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The International Comparative Legal Guide to:

Private Equity 2018

4th Edition

A practical cross-border insight into private equity

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EDITORIAL

Welcome to the fourth 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 chapters are designed to provide readers with an 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 34 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 editors Richard Youle and Lorenzo Corte of Skadden, Arps, Slate, Meagher & Flom LLP for their 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.com.

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1 Overview

1.1 What are the most common types of private equity transactions in your jurisdiction? What is the current state of the market for these transactions? Have you seen any changes in the types of private equity transactions being implemented in the last two to three years?

All of the standard transaction strategies to acquire portfolio companies are commonly used in Switzerland. We assume that regular leveraged buyouts have accounted for a majority of the transactions in recent years. In 2017, private equity funds were involved in around one-third of the transactions in Switzerland.

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

Although M&A levels were already high in 2016, they further increased in 2017, with private equity transactions reaching a 10-year high. Low interest rates for transaction financing as well as favourable borrowing conditions generate an incentive for high private equity activity.

2 Structuring Matters

2.1 What are the most common acquisition structures adopted for private equity transactions in your jurisdiction? Have new structures increasingly developed (e.g. minority investments)?

Usually, private equity funds investing in Swiss portfolio companies set up a NewCo/AcquiCo in Switzerland as an acquisition vehicle. The NewCo is held either directly or via Luxembourg, Netherlands or a similar structure. AcquiCos incorporated outside Switzerland are also seen.

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/application of double taxation treaties, tax-exempt exit). Directly investing in the AcquiCo may allow Swiss-domiciled managers to realise a tax-free capital gain on their investment when the AcquiCo is sold at the exit. However, management incentives and regulatory considerations also play important roles.

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

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

2.4 What are the main drivers for these equity structures?

Firstly, Swiss corporate law limits the formation of preferential shares in certain ways. Secondly, 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 features.

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

Management is often asked to acquire the full stake of its investment at the outset. In mid-sized deals, management participation usually ranges from 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 AcquiCo to have the opportunity to realise a tax-free capital gain at the exit.

Often, the equity sponsor or the target company grants loans to the managers so they can finance their investment; the exact structure, in particular in case of sweet equity for the managers, is usually sought to be confirmed by a tax ruling in order to obtain certainty on the 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 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.

2.6 If a private equity investor is taking a minority position, are there different structuring considerations?

Structuring considerations do not fundamentally differ for minority stakes. Of course, securing the exit possibilities and minority protection rights in the shareholders' agreement is of paramount importance.

3 Governance Matters

3.1 What are the typical governance arrangements for private equity portfolio companies? Are such arrangements required to be made publicly available in your jurisdiction?

The predominant type for acquisitions of portfolio companies in Switzerland is the stock corporation (*Aktiengesellschaft*). Sometimes, limited liability companies (LLCs, *GmbH*) are used, which have the advantage that they can be treated as transparent for US tax purposes.

The stock corporation is governed by a board of directors which has a 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. They 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.

Neither the organisational regulations nor the shareholders' agreement are required to be made publicly available in Switzerland; only the articles of association.

Our comments in question 3.1 regarding stock corporations apply largely for LLCs too.

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.)? If a private equity investor takes a minority position, what veto rights would they typically enjoy?

If 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 aimed at the 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 the composition of senior management. The exit rights for private equity investors holding a minority position are usually heavily negotiated.

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 (i) governing law and jurisdiction, and (ii) non-compete and non-solicit provisions)?

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

- 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 with 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.

Non-compete obligations of the shareholders in favour of the company are typically enforceable if the respective shareholders are (jointly) controlling the company. Furthermore, non-compete obligations need to be limited to the geographical scope and scope of activity of the company.

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 under corporate law and also more generally under other applicable laws (see section 10 below)?

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

Further, directors, officers and managers may be held liable in case of non-payment of certain social security contributions and taxes by the company.

