ICLG

The International Comparative Legal Guide to:

Private Equity 2015

1st Edition

A practical cross-border insight into private equity

Published by Global Legal Group, with contributions from:

Aabø-Evensen & Co
Ali Budiardjo, Nugroho, Reksodiputro
Angola Capital Partners
Anjarwalla & Khanna
Ashurst LLP
Bär & Karrer AG
Bentsi-Enchill, Letsa & Ankomah
British Private Equity & Venture Capital Association
Chiomenti Studio Legale
Clifford Chance
Elvinger, Hoss & Prussen
Garrigues
Goltsblat BLP
Greenberg Traurig, LLP
Hajji & Associés
Houthoff Buruma
Milbank, Tweed, Hadley & McCloy LLP
Morais Leitão, Galvão Teles, Soares da Silva & Associados
Schindler Rechtsanwälte GmbH
Schulte Roth & Zabel LLP
Shearman & Sterling LLP
Simont Braun
Skadden, Arps, Slate, Meagher & Flom (UK) LLP
Țuca Zbârcea & Asociații
Veirano Advogados
Vieira de Almeida & Associados, Sociedade de Advogados, RL
Zhong Lun Law Firm

GLG
Global Legal Group

GLG

Global Legal Group

Contributing Editor
Shaun Lascelles, Skadden, Arps, Slate, Meagher & Flom (UK) LLP

Head of Business Development
Dror Levy

Sales Director
Florjan Osmani

Commercial Director
Antony Dine

Account Directors
Oliver Smith, Rory Smith

Senior Account Manager
Maria Lopez

Sales Support Manager
Toni Hayward

Editor
Rachel Williams

Senior Editor
Suzie Levy

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

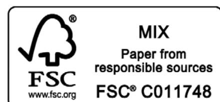
GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
July 2015

Copyright © 2015
Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-910083-53-6
ISSN 2058-1823

Strategic Partners



General Chapters:

1	**Vendor Due Diligence Reports: A Tale of Two Markets** – Jeremy W. Dickens, Shearman & Sterling LLP	1
2	**Enforcing Investors' Rights in Latin America: The Basics** – Emilio J. Alvarez-Farré & Juan Delgado, Greenberg Traurig, LLP	7
3	**Unitranche Facilities – A Real Debt Funding Alternative for Private Equity** – Paul Stewart & Ewen Scott, Ashurst LLP	12
4	**The Development of EU Regulation since the Financial Crisis and the Future of the Capital Markets Union** – Simon Burns, British Private Equity & Venture Capital Association	16

Country Question and Answer Chapters:

5	**Angola**	Vieira de Almeida & Associados – Sociedade de Advogados, R.L. and Angola Capital Partners: Hugo Moredo Santos & Rui Madeira	20
6	**Austria**	Schindler Rechtsanwälte GmbH: Florian Philipp Cvak & Clemens Philipp Schindler	26
7	**Belgium**	Simont Braun: David Ryckaert & Koen Van Cauter	33
8	**Brazil**	Veirano Advogados: Ricardo C. Veirano & Gustavo Moraes Stolagli	41
9	**China**	Zhong Lun Law Firm: Lefan Gong & David Xu (Xu Shiduo)	47
10	**Germany**	Milbank, Tweed, Hadley & McCloy LLP: Dr. Peter Memminger	55
11	**Ghana**	Bentsi-Enchill, Letsa & Ankomah: Seth Asante & Frank Nimako Akowuah	61
12	**Indonesia**	Ali Budiardjo, Nugroho, Reksodiputro: Oene J. Marseille & Emir Nurmansyah	68
13	**Italy**	Chiomenti Studio Legale: Franco Agopyan	75
14	**Kenya**	Anjarwalla & Khanna: Roddy McKean & Dominic Rebelo	83
15	**Luxembourg**	Elvinger, Hoss & Prussen: Toinon Hoss & Jean-Luc Fisch	89
16	**Morocco**	Hajji & Associés: Amin Hajji & Houda Boudlali	97
17	**Netherlands**	Houthoff Buruma: Alexander J. Kaarls & Johan Kasper	102
18	**Norway**	Aabø-Evensen & Co: Ole Kristian Aabø-Evensen & Harald Blaauw	110
19	**Poland**	Clifford Chance: Marcin Bartnicki & Wojciech Polz	129
20	**Portugal**	Morais Leitão, Galvão Teles, Soares da Silva & Associados: Ricardo Andrade Amaro & Pedro Capitão Barbosa	137
21	**Romania**	Ţuca Zbârcea & Asociaţii: Ştefan Damian & Silvana Ivan	143
22	**Russia**	Goltsblat BLP: Anton Sitnikov & Vera Gorbacheva	150
23	**Spain**	Garrigues: María Fernández-Picazo & Ferran Escayola	158
24	**Switzerland**	Bär & Karrer AG: Dr. Christoph Neeracher & Dr. Luca Jagmetti	165
25	**United Kingdom**	Skadden, Arps, Slate, Meagher & Flom (UK) LLP: Shaun Lascelles	171
26	**USA**	Schulte Roth & Zabel LLP: Peter Jonathan Halasz & Richard A. Presutti	179

