Market Intelligence

PRIVATE EQUITY 2020

Global interview panel led by Simpson Thacher & Bartlett

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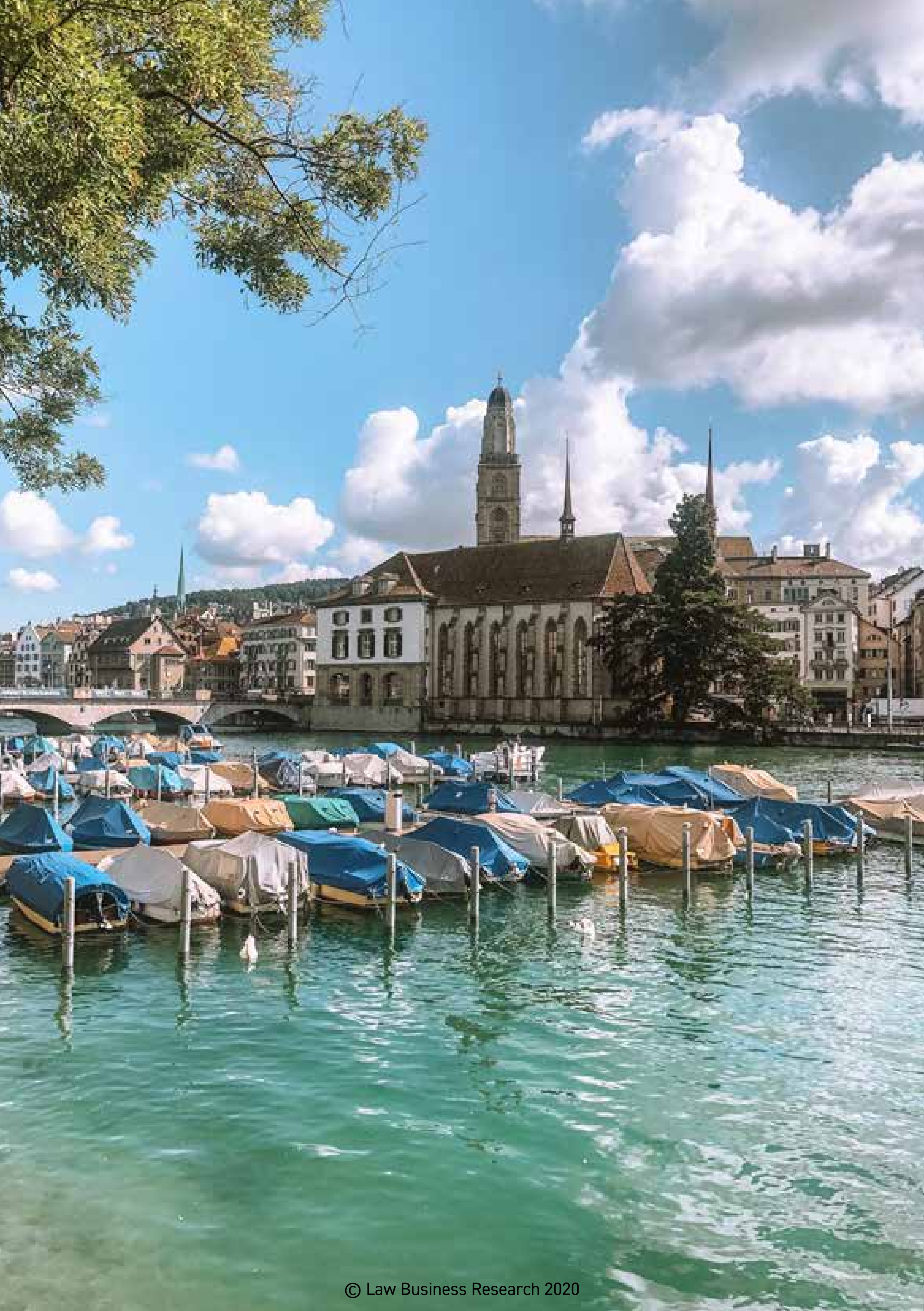
Private Equity 2020



Switzerland

Christoph Neeracher 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. He is experienced in a broad range of national and international transactions, both sell and buy side (including corporate auction processes), and in assisting clients in their ongoing corporate and commercial activities. Additionally, he represents clients in litigation proceedings relating to his specialisation.