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 your jurisdiction, 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 a four-month phase II investigation, clearance is granted within one month (phase I) after filing the complete application. It is strongly recommended to submit a draft filing for review by the Secretariat (which usually takes one to two weeks) to make sure that the filing is complete (thereby triggering the one-month period) and not rejected as incomplete 10 days after filing.

For transactions in certain industries, governmental approvals must be obtained (e.g. banks, telecoms, 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.

Further, given the current sellers' market, share purchase agreements tend to be more seller-friendly (e.g. with regards to R&W, etc.).

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 (depending on the circumstances, the Takeover

Board may grant exemptions). Thus, the bidder can typically not structure the offer in a way to exclude the risk of ending up holding less than 90% and, consequently, not being able to squeeze-out the remaining minority shareholders. In practice, however, bidders reach squeeze-out levels in most Swiss public acquisitions.

5.2 Are break-up fees available in your jurisdiction in relation to public acquisitions? If not, what other arrangements are available, e.g. to cover aborted deal costs? If so, are such arrangements frequently agreed and what is the general range of such break-up fees?

Both takeover parties can agree on break fees unless the fee payable by the target company 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 (i) on the sell-side, and (ii) on the buy-side, in your jurisdiction?

The locked-box mechanism (with anti-leakage protection) preferred on the sell-side, and NWC/Net Debt adjustments, based on closing accounts, preferred on the buy-side, are equally common in Switzerland. However, the seller-friendly market has led to an increase in the use of the locked-box mechanism in recent years. 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.

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? If so, what are the typical (i) excesses / policy limits, and (ii) carve-outs / exclusions from such warranty and indemnity insurance policies?

In the past, W&I insurances were relatively seldom used. However, with insurers being more active and given the current sellers' market, W&I insurances have become more common in Switzerland in recent years.

Generally, a W&I insurance policy will not cover (i) liabilities arising from known facts, matters identified in the due diligence or information otherwise disclosed by the seller, (ii) forward-looking warranties, (iii) certain tax matters, e.g. transfer pricing and secondary tax liabilities, (iv) pension underfunding, (v) civil or criminal fines or penalties where insurance cover may not legally be provided, (vi) post-completion price adjustments and non-leakage covenants in locked-box deals, (vii) certain categories of warranties, e.g. environmental warranties or product liability, and (viii) liabilities arising as a result of fraud, corruption or bribery.

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 Do (i) private equity sellers provide security (e.g. escrow accounts) for any warranties / liabilities, and (ii) private equity buyers insist on any security for warranties / liabilities (including any obtained from the management team)?

Escrows to secure R&W are not uncommon; in particular in case of multiple sellers (e.g. when a large number of managers are co-sellers).

6.7 How do private equity buyers typically provide comfort as to the availability of (i) debt finance, and (ii) equity finance? What rights of enforcement do sellers typically obtain if commitments to, or obtained by, an SPV are not complied with (e.g. equity underwrite of debt funding, right to specific performance of obligations under an equity commitment letter, damages, etc.)?

Typically, in relation to the equity portion 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). The debt portion is usually comforted by binding financing term sheets, interim loan agreements or similar. In the context of public transactions, the availability of funds must be confirmed by the review body before the launch of the offering.

6.8 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

Switzerland

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 six to 18 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 an 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 six to 18 months.

7.3 Do private equity sellers generally pursue a dual-track exit process? If so, (i) how late in the process are private equity sellers continuing to run the dual-track, and (ii) were more dual-track deals ultimately realised through a sale or IPO?

This is heavily dependent on the general market conditions. If an IPO is considered, dual-track processes are often seen. However, if an IPO is not the preferred route at the beginning, often just a trade sale (auction) process takes place. Dual-track processes have been pursued until very late in the process, although parties try to make their final decision before the intention to float is published.

8 Financing

8.1 Please outline the most common sources of debt finance used to fund private equity transactions in your jurisdiction and provide an overview of the current state of the finance market in your jurisdiction for such debt (particularly the market for high yield bonds).

