



ICLG

The International Comparative Legal Guide to: **Private Equity 2019**

5th Edition

A practical cross-border insight into private equity

Published by Global Legal Group, with contributions from:

Aabø-Evensen & Co
Advokatfirman Törngren Magnell
Ali Budiardjo, Nugroho, Reksodiputro
Allen & Gledhill LLP
Ashurst Hong Kong
Avance Attorneys Ltd
Bär & Karrer Ltd.
British Private Equity & Venture Capital
Association (BVCA)
Bub Memminger & Partner
Consortium Legal
Davis Polk & Wardwell LLP
Debarliev, Dameski & Kelesoska
Attorneys at Law
Dechert LLP

Dentons
DS Avocats
Eversheds Sutherland
(Luxembourg) LLP
Faveret Lampert Advogados
Garrigues
HBK Partners Attorneys at Law
Houthoff
Johnson Winter & Slattery
Maples Group
Matheson
McMillan LLP
Morais Leitão, Galvão Teles,
Soares da Silva & Associados
Pirola Pennuto Zei & Associati

Proskauer Rose LLP
Samväd: Partners
Schindler Attorneys
Solórzano, Carvajal, González,
Pérez-Correa, S.C. (SOLCARGO)
Udo Udoma & Belo-Osagie
Van Olmen & Wynant
Webber Wentzel
Zhong Lun Law Firm





Contributing Editors
Christopher Field &
Dr. Markus P. Bolsinger,
Dechert LLP

Publisher
Rory Smith

Sales Director
Florian Osmani

Account Director
Oliver Smith

Senior Editors
Caroline Collingwood
Rachel Williams

Sub Editor
Jenna Feasey

Group Consulting Editor
Alan Falach

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
July 2019

Copyright © 2019
Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-912509-82-9
ISSN 2058-1823

Strategic Partners



General Chapters:

1	2019 and Beyond: Private Equity Outlook for 2020 – Ross Allardice & Dr. Markus P. Bolsinger, Dechert LLP	1
2	Private Equity Transactions in the UK: the Essential Differences from the U.S. Market – Nicholas Plant, Dentons	4
3	Management Incentive Plans – The Power of Incentives – Eleanor Shanks & Rob Day, Proskauer Rose LLP	7
4	Alternative Exits: Legal and Structuring Issues in GP-Led Secondaries – Leor Landa & Oren Gertner, Davis Polk & Wardwell LLP	14
5	EU Sustainable Finance Rules Start to Affect Private Equity – Tom Taylor, British Private Equity & Venture Capital Association (BVCA)	20

Country Question and Answer Chapters:

6	Australia	Johnson Winter & Slattery: Divesh Patel & Andy Milidoni	24
7	Austria	Schindler Attorneys: Florian Philipp Cvak & Clemens Philipp Schindler	33
8	Belgium	Van Olmen & Wynant: Luc Wynant & Jeroen Mues	43
9	Brazil	Faveret Lampert Advogados: Claudio Lampert & João F. B. Sartini	50
10	Canada	McMillan LLP: Michael P. Whitcombe & Brett Stewart	58
11	Cayman Islands	Maples Group: Julian Ashworth & Patrick Rosenfeld	66
12	China	Zhong Lun Law Firm: Lefan Gong & David Xu (Xu Shiduo)	74
13	Finland	Avance Attorneys Ltd: Ilkka Perheentupa & Erkki-Antti Sadinmaa	84
14	France	DS Avocats: Arnaud Langlais & Gacia Kazandjian	93
15	Germany	Bub Memminger & Partner: Dr. Peter Memminger	101
16	Hong Kong	Ashurst Hong Kong: Chin Yeoh & Joshua Cole	108
17	Hungary	HBK Partners Attorneys at Law: Dr. Márton Kovács & Dr. Gábor Puskás	114
18	India	Samvād: Partners: Vineetha M.G. & Ashwini Vittalachar	122
19	Indonesia	Ali Budiardjo, Nugroho, Reksodiputro: Freddy Karyadi & Anastasia Irawati	132
20	Ireland	Matheson: Brian McCloskey & Aidan Fahy	140
21	Italy	Pirola Pennuto Zei & Associati: Nathalie Brazzelli & Massimo Di Terlizzi	149
22	Luxembourg	Eversheds Sutherland (Luxembourg) LLP: Holger Holle & José Pascual	155
23	Macedonia	Debarliev, Dameski & Kelesoska, Attorneys at Law: Dragan Dameski & Vladimir Boshnjakovski	162
24	Mexico	Solórzano, Carvajal, González, Pérez-Correa, S.C. (SOLCARGO): Fernando Eraña & Carlos Eduardo Ugalde	169
25	Netherlands	Houthoff: Alexander J. Kaarls & Vivian A.L. van de Haterd	176
26	Nicaragua	Consortium Legal: Rodrigo Taboada & Andres Caldera	186
27	Nigeria	Udo Udoma & Belo-Osagie: Folake Elias-Adebowale & Christine Sijuwade	192
28	Norway	Aabø-Evensen & Co: Ole Kristian Aabø-Evensen	199
29	Portugal	Morais Leitão, Galvão Teles, Soares da Silva & Associados: Ricardo Andrade Amaro & Pedro Capitão Barbosa	220
30	Singapore	Allen & Gledhill LLP: Christian Chin & Lee Kee Yeng	228

