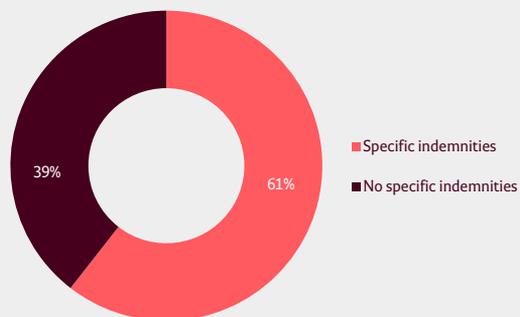
### Effect of buyer's knowledge



### Specific indemnities

Specific indemnities are ad hoc indemnity remedies negotiated when the risk of a specific loss is high, but not 100% certain. They are not usually subject to any limitation and do not have to follow the claim procedure negotiated under the SPA. For several reasons, specific indemnities were included in 61% of transactions.

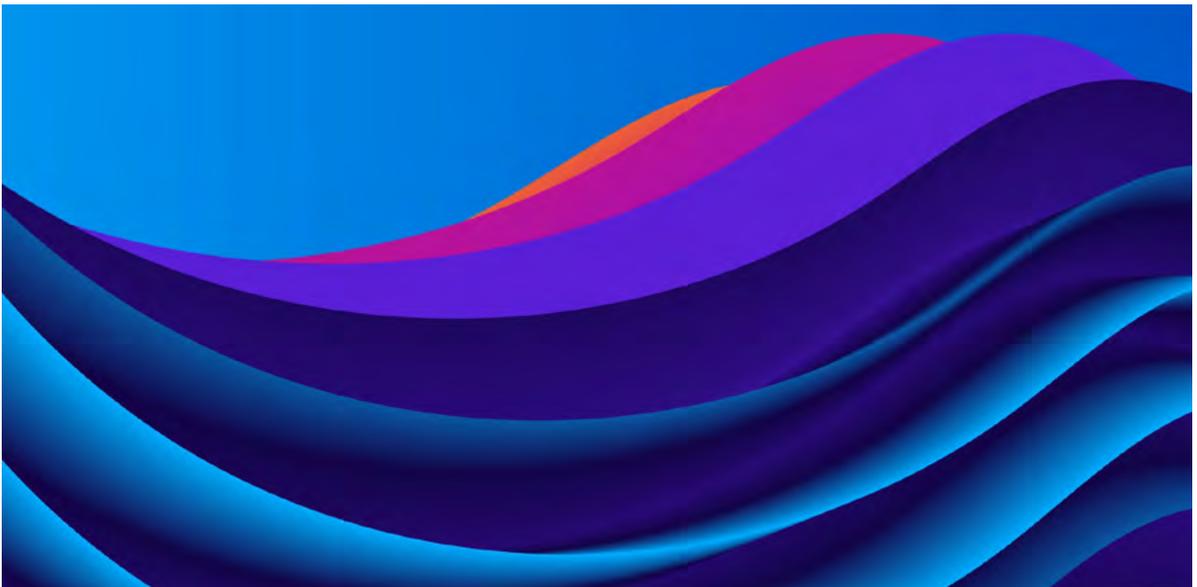
### Specific indemnities



## Buyer's remedies against seller's liability

To seek security against the seller's liability, including a buyer's remedy in the SPA is common. In general, during 2021, funds were less demanding in the seller's guarantees, either because they were buying highly demanded assets or because the valuation was beneficial and there was no need for further guarantees. However, since 2022, the figures have returned to more typical levels, with more than 70% of agreements including a seller's guarantee in the event of a breach of its R&Ws.

Regarding classic buyer's remedies, in 2022, escrows reclaimed their position as the most used option; however, they then lost it completely in 2023, when no deal included them despite the rise in interest rates. Bank guarantees, which were widely used some years ago, continue to be uncommon. In 2023, purchasers have mostly used the possibility of retaining the deferred price as a guarantee.

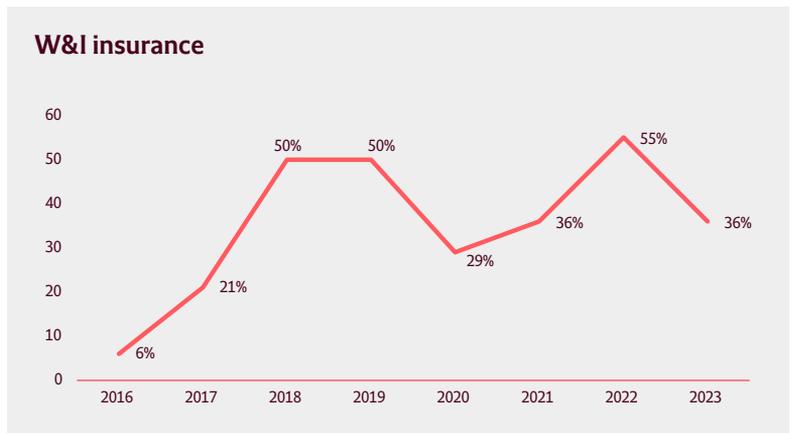


## W&I insurance

W&I insurance continues to be the most used buyer's remedy in private equity. It is clearly consolidated not only within the framework of an exit (39% of the transactions were investments, 16.5% exits and 44.5% SBOs). Therefore, the use of W&I insurance has become widespread, both when private equity funds are investing and disinvesting, but its use has focused on clean exits (95% of W&I insurance transactions) and is more common in transactions valued over €100 million, where almost all of them included it. As W&I insurance premiums are high, W&I insurance is more commonly used in high-value deals.