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer
This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice.
Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication.
This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

EDITORIAL

Welcome to the first edition of *The International Comparative Legal Guide to: Private Equity*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of private equity.

It is divided into two main sections:

Four general chapters. These are designed to provide readers with a comprehensive overview of key private equity issues, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in private equity laws and regulations in 22 jurisdictions.

All chapters are written by leading private equity lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor, Shaun Lascelles of Skadden, Arps, Slate, Meagher & Flom (UK) LLP, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Switzerland

Dr. Christoph Neeracher

Bär & Karrer AG

Dr. Luca Jagmetti

1 Overview

1.1 What are the most common types of private equity transactions in Switzerland and what is the current state of the market for these transactions?

All standard transaction strategies to acquire portfolio companies are commonly used in Switzerland. Regular leveraged buyouts probably account for a majority of the transactions.

1.2 What are the most significant factors or developments encouraging or inhibiting private equity transactions in Switzerland?

The abandonment of the CHF/EUR minimum exchange rate by the Swiss National Bank (SNB) in January 2015, resulting in the appreciation of the CHF against the EUR, is generally seen as the most significant recent development for the Swiss economy in general. It may also be the most important factor in private equity transactions. While first statistics suggest a decline in the number of transactions in the first quarter of 2015, the mid- and long-term impact of the SNB decision is much debated and remains to be seen.

2 Structuring Matters

2.1 What are the most common acquisition structures adopted for private equity transactions in Switzerland?

Usually, private equity funds investing in Swiss portfolio companies set up a NewCo/AcquiCo in Switzerland as an acquisition vehicle. Such NewCo is held either directly or via a Luxembourg, Netherland or similar structure. It is also seen that the AcquiCo is incorporated outside Switzerland.

Management usually invests directly in the AcquiCo rather than via a management participation company. Often, one single shareholders' agreement (SHA) between the financial investor(s) and management is concluded, which governs all aspects of the investment (governance, exit procedures, share transfers, good/bad leaver provisions, etc.). In other cases, a main SHA is concluded between the financial sponsors and a separate, smaller SHA with management.

2.2 What are the main drivers for these acquisition structures?

The acquisition structure is mainly tax-driven (tax efficient repatriation of dividends/double taxation treaties). Directly investing in the AcquiCo usually allows Swiss domiciled managers to realise a tax free capital gain on their investment when the AcquiCo is sold in the exit.

2.3 How is the equity commonly structured in private equity transactions in Switzerland (including institutional, management and carried interests)?

A Swiss NewCo often has only one class (or maximum two classes) of shares. Preferential rights, exit waterfall, etc., are implemented on a contractual level in the shareholders' agreement. In case of a NewCo incorporated abroad, often several classes of shares exist.

2.4 What are the main drivers for these equity structures?

From a corporate law perspective, certain limitations regarding the formation of preferential shares exist and the articles of association are publicly available. Consequently, the preferred route is to embody preferential rights, etc., in the shareholders' agreement (which is not publicly available) in which the parties can freely agree on such items.

2.5 In relation to management equity, what are the typical vesting and compulsory acquisition provisions?

Often, management is asked to acquire the full stake of their investment at the outset. In mid-sized deals, management participation usually ranges around 1% to 3%; however, certain funds request much higher management investments. As mentioned in question 2.2, usually each of the managers directly invests in the NewCo to realise a tax-free capital gain at the exit.

Normally, the equity sponsor or the target company grant loans to the managers so they can leverage their investment; the exact structure is usually sought to be confirmed by a tax ruling in order to avoid taxation of the exit gain as taxable income.

