LEXOLOGY
Getting The Deal Through

Private Equity (Transactions)

in Switzerland

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Table of contents

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Switzerland

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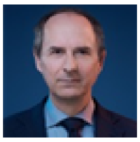

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TRANSACTION FORMALITIES, RULES AND PRACTICAL CONSIDERATIONS

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?

Private equity (PE) activity in Switzerland continues to be sustained by a combination of historically low interest rates, credit markets supplying cheap financing, the extended run of economic growth and a generous fundraising environment. Consequently, the number of PE deals involving Switzerland hit record highs in 2018 and 2019. Likewise, deal volumes bounced back after a sharp decline between 2014 and 2017, with the US$10 billion acquisition of Nestlé Skin Health by a consortium led by EQT and the Abu Dhabi Investment Authority leading Swiss PE league tables in 2019. Of the deals announced, the majority continue to be acquisitions rather than disposals, demonstrating how PE remains an active investor in Switzerland.

In the Swiss market, all standard PE transaction structures and strategies to invest in, grow or acquire profitable portfolio companies are present. Normally buyout or growth investments in Switzerland are structured such that the fund incorporates a new Swiss special-purpose acquisition vehicle (SPV) to buy the shares in the target portfolio company. For tax, financing and other purposes the Swiss SPV will often be held via a foreign-domiciled SPV (eg, Luxembourg). While the Swiss 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 to fund the Swiss SPV with the required equity to complete the transaction. Venture capital investors, on the other hand, generally acquire participations in portfolio companies directly through one (or several) of their investment funds.

However, creativity is emerging in a crowded market and thus specialisation and innovative deal structures have become more frequent. Likewise, diversification among industries or expansion across borders is a clear trend.

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?

Generally, Swiss corporate law provides for a high level of flexibility, allowing PE investors to tailor the governance structure of their portfolio companies according to their specific needs and practices.

In summary, the main rules relating to corporate governance in Switzerland are as follows:

- the Swiss Code of Obligations (CO), in particular articles 620 et seq, which are partly mandatory and apply to any Swiss stock corporation whether listed or not;
- the Financial Market Infrastructure Act (FMIA) and its implementing ordinances, which, inter alia, contain rules regarding the disclosure of significant shareholdings and public tender offers concerning Swiss companies listed in Switzerland and non-Swiss companies with a primary listing in Switzerland, and insider and other market behaviour rules for securities admitted for trading in Switzerland;
- the ordinance against excessive remuneration by listed companies (VegüV), which applies to Swiss (but not foreign) corporations whose shares are listed in Switzerland (note that the Swiss parliament is in the process of revising the CO to incorporate the VegüV, as amended, into the CO). The VegüV 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 (ie,

top) management, and the prohibition of certain forms of remuneration for the members of the board and the executive management (eg, severance payments, advance payments, payments related to the acquisition or disposal of businesses);

- the Financial Services Act and the related implementing ordinance, which entered into force on 1 January 2020, that, subject to certain transition periods, establish new rules on public offerings and admission to trading of securities and related prospectus requirements;
- the listing rules of the SIX Swiss Exchange (SIX) and its implementing directives (including the directives on Information relating to Corporate Governance, Ad-hoc Disclosure, and the Disclosure of Management Transactions), which, inter alia, contain periodic financial reporting and other continuing and ad hoc reporting rules applying to companies whose shares are listed on SIX. Similar rules apply to companies whose shares are listed on the BX Swiss exchange which emerged from the BX Berne eX-change and today is owned by the Börse Stuttgart;
- the Swiss Code of Best Practice for Corporate Governance issued by Economiesuisse, an association representing the Swiss economy, which sets forth corporate governance standards in the form of non-binding recommendations primarily for listed companies. Although not binding, these rules have become a standard for listed companies; and
- the governance and proxy voting guidelines and benchmarks of national and international proxy advisers (eg, Ethos, ISS, Glass Lewis), which, though not legally binding, have in practice become increasingly important for companies listed in Switzerland.