Continued Overleaf →

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations



Country Question and Answer Chapters:

31	South Africa	Webber Wentzel: Michael Denenga & Andrew Westwood	236
32	Spain	Garrigues: Ferran Escayola & María Fernández-Picazo	246
33	Sweden	Advokatfirman Tömgren Magnell: Sten Hedbäck & Vaiva Burgyté Eriksson	255
34	Switzerland	Bär & Karrer Ltd.: Dr. Christoph Neeracher & Dr. Luca Jagmetti	263
35	United Kingdom	Dechert LLP: Ross Allardice & Robert Darwin	271
36	USA	Dechert LLP: John LaRocca & Dr. Markus P. Bolsinger	281

PREFACE

We are privileged to have been invited to preface the 2019 edition of *The International Comparative Legal Guide to: Private Equity*, one of the most comprehensive comparative guides to the practice of private equity available today. The Guide is in its fifth edition, which is itself a testament to its value to practitioners and clients alike. Dechert LLP is delighted to serve as the Guide's Editor.

With developments in private equity law, it is critical to maintain an accurate and up-to-date guide regarding relevant practices and legislation in a variety of jurisdictions. The 2019 edition of this Guide accomplishes that objective by providing global businesses leaders, in-house counsel, and international legal practitioners with ready access to important information regarding the legislative frameworks for private equity in 31 different jurisdictions. This edition also includes five general chapters, which discuss pertinent issues affecting private equity transactions and legislation.

The fifth edition of the Guide serves as a valuable, authoritative source of reference material for lawyers in industry and private practice seeking information regarding the procedural laws and practice of private equity, provided by experienced practitioners from around the world.

Christopher Field & Dr. Markus P. Bolsinger
Dechert LLP

Switzerland

Dr. Christoph Neeracher



Dr. Luca Jagmetti



Bär & Karrer Ltd.

1 Overview

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

All of the standard transaction strategies to acquire portfolio companies are commonly used in Switzerland. We assume that regular leveraged buyouts have accounted for the majority of the transactions in recent years. In 2018, private equity funds were involved in around one-third of the transactions in Switzerland.

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

Although M&A levels have remained high in recent years, they continued to increase in 2018, with private equity transactions reaching a 10-year high. Low interest rates for transaction financing as well as favourable borrowing conditions have generated an incentive for high levels of private equity activity.

1.3 What trends do you anticipate seeing in (i) the next 12 months and (ii) the longer term for private equity transactions in your jurisdiction?

While several voices predict a slow-down of M&A activity in the near future, we have not experienced this so far and remain optimistic that 2019 will continue to show a solid volume of M&A activity.