The shareholders' agreements with management typically contain standard good and bad leaver provisions, providing for a call option of the financial sponsor in case of a departure (with a price reduction in case of a bad leaver – which may also depend on the duration of

© Published and reproduced with kind permission by Global Legal Group Ltd, London

employment). Sometimes, the management participation is structured as staggered vesting of the shares. The differences between initial investment with good/bad leaver provisions and staggered vesting are of a rather technical nature; the material result is usually the same.

3 Governance Matters

3.1 What are the typical governance arrangements for private equity portfolio companies?

The predominant type for acquisition and of portfolio companies in Switzerland is the stock corporation (*Aktiengesellschaft*). Sometimes, limited liability companies (LLCs, *GmbH*) are used which have the advantage that they are transparent for US tax purposes. The remarks in this question regarding stock corporations apply largely also for LLCs.

The stock corporation is governed by a board of directors which has supervisory function and resolves on strategic and important issues (appointment of senior management, etc.). A director is elected *ad personam*; proxies (e.g. in the case of absence at meetings) are not possible.

Day-to-day management is normally delegated to management, based on organisational regulations. The latter often contain a competence matrix defining the competences of each management level and which decisions need approval by the board or even shareholders.

Such division of competence is – together with board composition, quorum requirements, etc. – also reflected on a contractual level in the shareholders' agreement.

3.2 Do private equity investors and/or their director nominees typically enjoy significant veto rights over major corporate actions (such as acquisitions and disposals, litigation, indebtedness, changing the nature of the business, business plans and strategy, etc.)?

When a private equity investor holds a minority of the voting rights, its veto rights usually depend on the stake held: while a small investor (up to 20%) normally enjoys only fundamental veto rights aiming at protection of its financial interest (dissolution, *pro rata* right to capital increases, no fundamental change in business, maximum leverage, etc.), investors holding a more important minority stake (20-49%) usually also have veto/influence rights regarding important business decisions and composition of senior management.

3.3 Are there any limitations on the effectiveness of veto arrangements: (i) at the shareholder level; and (ii) at the director nominee level? If so, how are these typically addressed?

On a shareholder level, veto rights may be created by introducing high quorums for certain shareholders' decisions in the articles of association and the shareholders' agreement. Such veto rights are generally regarded as permissive as long as the arrangement does not lead to a blockade of decision taking in the company *per se*.

On a board level, individual veto rights of certain board members cannot be implemented based on the articles of association or other corporate documents. However, such individual veto rights are regularly incorporated in the shareholders' agreement; i.e. the parties agree that the board shall not take certain decisions without the affirmative vote of certain nominees. A board decision taken in contradiction to such contractual arrangement would still be valid, but may trigger consequences under the shareholders' agreement. Furthermore, directors are bound by a duty of care and loyalty *vis-à-vis* the company. If abiding by instructions given by another person based on contractual provisions leads to a breach of such duties, the board member may not follow such instructions and will likely not be in breach of the shareholders' agreement (at least if the latter is governed by Swiss law).

3.4 Are there any duties owed by a private equity investor to minority shareholders such as management shareholders (or *vice versa*)? If so, how are these typically addressed?

From its position as a shareholder alone, in principle, a private equity investor does not have such duties; shareholders of a Swiss stock corporation do not have any duty of loyalty.

However, directors, officers and management have a duty of care and loyalty towards the company and, to a certain extent, also to the minority shareholders. Under special, limited circumstances, a private equity investor or an individual acting for it may be regarded as *de facto/shadow director* of the company and, consequently, also be bound by such duties. The claim that a shareholder or one of its representatives is a shadow director might be made successfully if such person *de facto* acts as officer of the company, e.g. by directly taking decisions that would actually be in the competence of the board, etc.

3.5 Are there any limitations or restrictions on the contents or enforceability of shareholder agreements (including governing law and jurisdiction)?

Shareholders' agreements are common in Switzerland and normally governed by Swiss law. The parties are largely free to determine rights and duties but there are certain limitations, the most important ones being:

- a SHA may not be unlimited in time/valid during the entire lifetime of the company, but may have a maximum term of *ca.* 20-30 years; and
- as per mandatory corporate law, directors must act in the best interest of the company (duty of care and loyalty), which may hinder the enforcement of the SHA if its terms would conflict which such duties.