A clean exit is one in which the seller is not liable for the breach of any business warranty. Consequently, if there are any inaccuracies in the seller's R&Ws, the buyer's only remedy would be against the W&I insurer under the W&I insurance policy, and the buyer would not be able to take any action against the seller (or any claims against the seller would be limited to €1). However, in a clean exit, the purchaser is generally able to take action against the seller in cases of fraud, willful misconduct and breach of fundamental warranties.

While W&I insurance continues to be the most used buyer's remedy in 2023, it was used less often than in 2022

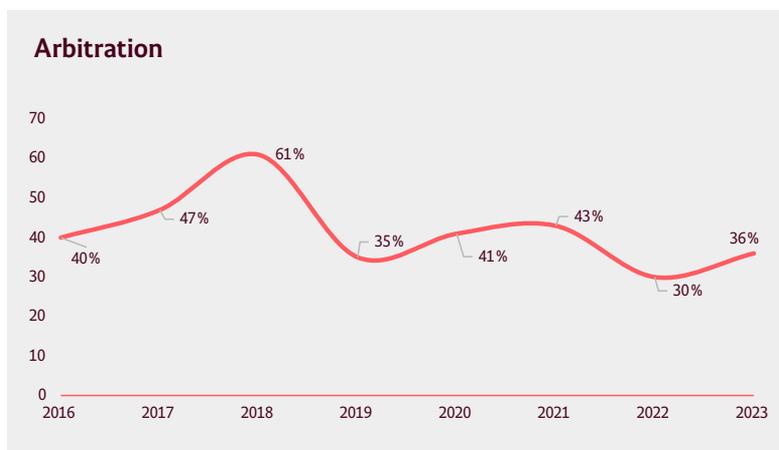
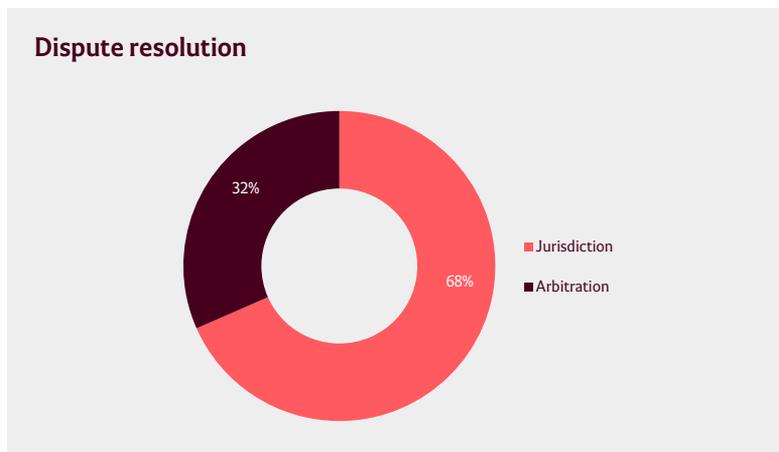


When arbitration is agreed, the seat of arbitration was always Madrid

### Dispute resolution

Since 2018, the use of arbitration as a dispute resolution mechanism to resolve conflicts arising from agreements has been declining, with parties opting for this mechanism in only 36% of transactions carried out in 2021, 2022 and 2023 on average.

The seat of arbitration was always Madrid. Arbitration proceedings were mostly managed by the International Court of Arbitration of the International Chamber of Commerce.



## SPAIN

# 2023 Market trends at a glance

1. A narrower gap between parties on the valuation of the targets and the stabilization of interest rates indicates a possible reactivation of private equity transactions in 2024.
2. Secondary buyouts sharply decreased, and investments gained traction.
3. Private equity funds focused on the energy and TMT sectors.
4. Reinvestment of the sellers through roll-over increased considerably.
5. A moderate increase was seen in transactions run as auctions, focused mainly on deals over €100 million.
6. A wave of economic protectionism of strategic interests often requires regulatory authorization for deals with investors from third countries.
7. Hell or high water clauses are increasing when regulatory authorization is needed.
8. Energy, technology, and infrastructure sectors are of particular concern for the FDI authorities.
9. The use of break-up fees rebounded in transactions with deferred closing.
10. Conditions subsequent—usually rare—were agreed in 16% of the deals.

