Private Equity

Contributing editor
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GETTING THE DEAL THROUGH

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Preface

Private Equity 2019

Fifteenth edition

Getting the Deal Through is delighted to publish the fifteenth edition of *Private Equity*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the British Virgin Islands, Canada, Colombia, Egypt and Thailand. The report is divided into two sections: the first deals with fund formation in 22 jurisdictions and the second deals with transactions in 23 jurisdictions.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Bill Curbow of Simpson Thacher & Bartlett LLP, for his continued assistance with this volume

GETTING THE
DEAL THROUGH

London
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Switzerland

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Lenz & Staehelin

1 Types of private equity transactions

What different types of private equity transactions occur in your jurisdiction? What structures are commonly used in private equity investments and acquisitions?

Types of transactions

With the Swiss private equity market benefiting from a generally good market environment and a relatively robust outlook, all standard transaction strategies to invest in, grow or acquire profitable portfolio companies are present in Switzerland. In terms of transaction values, however, the bulk of private equity funds still flows into buyout deals with aggregate deal values in excess of 50 billion Swiss francs in 2017. Rescue or turnaround investments, on the other hand, remain insignificant. In the past three years, a consistently large share of about 70 per cent of the total number of private equity deals took the form of venture capital financing rounds. While in 2017 record levels were achieved in overall venture investment and number of financing rounds, the total money invested only increased by 3.2 per cent, with approximately 938 million Swiss francs (compared with approximately 909 million Swiss francs in 2016) being raised in 175 financing rounds (compared with 151 financing rounds in 2016). Last year, the value of the median of all start-up financing rounds also increased to approximately 3.5 million Swiss francs (compared with approximately 2.5 million Swiss francs in 2016).

Structures commonly used

The majority of buyout or growth investments in Switzerland are structured so that the fund incorporates a new Swiss company, which then serves as a special-purpose acquisition vehicle (SPV) to purchase the shares in the target portfolio company. While such SPV is typically formed with only the minimum share capital of 100,000 Swiss francs, the fund managers draw down the capital committed by the investors shortly before the transaction in order to fund the SPV with the required equity to complete the transaction. Private equity houses focusing on venture capital investments, on the other hand, generally acquire participations in portfolio companies directly through one (or several) of their investment funds by subscribing for shares issued in a capital increase of the target company.

2 Corporate governance rules

What are the implications of corporate governance rules for private equity transactions? Are there any advantages to going private in leveraged buyout or similar transactions? What are the effects of corporate governance rules on companies that, following a private equity transaction, remain or later become public companies?

The main rules relating to corporate governance in Switzerland are as follows:

- the Swiss Federal Code of Obligations (CO), in particular articles 620 et seq, which are partly mandatory and govern any Swiss stock corporation, irrespective of whether it is privately held or listed on a stock exchange;
- the Financial Market Infrastructure Act (the FMIA, which entered into effect on 1 January 2016, replacing the previously relevant sections of the Swiss Federal Act on Stock Exchanges and Securities Trading) and its implementing ordinances, which, inter alia, contain rules regarding the disclosure of significant shareholdings and public tender offers with respect to Swiss companies listed on a stock exchange in Switzerland and non-Swiss companies with a primary listing on a stock exchange in Switzerland;
- the ordinance against excessive remuneration by listed companies, which applies to corporations organised under Swiss law whose shares are listed on a stock exchange in Switzerland or abroad (foreign companies only listed on a Swiss stock exchange or merely having tax residence in Switzerland are not affected) and provides, inter alia, for the mandatory election by the shareholders of the chairman of the board and the members of the remuneration committee, an annual binding shareholder vote on the aggregate remuneration of the board and the executive committee, and the prohibition of certain forms of remuneration for the members of the board and the executive committee (eg, severance payments, advance payments, payments related to the acquisition or disposal of businesses); the main principles contained in the above-mentioned ordinance are meant to be implemented in the CO (the bill was adopted by the Swiss government in November 2016 and is currently under review by the Swiss parliament);
- the listing rules of the SIX Swiss Exchange (SIX Listing Rules) and its implementing directives, which, inter alia, contain periodic financial reporting and other continuing and ad hoc reporting rules applying to companies whose shares are listed on the SIX Swiss Exchange;
- the Directive on Information relating to Corporate Governance of the SIX Swiss Exchange, which requires Swiss companies listed on the SIX Swiss Exchange and non-Swiss companies with a primary listing on the SIX Swiss Exchange to disclose in their annual reports certain information on the board and the senior management, their compensation, and the control mechanisms;
- the Directive on the Disclosure of Management Transactions of the SIX Swiss Exchange, which requires Swiss companies listed on the SIX Swiss Exchange and non-Swiss companies with a primary listing on the SIX Swiss Exchange to disclose transactions in the company's shares and related instruments by members of the board and the senior management; and
- the Swiss Code of Best Practice for Corporate Governance issued by Economiesuisse, the umbrella organisation representing the Swiss economy, which sets forth corporate governance standards in the form of non-binding recommendations primarily for listed companies. These recommendations are divided into four parts (shareholders, board of directors and executive management, auditing, and disclosure) and, although not binding, these rules have become a standard for listed companies.