Consequently, the majority of corporate governance-related rules and regulations apply to listed companies. However, this includes circumstances in which PE investors intend to dispose of an asset by way of IPO, which typically means that after the IPO such PE investors will continue to be a significant shareholder until full sell-down by way of subsequent block trades or otherwise; in these cases banks, financial advisers as well as institutional and private investors have become increasingly sensitive to the listed company adopting high standards of corporate governance (eg, as regards the independence and skillset of the board of directors, the capital structure and preference voting rights). It is important to consider these aspects early on and not only at the time of divestment.

In contrast, the mandatory corporate governance rules applying to private companies are much lighter and are 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 hold minority interests in a portfolio company but have far-reaching control and veto rights through their representatives on the board of directors of the portfolio company. In such cases potential conflict of interest-scenarios may arise where corporate governance principles will set certain limits.

Finally, special rules on corporate governance apply to certain regulated businesses such as banks, insurance companies and investment companies with variable capital or fixed capital.

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 are typically effected by way of a public tender offer in accordance with the FMIA, or less commonly by way of a merger pursuant to the Swiss Merger Act (SMA). Other PE investments into public companies, for example, the acquisition of a minority stake against cash or contribution in kind, are generally conducted pursuant to the common rules of the CO.

In all these transactions, the members of the board of directors are bound by fiduciary duties (including the duty to properly deal with conflicts of interest) and by the principle of equal treatment of all shareholders as set forth in the CO. Under Swiss law, the principle of equal treatment does not mean that all shareholders must be treated the same. Rather, shareholders must be treated alike in like circumstances. This means, for example, that a board of directors may under certain circumstances and subject to compliance with insider and other market behaviour rules provide more information to large shareholders if this is in the interest of the company.

Unlike directors and officers, shareholders do not owe the company a fiduciary duty. Accordingly, unless agreed otherwise by contract (eg, a shareholders' agreement), shareholders may pursue their interests freely as set forth in the articles of association and by exercising their voting rights at shareholders' meetings.

For public tender offers, the FMIA and related implementing ordinances as well as the practice of the Swiss Takeover Board require the board of directors of a public company to comply with more specific rules to ensure transparency, fairness and equal treatment of shareholders and similar rules apply in public mergers pursuant to the SMA. For example, in the event that not all members of the board of directors of a company that is the target of a public tender offer can be considered independent, the board must establish a special committee of independent directors. The special committee must be composed of at least two members who are not participating or do not have an interest in the transaction. If this is not possible the board will be required to commission and publish a fairness opinion as part of its report to shareholders. In practice, boards will often in any event obtain one or several fairness opinions to support their recommendations (if any).

Disclosure issues

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

Under Swiss stock exchange rules, listed companies must immediately inform the market of any price-sensitive facts that have arisen in their sphere of activity (ad hoc publicity). If the price-sensitive fact is based on a plan or decision of the issuer (eg, if an issuer is in negotiations with a PE investor about a potential going-private transaction) and its dissemination might prejudice the legitimate interests of the issuer, the issuer may postpone the disclosure of that fact. In such case the issuer needs to take certain safety measures. First, the issuer must ensure that the price-relevant fact remains confidential; in the event of a leak, the market must be informed immediately. For such purpose issuers will typically adopt a leak contingency plan and maintain an insider list. Secondly, the issuer will impose a blocking period on all insiders to avoid the risk of insider trading. Third, the issuer will enter into confidentiality agreements with involved third parties (including the potential PE investor and large shareholders that have been wall-crossed), which typically also contain rules on trading restrictions, coordination of announcements (especially if the counterparty is subject to public reporting duties as well) etc.

In the case of a going-private transaction by way of 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.

If the going-private transaction is effected by way of a merger, 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).

Timing considerations

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

Going-private transaction by way of public tender offer pursuant to the FMIA

- A public offer is typically initiated by public pre-announcement (not mandatory); 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. Settlement occurs within 10 trading days after publication of the final result or, to the extent permitted, later once all offer conditions (eg, regulatory approvals) are fulfilled (all deadlines may be reduced or extended by the Swiss Takeover Board upon request).
- In practice, the issuer and the bidder will negotiate a transaction agreement (and ancillary agreements), secure financing, obtain fairness opinions and submit the draft offer documents to the Swiss Takeover Board for pre-clearance in advance of publication of the pre-announcement or the offer prospectus. Depending on the complexity of the matter and the number of parties involved, the pre-offer negotiation and preparation period may last up to several months or longer.
- Further timing considerations relate to delisting and post-offer squeeze-outs, as further described in question 6.