2 Structuring Matters

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

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

Management usually invests directly in the AcquiCo rather than via a management participation company. Often, a single shareholders' agreement (SHA) is concluded between the financial investor(s) and management, which governs all aspects of the investment (governance, exit procedures, share transfers, good/bad leaver provisions, etc.). In other cases, a main SHA is concluded between the financial sponsors and a separate, smaller SHA with management.

2.2 What are the main drivers for these acquisition structures?

The acquisition structure is mainly tax-driven (tax-efficient repatriation of dividends/application of double taxation treaties, tax-exempt exit). Directly investing in the AcquiCo may allow Swiss-domiciled managers to realise a tax-free capital gain on their investment when the AcquiCo is sold on exit.

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

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

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

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

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

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

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

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

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

3 Governance Matters

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

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

The stock corporation is governed by a board of directors which has a supervisory function and resolves on strategic and important issues (appointment of senior management, etc.). A director is elected *ad personam*; proxies (e.g. in the case of absence at meetings) are not possible.

Day-to-day management is normally delegated to management, based on organisational regulations. They often contain a competence matrix defining the competences of each management level and the decisions which need approval by the board or even shareholders.

Such division of competence is – together with board composition, quorum requirements, etc. – also reflected on a contractual level in the SHA.

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

Our comments in question 3.1 regarding stock corporations apply largely also to LLCs.

3.2 Do private equity investors and/or their director nominees typically enjoy veto rights over major corporate actions (such as acquisitions and disposals, business plans, related party transactions, etc.)? If a private equity investor takes a minority position, what veto rights would they typically enjoy?

If a private equity investor holds a minority of the voting rights, its veto rights usually depend on the stake held, while a small investor (up to 20%) normally enjoys only fundamental veto rights aimed at the protection of its financial interest (dissolution, *pro rata* right to capital increases, no fundamental change in business, maximum leverage, etc.); investors holding a more significant minority stake (20–49%) usually also have veto/influence rights regarding important business decisions and the composition of senior management. The exit rights for private equity investors holding a minority position are usually heavily negotiated.

3.3 Are there any limitations on the effectiveness of veto arrangements: (i) at the shareholder level; and (ii) at the director nominee level? If so, how are these typically addressed?

At shareholder level, veto rights may be created by introducing high quorums for certain shareholders' decisions in the articles of association and the SHA. Such veto rights are generally regarded as permissive as long as the arrangement does not lead to a blockade of decision-taking in the company *per se*.

At board level, individual veto rights of certain board members cannot be implemented based on the articles of association or other corporate documents. However, such individual veto rights are regularly incorporated in the SHA; i.e. the parties agree that the board shall not take certain decisions without the affirmative vote of certain nominees. A board decision taken in contradiction to such contractual arrangement would still be valid but may trigger consequences under the SHA. Furthermore, directors are bound by a duty of care and loyalty *vis-à-vis* the company. If abiding by instructions given by another person based on contractual provisions leads to a breach of such duties, the board member may not follow such instructions and will likely not be in breach of the SHA (at least if the latter is governed by Swiss law).

3.4 Are there any duties owed by a private equity investor to minority shareholders such as management shareholders (or vice versa)? If so, how are these typically addressed?

Purely from its position as a shareholder, in principle, a private equity investor does not have such duties; shareholders of a Swiss stock corporation do not have any duty of loyalty.

However, directors, officers and management have a duty of care and loyalty towards the company and, to a certain extent, also to the minority shareholders. Under special, limited circumstances, a private equity investor or an individual acting for it may be regarded as *de facto*/shadow director of the company and, consequently, also be bound by such duties. The claim that a shareholder or one of its representatives is a shadow director might be successfully made if such person has *de facto* acted as an officer of the company, e.g. by directly taking decisions that would actually be within the competence of the board, etc.

3.5 Are there any limitations or restrictions on the contents or enforceability of shareholder agreements (including (i) governing law and jurisdiction, and (ii) non-compete and non-solicit provisions)?