Philippe Seiler has broad experience in M&A transactions in various industries (inter alia, manufacturing and engineering, IT, watch, real estate and logistics). In addition to large-scale transactions and takeovers, he focuses on small and medium-sized M&A transactions, private equity transactions, management buyouts and outsourcing projects. Furthermore, he specialises in regulatory matters in the fields of life sciences and healthcare.

Raphael Annasohn has broad experience in international and domestic M&A transactions in various industries focusing on 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.

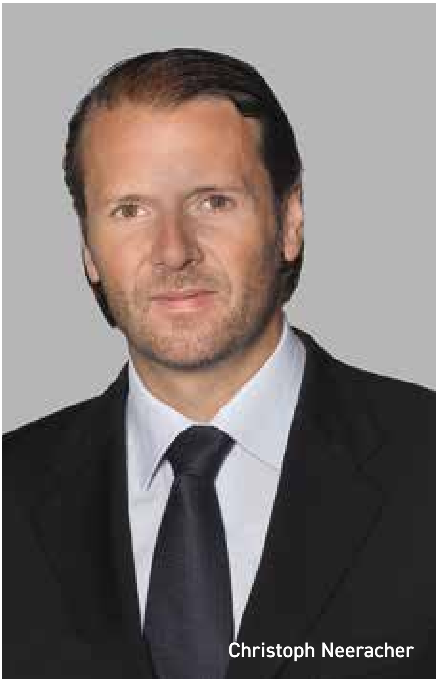
1 What trends are you seeing in overall activity levels for private equity buyouts and investments in your jurisdiction during the past year or so?

After all-time record deal volumes in 2018 and still high M&A deal flow and volume in 2019, deal activity in Switzerland declined in the first six months of 2020 due to the covid-19 pandemic and is down by approximately 25 per cent on a year-on-year comparison (72 transactions in the first half of 2020 compared to 95 transactions in the first half of 2019). Furthermore, due to the related uncertainties, several transactions were postponed or suspended and private equity firms had to react and implement measures in their portfolio companies, some of which were heavily affected by the covid-19 pandemic and the resulting lockdown in Switzerland.

However, despite all the uncertainties, Swiss small to medium-sized enterprises (SMEs) remained attractive targets for investors in the first half of 2020, especially for European buyers (72 per cent compared to the remainder being primarily North American buyers). We expect private equity investors to continue to be quite active in Switzerland in the second half of 2020, with a focus on SMEs in the industrial and technology, media, and telecoms (TMT) sector (approximately 80,000 SMEs in Switzerland need to deal with succession planning in the coming years). Already H1 of 2020 saw a high level of involvement of private equity investors in Switzerland, with financial investors being active as buyer or seller in approximately 40 per cent of the deals.

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 the past few years, we have seen many transactions where a seller wishes to keep a certain minority stake in the target company (which may be a result of the low interest rates and the overall positive market environment). 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