A shareholders' agreement is only enforceable against its parties. There is a debate in Swiss legal doctrine as to what extent the company itself may be party to a SHA and bound by its terms. While a majority acknowledges that the company may fulfil some administrative duties, entering into further obligations is questionable.

To secure share transfer provisions of the SHA, the parties often deposit their shares with an escrow agent under a separate share escrow agreement. Often SHAs also provide for penalty payments in case of breach.

3.6 Are there any legal restrictions or other requirements that a private equity investor should be aware of in appointing its nominees to boards of portfolio companies? What are the key potential risks and liabilities for (i) directors nominated by private equity investors to portfolio company boards, and (ii) private equity investors that nominate directors to boards of portfolio companies?

On a practical note, at least (i) one person with individual signatory power residing in Switzerland, or (ii) two individuals with joint

© Published and reproduced with kind permission by Global Legal Group Ltd, London

signatory power both residing in Switzerland must be able to fully represent the company (entry into the commercial register). It is not necessary that such persons are board members (but, e.g., managers). Additional individual or collective signatory rights may also be granted for persons residing outside Switzerland.

Directors, officers and managers of the company (including nominees of the private equity investor) have a duty of care and loyalty towards the company and must safeguard the (sole) interest of the portfolio company even if such interest is contrary to the interest of the appointing private investor. Under special, limited circumstances, a private equity investor or an individual acting for it may be regarded as *de facto/shadow director* of the company and consequently also be bound by such duties. To prevent such a scenario, decisions should be taken solely by the competent bodies.

3.7 How do directors nominated by private equity investors deal with actual and potential conflicts of interest arising from (i) their relationship with the party nominating them, and (ii) positions as directors of other portfolio companies?

In case of a conflict of interest, the concerned director must inform the other board members and abstain from participating in the respective discussion and decision making process. In typical Swiss private equity setups with one or few financial sponsor(s) that are each represented in the board, issues related to conflicts of interest are of limited relevance in practice.

4 Transaction Terms: General

4.1 What are the major issues impacting the timetable for transactions in Switzerland, including competition and other regulatory approval requirements, disclosure obligations and financing issues?

If certain turnover thresholds are met, a Swiss merger filing must be made. Unless the Competition Commission (CC) decides to initiate an investigation, clearance is granted within 30 days from filing a *complete* application. The start of the 30-day period may be delayed because the CC does not consider the filing as complete and requires additional information.

For transactions in certain industries, governmental approvals must be obtained (e.g. banks, telecom, etc.). The impact on the timetable depends on the respective regulation and on the authorities involved.

Other than that, practical timing constraints such as setting up a NewCo (*ca.* 10 days) are similar to other European jurisdictions.

4.2 Have there been any discernible trends in transaction terms over recent years?

Since debt financing is currently easily available, buyers have become increasingly willing to enter into binding purchase agreements prior to having the financing secured.

As a general observation, typical Swiss share/asset purchase agreements still tend to be significantly shorter than US/UK agreements – a consequence of Switzerland's civil law system.

5 Transaction Terms: Public Acquisitions

5.1 What particular features and/or challenges apply to private equity investors involved in public-to-private transactions (and their financing) and how are these commonly dealt with?

Anyone who acquires equity securities which, added to equity securities already owned, exceed the threshold of one third of the voting rights of a Swiss listed company is obliged to make an offer for all listed equity securities of the company (*mandatory tender offer*), barring exemptions granted by the Swiss Takeover Board. The target company may, however, have either increased the threshold to a maximum of 49% of the voting rights (opting-up) or completely excluded the obligation to make an offer (opting-out).

Further, anyone who exceeds certain thresholds of the voting rights in a Swiss listed company (the lowest threshold is 3%) is obliged to make a notification to the company and the stock exchange (*disclosure obligation*).

Moreover, to carry out a *squeeze-out merger* subsequent to a public tender offer, the bidder must hold at least 90% of the share capital and voting rights of the target company. Voluntary tender offers are regularly made subject to a minimum acceptance condition which, however, does normally not exceed two-thirds of the target company's shares. Thus, the bidder runs the risk of ending up holding less than 90% and, consequently, not being able to squeeze-out the remaining minority shareholders.

5.2 Are break-up fees available in Switzerland in relation to public acquisitions? If not, what other arrangements are available, e.g. to cover aborted deal costs?