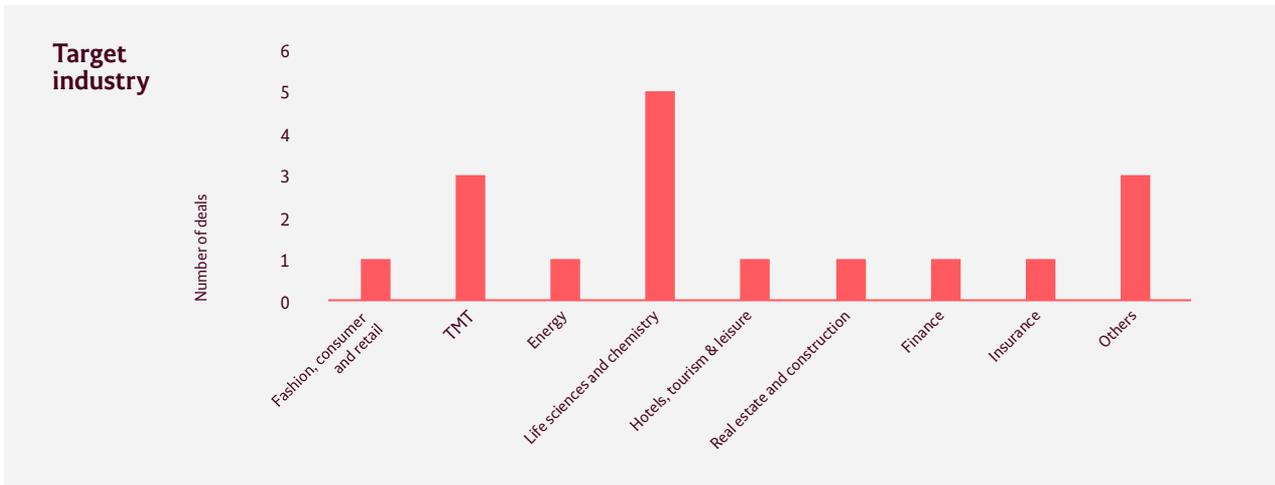
11. Locked-box mechanism was consolidated again as the most used pricing mechanism.
12. In locked-box mechanisms, the use of equity tickers and adding an interest to the leakage amount continued to grow.
13. Earn-outs continued to rise, as they help parties overcome their differing expectations about a company's future performance, crucial in times of uncertainty.
14. Joint and several liability was agreed in more than 40% of the deals.
15. A 24-month limitation period was the most used for business warranties.
16. Excluding clean exits, the most used liability cap for business warranties was again between 20% and 30% of the purchase price.
17. The latest trend of granting business and tax warranties through a management warranty deed continued.
18. Anti-sandbagging clauses became exceedingly more common than pro-sandbagging clauses.
19. W&I insurance continued to be the most used buyer's remedy but less pronouncedly so than in 2022.
20. Madrid was consolidated as the seat of arbitration in all deals where arbitration is the dispute resolution mechanism.

# PORTUGAL

## Study overview

Over 70% of private equity deals Cuatrecasas advised on were transactions valued over €50 million.

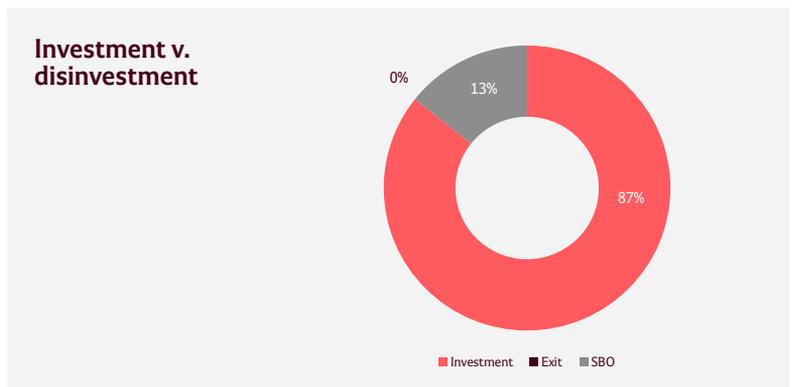
Although the private equity market in Portugal was highly diversified across multiple sectors, in our experience, private equity funds showed a clear preference for the life sciences in 2022, and TMT in 2023. Together, these sectors accounted for half of all transactions on which Cuatrecasas advised.



Private equity funds focused on the life sciences and TMT sectors

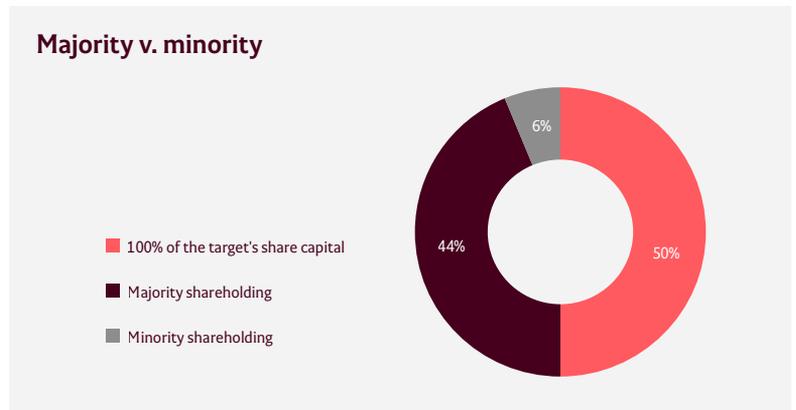
Investments were again clearly dominant

Yet again, investments were clearly dominant, with pure investments comprising 87% of all transactions. This figure rises to 100% if we include secondary buyouts (SBOs), where a private equity firm exit is made by selling the portfolio company to another private equity firm.

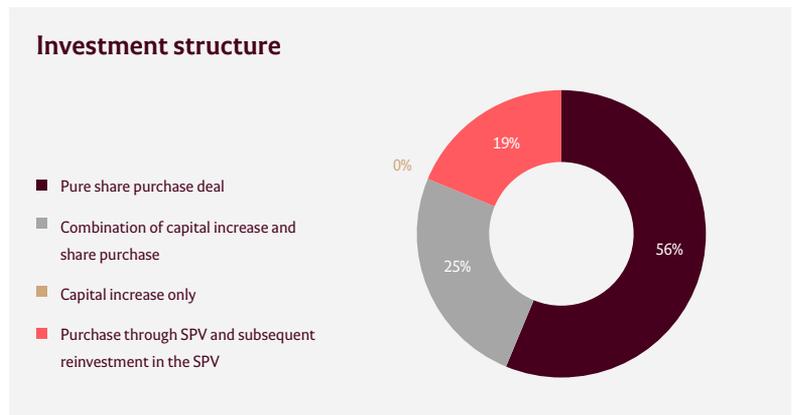


The deal process does not vary substantially across Iberia, and when a private equity fund invests, the most common transaction is one in which it buys 100% of the target company's capital stock or takes a majority shareholding through a pure share purchase deal.