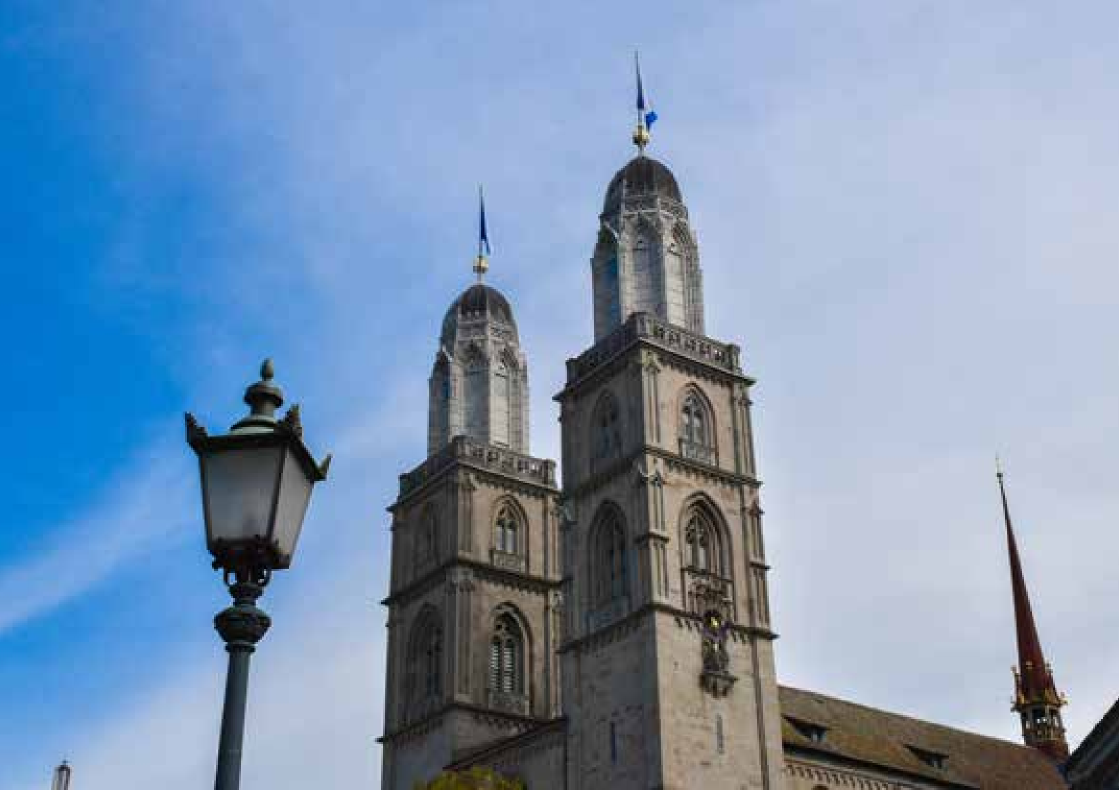


Christoph Neeracher

Philippe Seiler

Raphael Annasohn

"Swiss SMEs remained attractive targets for investors in the first half of 2020."



equity investments were syndicated (eg, the acquisition of Nestle Skin Health by a consortium led by Swedish private equity investor EQT). 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 therefore driving portfolio company activity in Switzerland.

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

Nestle SA's sale of Nestle Skin Health SA to a consortium led by EQT for US$10.2 billion marked the largest Swiss private M&A transaction in 2019 and the second largest of 2019 overall (surpassed only by the spin-off of Novartis AG's subsidiary Alcon Inc and listing of the shares on the SIX Swiss Exchange and

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the New York Stock Exchange, which boasted a transaction value of US$31 billion). Other big-ticket Swiss equity transactions in 2019 include RRJ Capital's acquisition of gategroup Holding AG from HNA Group Co, Ltd, valued at US$2.8 billion, and Sika AG's acquisition of Parex Group SA from CVC Capital Partners Limited, with a deal value in excess of US$2.5 billion.

In late 2019, the most noteworthy purely Swiss transactions were the sale of the Swiss broadcasting group 3 Plus Group to CH Media, one of the largest media companies in Switzerland, as well as the acquisition of the Tertianum group, a market leader for elderly care and assisted living in Switzerland, from Swiss Prime Site to Swiss investment firm Capvis. The 3 Plus Group deal can be seen as an example for the high activity in the TMT sector and the consolidation wave.

Notable private M&A deals in the first half of 2020 include:

- the sale of department store operator Magazine zum Globus AG, along with associated prime real estate properties by Migros-Genossenschafts-Bund, to a joint venture of SIGNA and CENTRAL Group;
- the investment of a 25 per cent stake in Ringier AG by La Mobilière; and
- the sale of Swissbit, a leading Swiss based manufacturer of secure, high-quality storage and embedded internet of things solutions, to private equity investor Ardian amid the covid-19 pandemic.