Going-private transaction by way of merger

- Pursuant to the Swiss Merger Act, the merger in a going-private transaction will require shareholder approval of the merging companies. This requires appropriate preparation. In particular, the signed merger agreement, a detailed board report on the merger and an audit report have to be issued 30 days prior to the shareholders' meeting; additional time may be required for employee consultations if the contemplated merger is expected to have any consequences on employment conditions.
- Compared with tender offers, mergers have the advantage that the absorbing entity will in a single step acquire 100 per cent of the absorbed entity, thereby avoiding the necessity of a subsequent squeeze-out. The disadvantages of a merger include the right of creditors to request that their claims be secured within three months of the publication of the merger and the right of dissenting shareholders to challenge the merger consideration in court (even after completion of the merger).

Further timing considerations applicable to PE transactions of all kinds relate to merger control and other regulatory filings and approvals as well as potential tax rulings. In this context it is worth noting, however, that unlike many other jurisdictions Switzerland has not yet implemented foreign investment restrictions, apart from limited exceptions in certain regulated areas.

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 by way of 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:

- If the bidder in a public tender offer holds more than 98 per cent of the voting rights in the target company, under the FMIA 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). The minority shareholders may join the court procedure. 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.
- Alternatively, the SMA provides 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.

In the case of a squeeze-out merger pursuant to the SMA, squeezed-out shareholders 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 chances of a successful challenge are rather low if the squeeze-out merger is carried out within a short period of time of a public tender offer.

Under the present law, the authority to apply for delisting of shares lies with the board of directors of the listed company (ie, no shareholder approval is required). SIX rules require that the listing must generally be maintained for at least three and a maximum of 12 months from the delisting announcement (continued listing period) depending, inter alia, on the size of the remaining free float; however, in general shareholders merely have the (limited) right to challenge the delisting decision with regard to the continued listing period.

In practice, once a tender offer has been declared successful (ie, unconditional save for pending regulatory approvals) by the bidder upon expiry of the initial offer period, it will typically reach very high acceptance rates (above 90 per cent) during the subsequent mandatory additional 10-day offer period. The reasons for this are, among others, limited minority shareholder rights under Swiss corporate and securities law and the less favourable tax treatment of squeeze-out mergers in comparison with a sale in the tender offer. The likely prospects of a delisting and squeeze-out combined with the limited rights of objection and defence and, more generally, the limited minority rights of shareholders under Swiss law make it unattractive for activists and other shareholders to resist an offer.

Purchase agreements

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

Sale and purchase agreements (SPA) in buyout deals and investment agreements (IA) in venture and growth capital deals in Switzerland follow a generally recognised catalogue of customary standard terms and conditions.

A full suite of venture capital model documentation for large and small deals (including investment agreements, shareholders' agreements, term sheets, board regulations and articles of association), which generally reflect market standards, can be found on the website of the Swiss Private Equity and Corporate Finance Association's (SECA) (www.seca.ch).

SPAs and IAs usually contain a catalogue of representations and warranties such as regarding title, organisation, financial statements, tax, intellectual property, employees and social security, real estate, material contracts, etc. In addition, investors will seek specific indemnities for risks identified in the due diligence process. However, in practice, representations, warranties and indemnities have become lighter in response to the continuing seller's market environment. Furthermore, warranty insurance purchased by the buyer is increasingly popular, thereby replacing the normal concept of seller's liability for representations and warranties.

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?

Market standard remuneration elements usually provided for in the respective employment agreements include a fixed salary base, with a bonus based on, for example, an EBITDA target, a net debt target or on qualitative targets. In non-listed portfolio companies, exit bonuses based on capital gain targets are also seen.