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

- a SHA may not be unlimited in time/valid during the entire lifetime of the company, but may have a maximum term of ca. 20–30 years; and
- as per mandatory corporate law, directors must act in the best interests of the company (duty of care and loyalty), which may hinder the enforcement of the SHA if its terms would conflict with such duties.

A SHA is only enforceable against its parties. There is a debate in Swiss legal doctrine as to what extent the company itself may be party to a SHA and be bound by its terms. While a majority acknowledges that the company may fulfil some administrative duties, entering into further obligations is questionable.

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

To secure share transfer provisions of the SHA, the parties often deposit their shares with an escrow agent under a separate share escrow agreement. Sometimes, SHAs also provide for penalty payments in case of breach.

3.6 Are there any legal restrictions or other requirements that a private equity investor should be aware of in appointing its nominees to boards of portfolio companies? What are the key potential risks and liabilities for (i) directors nominated by private equity investors to portfolio company boards, and (ii) private equity investors that nominate directors to boards of portfolio companies?

On a practical note, at least (i) one person with individual signatory power residing in Switzerland, or (ii) two individuals with joint signatory power both residing in Switzerland must be able to fully represent the company (entry into the commercial register). It is not necessary that such persons are board members (but, e.g. managers). Additional individual or collective signatory rights may also be granted for persons residing outside Switzerland.

Directors, officers and managers of the company (including nominees of the private equity investor) have a duty of care and loyalty towards the company and must safeguard the (sole) interest of the portfolio company even if such interest is contrary to the interest of the appointing private investor. Under special, limited circumstances, a private equity investor or an individual acting for it may be regarded as a *de facto*/shadow director of the company and, consequently, also be bound by such duties. To prevent such a scenario, decisions should solely be taken by the competent bodies.

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

3.7 How do directors nominated by private equity investors deal with actual and potential conflicts of interest arising from (i) their relationship with the party nominating them, and (ii) positions as directors of other portfolio companies?

In case of a conflict of interest, the concerned director must inform the other board members and abstain from participating in the respective discussion and decision-making process. In typical Swiss private equity set-ups with one or few financial sponsor(s) that are each represented on the board, issues related to conflicts of interest are of limited relevance in practice.

4 Transaction Terms: General

4.1 What are the major issues impacting the timetable for transactions in your jurisdiction, including antitrust and other regulatory approval requirements, disclosure obligations and financing issues?

If certain turnover thresholds are met, a Swiss merger filing must be made. Unless the Competition Commission (CC) decides to initiate

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

For transactions regarding certain industries, governmental approvals must be obtained (e.g. banks, telecoms, etc.). The impact on the timetable depends on the respective regulation and on the authorities involved.

Other than that, practical timing constraints such as setting up a NewCo (ca. 10 days) are similar to other European jurisdictions.

4.2 Have there been any discernible trends in transaction terms over recent years?

Since debt financing is currently easily available, buyers have become more willing to enter into binding purchase agreements prior to securing financing.

Further, given the ongoing sellers' market, share purchase agreements tend to be more seller-friendly (e.g. with regards to R&W, etc.), albeit not as extreme as in the recent past.

As a general observation, typical Swiss share/asset purchase agreements still tend to be significantly shorter in length than US/UK agreements – a consequence of Switzerland's civil law system.

5 Transaction Terms: Public Acquisitions

5.1 What particular features and/or challenges apply to private equity investors involved in public-to-private transactions (and their financing) and how are these commonly dealt with?

Anyone who acquires equity securities which, added to equity securities already owned, exceed the threshold of one-third of the voting rights of a Swiss listed company, is obliged to make an offer for all listed equity securities of the company (mandatory tender offer), barring exemptions granted by the Swiss Takeover Board. The target company may, however, have either increased the threshold to a maximum of 49% of the voting rights (opting-up) or completely excluded the obligation to make an offer (opting-out).

Further, anyone who exceeds certain thresholds of the voting rights in a Swiss listed company (the lowest threshold is 3%) is obliged to make a notification to the company and the stock exchange (disclosure obligation).

