

Global M&A Intelligence Report

Key differences between French market practice and that of the UK and the US

Put option agreements

In the French market it's sometimes necessary to sign a put option agreement before entering into a binding share purchase agreement. The put option means the seller has the right to require the buyer to buy the shares of the target, but the seller isn't obliged to sell the shares.

In France a seller can be stopped from committing to a binding sale before certain employee information or consultation requirements are met.

The "Hamon" law says that directors of small and medium companies have to inform employees about an intended sale of shares if the sale would result in a change of control of the company. Employees must be informed at least two months before any binding contract is signed. Waiver can be sought from employees to reduce this two-month period.

For companies with more than 50 employees, the company's works council (*comité social et économique*) must be informed of, and consulted on, the transaction before any binding contract is agreed. The maximum duration of the consultation process is one month. It's up to two months if the works council appoints an expert to help review the transaction.

Signing a put option agreement doesn't mean a seller will enter into a legally binding agreement to sell the target to the buyer. But a buyer can increase the chances of the seller exercising its put option by getting an extended period of exclusivity. And the buyer can publish press releases announcing the exclusivity and the planned transaction. Depending on the context and negotiations, the buyer can also get a break-fee.

Put option arrangements are generally not seen in the UK or the US.

Pricing structure

In France and in the UK, locked-box mechanisms are common, especially in auction processes. In the UK, we did see a slight reduction in locked-box pricing mechanisms in 2022 in both auctions and bilateral transactions. But this is probably because of the more challenging M&A market in the second half of 2022. We didn't see the same reduction in French deals. Locked-box levels were relatively static.

By contrast, there's evidence that US buyers are comfortable with locked box mechanisms when they're involved in French and UK deals. But locked box mechanisms are rare in US domestic deals, even in 2022. And virtually all domestic US deals use a completion accounts mechanism.

So US buyers in France and in the UK might be at a competitive disadvantage – especially in auction processes – when they try to get completion accounts mechanisms they're used to in US deals.

Conditions precedent

The type of conditions we see in France, the US and the UK are similar (e.g obtaining appropriate regulatory consents). But in US deals there's less difference between the scope of conditions on a competitive auction deal and a bilateral transaction compared to French and UK deals.

In France and the UK, in large deal auction processes, the only condition to closing is often satisfaction of mandatory regulatory consents (merger clearance, foreign direct investment approval). Sellers on competitive auction processes want "hell or high water" obligations. This means the buyer bears all antitrust risk in a deal conditioned on merger clearance.

By contrast, US deals often include material adverse change CPs or other CPs.

It's rare for the bringdown of representations and warranties to be a condition precedent in France and the UK. In the US it's common. It's also rare in a UK deal for a buyer to benefit from a material adverse change clause. But it's standard in the US and not unusual in French bilateral transactions for buyers to benefit from such a clause (contrary to French auction deals where it's rare).

In the US, deals technically have more "outs" for a buyer after signing an SPA than in France and the UK. This means, at least in theory, that US deals are much less certain at signing than in France and the UK.





“In France, after an exceptional first half of the year, we definitely saw a less competitive market in Q4 2022. A key item in 2023 will be the ability to bridge the gap between sellers’ and buyers’ respective expectations in a recession. We expect to see a continuing increase in roll-overs, earn-outs, vendor loans, and W&I.”

Thomas Priolet

Representations and warranties

In France, in small deals but also in bilateral transactions, the sellers usually give a large suite of representations and warranties (both fundamental and general commercial representations and warranties). But in large deals and in auction processes, the sellers only generally give fundamental representations and warranties (unless they’re covered by an RWI insurance policy, in which case business representations and warranties may also be granted with the principal recourse of the buyer being against the insurance policy).

In the US, representations and warranties are almost always granted and are generally very extensive, irrespective of whether there’s an RWI insurance policy or not. The UK sits somewhere between the two, but it’s closer to what can be seen in the US.

It’s standard in France and the UK for the contents of the data room to be disclosed (subject to certain qualifiers) against the representations and warranties in addition to there being specific disclosures. In the US, historically, the approach has been much stricter. Only disclosure schedules are permitted and there’s no general disclosure of the data room (so disclosure schedules are extremely detailed).

An escrow or holdback for claims in the US is standard practice – typically around 10% of the price. In most cases, this escrow or holdback is the buyer’s only remedy for all claims other than breaches of “fundamental” representations and warranties under the share purchase agreement.

Sellers in France and in the UK generally resist escrow for claims unless a specific risk has been uncovered during due diligence or there are concerns about the seller’s financial covenant strength.

Private equity sellers generally avoid giving escrows wherever possible – and for good reason given their fund structures.

RWI insurance

RWI insurance policies have been used for over a decade in the US and the UK and are common, especially in auction processes. The market is less mature in France.

But RWI insurance is becoming more common in France (especially for transactions with an EV greater than EUR50 million). But because of the cost of RWI insurance compared to its actual coverage, in small deals there’s often no RWI insurance. And escrow or holdback mechanisms guarantee the representations and warranties borne by the sellers.

Deal highlights:

- **Eagle Football** on the acquisition of a majority stake in **OL Groupe**
- **Mérieux Equity Partners** on their co-investment in **Laboratoires Serb** (along with the continuation fund of **Charterhouse** and the funds managers by **Partners Group**)
- **Mérieux Participations** on the acquisition of a minority stake in **Janvier Labs** group, and refinancing of the group
- **Michelin** in the context of the formation of a joint venture between **Scandinavian Enviro Systems**, **Antin Infrastructure Partners** and **Michelin** to create the world’s first large-scale tyre recycling group
- **Michelin** in connection with the investment of **Credit Agricole Lease & Factoring** in the share capital of **Watea**, a subsidiary of **Michelin** offering tailor-made electric mobility solutions for professional vehicle fleets
- **BIC Group**, listed on **Euronext Paris** - SBF 120, on its acquisition of **Advanced Magnetic Interaction** (AMI)
- **Renault** group on the sale of its worldwide distribution business
- **Société Générale** on its joint venture with **Mitsubishi** group in Thailand
- **Vauban Infrastructures** on the acquisition of the stake held by **Asterion Industrial Funds** in **Proxiserve**
- **Meaning Capital Partners** on the acquisition of a majority stake in **Kaliti**