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 so far has refused to introduce investment 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 has to take place between different law firms that are disperse 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.

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?

Due to ongoing negative interest rates, banks are more inclined towards financing transactions and financing conditions remain favourable for funding investments in Swiss companies. This is the reason why there often was an oversupply of interested investors prior to the covid-19 pandemic. Bidders looking to invest are very flexible with regard to transaction financing, as 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 capitalization rules).

Securing bank financing can be challenging, as banks are still cautious and require specific collaterals when lending funds to borrowers. However, with the current (partially still negative) interest rates, banks have become 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 and 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 shareholders' approval in addition to the board of directors, structured financial planning is very important. In fact, this planning is a responsibility of the board which cannot be delegated. Should the company go bankrupt because of excessive debt incurred, personal liability of the board members is possible.

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, needs to contain a financial assistance clause.

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

In recent years, financial regulation has increasingly become a central strategic dimension. The complexity of the regulatory environment – and thus the requirements and costs for the market participants – is growing. Even if Switzerland is not

"New laws were created with the goal of enhancing customer protection in the financial sector."

a member of the European Union, the European directives and regulations still have an important impact on Swiss policymaking.

Two new federal acts entered into force on 1 January 2020, the Federal Act on Financial Services of 15 June 2018 (FinSA) and the Federal Act on Financial Institutions of 15 June 2018 (FinIA), subject to a phasing-in period of up to two years. The new laws were created with the goal of enhancing customer protection in the financial sector, with the FinSA in particular being modelled to a significant extent on the EU Markets in Financial Instruments Directive, I and II (albeit with various differences).

The FinSA also introduced a new prospectus regime for public offerings of securities in Switzerland (including public offerings in Switzerland by foreign issuers). It sets out the required content of prospectuses, bringing the requirements in line with international standards and those historically applied by the SIX Swiss Exchange for listing prospectuses under the old regime and replaces the outdated rules of the Swiss Code of Obligations, which only required very limited disclosure. The new regime also includes a duty to have the prospectus reviewed for completeness, coherence and comprehensibility by a private reviewing body authorised by the Swiss Financial Market Supervisory Authority (FINMA) to act in this capacity. On 28 May 2020, FINMA published a media release to inform market participants that it had granted to the SIX Exchange Regulation AG and BX Swiss AG licences as prospectus-reviewing bodies, effective 1 June 2020.

The duty to publish a FinSA-approved prospectus will take effect as of 1 December 2020. Given the new rules, if, for instance, in the context of a public tender, securities are offered as consideration in Switzerland, it should be reviewed whether such offer might trigger the FinSA prospectus requirement and, if yes, whether an exemption is available. The FinSA provides for several exemptions from the duty to publish a prospectus requirement, including, with respect to takeover situations, if information that is equivalent to that contained in an issuance prospectus is otherwise available.

Another example of EU regulations affecting the regulatory landscape in Switzerland is the General Data Protection Regulation (GDPR). Even though Switzerland is not a member of the European Union, the guidelines are directly applicable to all Swiss-based companies doing business in the EU, as the scope includes all businesses processing personal data of EU data subjects (eg, employees), or organisations that monitor the online behaviour of EU data subjects (eg, customers). In addition, EU companies are asking its Swiss business partners to be GDPR compliant. Therefore, the GDPR has a major impact on numerous Swiss-based companies.

In June 2019, the Swiss parliament passed the Federal Act on the implementation of the recommendations of the Global Forum on Transparency and Exchange of Information for Tax Purposes. This act is a step towards increasing transparency and preventing money laundering and tax evasion in relation to the legal and beneficial ownership of shares in Swiss legal entities, and marks the continuation of implementations of the Financial Action Task Force's recommendations.