As in Spain, throughout 2023, there was a significant increase in the number of deals where a fund took a majority stake, accounting for almost 60% of transactions. In half of these deals, the sellers reinvested a portion of the sale proceeds in the holdco created by the private equity fund to structure the investment (roll-over).



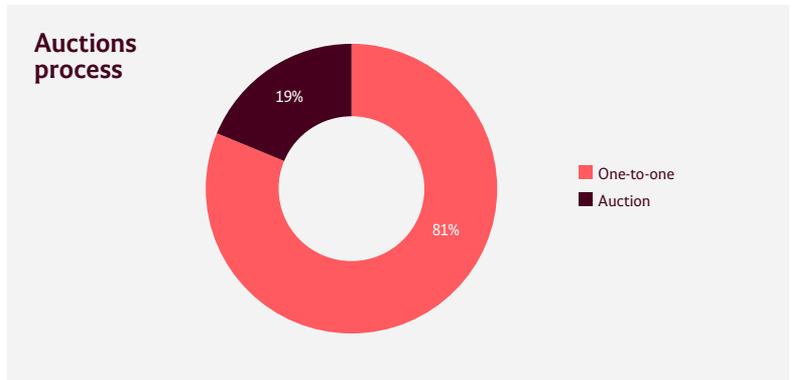
There was a significant increase in the number of deals where a fund took a majority stake



## Deal process

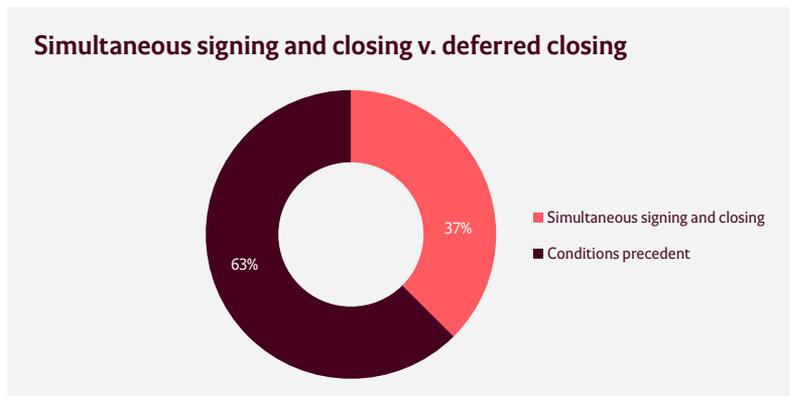
Following a trend seen across Europe, only a small number of private equity transactions were carried out as auctions involving multiple potential bidders, and most deals were bilateral negotiations. Transactions valued over €100 million were carried out as auctions in all cases advised by Cuatrecasas.

Most transactions were bilateral negotiations, except deals over €100 million, which were carried out as auctions in all cases



By 2023, almost all deals included conditions precedent, primarily due to the need for merger control clearance.

Deals with a transaction value of less than €10 million were the ones that did not include conditions precedent in most cases.



The post-pandemic geopolitical situation has led to a paradigm shift, resulting in increased economic protectionism in certain sectors across European countries driven by strategic interests. In the M&A market, particularly within the private equity sector, this protectionism is reflected in the need, in many cases, to require authorization for foreign direct investments.

Portugal has yet to follow the steps of other EU countries that have implemented specific regulations and tightened restrictions on foreign direct investments (FDIs). Also, it still has not yet further regulated or enforced the existing screening mechanism approved by Decree-Law 138/2014, of September 15. This mechanism allows the Portuguese government to investigate and oppose (ex post)—if necessary—transactions involving strategic assets in sensitive industry sectors for national defense and security reasons or to secure services that are fundamental to the national interest.

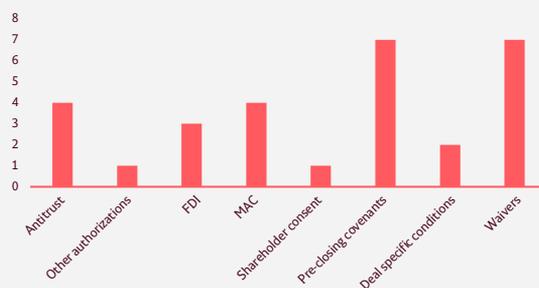
The entry into force of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (the so-called “FDI Regulation”) was reinforced by the entry into force of Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market (the so-called “Foreign Subsidies Regulation” or “FSR”). However, these regulations had little to no impact on crossborder investments in Portugal, as there have been no instances of investigation or opposition to any transactions.

Most deals that included a condition precedent did so because of the need for merger control clearance

Transactions subject to merger control clearance do not usually include a hell or high water clause, and the buyer can decide not to assume the conditions that the competition authorities impose.

Aside from merger control clearance, the other two most common conditions precedent were (i) obtaining third-party waivers, such as lenders, suppliers or other parties’ consent due to change of control clauses; and (ii) fulfilling pre-closing covenants, which mainly involved executing, terminating, or maintaining certain agreements, carrying out carve-out or carve-in transactions, or obtaining the buyer’s financing.