It follows from the above that the vast majority of corporate governance-related rules and regulations applies to listed companies, with the exception of the limited governance-related provisions contained in the CO that apply to all stock corporations irrespective of whether they are listed or private. The mandatory corporate governance rules applying to private companies are thus much lighter and essentially restricted to the provisions of the CO. Although such rules are more limited in scope, governance issues can, for example, arise if financial investors (eg, in the context of venture capital investments) hold minority interests in a portfolio company but have far-reaching control and veto rights through their representatives in the board of directors of such portfolio company, in which case potential conflict of interest-scenarios may arise where corporate governance principles will become important.

It should also be noted that special rules on corporate governance apply to banks and insurance companies and to investment companies with variable capital or fixed capital. In particular, the FINMA Circulars on Corporate Governance of Banks, on Corporate Governance of Insurance Companies and on Minimum Standards for Remuneration Schemes of Financial Institutions set forth minimum standards for corporate governance and the remuneration schemes of banks, insurance companies, and other financial institutions (meeting certain financial thresholds).

3 Issues facing public company boards

What are some of the issues facing boards of directors of public companies considering entering into a going-private or other private equity transaction? What procedural safeguards, if any, may boards of directors of public companies use when considering such a transaction? What is the role of a special committee in such a transaction where senior management, members of the board or significant shareholders are participating or have an interest in the transaction?

Going-private transactions of listed companies in Switzerland usually occur through a public tender offer pursuant to the rules of the FMIA or a merger pursuant to the Swiss Merger Act (SMA), whereas private equity transactions in general are conducted according to the common rules of the CO. Under Swiss law, the members of the board of directors are bound by fiduciary duties and by the principle of equal treatment of all shareholders. In addition, the FMIA contains provisions to ensure transparency, fairness and equal treatment of shareholders in corporate takeovers.

In particular, the board's fiduciary duties imply the duty to take measures, or rather, to apply procedural safeguards in order to avoid the effects of potential conflicts of interest. The appointment of independent directors or the establishment of a special (ad hoc) committee are such procedural safeguards. The special committee must be composed of at least two members who are not participating or do not have an interest in the transaction. Other measures include abstention of conflicted board members and obtaining of a fairness opinion. Should the board of directors issue a recommendation on a public tender offer, it will usually obtain a fairness opinion from an independent audit firm or investment bank. The board's recommendations will then be based on such fairness opinion. Members of the senior management may have to abstain from decisions on a transaction in case of a conflict of interest, whereas significant shareholders generally do not directly represent the company in a transaction and may pursue their interests as set forth in the articles of association and by exercising their voting right at shareholders' meetings.

4 Disclosure issues

Are there heightened disclosure issues in connection with going-private transactions or other private equity transactions?

According to the SIX Listing Rules, listed companies must inform the market of any price-sensitive facts that have arisen in their sphere of activity (ad hoc publicity). Price-sensitive facts are facts that are capable of triggering a significant change in market prices. Based on this provision, going-private transactions might need to be disclosed at an early stage. However, the issuer may postpone the disclosure of a price-sensitive fact if the fact is based on a plan or decision of the issuer and its dissemination might prejudice the legitimate interests of the issuer. The issuer must ensure that the price-relevant fact remains confidential for the entire time that disclosure is postponed. In the event of a leak, the market must be informed about the fact immediately.

Moreover, if a going-private transaction takes the form of a public tender offer, the bidder must publish an offer prospectus, and the board of directors of the target has to publish a report containing all necessary information in order for the shareholders to be able to assess the offer. The board's report should describe the effects of the offer on the target and its shareholders. It may contain a recommendation on whether to accept the offer, or may only set out the pros and cons of the offer without making any recommendation. It should further specify the intentions of the shareholders who hold more than 3 per cent of the voting rights, any defensive measures of the target as well as any potential conflicts of interest.

Should a going-private transaction be effected by way of a merger (see question 6), the board of directors of the target will have to provide a detailed report, which, inter alia, should explain the consequences of the merger, the merger agreement and the exchange ratio. Such report must then be verified by an independent auditor. Furthermore, during the 30 days preceding the merger, the shareholders have the right to inspect the documentation relating to the merger (including the merger agreement, the merger report, the audit report as well as the financial statements of the companies taking part in the merger).

5 Timing considerations

What are the timing considerations for negotiating and completing a going-private or other private equity transaction?