Private equity investors usually provide financing in the form of 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 and high yield bonds, although there are some restrictions in connection with bond financing into Switzerland. In the context of acquisitions, debt providers usually require that existing debt is refinanced at the level of the acquisition debt providers. 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.

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 generally 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 upstream or cross-stream nature (see question 8.1 above). The Swiss tax authorities publish maximum safe haven interest rates for intercompany loans on an annual basis. Higher interest rates can be justified with a third-party test.

9 Tax Matters

9.1 What are the key tax considerations for private equity investors and transactions in your jurisdiction? Are off-shore structures common?

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 jurisdictions like Jersey, Cayman Islands, Luxembourg, Scotland or Guernsey.

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 (minimum 10% shareholding) dividend distribution from a Swiss company.

9.2 What are the key tax considerations for management teams that are selling and/or rolling-over part of their investment into a new acquisition structure?

Swiss-resident managers generally try to achieve a tax-exempt capital gain upon the sale of privately held shares. In order not to qualify as salary (like synthetic bonus schemes), the managers should have full ownership rights (dividend, liquidation, voting rights). A tax neutral roll-over may be structured, in certain circumstances. Whether the sale of shares under a management participation qualifies for a tax-exempt capital gain is a case-by-case decision since preferential terms (like sweet equity) or a later investment at a formula value could lead to (partial) taxable salary for the managers upon sale and social security charges for the Swiss employer. Thus, it is recommendable to confirm the consequences of a specific management participation in an advance ruling.

9.3 What are the key tax-efficient arrangements that are typically considered by management teams in private equity portfolio companies (such as growth shares, deferred / vesting arrangements, “entrepreneurs’ relief” or “employee shareholder status” in the UK)?

There are no specific tax reliefs or tax provisions for management share participations, except for blocking period discounts (6% per blocking year) if shares are acquired below fair market value.

9.4 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, management teams or private equity transactions and are any anticipated?

There are currently no immediate tax changes expected affecting the investment in Swiss targets and the acquisition by private equity funds. 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 generally requires sufficient equity (minimum 30%), business reasons and certain substance of the foreign acquisition holding company. Under the OECD’s multilateral instrument, Switzerland has opted to apply a principal purpose test, which should be generally in line with current practice.

The OECD base erosion and profit shifting (BEPS) standards were implemented by Switzerland, e.g. country-by-country reporting, spontaneous exchange of tax rulings, with entry into force as of 2017 (with tax ruling exchange to be made as from 1 January 2018) respectively as of 2018 (country-by-country reporting) in Switzerland.

Further, the anticipated “Tax Proposal 17” (revised legislative draft for Swiss corporate tax reform), under which privileged tax regimes will be abolished (entry into effect expected as per 1 January 2019/2020), will have an impact on the effective tax rates of Swiss target companies, since general reductions of tax rates and measures like patent boxes are expected to be introduced to maintain the attractiveness.

Tax authorities tend to scrutinise tax-exempt capital gains for selling individuals; thus, earn-out arrangements for sellers continuing to work for the target or non-compete agreements may partly qualify as taxable income for the seller and should be structured carefully. Also, the practice of certain cantons with respect to the taxation of management participations has been tightened.

10 Legal and Regulatory Matters

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

The Swiss Federal Collective Investment Schemes Act (CISA) applies to the fund, its activities and management as well as to its distribution. 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 Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FMIA) 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 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 determining the admissibility of offering interests in private equity funds in or from Switzerland. This new concept replaced the previous distinction between public distribution and private placement under the old CISA.

As a consequence, fundraising has become more complex. 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 so-called ‘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 for a Swiss paying agent and representative of the funds). Distributors of foreign funds to Swiss qualified investors need to be adequately supervised, with Swiss distributors requiring a licence from the Swiss Financial Market Supervisory Authority FINMA.