Types of conditions precedent

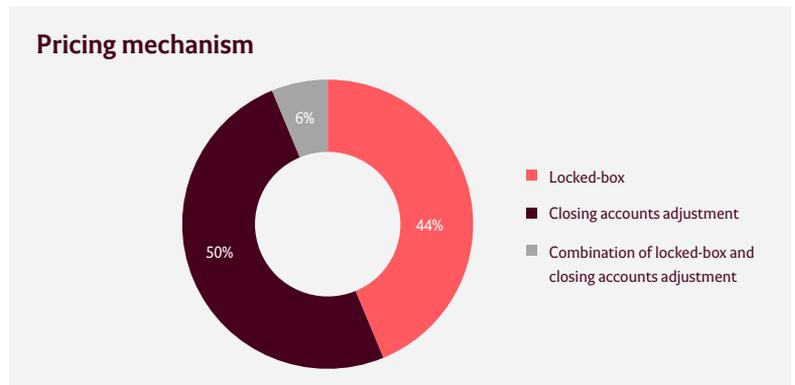


The use of break-up fees in situations where the closing did not occur or there was a breach of the closing obligations was markedly uncommon.

### Consideration and pricing mechanisms

As in traditional private M&A transactions, the completion accounts and locked-box mechanisms were the two most used pricing mechanisms. The use of the locked-box mechanism increased significantly in 2021, with 71% of transactions using it (if a combination of locked-box and completion accounts transactions is excluded). However, the completion accounts mechanism gained traction in 2022, with 44% of the transactions opting for it. This trend continued in 2023, when over half of the transactions used the completion accounts mechanism.

Completion accounts and locked-box pricing mechanisms were used almost equally



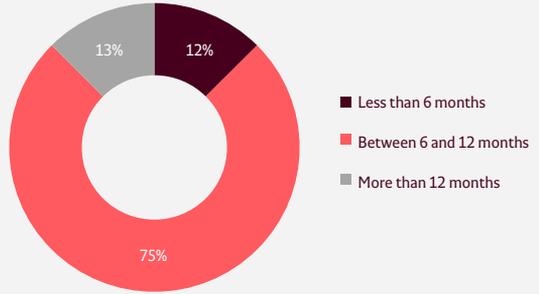
During 2022 and 2023, 50% of transactions used the completion accounts mechanism, 44% a pure locked-box mechanism, and 6% a mechanism combining the locked-box and completion accounts mechanisms (mostly in more complex transactions and those of higher value). The fixed-price mechanism was not used at all.

Generally, locked-box regulations did not provide for equity tickers for the seller to be compensated for the profit or cash generated by the target group between the locked box date and completion.

The seller's liability under leakage compensation is either capped at the leakage amount effectively received, or expenses and taxes are added. Adding an interest to the leakage amount is uncommon. The most common limitation period for leakage claims was 6 to 12 months after completion.



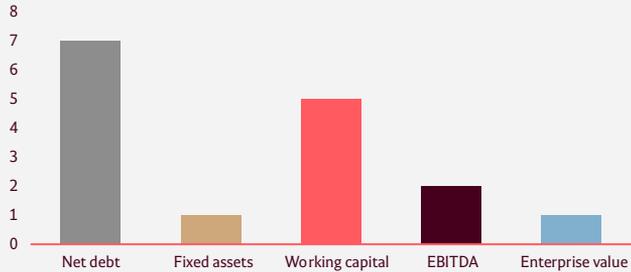
### Leakage limitation period



When the parties opted for the completion accounts mechanism, net debt and working capital were the most widely used financial parameters.

Net debt and working capital were the most widely used financial parameters for the post-closing adjustment

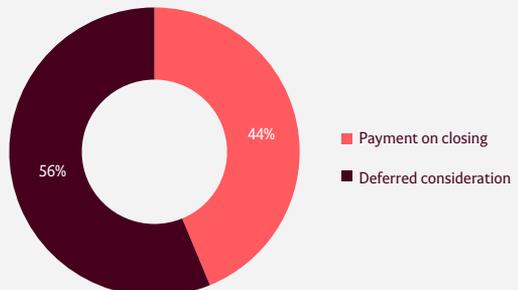
### Closing accounts adjustment - Financial parameters



In both 2021 and 2022, 73% of transactions used deferred consideration, mainly in the form of earn-outs. The following year, 2023, was marked by global uncertainty, which typically leads to an increase in the use of contingent payments to overcome parties' differing expectations about a company's future performance. However, only 42% of deals in 2023 used earn-outs, which were usually linked to EBITDA or the overall benefits of the company.

Despite the global uncertainty in 2023, the use of earn-outs decreased

### Payment on closing v. deferred consideration

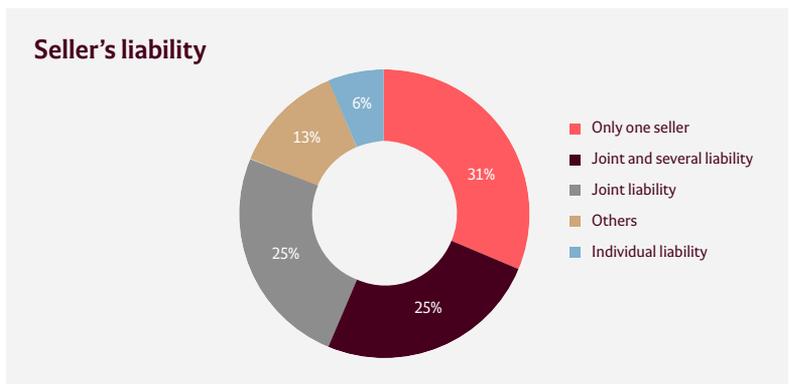


## Warranties and specific indemnities

Regarding the seller's liability, the Portuguese market follows the usual M&A trends in crossborder investments: (i) R&Ws are negotiated in share purchase agreements (SPAs); (ii) SPAs generally include a sole remedy clause for the breach of the seller's warranties (which may be subject to legal exceptions in certain circumstances); and (iii) the seller's indemnity for breach of warranties (except in case of fraud or willful misconduct) is usually limited quantitatively and temporally.