The following elements may, inter alia, influence the timing of a going-private transaction involving a listed company:

- in the case of a going-private transaction occurring through a public tender offer: the process starts by a pre-announcement; within six weeks of such pre-announcement, the bidder must publish the offer prospectus; the offer can be accepted 10 trading days after publication of the prospectus at the earliest (the 'cooling-off period'); the offer has to remain open for 20 to 40 trading days; if the offer was successful, the bidder must afford the shareholders an additional period of 10 trading days to accept the offer (all deadlines may be reduced or extended by the Swiss Takeover Board upon request);
- in the case of a going-private transaction occurring through a merger: the merger agreement, the board report on the merger, and the audit report have to be issued 30 days prior to the shareholders' resolution on the merger; in addition, the merging companies might need to observe a consultation period with the employees prior to the merger should the contemplated merger have any consequences on the employment conditions; moreover, within three months of the publication of the merger, creditors may require that their claims be secured;
- for companies whose shares are listed on the SIX Swiss Exchange, the Directive on the Delisting of Equity Securities, Derivatives and Exchange Traded Products (SIX-DD) is applicable; in principle, the SIX-DD requires that the listing must generally be maintained for at least three and a maximum of 12 months from the delisting announcement (continued listing period); shareholders in general merely have the (limited) right to challenge the delisting decision with regard to the continued listing period; and
- merger control notifications and approvals, governmental consents required in regulated industries, and the obtaining of tax rulings, as applicable, may also influence the timing, as they may take a few months depending on the circumstances.

Private equity transactions not involving a listed company generally do not have different timing considerations from any other Swiss mergers and acquisitions transactions, except that the securing of third-party financing may require additional time.

6 Dissenting shareholders' rights

What rights do shareholders of a target have to dissent or object to a going-private transaction? How do acquirers address the risks associated with shareholder dissent?

Going-private transactions in Switzerland are typically effected through a public tender offer, which is followed by a squeeze-out of any remaining minority shareholders. There are two alternative routes for squeezing out minority shareholders of a Swiss company listed on a stock exchange in Switzerland upon completion of a public tender offer.

According to the FMIA, the bidder in a public tender offer may squeeze out the remaining minority shareholders of the target company if such bidder holds more than 98 per cent of the voting rights in the target company. In such a case, the bidder may apply for a court decision cancelling the remaining equity securities of the target. The minority shareholders are entitled to receive the tender offer consideration for the cancelled shares. The request to the court must be made within three months of the end of the additional acceptance period for the public tender offer (see question 5).

Alternatively, the SMA provides for the possibility to squeeze out the minority shareholders by virtue of a squeeze-out merger if at least 90 per cent of the shareholders entitled to vote in the absorbed company's (ie, the target's) shareholders' meeting agree to such a merger. The squeezed-out minority shareholders can be forced to accept cash (or other kinds of assets) in exchange for their shares in the target.

Although the aforementioned thresholds may appear high, they are frequently reached in practice if a public tender offer has been successful and the consideration that has been offered is attractive.

In case of a statutory squeeze-out pursuant to the FMIA the minority shareholders have the right to adhere to the court procedure and bring forward their arguments. However, they almost never do so owing to the very limited grounds that can be asserted in such procedure. Importantly, the court has no power to reconsider the tender offer consideration in a squeeze-out in accordance with the FMIA. In contrast, the minority shareholders in a squeeze-out merger pursuant to the SMA have appraisal rights and may challenge the merger resolution arguing that the consideration received in exchange for their shares is not adequate. The squeezed-out minority shareholders may in such circumstances bring an action within two months of the publication of the merger resolution. However, such action does not hinder the legal effectiveness of the merger. In addition, because of the restrictive case law of the Swiss Federal Supreme Court, the risk of a successful challenge is rather low if the squeeze-out merger is carried out within a short period of time of a public tender offer.

7 Purchase agreements

What notable purchase agreement provisions are specific to private equity transactions?

As is the case for most other mature private equity markets, sale and purchase agreements (in buyout deals) and investment agreements (in venture and growth capital deals) in Switzerland follow a generally recognised catalogue of customary standard terms and conditions – as far as investment agreements are concerned, largely based on the Swiss Private Equity and Corporate Finance Association's (SECA) full suite of venture capital model documentations (see https://www.seca.ch/Templates/Templates/VC-Model-Documentation.aspx).

Sale and purchase agreements (in buyout deals) and investment agreements (in venture and growth capital deals) usually contain a catalogue of representations and warranties, including with regard to title, organisation, financial statements, tax, intellectual property, employees and social security, real estate, material contracts and absence of litigation. This catalogue has become lighter as a reflection of the current seller's market environment and is usually reduced in the case of MBOs, since the buyers have been involved in the management of the target or have profound knowledge about the target or extensive access to the management.

Sale and purchase agreements (in buyout deals) and investment agreements (in venture and growth capital deals) usually also contain specific indemnities for specific risks identified during the due diligence process.