Both takeover parties can agree on break fees unless they will result in coercing shareholders to accept the offer or deter third parties from submitting an offer. As a rough rule of thumb, break fees should not considerably exceed the costs in connection with the offer. The parties must also disclose such agreements in the offer documents.

6 Transaction Terms: Private Acquisitions

6.1 What consideration structures are typically preferred by private equity investors in Switzerland?

Locked-box mechanism (with anti-leakage protection) and NWC/Net Debt adjustments based on closing accounts are equally common in Switzerland. Earn-outs and vendor loans are less often seen.

6.2 What is the typical package of warranties/indemnities offered by a private equity seller and its management team to a buyer?

Usually, a customary set of representations and warranties is granted which is not materially different from what strategic sellers offer. Quite often, tax indemnities are seen.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

6.3 What is the typical scope of other covenants, undertakings and indemnities provided by a private equity seller and its management team to a buyer?

Typically, the parties agree on non-compete and non-solicitation obligations for a period of one to three years.

6.4 Is warranty and indemnity insurance used to "bridge the gap" where only limited warranties are given by the private equity seller and is it common for this to be offered by private equity sellers as part of the sales process?

W&I insurances have seldom been used, but this may change as insurers have recently become more active.

6.5 What limitations will typically apply to the liability of a private equity seller and management team under warranties, covenants, indemnities and undertakings?

The liability for breaches of R&W is typically subject to a *de minimis* amount (depending on deal size) and a threshold amount (often approximately 1% in mid-cap transactions), as well as a cap in the range of 10-30%. Title and tax representations are often not subject to such limitations.

Managers are only liable in proportion to their shareholding.

6.6 How do private equity buyers typically provide comfort as to the availability of equity finance and what rights of enforcement do sellers typically obtain if commitments are provided by SPVs?

Typically, the private equity fund provides an equity commitment letter which may be enforced by the seller (obliging the private equity fund to provide the NewCo with the necessary funds). If the ECL covers only a (equity) portion of the purchase price, the remaining (debt) portion is usually comforted by binding financing term sheets or similar.

6.7 Are reverse break fees prevalent in private equity transactions to limit private equity buyers' exposure? If so, what terms are typical?

Reverse break fees are relatively rarely seen in private equity transactions; sellers often insist on actual financing proof (see above).

7 Transaction Terms: IPOs

7.1 What particular features and/or challenges should a private equity seller be aware of in considering an IPO exit?

A private equity seller should be aware of the following features and challenges for a company going public:

- *Lock-up*: Typically, existing shareholders holding more than 3% in the share capital prior to the offering, as well as the members of the board of directors and the executive management, will be required by the underwriters to sign-up for lock-up undertakings during twelve to eighteen months after the IPO. Therefore, shareholders' agreements among private equity investors and agreements with directors and managers should provide for respective undertakings.
- *Drag-along rights*: Shareholders' agreements should also include drag rights to ensure that that there are sufficient shares to be sold in the secondary tranche.
- *Corporate governance*: Private equity-owned companies will have to adapt their corporate governance regimes in order to make the company fit for IPO (including amendments to the articles of association, board composition, internal regulations, etc.).
- *Regulation*: As in most jurisdictions, Swiss law and the listing rules of the SIX Swiss Exchange provide for additional obligations for a public company (e.g. obligations regarding financial reporting, compensation of the board of directors and the senior management, *ad hoc* announcement, disclosure of major shareholdings). These obligations require additional resources within the company and the support of an external specialist.

7.2 What customary lock-ups would be imposed on private equity sellers on an IPO exit?

Shareholders holding more than 3% in the share capital prior to the offering of the company going public as well as the members of the board of directors and the executive management are usually requested to sign-up for lock-up undertakings with lock-up periods of twelve to eighteen months.

7.3 To what extent can rights in pre-existing shareholders' agreements survive post-IPO?

Typically, shareholders' agreements automatically terminate upon an IPO. Post IPO, shareholders' agreements trigger notification duties and provisions therein are often not feasible in the context of a public company. If shareholders' agreements are not terminated upon the IPO this may have a negative impact on the valuation and the ability to place the shares in the market.

8 Financing

8.1 Please outline the most common sources of debt finance used to fund private equity transactions in Switzerland and provide an overview of the current state of the finance market in Switzerland for such debt.