Most specific indemnities are negotiated on the basis of known contingencies. Generally, they are not subject to any limitation.

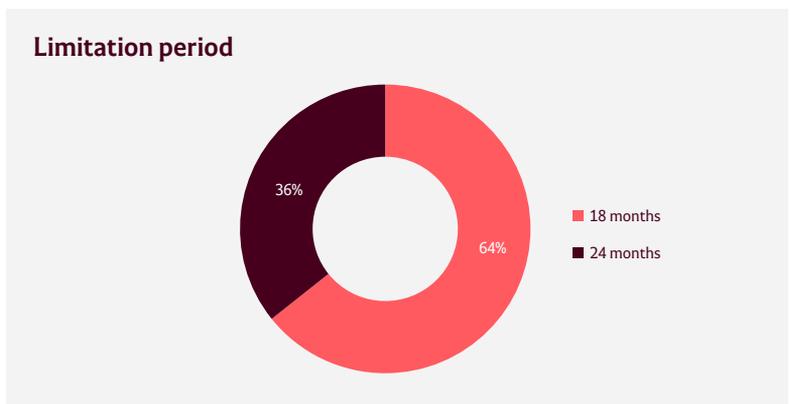
In 2022 and 2023, when there was more than one seller involved, they faced either joint liability or joint and several liability.



## Warranty limitations

Once again, an 18-month limitation period for the seller's warranties was the most used. Also, subjecting specific issues to time barring as provided by law continues to be common practice, mainly in tax and social security matters, but also in cases of damages related to the breach of a fundamental warranty.

**Eighteen-month limitation period for the seller's warranties remained the most used**



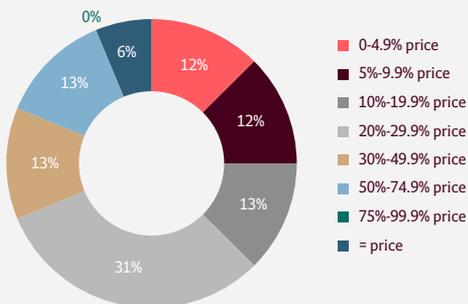
### Issues subject to time barring



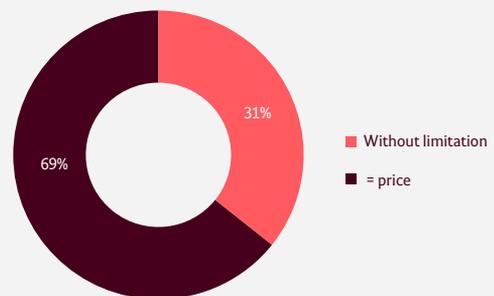
In contrast to fundamental warranties, which were typically limited to the purchase price (69%), the liability for business warranties was generally capped at under 50% of the purchase price. The most common liability cap for business warranties in 2022 and 2023 remained between 20% and 30% of the purchase price.

Excluding clean exits, the most used liability cap for business warranties was between 20% and 30% of the purchase price

### Liability caps - Business warranties



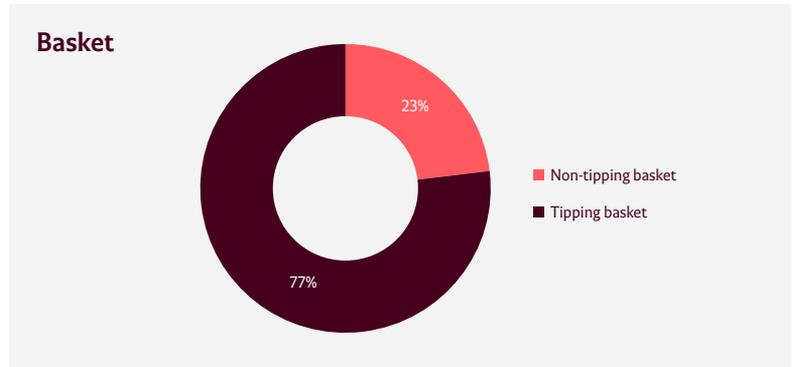
### Liability caps - Fundamental warranties



Regarding lower limits (and excluding transactions where there was buy-side W&I insurance), (i) the seller was not usually obliged to indemnify for losses if each loss, considered individually, was less than a certain amount (*de minimis* exclusion or *de minimis* amount); and (ii) almost all deals included a basket or threshold. In these cases, the seller is not liable for damages unless the aggregate amount of the claim, together with all the claims (each over the *de minimis* amount), exceeds the basket/threshold amount.

In most transactions, tipping baskets were used, meaning the seller is liable for the entire amount and not merely for the excess if the aggregate of claims exceeds the basket amount. Specifically, 77% of the transactions used tipping baskets, while 23% used non-tipping baskets.