In case of venture capital transactions or buyout deals for less than the entire outstanding share capital, the investors or acquirers and any continuing shareholders regularly conclude a shareholders' agreement along with the purchase or investment agreement (see question 13 for the key provisions customarily included in such shareholders' agreements).

8 Participation of target company management

How can management of the target company participate in a going-private transaction? What are the principal executive compensation issues? Are there timing considerations for when a private equity acquirer should discuss management participation following the completion of a going-private transaction?

There are two types of equity-based incentives: participation of the management from the outset (MBO) or stock option plans providing for a successive participation, which may be implemented at any time. Applicable tax rules and regulations may provide for reporting duties for Swiss employers who have employees participating in employee equity incentive plans. It is thus important to ensure that appropriate reporting procedures have been set up. Other benefits in the form of remuneration, bonuses and further compensation are usually granted through employment agreements.

Although there are no specific timing considerations regarding the determination of management participations, any management incentive is, however, susceptible to creating conflicts of interest in the context of a going-private transaction, since the management is bound by fiduciary duties and has a duty to act in the best interest of the company. Accordingly, in case of a public tender offer, the board report must disclose any arrangements between the bidder and the board or management of the target company, as well as the measures that will be taken in order to avoid any adverse effects of the conflict of interest on the shareholders. In case of a merger, the merger agreement also has to disclose any advantage granted to the management.

As regards companies in the financial industry, consideration must also be given to the Remuneration Circular of FINMA (which has been revised and entered into force on 1 July 2017) that sets minimum standards for remuneration schemes in banks, insurance companies and other financial institutions (meeting certain financial thresholds), putting particular emphasis on the sustainability of remuneration practices (especially regarding variable remuneration) and the prevention of incentive distortions, as well as the new ordinance against excessive remuneration (see question 2).

9 Tax issues

What are some of the basic tax issues involved in private equity transactions? Give details regarding the tax status of a target, deductibility of interest based on the form of financing and tax issues related to executive compensation. Can share acquisitions be classified as asset acquisitions for tax purposes?

Taxes are levied at three different levels in Switzerland: federal, cantonal, and municipal. The cantonal and municipal rates vary markedly across Switzerland, as cantons and municipalities are free to determine their tax rates. This said, the rates are generally below the average tax rates in Europe and are reviewed on a yearly basis. The ordinary effective corporate income tax rates currently range between approximately 11 per cent for the lowest canton and municipality and approximately 24.5 per cent for the highest.

Special tax regimes, such as the auxiliary, principal and holding company regimes, are in principle still available to date. These special tax statuses as well as Swiss finance branches are meant to be abolished in order to comply with international accepted standards. Such abolition forms part of the Federal Act on Tax Reform and AHV Financing (TRAF), which is planned to enter into force in January 2020 (potentially with certain earlier adoptions). The TRAF is subject to a referendum which, if called, will lead to a public vote on the TRAF (planned to be held in May 2019). Despite some cantonal particularities, the TRAF can be generally described as follows: companies that currently benefit from such special status will forthwith be subject to regular taxation, provided that, for a limited period of five years after the abolition of such special regimes, profits generated from assets and goodwill (ie, hidden reserves) that so far benefited from the special status treatment will be taxed at a lower rate. To maintain the attractiveness of the Swiss tax system, the TRAF will, inter alia, be associated with a general significant decrease by the cantons in their effective corporate income tax rates (eg, in the Canton of Vaud as of 2019), the adoption of the 'patent box', pursuant to which specific intangible property income may be subject to reduced taxation under certain circumstances (a patent box already exists in the Canton of Nidwalden), and a 'super deduction' for R&D expenses made in Switzerland. The special regimes currently still in place are as follows:

- the auxiliary company regime allows companies to benefit from a significant tax exemption of foreign source income, provided that the scope of the commercial activity carried out in Switzerland is limited;
- the principal company regime is, in essence, a lump-sum exemption of the corporate income tax base granted in consideration of foreign permanent establishments; it is available to companies that

assume certain key regional functions on behalf of a multinational group; and
- the holding company regime applies to holding structures and mainly consists in the exemption of corporate income tax at cantonal and municipal levels; holding companies frequently also benefit from 'participation relief' for income generated from dividends or capital gains from investments in other companies (subject to their participations meeting certain conditions), or both. The 'participation relief' is also available for ordinarily taxed Swiss companies if the relevant conditions are met.

Tax holidays, namely full or partial exemptions from corporate income and capital taxes for newly established businesses, may typically be granted to industrial companies. The main criteria for such tax holidays to be granted are the number of new positions created and the investments made in the canton where the company has its corporate seat.

Interest on debt is deductible from taxable profits, regardless of whether the debt is subordinated. This said, there are limitations on the deductibility of interest in connection with shareholder or related-party loans based on arm's-length rules for interest rates and thin-capitalisation rules (see question 10).

