International Comparative Legal Guides

Private Equity 2020

A practical cross-border insight into private equity law

Sixth Edition

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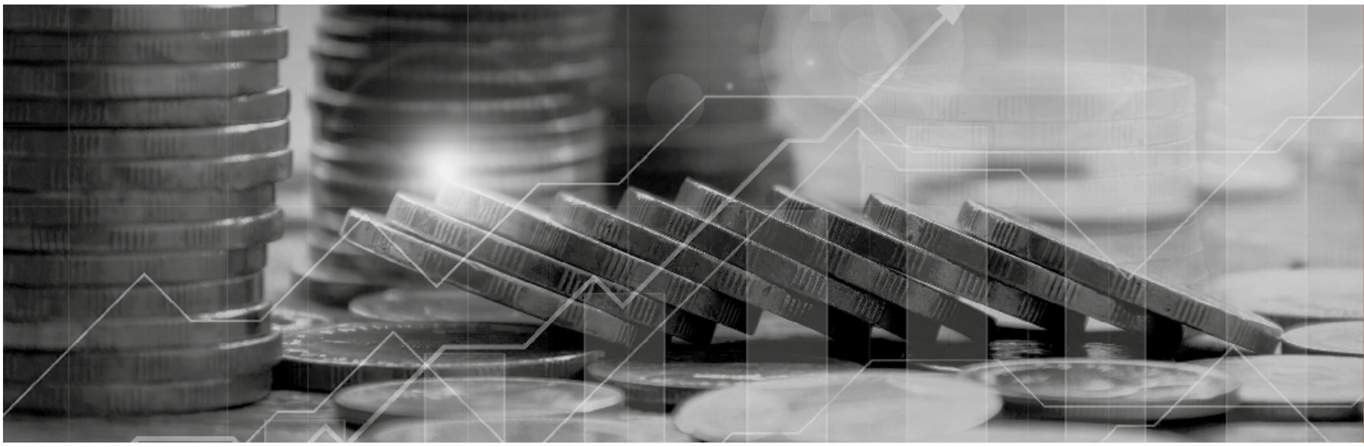

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1 Overview

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?

All of the standard transaction strategies to acquire portfolio companies are commonly used in Switzerland. We assume that regular leveraged buyouts have accounted for the majority of the transactions in recent years. In 2019, private equity funds were involved in around one-third of M&A transactions in Switzerland.

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

While low interest rates for transaction financing, as well as favourable borrowing conditions, still generate an incentive for high levels of private equity activity, the COVID-19 pandemic will have an impact on private equity transactions (see question 1.3).

1.3 What are going to be the long-term effects for private equity in your jurisdiction as a result of the COVID-19 pandemic?

The COVID-19 pandemic is expected to slow down private equity deal-making until summer 2020, at least. The further impact will largely depend on the development of the pandemic and we may see increased activity in distressed sales transactions towards the year end.

1.4 Are you seeing any types of investors other than traditional private equity firms executing private equity-style transactions in your jurisdiction? If so, please explain which investors, and briefly identify any significant points of difference between the deal terms offered, or approach taken, by this type of investor and that of traditional private equity firms.

A number of family offices are playing an active role in Swiss private equity-style transactions, both in co-investments with private equity funds and as sole investors. In particular, in the latter case, their approach can differ from traditional private equity firms, e.g. in terms of structuring in connection with tax considerations.

2 Structuring Matters

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

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, the Netherlands or a similar structure. We have also seen AcquiCos incorporated outside of Switzerland.

Management usually invests directly in the AcquiCo rather than via a management participation company. Often, a single shareholders' agreement (SHA) is concluded between the financial investor(s) and management, 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 on exit.

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 SHA. NewCos incorporated abroad often have several classes of shares.

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

Structuring is, in principle, not fundamentally different from majority investments. Pre-existing structures are often maintained to a certain extent. However, on a contractual level increased protection is sought (veto rights, right to trigger an exit, etc.).

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

Management equity amounts and terms depend very much on the individual deal. Typically the management stake ranges between 3–10%. In most cases, standard drag-along and tag-along provisions and good/bad leaver call options for the benefit of the financial sponsor will apply. Put options for the benefit of management are less prevalent.

2.6 For what reasons is a management equity holder usually treated as a good leaver or a bad leaver in your jurisdiction?

Good leaver cases typically encompass (i) termination of employment by the company absent cause set by the manager, (ii) termination of employment by the manager with cause set by the company, and (iii) death, incapability, reaching of retirement age or mutual termination.