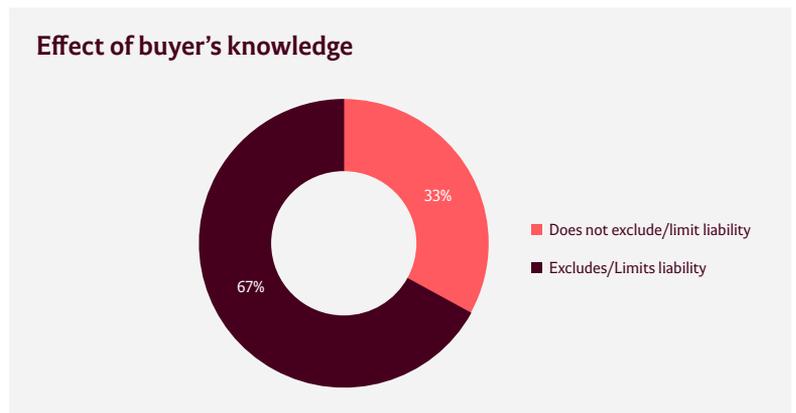
Usually, the basket/threshold amount is still below 1% of the purchase price, averaging 0.44% for tipping baskets in 2023. Also, the *de minimis* amount in 2023 was an average of 0.07% of the purchase price. In most cases where a *de minimis* amount is agreed on, the series of claims arising from facts, natures or circumstances that are substantially the same can be accumulated.



### Buyer's knowledge

Before 2021, the prevailing approach was that the buyer's knowledge would exclude or limit the seller's liability. However, in 2021 and 2022, the percentage of deals where the agreement did not include express limitations on the buyer's remedies if the buyer was already aware of an inaccuracy or breach rose from 20% to 43%. In 2023, 85% of deals opted for anti-sandbagging clauses, but they were limited to information that was "fairly disclosed" to the buyer in the due diligence materials.

Anti-sandbagging clauses gained popularity in 2023, but they were limited to "fairly disclosed" information

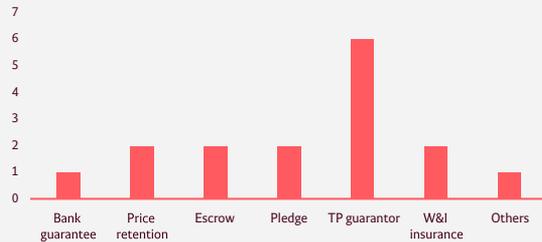


## Buyer's remedies against seller's liability

In almost two-thirds of the transactions, guarantees or other collateral were included to secure the seller's liability, with third-party guarantors being the most commonly used option. The use of buy-side W&I insurance is still not widely used and is limited to high-value transactions.

Third-party guarantors are the most used buyer's remedy

### Types of sellers' guarantee



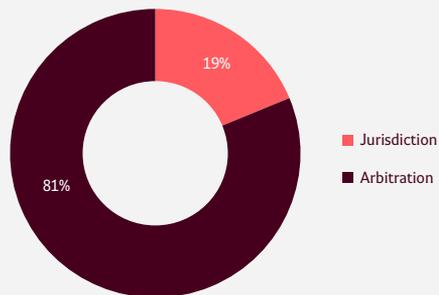
## Dispute resolution

In Portugal, arbitration is the most common dispute resolution mechanism, with 81% of transaction documents referring to arbitration to resolve conflicts arising from agreements.

Arbitration is the most common dispute resolution mechanism

The most common seat of arbitration was Lisbon, which the parties chose in all cases in 2023. In that same year, the arbitration clauses referred to the rules of the Commercial Arbitration Centre of the Portuguese Chamber of Commerce and Industry.