Executive compensation generally qualifies as taxable income of the relevant recipient. Incentive compensation awarded in the form of cash, shares or options is taxed at the time of award, except for unlisted or restricted options that are taxed upon exercise.

Capital gains realised by Swiss-resident individuals on privately-held assets, such as shares, are generally exempt from income tax. Exceptions apply to real property.

Share deals generally cannot be classified as asset acquisitions in Switzerland and may trigger a transfer tax of up to 0.3 per cent of the consideration if a securities dealer pursuant to the Swiss Federal Act on Stamp Duties is involved in the transaction. Asset deals usually involve VAT on assets or services, which is typically settled in a notification procedure.

The issuance of a company's share capital, as well as additional contributions in cash or in kind into the company's equity, are subject to Swiss issuance stamp tax at the rate of 1 per cent. However, contributions against issuance of new shares not exceeding an aggregate amount of 1 million Swiss francs and contributions that qualify as business restructuring are exempt.

A 35 per cent withholding tax is levied on profit distributions (including any hidden dividends and distributions of liquidation proceeds) by Swiss companies. This rate can be reduced or fully reclaimed if the dividend is paid to a Swiss-resident shareholder or if a double tax treaty applies (see question 18). By contrast, the repayment of contributions made by direct shareholders into the equity of a Swiss-resident company is not subject to Swiss withholding tax.

Pursuant to the practice of the Swiss tax authorities, the application of special tax regimes as well as the tax consequences of significant transactions involving Swiss-resident companies may be (and typically are) secured by written tax rulings. In this connection, it is worth pointing out that some tax rulings may be subject to spontaneous exchange of information following implementation of the OECD's Base Erosion and Profit Shifting Project.

10 Debt financing structures

What types of debt financing are typically used to fund going-private or other private equity transactions? What issues are raised by existing indebtedness of a potential target of a private equity transaction? Are there any financial assistance, margin loan or other restrictions in your jurisdiction on the use of debt financing or granting of security interests?

Private equity investors usually provide debt financing in the form of mezzanine debt or subordinated loans. In the context of leveraged buyouts, the debt financing is usually structured through senior and junior debt in the form of revolving and term credit facilities provided by financial institutions.

Customarily, banks providing the acquisition financing will require that the existing debt be refinanced and that the existing security be released and used as collateral to secure the acquisition financing.

The target can only provide security interest up to the amount of its freely disposable reserves. The target's ability to grant upstream or cross-stream guarantees or other types of security should be included in the corporate purpose clause of the target's articles and such guarantees must be approved by the shareholders (see question 12). Similarly, a Swiss Federal Supreme Court decision of 2014 has set stricter requirements for group financial assistance, in particular, with regard to the definition of 'at arm's length' upstream and cross-stream loans. Loans that do not meet the relevant requirements reduce the target's ability to distribute dividends (as reserves in the amount of the loan have to be created). If distributions in excess of free equity have been made, the company has a claim for repayment against the recipients of such distributions, and the board of directors may become liable towards the company, its shareholders, and the creditors.

There are no statutory margin or corporate minimum capitalisation requirements in Switzerland. However, de facto limitations result from the thin-capitalisation rules applied by Swiss tax authorities. Interest paid on amounts of debt exceeding certain thresholds may be requalified as a hidden dividend if paid to a shareholder or a related party of a shareholder. In addition, as per Swiss tax law, interest should respect the principle of 'dealing at arm's length'. In this context, the Swiss federal tax administration annually publishes guidelines providing for minimum (for loans to shareholders) and maximum (for loans from shareholders) interest rates. Those rates are deemed to reflect an arm's-length remuneration. Subject to proper evidence, the tax authorities may accept interest rates deviating from the yearly guidelines. Interest paid on excessive debt or that is not in line with the minimum/maximum rates would not be tax deductible and would be subject to 35 per cent withholding tax. If a loan is granted by a third party but guaranteed by the parent company, the thin-capitalisation rules also apply.

11 Debt and equity financing provisions

What provisions relating to debt and equity financing are typically found in going-private transaction purchase agreements for private equity transactions? What other documents typically set out the financing arrangements?

Generally speaking, there are no specific provisions related to the debt and equity financing in a merger agreement. In contrast, in the context of a public tender offer, the offer prospectus must contain information regarding the financing of the offer, as well as a statement from the independent review body that the bidder took all necessary measures so that the financing was available at closing (certainty of funds). However, the bidder is not required to summarise the financing terms and conditions or to publish any financing documents. In practice, very short statements in the prospectus have become standard (for instance, it is considered sufficient if the prospectus states that 100 per cent of the offer will be financed through a bank facility). This practice is justified by the fact that the review body must, in particular, assess the financing of the offer and the availability of funds before the offer is published. Where funds required for the offer are borrowed, the review body examines, in particular, the creditworthiness of the lender and the contractual terms that enable the lender to withhold the disbursement of the funds.