Bad leaver cases on the other hand usually include (i) termination of employment by the company with cause set by the manager, (ii) termination of employment by the manager absent cause set by the company, and (iii) material breach by the manager of the SHA or criminal acts.

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 model for acquisitions of portfolio companies in Switzerland is the stock corporation (*Aktiengesellschaft*). Sometimes, limited liability companies (LLCs, *GmbH*) are used, which have the advantage of being 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 the decisions which 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 SHA.

Neither the organisational regulations nor the SHA 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 also to LLCs.

3.2 Do private equity investors and/or their director nominees typically enjoy veto rights over major corporate actions (such as acquisitions and disposals, business plans, related party transactions, 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 significant 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?

At shareholder level, veto rights may be created by introducing high quorums for certain shareholders' decisions in the articles of association and the SHA. 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*.

At 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 SHA; 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 SHA. 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 SHA (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?

Purely from its position as a shareholder, 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 successfully made if such person has *de facto* acted as an officer of the company, e.g. by directly taking decisions that would actually be within 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)?

SHAs 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 interests 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 SHA 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 be 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. Sometimes, 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 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 a *de facto*/shadow director of the company and, consequently, also be bound by such duties. To prevent such a scenario, decisions should solely be taken 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 set-ups with one or few financial sponsor(s) that are each represented on 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 antitrust, foreign direct investment 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 that a draft filing be submitted 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 regarding 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. There is no general approval requirement regarding foreign direct investments, however.

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 has been easily available, buyers became more willing to enter into binding purchase agreements prior to securing financing. It is currently difficult to predict what effect the temporary dislocation of financial markets caused by the COVID-19 pandemic will have on this trend.

Further, given the recent sellers' market, share purchase agreements had tended to be more seller-friendly (e.g. with regard to R&W, etc.), albeit not as extreme as in the preceding years. As a result of the COVID-19 pandemic, we expect a tendency towards less seller-friendly agreements in the near future, in particular with regard to conditionality (e.g. MAC clauses).

As a general observation, typical Swiss share/asset purchase agreements still tend to be significantly shorter in length 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 (irrespective of whether these voting rights are exercisable) 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 such threshold in its articles of association 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 triggering threshold is 3%) is obliged to make a notification to the company and the stock exchange (disclosure obligation).

Moreover, to carry out a statutory squeeze-out or a squeeze-out merger subsequent to a public tender offer, the bidder must hold at least 98% (for a statutory squeeze-out) or 90% (for a squeeze-out merger), respectively of the 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 What deal protections are available to private equity investors in your jurisdiction in relation to public acquisitions?

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.

In addition, block trades secure an improved starting position and decrease the likelihood of a competing bid. An alternative would be tender obligations from major shareholders. These would, however, not be binding in the event of a competing offer.

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 in recent years has led to an increase in the use of the locked-box mechanism. Earn-outs and vendor loans have been seen less often recently.

6.2 What is the typical package of warranties / indemnities offered by (i) a private equity seller, and (ii) the management team to a buyer?

Usually, a customary set of representations and warranties is granted by a private equity seller and co-selling managers, 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 To what extent is representation & warranty insurance used in your jurisdiction? If so, what are the typical (i) excesses / policy limits, and (ii) carve-outs / exclusions from such insurance policies, and what is the typical cost of such insurance?

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

Generally, a W&I insurance policy will usually not cover (i) liabilities arising from known facts, matters identified in the due diligence (DD) 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 in the absence of compliance by the buyer (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% of 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 lock-up undertakings six to 18 months after the IPO. Therefore, SHAs among private equity investors and agreements with directors and managers should provide for respective undertakings.
- Drag-along rights: SHAs should also include drag-along 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, executive compensation, etc.).
- Regulation: As in most jurisdictions, Swiss law and the listing rules of the SIX Swiss Exchange provide for additional obligations of a public company (e.g. obligations regarding financial reporting, compensation of the board of directors and the senior management, *ad hoc* announcements, disclosure of major shareholdings). These obligations require additional resources within the company and the support of an external specialist.
- Liability: The liability regime and exposure in connection with an IPO is different to a trade sale. While in a trade sale, the liability of the seller(s) is primarily contractual (i.e. under the SPA) and, therefore, subject to negotiation, the main liability risk in an IPO results from the statutory prospectus liability. However, since the company going public is primarily responsible for preparing the prospectus, the sellers' exposure under this statutory regime is limited in most cases. In addition, the underwriters typically require the selling shareholder(s) to also make some limited representations in the underwriting agreement and it is advisable that these are agreed early in the process.
- Full exit: A full exit at the listing, i.e. a sale of all shares held by the private equity seller, is typically not possible via an IPO. Therefore, the private equity seller will need to sell the remaining shares gradually or in one or more block trades after the lock-up expired.