The key duty, stated in article 697(j) of the Swiss Code of Obligations, refers to any person that, by themselves or acting in concert, acquires 25 per cent or more in the share capital or voting rights of a non-listed Swiss company having to disclose to the beneficial owner of this position to the company. If the person acquiring the 25 per cent stake is a legal entity, its beneficial owner is defined, under the new law, as the individual exercising control by analogy with the consolidation rules under Swiss statutory accounting rules. In this context, an individual is considered to control a legal entity if they:

- hold, directly or indirectly, a majority of votes in the ultimate management body;
- directly or indirectly have the right to appoint or remove a majority of the members of the supreme management or administrative body; or
- are able to exercise a controlling influence based on the articles of association, a contract or comparable instrument.

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If there is no such individual, the person acquiring the 25 per cent stake is required to make a negative declaration to the company.

To ensure effective compliance with the transparency obligations and the associated record-keeping duties, criminal sanctions apply to relevant violations under the Swiss Criminal Code, in addition to the corporate law effects of failing to comply with disclosure duties (in particular suspension of voting and dividend rights).

In practice, with regard to standard private equity structures where, typically, the general partner takes the relevant decisions regarding the fund and its portfolio companies, the individuals controlling the general partner (respectively controlling the ultimate shareholder of the general partner) should be disclosed as beneficial owners. If such individuals cannot be determined, a negative declaration should be submitted to the company.

On 19 June 2020, after some 13 years of preparatory work, the Swiss parliament finally approved a general corporate law reform amending the Swiss Code of Obligations (Corporate Law Reform). The Corporate Law Reform seeks to modernise corporate governance by strengthening shareholders' and minority shareholders' rights, and promoting gender equality in boards of directors and in

"It seems that public opinion is again shifting back to a more pro-business approach but with a clear focus on corporate responsibility."

senior management. It also replaces the provisions of the Ordinance on Excessive Compensation that is applicable to listed companies, with only a few changes.

Furthermore, the Corporate Law Reform aims to facilitate company formation, makes capital rules more flexible and revises the rules on corporate restructurings. Pursuant to this revision, the board of directors is required to monitor a company's liquidity and is further obligated to take measures to ensure solvency.

Beyond this, the revision modernises the way general meeting of shareholders may be conducted as it allows for the holding of virtual meetings that may also take place abroad and universal meetings can also be held in written or electronic form. Finally, it introduces certain disclosure requirements for commodity firms (report of payments made to public authorities).

The effective date of the Corporate Law Reform has not yet been determined, but we expect that the Corporate Law Reform will enter into force in 2022 (unless submitted to a vote of the Swiss people as a result of an optional referendum). After coming into force, companies have two years to make any necessary amendments to their articles of associations and organisational regulations.

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 in 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 after the financial crisis. However, it seems that public opinion is again shifting back to a more pro-business approach but with a clear focus on corporate responsibility (as shown by the popular initiative on corporate responsibility, the vote of which is likely to be scheduled in November 2020).

Public opinion in Switzerland is generally also positive towards foreign investors – which has been shown in past years by the sale of various companies to Chinese buyers as well as the high level of cross-border transactions. As a consequence, there is no regulatory framework specifically targeted at such transactions. Even though some politicians favour investment restrictions for critical infrastructure in Switzerland (for example, in power supply, oil supply, natural gas supply and district and process heat), no such restrictions are currently in force nor being planned by the Swiss government.

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 2019 and shareholder activism has risen significantly in recent years. ABB Ltd's CEO, Ulrich Spiesshofer, stepped down in 2019 after almost six years and following years of pressure from investors (in particular from activist shareholder Cevian Capital who supposedly pushed the sale of ABB's power grid division to Hitachi Ltd).

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 has the ability to 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 the SIX Swiss Exchange (or a foreign stock exchange) are still less common but became more attractive in the recent past. 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.

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?

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 and FinIA that entered into force on 1 January 2020 and has essentially been relegated to the specification of fund or 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. Broadly speaking, the revised CISA and FinSA regime is subject to transitional

rules, under which the new regulatory duties are phased-in over a period of up to two years.