12 Fraudulent conveyance and other bankruptcy issues

Do private equity transactions involving debt financing raise 'fraudulent conveyance' or other bankruptcy issues? How are these issues typically handled in a going-private transaction?

Fraudulent conveyance issues are rather exceptional in private equity transactions other than in rescue and turnaround deals. In distressed situations, however, careful consideration has to be given to the structuring of the transaction and the terms of financing provided to a troubled company.

Transactions within a suspect period of up to five years before declaration of insolvency may be challenged if the consideration received was in manifest disproportion to the insolvent debtor's own performance. Furthermore, it must be ensured that the injected funds are not used to replace existing unsecured financing and that there are reasonable prospects of a successful restructuring of the distressed target company, as loans granted to the target might otherwise be subordinated to the claims of other creditors in the event of insolvency. In this context, the amendment of the Swiss Debt Enforcement and Bankruptcy Act (which became effective in 2014) brought about some noteworthy changes with respect to the ability of third parties to challenge a transaction and introduced certain mechanisms to facilitate restructuring measures for insolvent companies.

Like upstream or cross-stream loans, upstream or cross-stream guarantees or other security interests granted by the target in respect of obligations of a parent or an affiliate (other than a subsidiary) are also subject to various requirements and limitations (see question 10), which call for adherence to the formalities applicable to distributions to shareholders and may limit the enforceability of such guarantee for the benefit of an affiliate. Similarly, if the target company does not receive adequate consideration for entering into and maintaining such guarantee, any sum received thereunder may be challenged if the target were to become insolvent.

13 Shareholders' agreements and shareholder rights

What are the key provisions in shareholders' agreements entered into in connection with minority investments or investments made by two or more private equity firms or other equity co-investors? Are there any statutory or other legal protections for minority shareholders?

Shareholders' agreements in Switzerland follow a generally recognised catalogue of standard terms and conditions customarily restricting the transferability of shares and providing for a combination of rights in respect of the sale of shares (rights of first offer, pre-emption rights, call and put option rights, drag-along and tag-along rights), sometimes safeguarded by share escrow arrangements or conditional assignments of shares. Further common key provisions include voting undertakings, board appointment rights, special attendance and consent quora for a catalogue of important shareholder and board resolutions ensuring effective co-control for the investors, information rights, covenants regarding the company's business and management and provisions regarding voluntary and mandatory conversion of preferred shares (if applicable). In situations where it is important that no single party has control over the board, the shareholders' agreement may provide for a certain number of independent directors. In venture capital financings, the shareholders' agreement commonly provides for dividend and liquidation preferences and anti-dilution protections of the investor.

Occasionally, adherence to the shareholders' agreement is safeguarded by indemnities for breach of contract or call options exercisable against a breaching party. To the (limited) extent permissible under Swiss law, certain provisions of the shareholders' agreement are generally also embedded in the constitutional documents of the company. The Swiss Private Equity and Corporate Finance Association (SECA) has published a model documentation for venture capital transactions involving institutional investors and has now also launched a simplified model documentation for smaller investments by business angels and similar seed stage investors (see at https://www.seca.ch/Templates/Templates/VC-Model-Documentation.aspx).

Pursuant to the principle of equal treatment of shareholders, the board and the shareholders' meeting must give equal treatment to all shareholders. Core statutory shareholder rights are the right to participate at shareholders' meetings, information and inspection rights, and the right to receive a share of any dividends and liquidation proceeds. Shareholders also have a pro rata pre-emptive right (which may be restricted for certain important reasons) to any newly issued shares or bonds which are convertible into equity. Shareholders representing more than 33.33 per cent of the voting rights can block a number of key resolutions (for example, qualified capital increases, limitation of pre-emptive rights or corporate reorganisations such as mergers).

14 Acquisitions of controlling stakes

Are there any legal requirements that may impact the ability of a private equity firm to acquire control of a public or private company?

The FMIA provides for a mandatory offer regime. A person or group of persons acting in concert and acquiring more than 33.33 per cent of the voting rights of a Swiss company listed on a stock exchange in Switzerland (or of a foreign company if its primary listing is on a stock exchange in Switzerland) is required to make a public tender offer for all listed shares of that company, unless such company's articles of association provide for an 'opting-up' (up to 49 per cent) or 'opting-out' of that requirement. The majority of Swiss listed companies (approximately 70 per cent) are subject neither to an opting-out nor an opting-up. Furthermore, any person that reaches, exceeds or falls below certain thresholds of voting rights (3, 5, 10, 15, 20, 25, 33.33, 50 or 66.66 per cent) must notify the company and the stock exchange.

To carry out a squeeze-out merger or a statutory squeeze-out in a going-private transaction, a bidder must hold at least 90 per cent (98 per cent in the case of a statutory squeeze-out) of the share capital and voting rights of the target (see question 6). Although voluntary bids in a public tender offer can be made subject to a minimum acceptance condition, the acceptance threshold may normally not exceed two-thirds of the target's issued shares (if the bidder does not previously hold a significant stake).