However, the most fruitful strategy in incentivising the management of a target company is to align as far as possible the interests of the managers with those of the PE investor (reduction of the principal-agent conflict of interest). The most effective way to achieve this goal is to ensure that the manager invests - directly or indirectly - a fair amount of his or her net worth in the target company right from the outset (skin in the game). Such investment should be on similar terms as the PE investor's investment, as far as appropriate.

In addition, in standard market practice, the following forms of incentives are most commonly used in order to incentivise the target company management:

- share options;
- restricted shares or restricted share units; and
- in some circumstances, performance share units.

For tax reasons, phantom and similar virtual stocks are less common in Swiss PE environment. Further specific regulations apply for listed target companies and for regulated target companies in the financial industry.

Regarding timing the following should be considered:

- in general, considerable time is required to agree with the target company management on a specific participation scheme. Therefore, it may well make sense to just agree prior to closing with the management on the key terms but to save the implementation or execution of the participation for the post-closing phase;
- the fact that the negotiations regarding the future participation of the target management may lead to potential conflicts of interest should be considered when deciding on the timing of such negotiations; and
- last but not least, the timing of the negotiations regarding the future participation of the target management affects the timing of the loyalty shift of the target company management.

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?

Swiss resident target companies are subject to profit and capital taxation on federal, cantonal and communal level.

Depending on the canton or municipality where the target operates, the effective corporate profit taxes on federal, cantonal and communal level currently vary between about 12 and 21 per cent. With regard to corporate profit tax it should be noted that the Federal Act On Tax Reform and AHV Financing (TRAF), which entered into force on 1 January 2020, has resulted in the abolition of the special tax regimes (holding company, mixed company and domicile company) at cantonal and communal level (no change has occurred on federal level as such regimes did not exist at this level). As a result, all companies are now ordinarily taxed. Some benefits have been introduced to allow for a smooth transition from privileged taxation to ordinary taxation (step-up under old or new law). The practice in this regard is not yet fully clear but is currently being established by the cantonal tax authorities and the Swiss Federal Tax Administration. Under the new law, a target company may benefit from privileged taxation under the rules applying to patent boxes, notional interest deduction and increased tax deduction for research and development expenses. However, at least 30 per cent of the taxable profit (taxable profit after deduction of the tax expense, prior to deduction of tax loss carry-forwards and excluding net participation income from qualifying participations) before such compensation measures must be subject to taxation at cantonal and communal level.

Switzerland grants participation relief for the dividends distributed by subsidiaries (whether Swiss or non-Swiss) provided that certain requirements are met. The Swiss share company must hold at least 10 per cent of the share capital of the company paying the dividend or the shareholding in a dividend-paying company must have a fair market value of not less than 1 million Swiss francs. In the case of capital gains, the selling company must have sold at least 10 per cent of the shares in the share company that it owned for at least one year for a sale price exceeding cost price (recaptured depreciation will be ordinarily taxed). The participation relief works as a reduction of taxes rather than as an exemption system. Participation relief is calculated as follows: [gross dividend income minus financing costs minus administration costs minus depreciation of the participation] divided by [taxable income] equals [percentage of relief from profit taxes of the company receiving the dividend]. Owing to this mechanism, participation relief is factually limited in certain circumstances but also may result in full exemption. Investments in collective investment schemes or transparent entities do not qualify for participation relief.

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.

Any dividend payments made by a Swiss company are subject to Swiss withholding tax at the rate of 35 per cent. This also includes deemed profit distributions and liquidation proceeds. The withholding tax can fully be reclaimed by Swiss-resident entities or individuals who fully meet the legal obligations. Full or partial refund or reduction at source may be available under a double taxation treaty to qualifying non-Swiss investors.

The issuance of share capital and any contributions to the equity of a Swiss company are subject to Swiss securities issuance tax at the rate of 1 per cent unless an exemption applies (free amount of 1 million Swiss francs and tax-neutral reorganisations should be considered).

If a Swiss registered securities dealer for the purposes of Swiss securities transfer tax is involved in a transaction as an intermediary (broker) or as a party, Swiss securities transfer tax at the rate of up to 0.15 per cent (Swiss securities) and up to 0.3 per cent (non-Swiss securities) of the sales price may become due, unless an exemption is given.