The revision of the CISA abolishes the former concept of both product-level requirements and point-of-sale duties being linked to the broad notion of 'distribution' of a collective investment scheme with very limited exceptions, limiting the possibilities of foreign private equity funds raising 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 'per se' qualified investors (including, 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) without having to seek approval of the fund by FINMA and without having to appoint a Swiss paying agent and representative. 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 elected to be treated as professional clients

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and qualified investors (ie, not 'per se' qualified investors), the appointment of a Swiss representative and paying agent for the fund is still required.

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' triggering point-of-sale duties and other requirements under the FinSA, even if conducted on a cross-border basis from abroad into Switzerland. The main duties of financial service providers under the FinSA are:

- a 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 under the meaning of the FinSA);
- a requirement to conduct client segmentation;
- rules of conduct at the point-of-sale, such as information duties, suitability and appropriateness checks (again subject to exemption or waiver in the case of professional or institutional clients);
- organisational rules, including rules on conflicts of interest and third-party remunerations; and
- duty to join an ombudsman's office.

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 FinSA, which 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. Marketing materials have to be marked 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, among others).

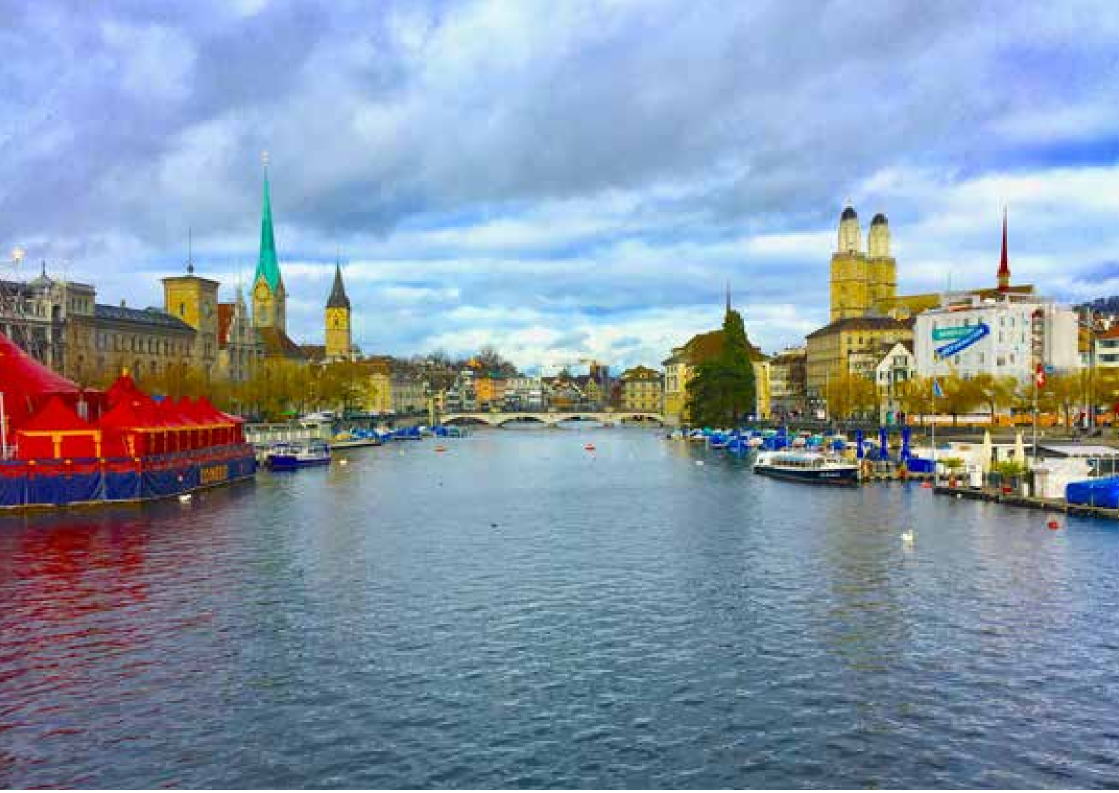
Generally speaking, private equity fundraising is effected by one-on-one presentations by general partners to investors, often set up by specialised placement agents. These presentations typically involve the distribution of a private placement

> "The distribution of funds is no longer an activity subject to a licence requirement in Switzerland."