15 Exit strategies

What are the key limitations on the ability of a private equity firm to sell its stake in a portfolio company or conduct an IPO of a portfolio company? In connection with a sale of a portfolio company, how do private equity firms typically address any post-closing recourse for the benefit of a strategic or private equity acquirer?

A private equity firm's ability to exit its investment very much depends on the terms of the investment documents and especially the shareholders' agreement. Contractual arrangements regarding transfer restrictions and exit rights are particularly decisive. While the right to coerce the other shareholders to a sale (drag-along) or to unilaterally request an IPO can facilitate the exit of the private equity investor, minimum rights of the common shareholders (for example, minimum valuation thresholds) may have a limiting effect. Ultimately, the terms agreed upon are a direct reflection of the parties' negotiation leverage and primarily hinge on the size of the investment and the relative attractiveness of the target.

For an IPO on the SIX Swiss Exchange, the target, inter alia, must have a certain minimum size. The SIX Listing Rules require an adequate free float of the company's securities at the time of listing (generally, at least 20 per cent of the issuer's outstanding securities in the same category must be in public ownership and the capitalisation of those securities must amount to at least 25 million Swiss francs).

In general, private equity firms are reluctant to assume liabilities surviving the exit, will aim at a low cap on any indemnities, and will seek to include a high de minimis, deductible or threshold. Potential claims for indemnification of the buyer are sometimes secured by holding a portion of the purchase price in escrow for a certain period of time. In addition, we have seen an increased interest in Swiss private equity deals to obtain insurance coverage for otherwise existing exposure under representations and warranties, in particular, where there is non-alignment of involvement, knowledge, and pockets among numerous sellers.

16 Portfolio company IPOs

What governance rights and other shareholders' rights and restrictions typically survive an IPO? What types of lock-up restrictions typically apply in connection with an IPO? What are common methods for private equity sponsors to dispose of their stock in a portfolio company following its IPO?

Governance rights and other shareholders' rights typically included in shareholders' agreements normally do not survive an IPO, as shareholders' agreements usually terminate upon the IPO (otherwise, disclosure in the prospectus would be required). The survival of board appointment or veto rights is highly unusual. If the pre-IPO capital structure includes various categories of shares, it is customary to simplify the share structure before the IPO. Shareholders' agreements generally anticipate this issue by providing for the mandatory conversion of preferred shares in the event of an IPO.

Lock-up provisions are usually subject to negotiation between the private equity firm and the incumbent shareholders. Typically, the investor wants to anticipate the requirements of the underwriters and have the core shareholders agree to execute lock-up and market stand-off arrangements (if and as requested by the underwriters) already in the shareholders' agreement, as its right to unilaterally request an IPO could otherwise be put in question. The underwriters generally require

Update and trends

Although transaction levels were already high in previous years, the Swiss private equity market continued to grow steadily in 2017, fuelled by still historically low interest rates, favourable borrowing conditions, and plenty of dry powder available to private equity houses. Over the past five years about 100 companies have been supported with about 1.5 billion Swiss francs by private equity investors in Switzerland. This is in particular true for companies in the early-stage phases of the private equity cycle (about 70 per cent of the funded companies). That said, the bulk of the market, measured in volume, is still in the buyout industry. A large share of the investments still flows into the consumer and retail sector as well as industrial companies, but life sciences and ITC have very significant weight both in terms of the number of transactions and total funds invested. Other Swiss key sectors such as chemicals, construction or finance, on the other hand, have hardly received any private equity capital.

that the core shareholders (management and founders, private equity investors) commit themselves to a lock-up of between 180 days and 18 months.

Under the SIX Listing Rules, all shares of the same class must be listed. There is no registration requirement for post-IPO sales of shares in Switzerland. Hence, private equity sponsors are generally free to dispose of their shares in a portfolio company following its IPO (subject to any lock-up or other contractual arrangements; notification duties also apply, see question 14). Strategies commonly seen are disposals pursuant to a 'dribble-out' trading plan, in which the shares are sold piecemeal in the secondary market over the course of days or a few weeks (depending on market conditions and the size of the stake), or trades in a larger block of shares (usually to a single buyer).

17 Target companies and industries

What types of companies or industries have typically been the targets of going-private transactions? Has there been any change in industry focus in recent years? Do industry-specific regulatory schemes limit the potential targets of private equity firms?

While there is no noticeable industry focus, small to mid-cap listed entities with comparatively significant anchor investors and less favourable listing cost/benefit ratios have been the stereotypical targets of going-private transactions or related rumours in Switzerland.