The VAT system can be compared to the regulations that apply in the EU. The standard VAT rate currently amounts to 7.7 per cent.

Personal income taxes vary between about 15 and 40 per cent. The income tax rates are progressive. In addition, net wealth tax at the rate of between about 0.1 and 1 per cent per annum needs to be considered. If a Swiss resident investor sells assets which he or she holds as part of his or her private assets with a capital gain, such capital gain will - provided that certain requirements are met - be tax-free. A loss will not be deductible.

With regard to corporate investors the taxation follows treatment in the statutory accounts. Participation relief may be available if the investor is a share company holding the target company directly. No participation relief is available if the shares are held through a fund. Ordinary tax rates apply. Pension funds are exempt from profit tax (apart from gains arising in relation to real estate).

Typical PE structures allow for individual Swiss resident investors to realise a tax-free capital gain. The investors invest directly in the target company or through a transparent fund. The individuals investing in fund structures will be taxed in the same way as if they would hold the underlying assets and liabilities directly. To the extent that certain requirements are met, any capital gain will be tax-free and losses are not deductible. Any income stemming from dividends and interest and other sources will be part of the taxable income. Costs run up by the fund may only be deducted up to 1.5 per cent of NAV from potentially taxable income from the fund.

The fund managers or executives of the target resident in Switzerland as a rule will also strive for a structure that allows them to achieve a tax-free capital gain. The competent Swiss tax authorities expect the target company or employer to approach them when the employee share scheme is being established to determine the taxation of the participating employees. As a rule, it will be necessary to agree on a suitable formula to apply during the lifetime of the investment (ie, upon acquisition, holding and exit). To the extent that the formula is not adhered to taxable income will arise that is as a rule subject to Swiss income tax and social security. Income from golden parachutes and deferred compensation plans is usually ordinarily taxed. It needs to be taken into account that income from employment is not only subject to income taxation but as a rule also to Swiss social security contributions (no cap).

Share deals are as a rule not classified as asset acquisitions for tax purposes. An exemption may apply in case of the transfer of real estate companies where a 'piercing-the-veil' approach may apply and cantonal and communal real estate capital gains tax and transfer tax may be levied.

It is a standard procedure to apply for tax rulings with the competent tax authorities in relation to matters which are not 100 per cent clear. The rulings may be subject to international spontaneous information exchange under the applicable Swiss legislation.

DEBT FINANCING

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?

Depending on the type of transaction (eg, acquisition of a minority participation or 100 per cent stake) PE sponsors typically use different layers to finance their acquisitions. In Swiss deals, senior loans will be provided by banks under a syndicated credit facilities agreement. Typically, there will be a term loan A and a term loan B. In addition, often the credit facilities agreement will also provide for a revolving credit for general corporate purposes. Additional layers of debt financing may include second lien debt, mezzanine debt, high-yield bonds or payment-in-kind notes.

Acquisition debt is initially secured by BidCo and post-closing usually by an extensive security package that consists of pledge or security assignment over assets of the target group such as shares, intercompany receivables, bank account receivables, IP rights, mortgage certificates and other assets. Such security by the target group is of an upstream nature and thus limited according to Swiss corporate law. In particular, collateral that is granted by a Swiss company to secure obligations of a direct or indirect shareholder can only be provided to the extent of the Swiss company's freely distributable reserves. Furthermore, corporate approvals at board and shareholder level must be passed. Acquisition structures that do not involve the acquisition of a 100 per cent stake can pose issues in light of the restrictions applicable to upstream security and must be analysed carefully. Furthermore, debt financing to Swiss borrowers or to borrowers that benefit from a Swiss parent guarantee may be subject to the Swiss 10/20 non-bank rule, which restricts the non-bank lenders under the credit facilities agreement to 10 and the non-bank lenders to the relevant borrower across any debt financing to 20.