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 language in all offering or marketing material, and legal advice should be sought from local counsel before any investor is contacted. Furthermore, fund-raising, even if limited to qualified investors, is subject to certain legal and regulatory requirements, some of which are outlined in the answer to question 9.

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

Under the new FinSA and FinIA regime, there is no longer a distributor licence, meaning that the 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 answer to question 9). In particular, fund management companies and 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 of the European Union and therefore has no obligation to implement the AIFMD. However, certain EU directives have a significant impact on Switzerland as Swiss domestic laws, in particular in the financial sector, are often modelled to some extent on them. Furthermore, the 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 and EU funds.

At the local Swiss level, investment managers of collective investment schemes are subject to a licence requirement under the new FinIA and to ongoing prudential supervision by FINMA. This applies also to investment managers in Switzerland that

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intend to act as delegated portfolio managers for foreign funds. In line with the 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 through the use of leveraged finance) or 500 million 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 requirements 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 depending on when the activity is started).

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, and if the target company has distributable reserves and non-business required assets at the time of the transfer and that such assets are distributed within five years of the share transfer. If an indirect partial liquidation event is triggered, the sale proceeds is reclassified from tax-free capital gain 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 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 a tax exempt capital gain for the Swiss resident managers upon exit. However, depending on the individual terms, (part of) the income may qualify as fully taxable employment income and be generally subject to social security charges for the employing entity (ie, the target). The cantonal tax practices on the taxation of management participations vary significantly 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 gain or privileged dividend income if they hold at least 10 per cent shares, provided that no part of the carried interest is deemed employment income. The taxation of such privileged dividends currently ranges between about 1 per cent and 30 per cent, depending on the domicile in Switzerland.

Recently, 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 his or her shares in a company, the capital gain is considered as tax-free capital gain. 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

> "Recently, Swiss tax authorities have been stricter regarding the taxation of deemed considerations for earn-out proceeds of private sellers of shares."

contributions (currently about 12 per cent in total for employee and employer). Swiss individual sellers often opt for a share deal to ensure their tax-free capital gain, often leading to restrictions for the buyer under the indirect partial liquidation clause in the share 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 is in particular relevant for private equity funds, since the full withholding tax refund entitlement of intermediate holding companies (eg, in Luxembourg) is increasingly scrutinised by the Swiss federal tax administration. Based on a recent 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 (eg, 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?

The first half of 2020 shows that the M&A business on the Swiss market decreased by roughly a quarter compared to the same period of 2019. This slow-down was primarily caused by the covid-19 pandemic and due to the related uncertainties several transactions were postponed or suspended. Furthermore, private equity firms had to react and implement measures in their portfolio companies, some of which were heavily affected by the covid-19 pandemic and the resulting lockdown in Switzerland. However, looking at the activity of private equity investors in the first half of 2020 (financial investors were involved in approximately 40 per cent of the deals) we are fairly optimistic to see a higher level of private equity activity in the first half of 2020 as private equity investors are still facing high pressure to invest and can (still) benefit from low interest rates. This is, of course, all conditional upon the covid-19 pandemic not worsening again and thereby creating even more uncertainty, and banks not becoming less accommodating in financing transactions due to the covid-19 pandemic.

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The Inside Track

What factors make private equity practice in your jurisdiction unique?

Switzerland's stable political system, globally oriented and liberal economy, highly skilled workforce and efficient legal environment as well as a 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.

What should a client consider when choosing counsel for a complex private equity transaction in your jurisdiction?

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

What interesting or unusual issues have you come across in recent matters?

Every deal raises interesting and unique questions. A very interesting and challenging deal we worked on in the past couple of months was the sale of Magazine zum Globus AG (MzG), along with associated prime real estate properties, to a joint venture of Signa and Central Group right before the outbreak of the covid-19 pandemic. As MzG and the department stores operated by MzG was heavily affected by the lockdown in Switzerland the deal raised complex questions that needed to be handled.

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