Private equity investors usually provide financing in the form of mezzanine debt or subordinated loans. In the context of leveraged buyouts, investors will typically use senior and junior debt in the form of credit facilities provided by financial institutions. In the context of acquisitions, debt providers usually require that the existing debt is refinanced. Security released in connection with the refinancing typically serves as collateral for the new acquisition financing. The ability of Swiss target group companies to provide collateral is limited under Swiss law. Upstream security may only be granted if certain prerequisites are met and only in the amount of the relevant Swiss company's freely distributable reserves.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

8.2 Are there any relevant legal requirements or restrictions impacting the nature or structure of the debt financing (or any particular type of debt financing) of private equity transactions?

Under Swiss law, there are no statutory corporate minimum leverage requirements. However, *de facto* limitations result from the thin capitalisation rules applied by Swiss tax authorities. Interest paid on amounts of debt exceeding certain thresholds may be requalified as a hidden dividend if paid to a shareholder or a related party of a shareholder. Consequently, such interest would not be tax deductible and subject to 35% withholding tax. The same applies if debt is provided by a third party but secured by a shareholder. Furthermore, there are restrictions for Swiss companies to grant loans or provide security which are of an up-stream or cross-stream nature (please refer to question 8.1 above).

9 Tax Matters

9.1 What are the key tax considerations for private equity investors and transactions in Switzerland?

Switzerland is not known as a very attractive location for the establishment of private equity funds, mainly due to the Swiss withholding tax and securities transfer tax regime. Therefore, private equity funds are often established in offshore or other jurisdictions like Jersey, Cayman Islands, Ireland, Scotland or Malta.

Private equity acquisitions in Switzerland are mainly performed by an acquisition vehicle (holding company) from jurisdictions with which Switzerland has concluded a double taxation treaty and which foresee a 0% Swiss withholding tax for a qualifying (up to 10% shareholding) dividend distribution from a Swiss company.

9.2 Have there been any significant changes in tax legislation or the practices of tax authorities (including in relation to tax rulings or clearances) impacting private equity investors or transactions and are any anticipated?

There are currently no tax changes expected affecting the investment in and the acquisition of private equity. In order to pass the beneficial owner test to qualify for 0% Swiss withholding taxes under the respective double taxation treaty, the Swiss Federal Tax Administration no longer deems the 30% equity test at the level of the foreign acquisition holding company sufficient (i.e. it requires more substance).

10 Legal and Regulatory Matters

10.1 What are the key laws and regulations affecting private equity investors and transactions in Switzerland, including those that impact private equity transactions differently to other types of transaction?

To the fund, its activities and distribution, the Swiss Federal Collective Investment Schemes Act (CISA) applies. On the transactional level, private transactions are mainly governed by the Swiss Code of Obligations (CO), no specifics apply. In case of a public tender offer, the Federal Stock Exchanges and Securities Trading Act (SESTA) and a number of implementing ordinances apply and, as the case may be, also the Listing Rules of the SIX Swiss Exchange. Beyond, if a transaction exceeds certain thresholds, the regulations of the Federal Act on Cartels and other restraints of competition also need to be considered.

10.2 Have there been any significant legal and/or regulatory developments over recent years impacting private equity investors or transactions and are any anticipated?

After a major revision of the Swiss collective investment schemes legislation in 2013, private equity funds may qualify as collective investment schemes under Swiss law (Collective Investment Schemes Act, CISA). Under the revised CISA, the requirements for the offering and placement of funds mainly depend on whether the fund interests are being "distributed" in the meaning of CISA in or from Switzerland and, if so, whether they are distributed to qualified investors only or to other persons as well. As a result, the concept of distribution is key to determine the admissibility of offering interests in private equity funds in or from Switzerland. This new concept replaced the previous distinction under the old CISA between public distribution and private placement.

As a consequence of the revision of CISA, fundraising has become more complex during the last few years. In particular, special attention has to be paid to the question of what kind of investors can be approached for fundraising. In short, interests in private equity funds may still be freely offered to regulated financial intermediaries such as banks, securities dealers, fund management companies and insurance companies in Switzerland (the 'super-qualified investors'). Fundraising from these super-qualified investors does not qualify as 'distribution' and is therefore not subject to the distribution rules of the CISA. The case is different for the offering of interests in private equity funds to qualified investors as this may be subject to legal and regulatory requirements (e.g. the requirement of a paying agent and representative of the funds).