Acquisition finance lenders normally require that the existing indebtedness of the target group be completely refinanced, as any lenders further up in the structure are structurally subordinated. In addition, the acquisition of a majority stake will also trigger change of control provisions of financing arrangements of the target group. In connection with the refinancing the seller should be obliged to mitigate potential break costs by ensuring that interest periods are synchronised with the contemplated timing of closing or repayment. Analysis of existing indebtedness is a crucial part of determining the financing.

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?

Going-private transaction agreements between BidCo and the target company do not usually contain any financing-related provisions. However, according to Swiss public takeover law, a bidder is required to demonstrate that it has secured sufficient funds to finance the public tender offer before it launches the offer. Such certainty of funds needs to be confirmed by the independent review body. In connection with the assessment by the independent review body, the creditworthiness of the financing providers and the permissibility of conditions precedent to drawdown will be carefully analysed.

In order to secure certain funds prior to the launch of the public tender offer, equity and debt commitment papers must be in place. Typically, either a credit facilities agreement has already been executed by then or the parties decide to enter into an interim facility agreement along with a committed term sheet for a full credit facilities agreement that will then usually be negotiated and executed before settlement of the public tender offer (so that no drawdown under the interim facility agreement is necessary).

The bidder is required to include a statement regarding the financing of the public tender offer in the offer prospectus. Typically, these statements are very brief and, in particular, do not have to set forth detailed provisions of debt and equity financing arrangements.

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 and other bankruptcy issues are very rare in Switzerland in the context of PE transactions. In principle, no such issues arise. However, in a distressed scenario or in the case of a scenario where a target company gets into financial difficulties after the acquisition, careful consideration needs to be given. Generally, transactions are subject to avoidance actions during a period of up to five years. This means that any type of agreement or transaction that was entered into or carried out within the five-year period before the company became bankrupt or insolvent may be unwound by operation of law. Also, board members and de facto officers of Swiss companies may become personally liable if creditors of the company suffer a damage. As indicated in question 10, bidders and target groups are typically requested to provide extensive security packages. Thus it is very important that the security is granted in accordance with best practice (including, in particular, in connection with the provision of upstream security) in order to mitigate the risk exposure of the individuals and companies involved.

SHAREHOLDERS' AGREEMENTS

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?

Based on Swiss company law, in private companies no duty can be imposed on a shareholder other than the obligation to pay in the relevant subscription amount for its shares (for additional disclosure duties of shareholders in public companies, see question 14). However, Swiss company law provides for certain specific rights aiming at the protection of minority shareholders, such as, for example, the right to call for a shareholders' meeting or to put certain items on the agenda of such shareholders' meeting if the minority shareholder holds individually or together with other minority shareholders at least 10 per cent of the share capital of the company. Furthermore, certain shareholder resolutions require a qualified majority of two-thirds of the votes and the majority of the capital represented at a specific shareholders' meeting. Minority investors are, in addition, protected by the principle of equal treatment of shareholders applicable to the board of directors or the (not unrestricted) pre-emptive right for new shares to be issued.

If a shareholder requests further minority rights or additional duties to be imposed on certain other shareholders, it is only possible to a very limited extent to mirror these rights and duties in the company's corporate documents. These rights and duties can in most cases merely be provided for in a shareholders' agreement applicable only inter partes. Such shareholders' agreements are fairly standardised in Swiss transactions.

Accordingly, in situations where a PE investor only acquires a minority stake, it will request further protective rights to be implemented in a shareholders' agreement. Such additional rights may include, for example, the right to appoint board members or supermajority requirements for certain important shareholder and board matters, covenants regarding the conduct of business, veto rights or voting requirements in favour of PE investors (eg, to vote in favour of a share capital increase in combination with an obligation to waive subscription rights in defined circumstances, such as a joinder of a new PE investor) and also specific rights regarding the waterfall of proceeds and other liquidation preferences. Last but not least, in the context of a PE investment, the PE investor must ensure transparency and strict monitoring that goes beyond financial reporting. The required level of disclosure and the framework for the reporting of relevant information is most commonly tailored to the PE investors' needs and, accordingly, also reflected in the shareholders' agreement.