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

Typically, existing shareholders holding more than 3% of 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 six to 18 months after the IPO. Therefore, SHAs among private equity investors and agreements with directors and managers should provide for respective undertakings.

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, a trade sale (auction) process will often just take place. Dual-track processes are being pursued until very late in the process, although parties try to make their final decision before the intention to float is published. Preferably, the timelines for both tracks are aligned so that the analyst reports and investor feedback on the IPO track are available simultaneously with the binding offers on the trade sale track. This allows the decision on the track to be made once there is a relatively clear view on the valuation.

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 and cross-stream 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?

Certain limitations on leverage 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. 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.

Furthermore, there are restrictions on Swiss companies granting loans or providing security which are of an upstream or cross-stream nature (see question 8.1 above).

8.3 What recent trends have there been in the debt financing market in your jurisdiction?

The Swiss debt financing market stayed robust despite the fact that M&A activity appears to be slowing down slightly in terms of the number of transactions and their total volume. Uncertainties on economic, legal and political levels – both internationally, such as Brexit or more recently the COVID-19 pandemic, and domestically, such as the unresolved relationship with the EU – raise doubts about an imminent resumption of M&A activity. The negative interest rates introduced by the Swiss National Bank are being maintained.

Covenant-lite and loose loans (especially with respect to financial covenants) have become more and more common but that may change due to the impact of the COVID-19 pandemic.

In order to fight the financial consequences of the COVID-19 pandemic for small and medium-sized businesses, the Swiss government decided to provide government guarantees for emergency credit lines provided by Swiss commercial banks to Swiss businesses. Due to their restrictive covenants (*inter alia*, a dividend prohibition on a single entity level) and unless the respective emergency laws are changed, an acquirer will need to refinance these emergency credit lines with priority.

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 regimes. 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 NewCo acquisition vehicles (holding company) from jurisdictions with which Switzerland has concluded a double taxation treaty and which foresee a 0% Swiss withholding tax for a qualifying (generally a minimum of 10% shareholding) dividend distribution from a Swiss company. The entitlement for a withholding tax reduction requires sufficient substance and beneficial ownership of the shareholder in the Swiss target.

9.2 What are the key tax-efficient arrangements that are typically considered by management teams in private equity acquisitions (such as growth shares, incentive shares, deferred / vesting arrangements)?

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.

9.3 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 as 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.

9.4 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?

The substance of foreign acquisition companies and their qualification as beneficial owners of the shares in the Swiss target in order to benefit from a Swiss dividend withholding tax reduction are subject to more scrutiny by the Swiss Federal Tax Administration. Thus, a diligent set-up and advance tax ruling confirmation are recommended, in particular since a future buyer will generally inherit the current withholding tax situation under the so-called "old reserve" regime and address such withholding tax risks in the purchase price determination. Under the OECD's multilateral instrument, Switzerland has opted to apply a principal purpose test, which should, however, not change the currently applied practice.

Further, the corporate tax reform (approved on 19 May 2019) entered into force on 1 January 2020 and provides for an abolishment of the privileged tax regimes. It also has an impact on the effective tax rates of Swiss target companies, as, in order to maintain attractive tax conditions for investors in Switzerland, measures such as a reduction of tax rates, patent boxes, an extra R&D deduction, a notional interest deduction on surplus equity (only in the canton of Zurich) and exemptions for capital tax purposes were introduced. It also provides for an immigration step-up, i.e. legal corporations may disclose hidden reserves, including goodwill, in a tax-neutral way and subsequently create tax-deductible expenses through amortisation of the stepped-up value. Further, the lump-sum tax credit system was adjusted and now allows lump-sum tax credits for permanent establishments of foreign corporations under certain circumstances. Finally, adjustments with respect to dividend taxation for individuals were introduced.

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. It is important to note also that payments by related parties could qualify as (taxable) salary which is generally subject to social security contributions by the Swiss employer.