Moreover, to carry out a statutory squeeze-out or a squeeze-out merger subsequent to a public tender offer, the bidder must hold at least 98% (for a statutory squeeze-out) or 90% (for a squeeze-out merger) respectively of the voting rights of the target company. Voluntary tender offers are regularly made subject to a minimum acceptance condition which, however, does normally not exceed two-thirds of the target company's shares (depending on the circumstances, the Takeover Board may grant exemptions). Thus, the bidder can typically not structure the offer in a way to exclude the risk of ending up holding less than 90% and, consequently, not being able to squeeze-out the remaining minority shareholders. In practice, however, bidders reach squeeze-out levels in most Swiss public acquisitions.

5.2 What deal protections are available to private equity investors in your jurisdiction in relation to public acquisitions?

Both takeover parties can agree on break fees unless the fee payable by the target company will result in coercing shareholders to accept the offer or deter third parties from submitting an offer. As a rough rule of thumb, break fees should not considerably exceed the costs in connection with the offer. The parties must also disclose such agreements in the offer documents.

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

6 Transaction Terms: Private Acquisitions

6.1 What consideration structures are typically preferred by private equity investors (i) on the sell-side, and (ii) on the buy-side, in your jurisdiction?

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

6.2 What is the typical package of warranties/indemnities offered by a private equity seller and its management team to a buyer?

Usually, a customary set of representations and warranties is granted which is not materially different from what strategic sellers offer. Quite often, tax indemnities are seen.

6.3 What is the typical scope of other covenants, undertakings and indemnities provided by a private equity seller and its management team to a buyer?

Typically, the parties agree on non-compete and non-solicitation obligations for a period of one to three years.

6.4 To what extent is representation & warranty insurance used in your jurisdiction? If so, what are the typical (i) excesses / policy limits, and (ii) carve-outs / exclusions from such insurance policies, and what is the typical cost of such insurance?

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

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

of warranties, e.g. environmental warranties or product liability, and (viii) liabilities arising as a result of fraud, corruption or bribery.

6.5 What limitations will typically apply to the liability of a private equity seller and management team under warranties, covenants, indemnities and undertakings?

The liability for breaches of R&W is typically subject to a *de minimis* amount (depending on deal size) and a threshold amount (often approximately 1% in mid-cap transactions), as well as a cap in the range of 10–30%. Title and tax representations are often not subject to such limitations.

Managers are only liable in proportion to their shareholding.

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

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

6.7 How do private equity buyers typically provide comfort as to the availability of (i) debt finance, and (ii) equity finance? What rights of enforcement do sellers typically obtain in the absence of compliance by the buying entity (e.g. equity underwrite of debt funding, right to specific performance of obligations under an equity commitment letter, damages, etc.)?

Typically, in relation to the equity portion the private equity fund provides an equity commitment letter which may be enforced by the seller (obliging the private equity fund to provide the NewCo with the necessary funds). The debt portion is usually comforted by binding financing term sheets, interim loan agreements or similar. In the context of public transactions, the availability of funds must be confirmed by the review body before the launch of the offering.

6.8 Are reverse break fees prevalent in private equity transactions to limit private equity buyers' exposure? If so, what terms are typical?

Reverse break fees are relatively rarely seen in private equity transactions; sellers often insist on actual financing proof (see above).

7 Transaction Terms: IPOs

7.1 What particular features and/or challenges should a private equity seller be aware of in considering an IPO exit?

A private equity seller should be aware of the following features and challenges for a company going public:

- Lock-up: Typically, existing shareholders holding more than 3% of the share capital prior to the offering, as well as the members of the board of directors and the executive management, will be required by the underwriters to sign lock-up undertakings during six to 18 months after the IPO. Therefore, SHAs among private equity investors and agreements with directors and managers should provide for respective undertakings.