A company's articles of incorporation may restrict the transfer of shares. If so, an approval of the board of directors is required for any share transfer. In general, shareholders' agreements contain additional detailed provisions on permitted and restricted share transfers, rights of first refusal, pre-emptive rights, co-selling rights (tag-along) and co-selling obligations (drag-along).

For venture capital transactions SECA has issued model documentation, also including a standardised shareholders' agreement that is widely used as a starting point in corresponding Swiss transactions, especially financing rounds. This documentation can be downloaded from the SECA website (www.seca.ch).

ACQUISITION AND EXIT

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?

Regarding public companies, the FMIA sets out the relevant disclosure or notification duties and the mandatory takeover rules. During the stakebuilding, the following notification duties toward the target company and the stock exchange on which the equity securities are listed apply to a PE firm if the following thresholds of voting rights are reached or exceeded by it (or fall below): 3, 5, 10, 15, 20, 25, 33, 50 and 66 per cent (article 120 paragraph 1 FMIA).

The FMIA further provides that if, for example, a PE firm alone or together with other investors acting in concert directly or indirectly acquires equity securities that, added to the equity securities already held, exceed the threshold of 33 per cent of the voting rights of a target company, whether exercisable or not, must make an offer to acquire all listed equity securities of the target company (article 135 paragraph 1 FMIA). This applies unless the target company has raised the threshold to 49 per cent of the voting rights in its articles of association (opting up; article 135 paragraph 1 last sentence FMIA) or has waived that requirement entirely (opting out; article 125 paragraphs 3 and 4 FMIA).

While the above rules apply for any bidder, PE sponsors need to cope with additional complexity in connection with public tender offers as they typically finance the acquisitions using highly leveraged finance structures. Thus banks and other lenders will usually require an extensive security package from the target group after completion of the public tender offer. However, Swiss companies are restricted in granting upstream security (see question 10). In particular, in a scenario where the public tender offer does not result in a tender rate that allows the PE sponsor to squeeze out minority investors, the provision of upstream security may not be possible at all or only along with additional measures and risks. This can make the financing impossible or too expensive. In other words, uncertainty about the outcome of the public tender offer at the beginning of the process in combination with the typically highly leveraged financing structure increases the complexity of going-private transactions for PE sponsors.

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?

The exit lies at the heart of every PE transaction. Therefore, exit strategies are considered by a PE investor in assessing a transaction even before investing. As in every other jurisdiction, the most common forms of exit in successful portfolio companies are a trade sale or an initial public offering (IPO). In the evaluation and planning phase, one of these forms of exit can be explored individually (single track) or can be combined and structured as a double- or triple-track exit process. Already at the stage of drafting the initial investment documentation including the shareholders' agreement, if any, one should carefully safeguard as much flexibility regarding the potential exit strategies as possible.

The key limitations on the ability of a PE investor to do a trade sale are:

- the selling PE investor loses the opportunity to participate in future benefits of the portfolio company;
- potential disputes about and liability for breaches of representations and warranties, although these are rare as PE sellers insist on selling on standard institutional terms, giving only representation for title to the shares and capacity to enter into the share purchase agreement combined with low cap and high de minimis, and even these risks are nowadays mostly mitigated by R&I insurances; and
- in certain rare cases, PE investors may have to keep part of the proceeds in escrow as a security.

The key limitations on the ability of a PE investor to do an IPO include:

- the PE investor's main goal to achieve maximum liquidity is impeded by lock-up provisions that usually prevent the PE investor (and other shareholders) from selling their shares during a period of up to 18 months after the IPO;
- the IPO is usually costly;

- the completion of the transaction is subject to market conditions;
- the day-to-day business is more exposed to market pressure;
- being listed adds regulatory pressure and the fulfilment of the various compliance rules. Ongoing disclosure obligations may add stress and complexity to the management of the company; and
- in Switzerland, being listed also means that board and management compensation is subject to shareholders' approval.

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?

In Switzerland, shareholders' agreement are typically terminated upon the IPO and post-IPO relationship agreements and shareholders' agreements by PE sponsors and the company or other shareholders are unusual. However, there are some recent examples where sponsors entered into shareholders' agreements with co-investors (for instance in the case of an IPO led by two sponsors). Such arrangements may include board appointment rights and joint sell-down or other 'orderly market' arrangements.