10 Legal and Regulatory Matters

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

A notable change in Swiss corporate law was implemented in November 2019 and concerns the regime for the notification of the beneficial owner of shareholders acquiring more than 25% in a Swiss company. The amendments removed some of the uncertainty surrounding the former rules implemented in 2015. At the same time, failure to comply with the obligations to disclose the beneficial owners is now subject to a fine. The same applies for intentional breaches of directors' obligations relating to the keeping of a share register and register of beneficial owners. These newly introduced criminal sanctions apply in addition to corporate law consequences of non-compliance with disclosure duties, which include the suspension of voting rights and the loss of property rights until due notice is given. Another key pillar of the new rules is the *de facto* abolition of bearer shares. After a transitional period and subject to few exceptions (notably companies with shares listed on a stock exchange), Swiss stock corporations will no longer be allowed to issue bearer shares. If bearer shares are still outstanding by the end of the transitional period in May 2021, they will be converted by law into registered shares.

On 1 January 2020, the new Financial Services Act (FinSA) and Financial Institutions Act (FinIA) entered into force, changing the Swiss financial regulatory landscape significantly. The FinSA, in particular, introduces new concepts of financial services regulation, partly modelled on the MiFID, to Switzerland. Furthermore, the new laws include a number of revisions to the Collective Investment Schemes Act (CISA), which affect the regulatory framework for the marketing and offering of interests in private equity funds in or into Switzerland. Broadly speaking, the revised regime is subject to transitional rules under which the new regulatory duties are phased in over a period of up to two years.

In a nutshell, the revision of the CISA abolishes the former concept under which both product-related requirements and point-of-sale duties in connection with investment funds were linked to a broad notion of "distribution" with very limited exceptions, limiting the possibilities of foreign private equity funds to raise funds in Switzerland without triggering regulatory requirements. The new regime is more closely integrated into general financial instruments regulation and enables the offering of foreign investment funds to a broader audience of qualified investors (including, for instance, regulated financial institutions, but also large corporates, occupational pension schemes and other companies with professional treasury operations) without having to seek approval of the fund by the Swiss regulator FINMA and/or having to appoint a Swiss paying agent and representative. Furthermore, the licence/supervision requirement for distributors of collective investment schemes was abolished with the revised CISA. However, activities in or into Switzerland, aimed at the purchase of fund interests by Swiss investors, may qualify as a "financial service", which may trigger point-of-sale duties and other requirements under the FinSA, even if conducted on a cross-border basis from abroad.

10.2 Are private equity investors or particular transactions subject to enhanced regulatory scrutiny in your jurisdiction (e.g. on national security grounds)?

While a few voices in politics have called for scrutiny on foreign investments in the recent past, at this point there are no political majorities for stricter laws in that respect.

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.)?

The legal DD usually covers the following areas: corporate; financing agreements; business agreements; employment; real property/lease; and IP/IT, data protection 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' duration.

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 DD as well as transaction agreements, a 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 a *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 will be 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 several speaking engagements on asset transactions, legal DD and other M&A topics (e.g.: Akademie der Treuhand-Kammer; the Seminar on Mergers & Acquisitions for practitioners; and the Course on Commercial Law of the University of St. Gallen).

According to *The Legal 500* (2016) he is "very knowledgeable and speedy". *IFLR* (2018) lists him as a noticeable practitioner. 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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Bär & Karrer is a renowned Swiss law firm with more than 170 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. Almost all leading private equity funds active in Switzerland form part of our client basis.

- 2019 STEP Award ("International Legal Team of the Year").
- 2019 *Citywealth* Magic Circle Award ("Law Firm of the Year – Switzerland").
- 2019, 2015 and 2014 *International Financial Law Review* (*IFLR*) Awards.
- 2019 *IFLR* "Debt and Equity-linked Deal of the Year" Award.
- 2019, 2015 and 2014 *IFLR* Awards.
- 2018 *IFLR* "Deal of the Year" Award.
- 2018, 2017 and 2016 Trophées du Droit Gold or Silver.
- 2018, 2016, 2015 and 2014 *Mergermarket* M&A Awards.
- 2016, 2013 and 2012 *Chambers* European Awards.
- 2016, 2015 and 2014 *The Legal 500* ("most recommended law firm in Switzerland").
- 2015, 2014, 2013, 2011 and 2010 *The Lawyer*'s European Awards.
- 2015 *Citywealth* Magic Circle Awards ("International Law Firm of the Year EMEA").
- 2014 *Citywealth* International Financial Centre Awards.

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