- Drag-along rights: SHAs should also include drag rights to ensure that there are sufficient shares to be sold in the secondary tranche.
- Corporate governance: Private-equity owned companies will have to adapt their corporate governance regimes in order to make the company fit for an IPO (including amendments to the articles of association, board composition, internal regulations, executive compensation, etc.).
- Regulation: As in most jurisdictions, Swiss law and the listing rules of the SIX Swiss Exchange provide for additional obligations of a public company (e.g. obligations regarding financial reporting, compensation of the board of directors and the senior management, *ad hoc* announcements, disclosure of major shareholdings). These obligations require additional resources within the company and the support of an external specialist.
- Liability: The liability regime and exposure in connection with an IPO is different to a trade sale. While in a trade sale, the liability of the seller(s) is primarily contractual (i.e. under the SPA) and, therefore, subject to negotiation, the main liability risk in an IPO results from the statutory prospectus liability. However, since the company going public is primarily responsible for preparing the prospectus, the sellers' exposure under this statutory regime is limited in most cases. In addition, the underwriters typically require the selling shareholder(s) to also make some limited representations in the underwriting agreement and it is advisable that these are agreed on early in the process.
- Full exit: A full exit at the listing, i.e. a sale of all shares held by the private equity seller, is typically not possible via an IPO. Therefore, the private equity seller will need to sell the remaining shares gradually or in one or more block trades after the lock-up expired.

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

Typically, existing shareholders holding more than 3% of the share capital prior to the offering, as well as the members of the board of directors and the executive management, will be required by the underwriters to sign up for lock-up undertakings during six to 18 months after the IPO. Therefore, SHAs among private equity investors and agreements with directors and managers should provide for respective undertakings.

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

This is heavily dependent on the general market conditions. If an IPO is considered, dual-track processes are often seen. However, if an IPO is not the preferred route at the beginning, often just a trade sale (auction) process takes place. Dual-track processes are being pursued until very late in the process, although parties try to make their final decision before the intention to float is published. Preferably, the timelines for both tracks are aligned so that the analyst reports and investor feedback on the IPO track are available simultaneously with the binding offers on the trade sale track. This allows the decision on the track to be made once there is a relative clear view on the valuation.

8 Financing

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

Private equity investors usually provide financing in the form of subordinated loans. In the context of leveraged buyouts, investors will typically use senior and junior debt in the form of credit facilities provided by financial institutions and high-yield bonds, although there are some restrictions in connection with bond financing into Switzerland. In the context of acquisitions, debt providers usually require that existing debt is refinanced at the level of the acquisition debt providers. Security released in connection with the refinancing typically serves as collateral for the new acquisition financing. The ability of Swiss target group companies to provide collateral is limited under Swiss law. Upstream security may only be granted if certain prerequisites are met, and only in the amount of the relevant Swiss company's freely distributable reserves.

8.2 Are there any relevant legal requirements or restrictions impacting the nature or structure of the debt financing (or any particular type of debt financing) of private equity transactions?

Under Swiss law, there are no statutory corporate minimum leverage requirements. However, *de facto* limitations result from the thin capitalisation rules applied by Swiss tax authorities. Interest paid on amounts of debt exceeding certain thresholds may be requalified as a hidden dividend if paid to a shareholder or a related party of a shareholder. Consequently, such interest would not be tax-deductible and subject to 35% withholding tax.

The same generally applies if debt is provided by a third party but secured by a shareholder. Furthermore, there are restrictions on Swiss companies granting loans or providing security which are of an upstream or cross-stream nature (see question 8.1 above). The Swiss tax authorities publish maximum safe haven interest rates for intercompany loans on an annual basis. Higher interest rates can be justified with a third-party test.

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

The Swiss debt financing market still proves to be robust with no apparent slow-down of M&A activity and sustained negative interest rates introduced by the Swiss National Bank. Covenant-lite and loose loans (especially with respect to financial covenants) become more and more common.

9 Tax Matters

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

Switzerland is not known as a very attractive location for the establishment of private equity funds, mainly due to the Swiss

withholding tax and securities transfer tax regimes. Therefore, private equity funds are often established in jurisdictions like Jersey, Cayman Islands, Luxembourg, Scotland or Guernsey.

Private equity acquisitions in Switzerland are mainly performed by NewCo acquisition vehicles (holding company) from jurisdictions with which Switzerland has concluded a double taxation treaty and which foresee a 0% Swiss withholding tax for a qualifying (minimum 10% shareholding) dividend distribution from a Swiss company.