As far as private equity transactions and investments are concerned, private equity firms have traditionally invested in a wide array of industries in Switzerland, reflecting the well-diversified Swiss economy. In the recent past, the sectors that have experienced most deal activity in terms of both number and value of transactions were still business products and services and consumer goods and services, closely followed by pharmaceuticals and life sciences (including biotech and medtech) as well as information and communications technology. In venture capital financings, out of the top 20 start-up financings, the top 13 and all but two capital rounds were in these sectors in 2017 (the other two financings having been in micro/nano technology).

There are no regulatory schemes specifically targeted at private equity firms. However, there are a number of regulated industries where certain limitations must be considered. Regulatory restrictions exist, for instance, in the banking, securities trading, insurance, telecommunication and media sectors. Generally speaking, the acquisition of control or a minority stake of a company holding a banking, securities dealer, insurance, radio or television broadcasting licence is subject to prior notification to or authorisation by the competent regulatory body. There are restrictions on permitted foreign ownership in a number of other regulated sectors such as aviation, nuclear power generation, and other areas of public infrastructure.

The direct or indirect acquisition of real estate for residential purposes in Switzerland by 'persons abroad' (non-Swiss nationals and other foreign entities) is subject to legal restrictions and may require a special authorisation.

18 Cross-border transactions

What are the issues unique to structuring and financing a cross-border going-private or other private equity transaction?

There are no foreign exchange control or similar laws generally restricting investments or acquisitions in Switzerland by persons or companies domiciled abroad. Regulatory restrictions exist with regard to certain industries (see question 17). There is currently increased political motion in the Swiss parliament advocating the screening of foreign direct investment in Swiss companies (in certain pivotal sectors), but no concrete legislative project has taken shape so far. Rules regarding public tender offers apply irrespective of whether the bidder is a Swiss or a foreign company.

Generally speaking, any dividends and similar distributions (cash or in kind) made by a company to its shareholders are subject to a withholding tax of 35 per cent unless they come from paid-in share capital or additional capital contributions from the shareholders. Foreign beneficiaries of dividends may be entitled to a partial or full reduction of the withholding tax in accordance with applicable double taxation treaties between Switzerland and the beneficiary's country of tax residence or the agreement on the automatic exchange of information in tax matters between the EU and Switzerland (to the extent applicable).

Both immigration as well as emigration mergers are admissible under Swiss law if the laws of all involved jurisdictions so permit and the merger meets certain minimum criteria. While the requirements stated in the law appear straightforward at face value, the actual mechanics of a cross-border merger prove quite cumbersome in practice. Consequently, rather few transactions (other than intragroup reorganisations) structured as cross-border mergers have been seen thus far (except for large companies with substantial existing operations, especially in regulated industries such as insurance).

19 Club and group deals

What are some of the key considerations when more than one private equity firm, or one or more private equity firms and a strategic partner or other equity co-investor is participating in a deal?

Swiss law does not prevent or restrict the participation of two or more private equity firms in a club or a group deal. In 2017, about half of the private equity deals (approximately one-third of the total funds invested) involving Swiss target companies were syndicated.

From a practical perspective, the participating investors generally lay down the terms and conditions governing their relationship in a formal shareholders' agreement (see question 13). This is advisable also because the group (often inadvertently) forms a 'simple partnership' pursuant to Swiss law, which imposes default rules regarding governance, representation rights, profit allocation, and other aspects of their relationship.

In respect of listed targets, an additional issue to be considered is that firms partnering in a club deal will generally be regarded as acting in concert under the rules of the FMIA. As a result, their consolidated stakes in the target will be relevant for the assessment as to whether notification and mandatory offer obligations are triggered (see question 14), which may make the group susceptible to the actions of any one of the partner investors.

20 Issues related to certainty of closing

What are the key issues that arise between a seller and a private equity acquirer related to certainty of closing? How are these issues typically resolved?

Certainty of closing is one of the key issues in any kind of mergers and acquisitions transaction. The simultaneous signing and closing can simplify smaller transactions, as it eliminates the risk of unforeseen events occurring during the period between signing and closing. It may also reduce the complexity of the purchase agreement. More often, however, the circumstances of the transaction call for a separation of signing and closing (for example, to obtain governmental approvals or third-party consents, to carry out pre-closing carve-outs or reorganisations, or to call funds under equity commitments).

If there is a need for a separation of signing and closing, the parties will require each other to fulfil certain conditions before the transaction closes. At the same time, it is customary for the transaction agreement to provide for a 'long stop date' (ie, a date until which the transaction must close, failing which the agreement will terminate) and pre-closing obligations, such as covenants regarding the target's conduct of business or certain restructuring measures.

In public tender offers, only limited conditions are permissible in the offer (for example, regulatory approvals or acceptance thresholds; see question 14). A public tender offer may not be made subject to the obtaining of financing. The bidder and the target can agree on a break fee, provided that this does not result in coercing shareholders to accept the offer. Break fees must be disclosed in the offer documents. As a general rule, they should not substantially exceed the cost incurred by the bidder in connection with the offer.

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