### Dispute resolution



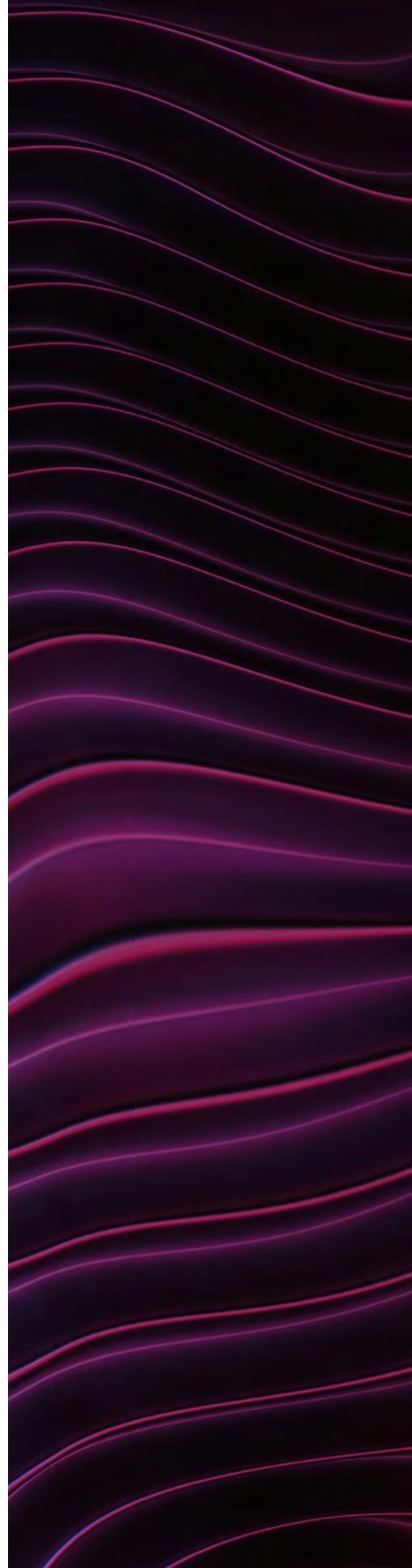


## PORTUGAL

# 2023 Market trends at a glance

1. Transactions valued over €50 million rebounded after a 2022 where small and middle market transactions had gained traction.
2. The TMT sector was the most active.
3. There was a significant increase in majority deals.
4. Most transactions were bilateral negotiations, except deals over €100 million, which were carried out as auctions in all cases.
5. Almost all deals included conditions precedent, usually due to the need for merger control clearance.
6. Completion accounts and locked-box pricing mechanisms were used almost equally.
7. Net debt and working capital were the most widely used financial parameter for the post-closing adjustment.

8. Despite the global uncertainty in 2023, the use of earn-outs has decreased.
9. Eighteen-month limitation period for the seller's warranties remained the most used for business warranties.
10. Excluding clean exits, the most used liability cap for business warranties was between 20% and 30% of the purchase price.
11. Anti-sandbagging clauses gained popularity in 2023, but they were limited to "fairly disclosed" information.
12. Third-party guarantors were the most used buyer's remedy.
13. In all deals where arbitration was chosen as the dispute resolution mechanism, Lisbon was selected as the seat of arbitration, while the Commercial Arbitration Centre of the Portuguese Chamber of Commerce and Industry was designated to manage any proceedings.



# Our private equity practice

One of the most active teams with multidisciplinary capacity and extensive experience in private equity transactions

Our large and specialized team advises clients on designing, negotiating, and implementing private equity investments and acquisitions, as well as on private equity recapitalization transactions and divestments. Our team also includes experts in setting up funds, the financing of portfolio companies and restructuring transactions. We place special emphasis on designing innovative strategies and implementing investment and divestment structures that are optimum and efficient from a tax and commercial perspective.

We regularly advise national and international private equity firms and funds, fund sponsors, management companies, investors, portfolio companies, and banks and financial institutions on all aspects and stages of a wide range of investment, financing, and acquisition transactions.

## Chambers, 2023

*"The lawyers at Cuatrecasas have shown to be flexible and creative to find solutions to some complex issues"*

## Chambers, 2022

*"Strong practice group handling a broad spectrum of domestic and cross-border corporate matters for clients including private equity houses"*

**Relevant experience:** We have participated in some of the largest and most complex transactions in recent years.

**Market leadership:** According to the main private equity deal rankings, year after year we are one of the law firms with the largest market share on the Iberian Peninsula. In 2023, we participated in 75 private equity and venture capital transactions both in Spain and Portugal.

**Crossborder vision:** We regularly advise major international private equity firms on their investments in several jurisdictions, particularly in Spain, Portugal, and Latin America.



Top 1 by deal volume in private equity transactions in Spain and Portugal, 2023



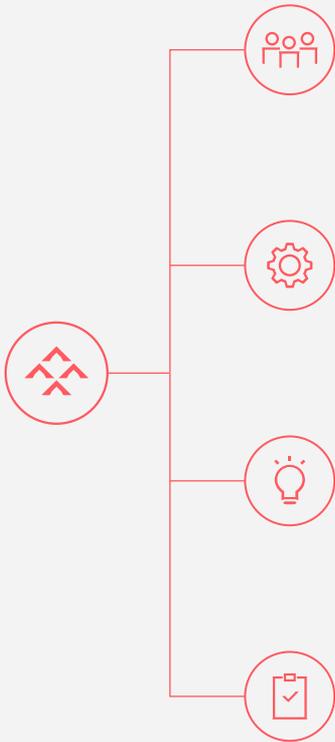
Top 2 by deal volume in private equity transactions in Spain and Portugal, 2023





# Cuatrecasas at a glance

Through our highly specialized legal teams with extensive knowledge and experience, we advise on all areas of business law. We help clients with the most demanding matters wherever they are based.



## TALENT

A multidisciplinary and diverse team made up of over **1,300 lawyers and 29 nationalities**. Our people are our strength and we are committed to being inclusive and egalitarian.

## EXPERIENCE

We have a **sectoral approach** and focus on all types of business. With extensive knowledge and experience, we offer our clients the **most sophisticated advice**, covering ongoing and transactional matters.

## INNOVATION

We promote an **innovation culture** applied to the legal activity, which combines **training, procedures and technological resources** to enhance efficiency.

## SPECIALIZATION

We offer optimal value thanks to our highly specialized teams, which apply a **cross-sectoral approach** to our clients' business to offer efficient solutions.

Recommended in the main areas of law in Europe and Latin America

Law firm of the year in Europe and the Iberian Peninsula, 2022

Fifth most popular international law firm in Latin America, 2021



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# CUATRECASAS

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## Spain & Portugal

> Alicante > Barcelona > Bilbao  
> Girona > Lisbon > Madrid > Málaga  
> Palma de Mallorca > Porto  
> San Sebastián > Seville > Valencia  
> Vigo > Vitoria > Zaragoza

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## International

> Beijing > Bogotá > Brussels  
> Casablanca\* > Lima > London  
> Luanda\* > Mexico City  
> New York > Santiago > Shanghai

*\* in association with the respective local law firm*

[www.cuatrecasas.com](http://www.cuatrecasas.com)