One of the more recent regulatory developments has been the enactment of the Financial Market Infrastructure Act (FinMIA) on 1 January 2016, which provides for improvements in the provision of financial services and financial instruments in Switzerland, and has been drafted in conformity with the respective European provisions and international standards. It contains rules regarding the financial markets infrastructure and the trade in derivatives, such as provisions for operators of an organised trading system regarding organisation and transparency of trade. Furthermore, the FinMIA contains a set of ‘market rules of conduct’, which regulate the financial market participants’ activities in relation to securities and derivatives trading. These include the provisions on the disclosure of shareholdings, public takeover offers, insider trading and market manipulation that were formerly included in the Stock Exchange Act, as well as the new regulations for derivatives trading, which are in line with international standards.

The next major regulatory development in the area of financial markets will be the enactment of the Financial Services Act and the Financial Institutions Act (FinSA and FinIA), which is planned for 2019. These are currently still under parliamentary debate, but are expected to change the regulatory landscape for financial services significantly, with the FinSA being to some extent modelled on MiFID. In particular, the new laws are expected to affect the distribution regime under the CISA. For one, the distributor licence requirement will be eliminated in favour of registration and other regulatory requirements applicable to client advisers. Furthermore, the concept of “distribution” will be replaced by a concept of “offering”, with associated changes to the available exemptions.

10.3 How detailed is the legal due diligence (including compliance) conducted by private equity investors prior to any acquisitions (e.g. typical timeframes, materiality, scope etc.)? Do private equity investors engage outside counsel / professionals to conduct all legal / compliance due diligence or is any conducted in-house?

The legal due diligence (DD) usually covers the following areas: corporate, financing agreements, business agreements, employment, real property/lease as well as IP/IT and litigation. The handling of compliance and regulatory matters depends on the specific case. Typically, an external legal counsel is engaged to conduct a red flag legal DD of two to four weeks.

10.4 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.

10.5 Are there any circumstances in which: (i) a private equity investor may be held liable for the liabilities of the underlying portfolio companies (including due to breach of applicable laws by the 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).

A private equity investor that (solely or jointly) controls a portfolio company that has infringed competition law could be made jointly and severally liable for paying the resulting fine. While it is possible that a portfolio company may be made liable for the liabilities of another portfolio company, this is a less likely scenario. See also section 11 below.

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

11 Other Useful Facts

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

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. GS and the portfolio company were held jointly and severally liable for the fine. GS was held liable on the basis that it exercised decisive influence over the portfolio company, although GS was not alleged to have participated in, been aware of or facilitated the alleged cartel in any way. Even though in Switzerland no such precedents in relation to private equity companies exist so far, it is possible that the Swiss Competition Commission could follow the European Commission's line of thinking. In Switzerland, holding companies tend to be found to be jointly and severally liable for the antitrust fines of their subsidiaries. Private equity investors should, therefore, implement a robust compliance programme in their portfolio companies to avoid antitrust law infringements.

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Chambers Global and Europe rank him as a leader in the field of M&A (since 2010) and *IFLR1000* lists him as one of the leading lawyers in Switzerland (since 2012). The *International Who's Who of M&A Lawyers* lists Christoph Neeracher as one of the world's leading M&A lawyers. *The Legal 500* (2012) describes him as "extremely experienced in M&A matters and very strong in negotiations" and ranks him among the leading individuals. Christoph Neeracher is ranked first in Mergermarket's Profile League Table for 2016's most prolific individual DACH legal advisors.

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Luca Jagmetti has had several speaking engagements on asset transactions, legal due diligence and other M&A topics (e.g. Akademie der Treuhand-Kammer, Seminar on Mergers & Acquisitions for practitioners and Course on Commercial Law of the University of St. Gallen).

According to *The Legal 500* 2016 he is "very knowledgeable and speedy". Luca Jagmetti is jointly ranked first in Mergermarket's Profile League Table for 2016's most prolific individual DACH legal advisors.

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- Telecoms, Media & Internet
- Trade Marks
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