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

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

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

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

9.4 Have there been any significant changes in tax legislation or the practices of tax authorities (including in relation to tax rulings or clearances) impacting private equity investors, management teams or private equity transactions and are any anticipated?

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

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

Further, the anticipated corporate tax reform, under which privileged tax regimes will be abolished (entry into effect expected

as of 1 January 2020, subject to the public vote in May 2019), will have an impact on the effective tax rates of Swiss target companies, since general reductions of tax rates and measures like patent boxes are expected to be introduced to maintain the attractiveness.

Tax authorities tend to scrutinise tax-exempt capital gains for selling individuals; thus, earn-out arrangements for sellers continuing to work for the target or non-compete agreements may partly qualify as taxable income for the seller and should be structured carefully. It is important to note also that payments by related parties could qualify as (taxable) salary which is generally subject to social security contributions by the Swiss employer.

10 Legal and Regulatory Matters

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

After a major revision of the Swiss collective investment schemes legislation in 2013, private equity funds may qualify as collective investment schemes under Swiss law (Collective Investment Schemes Act, CISA). Under the CISA, the requirements for the offering and placement of funds mainly depend on whether the fund interests are being “distributed” in the meaning of CISA in or from Switzerland and, if so, whether they are distributed to qualified investors only or to other persons as well. As a result, the concept of distribution is key to determining the admissibility of offering interests in private equity funds in or from Switzerland. This new concept replaced the previous distinction between public distribution and private placement under the old CISA.

As a consequence, fundraising has become more complex. In particular, special attention has to be paid to the question of what kind of investors can be approached for fundraising. In short, interests in private equity funds may still be freely offered to regulated financial intermediaries such as banks, securities dealers, fund management companies and insurance companies in Switzerland (the so-called “super-qualified investors”). Fundraising from these super-qualified investors does not qualify as “distribution” and is, therefore, not subject to the distribution rules of the CISA. The case is different for the offering of interests in private equity funds to qualified investors, as this may be subject to legal and regulatory requirements (e.g. the requirement for a Swiss paying agent and representative of the funds). Distributors of foreign funds to Swiss qualified investors need to be adequately supervised, with Swiss distributors requiring a licence from the Swiss Financial Market Supervisory Authority (FINMA).

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

The next major regulatory development in the area of financial markets will be the enactment of the Financial Services Act and the Financial Institutions Act (FinSA and FinIA), which will enter into force in 2020. These will change the regulatory landscape for financial services significantly, with the FinSA being to some extent modelled on MiFID. In particular, the new laws will affect the distribution regime under the CISA. For one, the distributor licence requirement will be eliminated in favour of registration and other regulatory requirements applicable to client advisers. Furthermore, the concept of “distribution” will be replaced by a more narrowly defined concept of “offering”, and changes to the available exemptions and the categories of qualified investors will be introduced. The new regime is expected to substantially decrease the compliance burden for offering foreign collective investment schemes to Swiss qualified investors. In particular, it will be possible to offer foreign collective investment schemes to all types of qualified investors (except high-net worth individuals) – not only “super-qualified investors” – without triggering a requirement to appoint a Swiss paying agent and representative.

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

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

10.3 How detailed is the legal due diligence (including compliance) conducted by private equity investors prior to any acquisitions (e.g. typical timeframes, materiality, scope etc.)?

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

10.4 Has anti-bribery or anti-corruption legislation impacted private equity investment and/or investors’ approach to private equity transactions (e.g. diligence, contractual protection, etc.)?

In DD, a focus on compliance of target companies with anti-bribery, anti-corruption and economic sanctions has increased in recent years.

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

Under special, limited circumstances, a private equity investor or an individual acting for it may be regarded as a *de facto*/shadow director of the company and, consequently, be bound by directors’ duties (see question 3.6).

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

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

11 Other Useful Facts

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

In April 2014, the European Commission imposed a €37 million fine on Goldman Sachs for antitrust breaches committed by a portfolio company that was formerly owned by its private equity arm, GS Capital Partners. GS and the portfolio company were held jointly and severally liable for the fine. GS was held liable on the basis that it exercised decisive influence over the portfolio company, although GS was not alleged to have participated in, been aware of or facilitated the alleged cartel in any way. Even though in Switzerland no such precedents in relation to private equity companies exist so far, it is possible that the Swiss Competition Commission could follow the European Commission’s line of thinking. In Switzerland, holding companies tend to be found to be jointly and severally liable for the antitrust fines of their subsidiaries. Private equity investors should, therefore, implement a robust compliance programme in their portfolio companies to avoid antitrust law infringements.

**Dr. Christoph Neeracher**

Bär & Karrer Ltd.
Brandschenkestrasse 90
8027 Zurich
Switzerland

Tel: +41 58 261 52 64
Email: christoph.neeracher@baerkarrer.ch
URL: www.baerkarrer.ch

Dr. Christoph Neeracher is a partner at Bär & Karrer and co-head of the Private M&A and Private Equity Practice Group. He is recognised as one of the preeminent private M&A and private equity attorneys at law in Switzerland and is a leading lawyer in financial and corporate law. Christoph Neeracher is experienced in a broad range of domestic and international transactions, on both the sell- and buy-side (including corporate auction processes), and specialises in private M&A, private equity and venture capital transactions. Furthermore, he advises clients on general corporate matters, corporate restructurings as well as on transaction finance and general contract matters (e.g. joint ventures, partnerships and SHAs), relocation and migration projects, and all directly related areas such as employment matters for key employees (e.g. employee participation and incentive agreements). In his core fields of activity he represents clients in litigation proceedings.

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

**Dr. Luca Jagmetti**

Bär & Karrer Ltd.
Brandschenkestrasse 90
8027 Zurich
Switzerland

Tel: +41 58 261 52 62
Email: luca.jagmetti@baerkarrer.ch
URL: www.baerkarrer.ch

Dr. Luca Jagmetti is a partner at Bär & Karrer in the Practice Group Private M&A and Private Equity. He has vast experience in domestic and international M&A transactions (share and asset deals) involving a broad range of industries, corporate auction processes, venture capital investments and management equity participation schemes. Luca Jagmetti further advises clients on intragroup and transaction financing, corporate restructurings and general contract and commercial matters. In his core fields of activity he represents clients in litigation proceedings.

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

According to *The Legal 500* 2016 he is "very knowledgeable and speedy". *IFLR* 2018 lists him as a noticeable practitioner. Luca Jagmetti is jointly ranked first in *Mergermarket's* Profile League Table for 2016's most prolific individual DACH legal advisors.

BÄR
& KARRER

Bär & Karrer is a renowned Swiss law firm with more than 170 lawyers in Zurich, Geneva, Lugano and Zug. The core business is advising clients on innovative and complex transactions and representing them in litigation, arbitration and regulatory proceedings. The clients range from multinational corporations to private individuals in Switzerland and around the world. Bär & Karrer was repeatedly awarded Switzerland Law Firm of the Year by the most important international legal ranking agencies in recent years. Almost all leading private equity funds active in Switzerland form part of our client basis.

2019 *International Financial Law Review (IFLR)* "Debt and Equity-linked Deal of the Year" Award.

2019, 2015 and 2014 *IFLR* Awards.

2018 *IFLR* "Deal of the Year" Award.

2018, 2017 and 2016 Trophées du Droit Gold or Silver.

2018, 2016, 2015 and 2014 *Mergermarket* M&A Awards.

2016, 2013 and 2012 *Chambers* European Awards.

2016, 2015 and 2014 *The Legal 500* ("most recommended law firm in Switzerland").

2015, 2014, 2013, 2011 and 2010 *The Lawyer's* European Awards.

2015 Citywealth Magic Circle Awards ("International Law Firm of the Year EMEA").

2014 Citywealth International Financial Centre Awards.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Financial Services Disputes
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Investor-State Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms



59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com