10.3 Has anti-bribery or anti-corruption legislation impacted private equity investment and/or investors' approach to private equity transactions (e.g. diligence, contractual protection, etc.)?

In due diligence, focus on compliance of target companies with anti-bribery, anti-corruption and economic sanctions has increased in recent years.

10.4 Are there any circumstances in which: (i) a private equity investor may be held liable for the liabilities of the underlying portfolio companies; and (ii) one portfolio company may be held liable for the liabilities of another portfolio company)?

Under special, limited circumstances, a private equity investor or an individual acting for it may be regarded as *de facto/shadow director* of the company and, consequently, be bound by directors' duties (see question 3.6).

Under normal circumstances, it is highly unlikely that a portfolio company is liable for another portfolio company.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

11 Other Useful Facts

11.1 What other factors commonly give rise to concerns for private equity investors in Switzerland or should such investors otherwise be aware of in considering an investment in Switzerland?

In April 2014, the European Commission imposed a €37 million fine on Goldman Sachs for antitrust breaches committed by a portfolio company that was formerly owned by its private equity arm, GS Capital Partners. The fine was joint and several on GS and the portfolio company. It was imposed on the basis that GS exercised decisive influence over the portfolio company, though GS was not alleged to have participated in, been aware of or facilitated the alleged cartel in any way. Even though there are not yet such precedents in Switzerland in relation to private equity companies, it may be possible that the Swiss Competition Commission could follow the European Commission's route of thinking. In Switzerland, in the past holding companies tended to be found to be jointly and severally liable for the antitrust fines of their subsidiaries.

Dr. Christoph Neeracher
Bär & Karrer AG
Brandschenkestrasse 90
8027 Zürich
Switzerland

Tel: +41 58 261 50 00
Fax: +41 58 261 50 01
Email: christoph.neeracher@baerkarrer.ch
URL: www.baerkarrer.ch

Dr. Christoph Neeracher is a partner at Bär & Karrer and co-head of the Practice Group Private M&A and Private Equity. He is recognised as one of the preeminent private M&A and private equity attorneys at law in Switzerland and as a leading lawyer in financial and corporate law. Christoph Neeracher is experienced in a broad range of domestic and international transactions, both sell- and buy-side (including corporate auction processes), and specialises in private M&A, private equity and venture capital transactions. Furthermore, he advises clients on general corporate matters, corporate restructurings, as well as on transaction finance and general contract matters (e.g. joint ventures, partnerships and shareholders' agreements), relocation and migration projects, and all directly related areas such as employment matters for key employees (e.g. employee participation and incentive agreements). In his core fields of activity he represents clients in litigation proceedings.

Dr. Luca Jagmetti
Bär & Karrer AG
Brandschenkestrasse 90
8027 Zürich
Switzerland

Tel: +41 58 261 50 00
Fax: +41 58 261 50 01
Email: luca.jagmetti@baerkarrer.ch
URL: www.baerkarrer.ch

Dr. Luca Jagmetti is a partner at Bär & Karrer in the Practice Group Private M&A and Private Equity. Luca Jagmetti is broadly experienced in domestic and international M&A transactions involving a broad range of industries, venture capital investments and corporate restructurings. He further advises his clients on transaction finance and general contract and commercial matters. Further, Luca Jagmetti represents clients in litigation proceedings in his core fields of activity.

BÄR
& KARRER

Bär & Karrer is a leading Swiss law firm with more than 130 lawyers in Zurich, Geneva, Lugano and Zug. The core business is advising clients on innovative and complex transactions and representing them in litigation, arbitration and regulatory proceedings. The clients range from multinational corporations to private individuals in Switzerland and around the world. Bär & Karrer was repeatedly awarded Switzerland Law Firm of the Year by the most important international legal ranking agencies in recent years:

- 2015 and 2014 IFLR Awards.
- 2015, 2014, 2013, 2011 and 2010 The Lawyer European Awards.
- 2015 Citywealth Magic Circle Awards ("Law firm of the year – EMEA").
- 2014 Mergermarket M&A Awards.
- 2014 Citywealth International Financial Centre Awards.
- 2013 and 2012 Chambers Awards.

According to Legal 500, Bär & Karrer was Switzerland's "most recommended" law firm 2014.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Other titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Environment & Climate Change Law
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- Pharmaceutical Advertising
- Private Client
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk