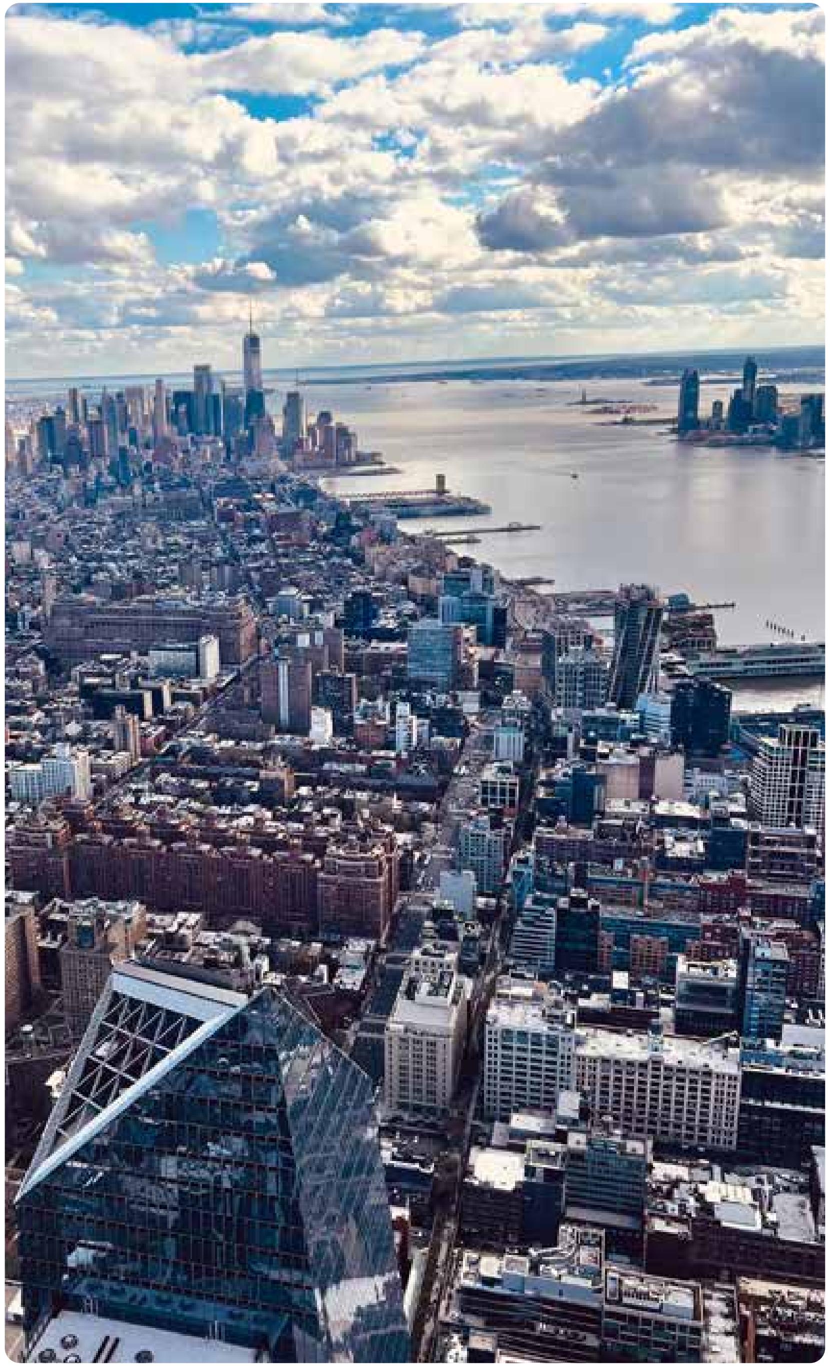
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2022

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About the editor





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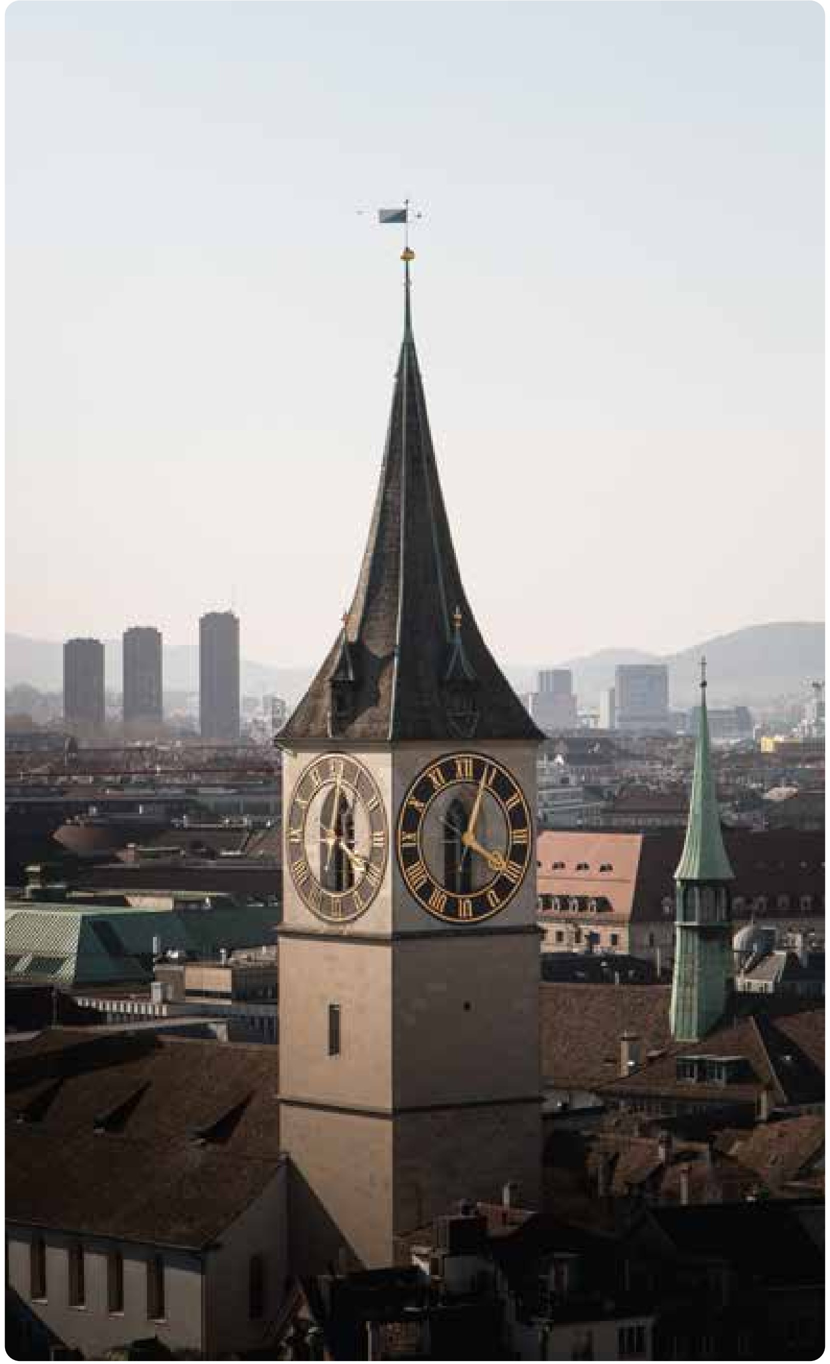
Contents

While reading, click this icon to return to the Contents at any time



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Switzerland

Christoph Neeracher at Bär & Karrer specialises in international and domestic M&A transactions (focusing on private M&A and private equity transactions, including secondary buyouts, public-to-private transactions and distressed equity), transaction finance, corporate restructurings, relocations, corporate law, general contract matters (eg, joint ventures, partnerships and shareholders' agreements) and all directly related areas.

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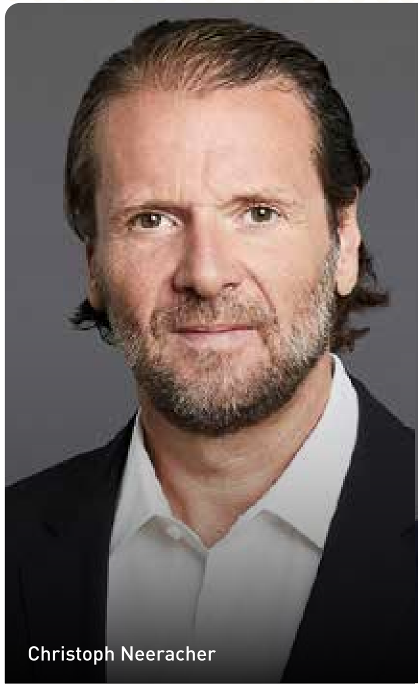
Raphael Annasohn at Bär & Karrer focuses on international and domestic M&A transactions in various industries specialising in private M&A and private equity, corporate reorganisations and restructurings, as well as corporate law and general contractual matters, in particular shareholders' agreements. Furthermore, he specialises in the fields of venture capital and start-ups, and assists clients in their ongoing commercial activities.

1 What trends are you seeing in overall activity levels for private equity buyouts and investments in your jurisdiction during the past year or so?

M&A deals in Switzerland soared in 2021, with the past year being a record year for M&A deal activity across all sectors. Switzerland's M&A activity started strong into H1 2021 with over 290 deals compared to a mere 140 in the same period in 2020. The momentum of H1 continued in H2 2021 with over 300 deals completed compared to the 200 deals in H2 2020. With a total of over 600 deals in 2021, it is safe to say, that 2021 was a very strong year for M&A in Switzerland. Despite the ongoing fear of the covid-19 pandemic in 2021, low interest rates, attractive financing conditions and economic stimulus packages were instrumental in the record-breaking year of 2021.

The increase that was observed in 2021 continued in the first half of 2022. However, the negative movement on the stock markets, the prospects of runaway inflation, fears of recession, Russia's invasion of Ukraine, and further geopolitical risks certainly dampened the risk appetite of M&A investors. We expect the total M&A deal activity for 2022 to be lower than for 2021 and certainly a decline compared with last year's second half. Swiss small and medium-sized enterprises (SMEs) continue to be attractive targets for investors in H1 2022, especially for European buyers (61 per cent, with the remainder being primarily North American and Asian buyers).

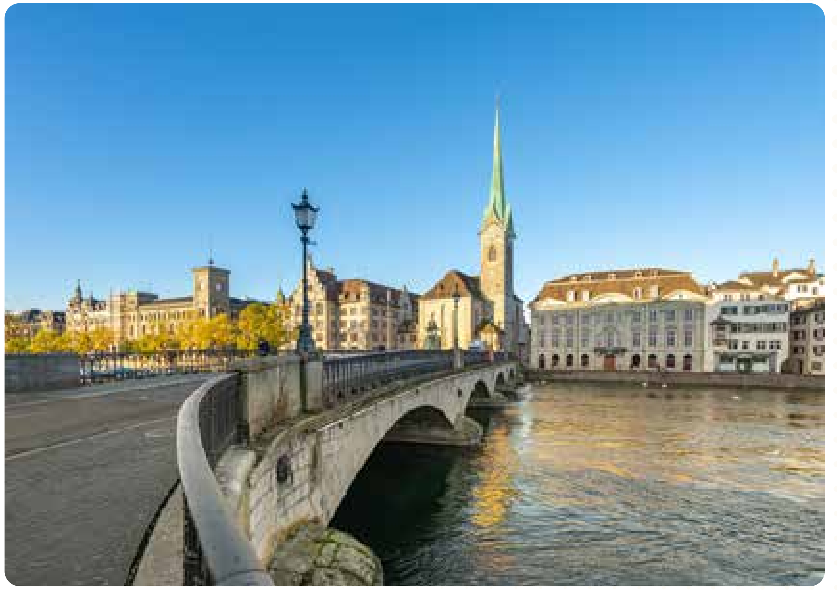
The year 2021 was already marked by a high degree of private equity investor activity in Switzerland, with financial investors actively engaged as either buyers or sellers. The coming deal activity in private equity will most likely increasingly focus on sustainability topics, as we see an increasing trend developing. With private equities currently sitting on a high amount of dry powder and covid-19 concerns easing, we expect a positive trend for private equity


Christoph Neeracher


Philippe Seiler


Raphael Annasohn

"We expect the total M&A deal activity for 2022 to be lower than for 2021."



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transactions in 2022. However, the above-mentioned factors might impact this positive trend.

2 Looking at types of investments and transactions, are private equity firms primarily pursuing straight buyouts, or are other opportunities, such as minority-stake investments, partnerships or add-on acquisitions, also being explored?

Private equity firms active in Switzerland follow a wide range of strategies, including control and non-control deals, club deals and joint ventures with corporates. In recent years, we have seen many transactions where a seller wishes to keep a certain minority stake in the target company. Such sellers often prefer straightforward Swiss structures, which also take into account the tax situation of the seller in case of a full exit at a later point in time (which is often governed in a separate shareholders' agreement). Accommodating these preferences may give a bidder an important competitive advantage in an auction process. As Swiss law does not prevent or restrict the participation of two or more private equity investors in a club or group deal, several private equity transactions were syndicated (eg, the sale of Leoni Schweiz AG to a consortium of buyers led by a former board member and Helvetica Capital AG, an independent investor, in April 2021).

Typically, private equity players taking non-control positions seek protection via shareholders' agreements, which usually not only restrict the transferability of the shares, but also include board appointment rights as well as provisions regarding voting undertakings for certain or even all board or shareholders' resolutions. In this respect, Swiss law provides great flexibility and Swiss market practice has, in recent years, reached a high level of sophistication. Additionally, private equity investors are increasingly pursuing a buy-and-build strategy, purchasing different companies in the same or similar industries and therefore driving portfolio company activity in Switzerland.

Private equity firms are especially active in the German-speaking part of Switzerland with a focus on industrial; technology, media and telecom (TMT); pharmaceuticals; healthcare and life sciences sectors.

3 What were the recent keynote deals? And what made them stand out?

In 2021, the transaction involving Novartis AG selling its stake in Roche Holding AG back to Roche Holding AG for US$20.8 billion marked the largest transaction in 2021 in Switzerland. The public takeover of the Swiss-based global pharmaceutical company, Vifor Pharma AG by CSL Limited, a global biotechnology company based in Australia came in second place in terms of transaction value with an aggregate equity value for Vifor of US$11.7 billion. Additionally, the sale of Lonza's speciality ingredients business and operations by

> "Cross-border private equity M&A deals have always been a major pillar in an overall busy M&A market in Switzerland."

Bain Capital and Cinven in the beginning of 2021 stood out for being a complex carve-out.

Noteworthy transaction in 2021 also include Nestle SA selling back part of its stake in the French cosmetic brand L'Oréal (US$10 billion) and Partners Group Holding AG selling its stake in GlobalLogic Inc. (US$9.6 billion). The acquisition of Swiss IT Security Group by Triton, the acquisition of a significant minority stake in Breitling AG by CVC Capital Partners and Partners Group, as well as the merger of TX Markets and Scout24, which has led to one of the largest digital companies in Switzerland, stood out in 2021 in terms of private M&A transactions.

The merger between the Dutch chemical company Royal DSM and the Swiss flavours and fragrance group Firmenich as announced in early 2022 marks the biggest transaction in 2022 with an estimated value of around €40 billion up until now. The merger will be structured so that DSM shareholders will own 65.5 per cent of the new firm, while the shareholders of Firmenich will initially own 34.5 per cent and receive €3.5 billion in cash.

Notable private equity deals in H1 2022 included the acquisition of Confinale, a Swiss-based consulting specialist for digital banking and solutions for wealth management by HCL Technologies, and the acquisition of SwissQ Consulting by Xebia, a worldwide IT consultancy company with a seat in the Netherlands and a portfolio company of Waterland.

4 Does private equity M&A tend to be cross-border? What are some of the typical challenges legal advisers in your jurisdiction face in a multi-jurisdictional deal? How are those challenges evolving?

Cross-border private equity M&A deals have always been a major pillar in an overall busy M&A market in Switzerland. The importance of cross-border M&A for Switzerland has also been underlined by the Swiss legislator, which has been working on introducing investment restrictions since 2018 but has not yet introduced any restrictions for foreign investors despite an international trend in this direction.

Cross-border transactions create challenges for the legal advisers involved, as coordination and communication become the key success factors. Thus, getting all legal advisers on the same page, by assigning clear responsibilities and committing to strict deadlines from kick-off to closing, is critical, in particular where coordination must take place between different law firms that are dispersed over different time zones. Although such transactions are not always without friction, the major Swiss law firms are experienced in handling multi-jurisdictional M&A transactions and dealing with fast-paced private equity dealmaking.

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5 What are some of the current issues and trends in financing for private equity transactions? Have there been any notable developments in the availability or the terms of debt financing for buyers over the past year or so?

The past years have been marked by historically low negative interest rates and banks being more inclined towards financing transactions. As this is one reason why there was an oversupply of interested investors, bidders looking to invest were very flexible with regard to transaction financing. Although interest rates have increased in 2022 due to inflation, they are still low, and the borrowing conditions remain generous. Private equity investors, who tend to be highly leveraged, have heavily benefitted from this environment in recent years.

Swiss corporate law only stipulates limited restrictions on a company's debt-to-equity ratio (however, from a Swiss tax law perspective, de facto limitations exist due to thin capitalisation rules). Securing bank financing can be challenging, as banks are more cautious than ever and require specific collateral when lending funds to borrowers. However, with the current (partially still negative) interest rates, banks have been more inclined to provide financing. It is standard market practice that pledges are taken by the financing institutions to protect their rights under the financing agreements. It is not unusual that both the shares in the portfolio company and the shares in any of its material subsidiaries are pledged. Additionally, financing providers secure the financing by requiring that existing debt is refinanced, and that existing securities will be released and used as collateral. Various restrictions apply to upstream and cross-stream guarantees, as well as to other security interests granted by the target to the parent or an affiliate (other than a subsidiary). As Swiss corporate law requires the shareholders' approval in addition to that of the board of directors, structured financial planning is very important. In fact, planning this is a responsibility of the board that cannot be delegated. Should the company go bankrupt because of excessive debt incurred, board members may be held personally liable. Further, the articles of association of the company may have to be changed before it is able to grant security interests, as the company's purpose according to its articles of association must provide the basis for the granting of security interests and therefore need to contain a financial assistance clause.

6 How has the legal, regulatory and policy landscape changed during the past few years in your jurisdiction?

The regulatory environment in Switzerland is generally very investor friendly. To this day, there are no general foreign investment restrictions in Switzerland that would impose general notification obligations on foreign investors. In the beginning of 2018, a motion was submitted in the Swiss parliament, which aims to create a legal basis for the review of foreign direct investments by establishing an approval authority for transactions subject to investment control. In

2020, the motion was approved by the National Council, thus obliging the Swiss Federal Council to submit a preliminary draft law.

However, the introduction of an investment control is still uncertain as the Swiss Federal Council still opposes the enactment of a foreign direct investment control. The parliamentary deliberation process is expected to last until 2023.

Another influence on the regulatory landscape in Switzerland emanates from the EU's General Data Protection Regulation (GDPR), which came into force in May 2018. Even though Switzerland is not a member of the European Union, the GDPR has a major impact on various Swiss companies.

Due to the scope of the GDPR, which includes all companies that process personal data of EU data subjects (eg, employees) or organisations that monitor the (online) behaviour of EU data subjects (eg, customers), these guidelines apply to all companies located in Switzerland and operating in the European Union. In addition, Swiss companies are required by their European business partners to comply with the GDPR.

Partly in response to the GDPR and its implications, Switzerland is currently undergoing a total revision of the Federal Act on Data Protection of 19 June 1992 (FADP) and its accompanying Ordinance to the Federal Act on Data Protection of 14 June 1993 (DPO). The aim is to adapt the FADP to technological developments and to align it with the GDPR. The revision of the FADP is essential to ensure that the transfer of data between Switzerland and the EU can continue without further limitations. The new FADP and the associated Ordinance are scheduled to come into force on 1 September 2023, but the corresponding Federal Council resolution is still pending.

Furthermore, while special purpose acquisition companies (SPACs) are not a new concept (in particular, in the United States), the Directive on the Listing of SPACs of 18 October 2021 has been

"Partly in response to the GDPR and its implications, Switzerland is currently undergoing a total revision of the Federal Act on Data Protection of 19 June 1992."

implemented in Switzerland in December 2021, allowing SPACs to be listed on the SIX Swiss Exchange. Such 'blank-cheque companies' have therefore joined the Swiss 'investor' landscape. According to this directive, the de-SPAC must be completed within three years following the first trading day. While 2020 and 2021 were record years for SPACs in the US market, Switzerland joined the SPAC party late. On 15 December 2021, the first – and so far, only – SPAC in Switzerland was listed. Meanwhile, the hype in the rest of the world seems to be decreasing as the competition for good takeover candidates goes up, driving up multiples for sought-after assets. At the same time, US studies show that companies that went public through SPACs performed worse, accordingly dampening the trend. The general reception and success of that financial vehicle is yet to be explored.

The new equity segment 'Sparks' was announced mid-2021 by the SIX Swiss Exchange for SMEs and consequently approved by the Swiss Financial Market Supervisory Authority FINMA. Since October 2021, SMEs can now be listed on the SIX under simplified, SME-specific requirements to receive access to Swiss and international investors with extensive experience and capitalisation. The upside of Sparks also includes an increase in visibility by having to comply with the increased regulatory requirements (eg, ad hoc publicity, disclosure of significant shareholdings, financial reporting) as well as in liquidity through tradability of the shares. Until now, raising capital efficiently has been difficult for SMEs. By allowing SMEs to benefit from the advantages offered by SIX, the companies and investors have new opportunities to grow. The first company to list on Sparks was the Swiss portfolio company Xlife Sciences (February 2022), which specialises in the value development and commercialisation of promising early-stage research projects from universities and other research institutions in the healthcare sector. While Xlife Sciences had a stellar stock market debut, the success and demand for the new equity segment Sparks will depend on the response of market participants, especially banks and investors.


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On 19 June 2020, after more than a decade of preparatory work, the Swiss parliament finally passed a general reform of corporate law that amends the Swiss Code of Obligations (the Corporate Law Reform or Reform). This Reform will modernise corporate governance by strengthening shareholders' and minority shareholders' rights and promoting gender equality in boards of directors and in senior management.

Noteworthy changes include the possibility to file a liability claim by the general meeting on behalf of the company and thus the company itself, rather than the shareholders filing the claim, bears the associated costs. In addition, the time limit for filing an action by a shareholder who did not grant discharge and the catalogue of general meeting resolutions requiring a qualified quorum are extended. The lowering of thresholds to exercise the minority shareholder rights will be of particular importance for shareholders' agreements, which preferably must be adapted before the Reform comes into force.

Additionally, the Reform also replaces the provisions of the Ordinance against Excessive Compensation (Minder Ordinance), which is applicable to listed companies, with only a few changes. Objectives of the Corporate Law Reform are to make the capital rules more flexible, to facilitate the formation of companies and to revise the rules on corporate restructuring.

The revised Corporate Law also entails changes to the provisions of acquisition in kind and set-off of claims. While the provision on acquisition in kind is abolished, the provision on set-off of claims is burdened with new disclosure requirements in the articles of association and an increased quorum for resolutions by the general meeting of shareholders.

Moving forward, the board of directors of a Swiss company is obliged to monitor the liquidity of a company and to take measures to ensure solvency.

The Reform modernises the way general meetings can be held as it allows the general meeting to be held virtually or even abroad. Further, general meeting resolutions can be passed in writing or in electronic form, provided that no shareholder requests an oral discussion.

The revised company law will come into force on 1 January, 2023. From this date, companies will have two years to make the necessary changes to their articles of association and organisational regulations. We expect the impact of the Corporate Law reform on private M&A transactions to be limited.

> "As the political system in Switzerland is organised as a direct democracy, the Swiss voters are ultimately the policymakers."

7 What are the current attitudes towards private equity among policymakers and the public? Does shareholder activism play a significant role in your jurisdiction?

As the political system in Switzerland is organised as a direct democracy, the Swiss voters are ultimately the policymakers. Therefore, public opinion is often at the forefront of new regulations and laws. Public opinion in Switzerland in relation to large corporations – especially in the finance sector – has been fairly negative since the financial crisis. However, public opinion shifted back to a more pro-business approach but with a clear focus on corporate responsibility, as was shown by the initiative on corporate responsibility. The initiative on corporate responsibility was rejected in November 2020 because of the initiative's strict provisions. Due to the rejection, the counterproposal was approved and came into force on 1 January 2022. This new legislation, which aims to improve the protection of people and environment as well as provide transparency for investors on environmental social governance (ESG)-related topics

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in a more business-friendly way, will apply for the first time to the financial year beginning in 2023.

During the past years, we have seen a trend in Europe (and globally) that criteria of sustainability and environmental protection, as well as social and responsible corporate governance, are gaining in importance (criteria of ESG). The new ESG reporting provisions will apply to certain companies, depending on their size and importance.

Swiss companies that are of public interest will be required to prepare an annual and public ESG report covering non-financial matters. The obligation to prepare such a report applies primarily to listed companies and banks that, together with the domestic or foreign companies they control, have an annual average of at least 500 full-time positions in two consecutive years and exceed a balance sheet total of at least 20 million or sales revenue of 40 million Swiss francs. The report addresses non-financial matters such as the business model, the emerging environmental, employee and human rights risks, and the due diligence measures taken by the company to address ESG concerns.

Compared to companies of public interest, SMEs are not yet required to publish such an ESG report. However, all companies with their registered office, head office or principal place of business in Switzerland are also subject to additional due diligence requirements if they process or import certain minerals or metals originating from conflict or high-risk areas. Further affected are such companies that offer products or services for which there is a reasonable suspicion that they have been manufactured using child labour.

By introducing the new reporting requirements, Swiss companies will need to adapt to the changes in the political landscape. Swiss companies that are affected by the new provisions must implement appropriate control mechanisms and measures regarding their supply chains, as well as further precautions to ensure social and environmental governance. Should the trend of stricter ESG reporting continue – as can be seen in the EU – it is advisable for Swiss companies that are not yet subject to the legal regulations to develop and implement ESG concepts at an early stage.

The topic of ESG is rapidly becoming front of mind for investors, customers and employees, and rising to the top of corporate agendas. Energy and natural resources companies are especially focused on ESG deals. Many market participants view a well-devised corporate ESG strategy as a positive indicator for growth. The increased importance of ESG for investors has also had an impact on the legal industry, as clients require advisers to perform due diligence on a target's ESG policies and assess ESG risks.

While the number of campaigns by activist shareholders in Switzerland is still relatively low compared to the United States, for example, activist shareholders also played an important role in the recent past and shareholder activism has risen significantly in recent years. This trend can be expected to advance, as activist shareholders

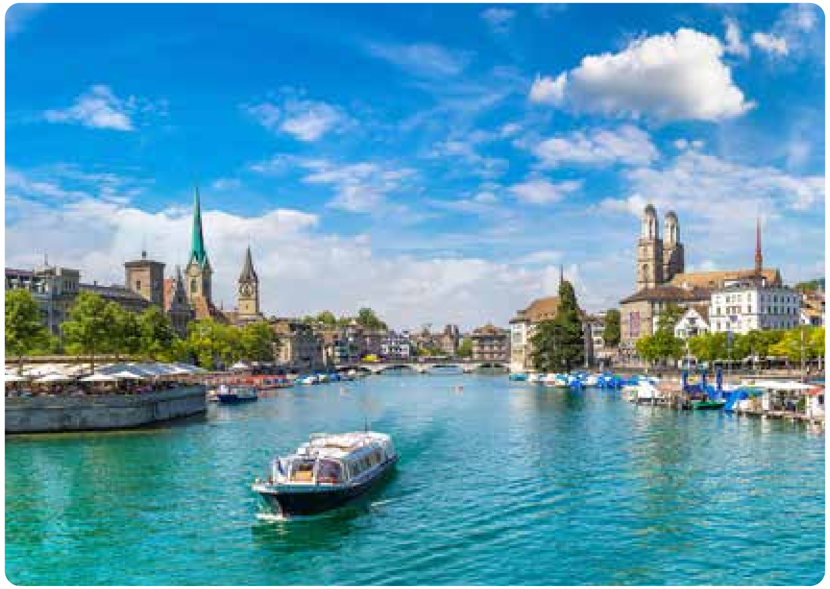
“Exits through an IPO on SIX Swiss Exchange (or a foreign stock exchange) are still less common but have become more attractive recently.”

are becoming more sophisticated and better funded. In 2020, a group of shareholders around Veraison Capital AG, a Swiss activist shareholder, and Cobas Asset Management, a Spanish investor, pushed at an extraordinary general meeting aiming to replace five of the board members, including the CEO of ARYZTA AG. As a result, two board members resigned voluntarily and the chairman of the board held out the prospect of his resignation.

8 What levels of exit activity have you been seeing? Which exit route is the most common? Which exits have caught your eye recently, and why?

The conditions under which a private equity investor can exit its investment depend very much on the terms of the shareholders' agreement (if the private equity investor is invested in a target jointly with another party). Contractual arrangements regarding transfer restrictions and exit rights are specifically decisive. In particular, the right to force other shareholders to a sale (drag-along) or to unilaterally request an initial public offering (IPO) can facilitate the exit of the private equity investor. Ultimately, the terms agreed upon are a direct reflection of the parties' negotiation leverage. The most prominent exit routes are certainly trade sales and sales to other private equity investors.

Exits through an IPO on SIX Swiss Exchange (or a foreign stock exchange) are still less common but have become more attractive recently. We are also observing a trend towards dual-track processes to increase deal certainty, specifically in times of volatile and unpredictable markets, and maximise valuation, despite the inherent complexity in running simultaneous IPO and M&A processes.



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9 Looking at funds and fundraising, does the market currently favour investors or sponsors? What are fundraising levels like now relative to the past few years?

Interest of foreign sponsors to market their products to Swiss investors remains high, with Switzerland providing for an attractive investor demographic (including pension funds, but also many family offices and high net worth individuals).

Because interests in (foreign) private equity funds typically qualify as collective investment schemes under Swiss law (in particular, the Collective Investment Schemes Act (CISA) and its implementing ordinances), fundraising in Switzerland is subject to compliance with the relevant rules, which in particular affect the scope and framework within which private placements can be conducted. The CISA has been substantially revised in the wake of new Swiss financial services legislation under the FinSA that entered into force on 1 January 2020, subject to a phasing-in period of two years, which ended on 31 December 2022. Essentially, under the revised regime, the CISA has been relegated to the specification of fund and product-level requirements. Separately, any point-of-sale duties in connection with the offering of collective investment schemes in Switzerland are now governed by the FinSA.

The revision of the CISA abolished the former concept under which both product-level requirements and point-of-sale duties were linked to a broad notion of distribution of a collective investment scheme with very limited exceptions, limiting the possibilities of foreign private equity funds to raise funds in Switzerland without triggering regulatory requirements. The current regime is more closely integrated into general financial instruments regulation and enables the offering of foreign investment funds to a broader audience of 'per se' qualified investors without having to seek approval of the fund by the Swiss regulator FINMA and without having to appoint a Swiss paying agent and representative. This category of qualified investors includes, for instance, regulated financial institutions and insurance companies, but also large corporates, occupational pension schemes and other companies or investment structures with professional treasury operations. In addition, also individuals that have in place a long-term investment management or advisory agreement with a prudentially regulated, foreign or domestic, financial intermediary are considered 'per se' qualified investors and can be approached indirectly through such financial intermediary. The new regime thus extends the potential scope of and facilitates fundraising activities of sponsors in Switzerland. That said, if the sponsor intends to offer fund interests also to high net worth individuals who have to elect to be treated as professional clients and qualified investors (ie, not per se qualified investors), the appointment of a Swiss representative and paying agent for the fund is still required.

Furthermore, the licence requirement for (domestic) distributors of collective investment schemes was abolished with the revised CISA. However, instead, activities in or into Switzerland aiming at the purchase of fund interests by Swiss investors (which may in certain cases also include marketing activities in the context of road shows) may qualify as a financial service under the FinSA, triggering point-of-sale duties and other requirements under Swiss law even if conducted on a cross-border basis from abroad into Switzerland. Private equity fund houses might therefore still prefer to use specialised placement agents to market to Swiss investors and ensure compliance with the FinSA. The main duties of financial services providers under the FinSA are (1) registration requirement for client advisers (an exemption applies to client advisers of foreign financial service providers subject to prudential supervision in their home jurisdiction if they exclusively provide financial services to professional or institutional clients in the meaning of the FinSA); (2) requirement to conduct a client segmentation (which is, in any case, a necessity to ascertain qualified investor status under the CISA); (3) rules of conduct and information duties at the point of sale (subject to exemption or waiver in the case of professional or institutional clients); (4) organisational rules including rules on conflicts of interests and disclosure of third-party remunerations; (5) duty to label marketing materials and ensure they are in line with the formal offering documentation; and (6) duty to join a Swiss ombudsman's office to act as a mediator of first instance in case of a dispute (an exemption applies if only professional or institutional clients are approached).

10 Talk us through a typical fundraising. What are the timelines, structures and the key contractual points? What are the most significant legal issues specific to your jurisdiction?

In Switzerland, private equity funds typically seek to raise capital in private placements of interests in accordance with exemptions from the CISA approval requirement with regard to the fund. While the new concept of 'offering' under the Federal Act on Financial Services of 15 June 2018 (FinSA) that has replaced the CISA concept of 'distribution' is narrower, regulatory requirements may already be triggered by mere marketing activities, which is why careful consideration of the investors to be approached and the methods used is required at an early stage. Marketing materials must be labelled as such and their content must conform to the prospectus, private placement memorandum or other documents of the fund. Furthermore, care needs to be taken to only make such materials available to eligible investors (including by way of access restrictions to websites, if required).

> "Generally, private equity fundraising is affected through one-on-one presentations by general partners to investors."

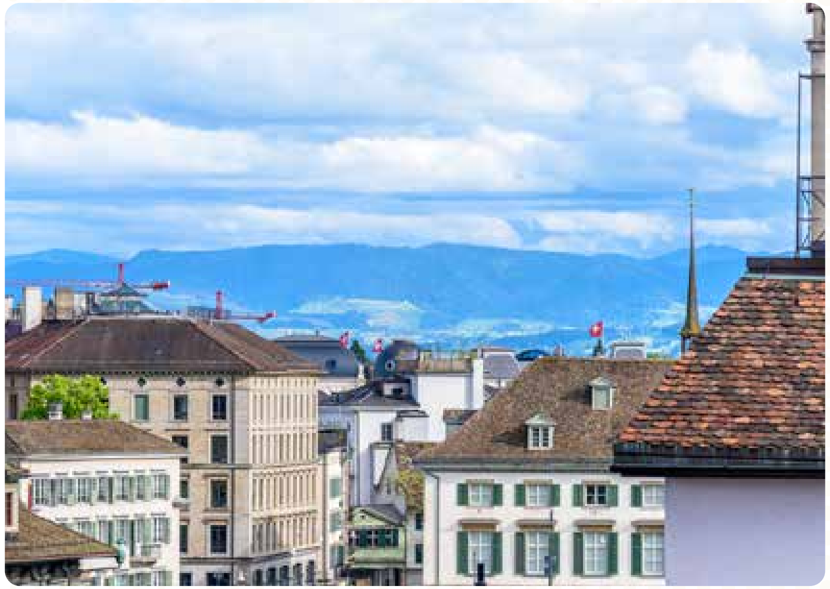
Generally speaking, private equity fundraising is affected through one-on-one presentations by general partners to investors, often set up by specialised placement agents. These presentations typically involve the distribution of a private placement memorandum or other marketing documents. Although it is not a requirement under Swiss law, it is advisable and considered best practice to include specific Swiss disclaimer and selling restriction language in all offering or marketing materials. In any case, legal advice should be sought from local counsel before any Swiss investors are contacted. Furthermore, fundraising, even if limited to qualified investors, is subject to certain legal and regulatory requirements, some of which are outlined in question 9. Although Switzerland does not know a concept of pre-marketing, certain limited sounding activities may be permissible in the concept stage of a new fund.

11 How closely are private equity sponsors supervised in your jurisdiction? Does this supervision impact the day-to-day business?

Under the FinSA and Federal Act on Financial Institutions of 15 June 2018 (FinIA) regime, there is no longer a distributor licence, meaning that distribution of funds is no longer an activity subject to a licence requirement in Switzerland. However, the offering of fund interests to investors in Switzerland, even on a cross-border basis, in many cases qualifies as a financial service in the sense of the FinSA, requiring the persons and entities engaged in the fundraising process to comply with the various duties set out in the FinSA (see question 9). Furthermore, in particular, Swiss fund management companies as well as investment managers of collective investment schemes are subject to a licence requirement and ongoing prudential supervision by FINMA, requiring compliance with organisational and capital requirements as well as fit-and-proper requirements for the members of senior management and supervisory boards as well as major shareholders.

12 What effect has the AIFMD had on fundraising in your jurisdiction?

Switzerland is not a member state of the European Union, nor part of the European Economic Area, and therefore has no obligation to



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implement the AIFMD. However, certain EU directives have had a significant impact on Switzerland. Swiss domestic laws, in particular in the financial sector, are often modelled to some extent on foreign regulation. Furthermore, AIFMD and its implementation in the various EU member states also has an impact on the prerequisites for Swiss investment managers to be able to manage portfolios of foreign or EU funds. At the local Swiss level, investment managers of collective investment schemes are subject to a licence requirement under the FinIA and to ongoing prudential supervision by FINMA. This applies also to investment managers in Switzerland that intend to act as delegated portfolio managers for foreign funds. In line with AIFMD, there are simplifications for Swiss-based investment managers if the total assets of the funds they manage do not exceed 100 million Swiss francs (including assets acquired using leveraged finance) or 500 million Swiss francs (if they do not include leveraged financial instruments), respectively, and if all investors in the funds are qualified investors in the meaning of the CISA (de minimis rule). De minimis fund managers are exempt from the licensing requirement

"Switzerland has no tax consolidation for income tax purposes and dividend income from subsidiaries is virtually tax exempt for a Swiss company."

as a manager of collective assets but are required to obtain a FINMA licence as portfolio manager under the FinIA, with ongoing supervision by a private supervisory organisation (and subject to transitional periods of the FinIA, the last of which will expire at the end of 2022, depending on when the activity is started).

The AIFMD is currently undergoing a review to strengthen the rules and complete the EU's internal market and financial stability. The new AIFMD II is not expected to be a radical reform but rather entail changes to topics such as delegation of portfolio management to entities outside the EU and increased reporting requirements for fund managers. The revised directive will also focus on liquidity as liquidity management is of particular importance for the European regulator and the European Securities and Markets Authority (ESMA). The final revised directive will probably be published in early 2023 and come into effect from the end of 2024 (with an implementation period of 24 months). The impact on Switzerland and Swiss domiciled funds is expected to be limited.

13 What are the major tax issues that private equity faces in your jurisdiction? How is carried interest taxed? Do you see the current treatment potentially changing in the near future?

Major tax issues include limitations on the acceptance of debt push-downs, rules regarding indirect partial liquidation for acquisitions of shares from Swiss resident individuals, rules in relation to management participation and potential tax consequences of non-compete undertakings and earn-out or deferred payment provisions in the context of transactions. Switzerland has no tax consolidation for income tax purposes and dividend income from subsidiaries is virtually tax exempt for a Swiss company. The consolidation of financing expenses of a Swiss acquisition company with the operating profits of a Swiss target company can generally be achieved by merging these companies (debt push-down). Mergers in Switzerland may generally be conducted in a tax-neutral way if the tax liability remains in Switzerland, and the assets and liabilities are transferred at their (tax) book value. However, based on the tax-avoidance doctrine, Swiss tax authorities often deny, during a five-year period following a merger, the tax-effective deduction of interest against the target's taxable income upon a merger of a pure acquisition vehicle with the target where the acquisition vehicle could not have used the interest deduction itself due to the lack of taxable income. As a consequence of this practice, alternative debt push-down strategies, such as cascade purchases, leveraged dividends and equity to debt swaps, can be an option to secure (at least partially) tax-effective deduction of interest. As a Swiss particularity, indirect partial liquidation taxation generally applies in the event that Swiss resident individuals sell at least 20 per cent shares in a Swiss or foreign company held as private assets to an acquirer holding the shares as business assets if the target company has distributable reserves and non-business required assets at the time of the transfer, and such assets are distributed within five years of the share transfer.

If an indirect partial liquidation event is triggered, the sale proceeds are reclassified from tax-free capital gains into taxable dividend income in the hands of the individual selling shareholder to the extent that the target company distributes its non-business required substance existing at the time of the sale to the acquirer. In principle, any distribution out of distributable reserves existing at closing (ordinary or construed dividends, including merger proceeds) caused by the buyer (generally during the first five years after the disposal) is considered harmful if, and to the extent that, the target group had non-operating assets at the time of disposal. Although such income tax arises with the seller, it typically results in a liability for the buyer as the seller will ask for an indemnity in the sales and purchase agreement in case the buyer triggers such an indirect partial liquidation event post-closing.

The Swiss tax provisions on employee participations, together with the corresponding circular letter by the Swiss federal tax authority, provide a legal basis for the taxation of financial benefits derived from employee participations. It regulates, inter alia, the taxation value of employee shares, the taxation point of employee stock options and the treatment of artificial employee participations, which do not provide for an allocation of ownership rights. Management participation programmes generally aim to obtain tax-exempt capital gains for the Swiss resident managers upon exit. However, depending on the individual terms, (part of) the income may qualify as fully taxable employment income, generally also subject to social security charges for the employing entity (ie, the target). The cantonal tax practices on the taxation of management participations vary and it is therefore recommended to obtain certainty in an advance tax ruling. There is no special taxation rate applicable to carried interest in Switzerland: Swiss resident managers can generally only benefit to a certain extent from a tax-exempt capital gains or privileged dividend income if they hold at least 10 per cent of the shares, provided that no part of the carried interest is deemed employment income. The taxation of such

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privileged dividends currently ranges between about 15 per cent and 30 per cent, depending on the domicile in Switzerland.

In the past few years, the Swiss tax authorities have been stricter regarding the taxation of deemed considerations for earn-out proceeds of private sellers of shares. In short, if a person sells their shares in a company, the capital gains is considered tax-free capital gains. Nevertheless, if in connection with such a sale the person enters into an earn-out agreement where the earn-out is dependent on the continuation of the employment activity of the seller, the Swiss tax authorities may requalify part of the sales proceeds into income subject to income tax. A qualification of income as employment income generally also triggers social security contributions (currently about 14 per cent in total for employee and employer). Swiss individual sellers often opt for a share deal to ensure their tax-free capital gains, often leading to restrictions for the buyer under the indirect partial liquidation clause in the sale and purchase agreement. Regarding a future exit, the IPO of a Swiss target is an interesting option in the current environment, in particular since capital contribution reserves of a Swiss target may be repaid without being subject to Swiss withholding tax (and income tax for Swiss individuals as shareholders), with certain limitations for Swiss listed companies. For trade sales, it is important to ensure that the seller of the Swiss target benefits from a full dividend withholding tax exemption under a double tax treaty with Switzerland, since otherwise a latent dividend withholding tax burden may be inherited by a buyer (and deducted from the purchase price). The latter topic is particularly relevant for private equity funds, if the full withholding tax refund entitlement of an intermediate holding company, for example, in Luxembourg, is not achieved. Based on an anti-abuse practice introduced by the Swiss federal tax administration, withholding tax may also apply to dividends from the Swiss target to a Swiss acquisition company (extended international transposition) if the Swiss acquisition company is held by the fund directly or a shareholder not benefiting from a full withholding tax entitlement. It is important to clarify this point, for example, by providing economic reasons for the structure in an advance tax ruling.

14 Looking ahead, what can we expect? What might be the main themes in the next 12 months for private equity deal activity and fundraising?

While the covid-19 pandemic had a negative impact on certain economic sectors and citizens' social life, M&A activity in Switzerland experienced an unexpectedly fast recovery after the first lockdown in 2020 and M&A deal activity developed positively in 2021 as market participants adapted quickly to the new environment (eg, fewer physical and more virtual meetings, and remote signings and closings). M&A deal activity saw a record year in 2021 regarding deal count: 604, as opposed to 363 deals in 2020. M&A deal flow and volume were particularly high in the TMT, industrial markets, and pharmaceuticals and life sciences sectors. We expect the TMT, consumer goods and healthcare sectors to experience an ongoing popularity in 2022 for outbound transactions, and as for inbound transactions, increasing deal activity in the TMT, consumer goods and industrial sectors is expected. The phasing-in of the regulations under the FinIA could lead to increased M&A activity in the financial sector, especially in the asset and wealth management sector. We expect companies to increasingly divest certain assets, divisions or subsidiaries by spin-offs, split-offs and carve-outs. Henceforth, more specialist companies will be traded on the M&A market.

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QUESTIONS

The Inside Track

What is the most interesting dispute you have worked on recently and why?

Switzerland's stable political system, globally oriented and liberal economy, highly skilled workforce and efficient legal environment as well as traditionally mild tax regime and relatively low bureaucracy create an excellent environment not only for private equity, but also as a business environment in general. In general, private transactions in Switzerland are not extensively regulated and the parties have great flexibility to determine the transaction structure as well as the contractual framework.

The (still) low interest rate as well as availability of financing certainly also make Switzerland attractive for private equity investors looking to leverage their investments.

What do you consider to have been the most significant legal development or change in your jurisdiction of the past 10 years?

Competence, deal experience, accessibility and pragmatism are certainly the most crucial factors for successfully completing complex private equity transactions.

What key changes do you foresee in relation to dispute resolution in the near future arising out of technological changes?

Every deal, of course, raises interesting and unique questions. At the beginning of 2022 we were challenged by newly implemented foreign direct investment legislation, setting a closing on hold for quite some time.