Furthermore, in some cases the company and the sponsor enter into a post-IPO relationship agreement for a certain period of time according to which the sponsor continues to provide certain consulting services and the parties agree on the exchange of certain information with respect to consolidation, tax and certain other requirements.

In Swiss IPOs, the underwriters require sponsors and other large shareholders to enter into customary lock-up undertakings for a period of usually six months after the IPO (while the company and directors and managers are typically required to enter into 12 months' lock-up undertakings). After the lapse of the lock-up, the sponsor will sell down shares depending on prevailing market conditions pursuant to 'dribble-out' trading plans or by way of accelerated bookbuildings or block trades to single buyers.

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?

Going-private transactions by PE sponsors have been relatively rare in Switzerland. However, in the past couple of years there have been a number of such transaction. As far as we can see there are not really any industry-specific trends with respect to PE and PE sponsors have invested in a broad range of industries.

PE sponsors are not subject to specific regulatory requirements. There are, however, a number of regulated industries where specific rules must be considered. For instance, specific rules must be complied with when investing in the banking, securities trading, insurance, telecommunications or real estate sectors.

SPECIAL ISSUES

Cross-border transactions

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

As far as no real estate and no regulated target company is concerned, Switzerland has currently not implemented foreign investment restrictions. Furthermore, Switzerland has adopted the OECD's Code of Liberalisation of Capital Movements and hence has agreed not to take discriminatory action against foreign investments made by investors from OECD member states. However, as in recent years companies from emerging economies have increasingly been investing in Switzerland, such investments have led to fears that this may result in a loss of jobs and expertise, and that national security may be put at risk. As a consequence, the Swiss Federal Council has closely considered these potential risks but came to the conclusion that the implementation of foreign investment restrictions would generate uncertainty and make Switzerland a less attractive place to invest. Accordingly, there are currently no specific legislative projects aiming at implementing foreign investment restrictions, but this topic will most probably remain on the political agenda.

Any dividend payments made by a Swiss company are subject to Swiss withholding tax at the rate of 35 per cent. This also includes deemed profit distributions and liquidation proceeds. No Swiss withholding tax is levied on the repayment of paid-in share capital and qualifying reserves from capital contributions. The withholding tax can fully be reclaimed by Swiss resident entities or individuals who fully meet the legal obligations. Full or partial refund or reduction at source may be available under a double taxation treaty to qualifying non-Swiss investors. Switzerland has entered into double taxation treaties with a large number of countries.

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?

Club deals are very common in the Swiss market as there are hardly any restrictions from a Swiss corporate law perspective to syndications. However, if the PE investors invest by using debt, limitations from a Swiss withholding tax perspective need to be considered.

The relationship among the club participants is in most cases governed by a shareholders' agreement (see question 13). If the target company is a listed company, the club participants are most likely to be qualified as acting in concert with regard to the mandatory takeover rules (for the respective consequences see question 14).

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?

Back-to-back signing and closings are extremely rare in the PE context. In most cases signing and closing are separated in order to give the parties time for antitrust or other governmental approvals, capital calls and other financing arrangements, carve-out transaction, arranging or finalising R&I insurance coverage and - in some cases - even confirmatory due diligence. Accordingly, the share purchase agreement will provide for respective closing conditions and a corresponding long-stop date until which the closing conditions have to be fulfilled, failing which the share purchase agreement is terminated with or without termination fees or other pecuniary consequences - depending on the circumstances and the negotiating power of the parties.

In the context of public transactions termination or break fees are a common instrument and often seen. However, pursuant to the Swiss Takeover Board's practice, the amount of the break fee must be proportionate and, in particular, must not prejudice investors' decision to tender their shares or third parties from launching a competing bid. As a rule of thumb, the break fee should not exceed the amount of the expected damage incurred by the bidder in case its offer fails.

UPDATE AND TRENDS

Key developments of the past year

Have there been any recent developments or interesting trends relating to private equity transactions in your jurisdiction in the past year?

No updates at this time.