Private equity in Switzerland: market and regulatory overview

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MARKET OVERVIEW

1. What are the current major trends in the private equity market?

Statistics issued by Invest Europe for 2018 show that investments of private equity firms in Swiss-based portfolio companies totalled EUR2,219 million.

Investments in portfolio companies remain at a high level of over EUR2,000 million as in previous years (EUR2,728 million in 2017; EUR2,476 million in 2016).

In comparison, divestments in 2018 only amounted to EUR487 million in total (EUR563 million in 2017; EUR1,769 million in 2016), suggesting that the Swiss market continued to be considered attractive for private equity investments and therefore a seller's market.

Major deals in or with an impact on the Swiss market included the:

- Acquisition of the Thomson Reuters Financial & Risk business by a joint venture managed by Blackstone for USD17,000 million (2018).
- Acquisition of Swiss based Canopius AG by a consortium of investors led by private equity and credit specialist Centerbridge Partners, L.P. for USD952 million (subject to certain conditions; 2018).
- Sale of Sportradar AG by the former shareholders (including private equity firms) to Canada Pension Plan Investment Board (CPPIB) and Silicon Valley-based growth equity firm TCV for EUR2,100 million (2018).
- Sale of Heptagon Advanced Micro-Optic by the former shareholders (including private equity firms) to ams AG with an earn out structure taking the transaction value to about USD1,100 million.

Following years with lower IPO activities involving private equity companies, IPOs were finally revived as an exit route in 2014. 2015 saw the IPOs of CVC Capital Partners and Sunrise, Switzerland's second largest telecom operator. With an offer size of CHF2,274 million (including Over-Allotment Option), the Sunrise IPO was the largest Swiss IPO since 2006 and the largest telecom IPO in the EMEA region since 2004. This trend continued into 2016 with the IPO of VAT Group in April 2016 with an implied market capitalisation of CHF1,350 and the subsequent, staggered placements of VAT Group AG shares by Capvis Equity Partners AG's and by funds managed by Partners Group AG through 2016 and 2017. In 2019, SoftwareONE Holding AG went public with a market capitalisation of CHF3,200 million.

In buyout transactions, private equity firms continue to let the management of the portfolio company participate in the equity of a special purpose vehicle (SPV), either by way of a capital increase following the buyout transaction or by selling part of the shares of the SPV. Private equity firms also regularly have the management participating in the portfolio company's debt by assigning parts of shareholder loans granted to the SPV to the respective management members.

The continuing sellers' market has resulted in share purchase agreements becoming increasingly seller-friendly.

In addition, innovative investments, such as transaction structures in financial technologies (FinTech), have gained higher popularity. In particular, crowd investing and Initial Coin Offerings (ICOs) are new transaction models that are currently popular in Switzerland (*see Question 9*).

2. What has been the level of private equity activity in recent years?

Fundraising

The Invest Europe statistics (*https://www.investeurope.eu/research/data-and-insight/*) show funds raised by Swiss private equity firms raised an aggregate amount of EUR2,374 million in 2018 compared to the exceptional fundraising activities in 2017 which resulted in aggregate funds raised of EUR4,300 and EUR700 million in 2016.

Venture funds accounted for a record high EUR1,090 million in 2018, a considerable increase compared to the previous year (EUR269 million in 2017), which is put down mainly to the ICT sector. Buyout funds raised EUR1,284 million.

Investment

In 2018, private equity companies invested a total of EUR2,200 million in 133 Swiss-based portfolio companies, compared to EUR2,700 million invested in 187 companies in 2017.

Statistically covered investments by private equity companies in Swiss portfolio companies in 2018 showed the following characteristics:

- Over 50% of the total investments were made in the ICT sector.
- Around 17% of the total investments were made in the Swiss biotech and healthcare sector.
- Around 21% of the total investments went into the business products and services sector.
- Investments in the ICT sector increased significantly compared to previous years.
- Buyout investments (the nominal equity value of all shares bought out) were below the 2017 figures, with EUR708 million (compared to EUR1,531 million in 2017). Nearly 90% of the buyout investment deals were small to lower mid-market deals,

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with buyout investments below EUR50 million generating close to 45% of the total buyout investments.

- Foreign private equity investments in Swiss portfolio companies accounted for around EUR1,900 million while investments by local private equity firms amounted to approximately EUR300 million.

Transactions

2018 saw the signing or closing of some major deals including the Thomson Reuters Financial & Risk/Blackstone and the Canopius AG transactions detailed in *Question 1*.

The basic structure of buyout transactions did not change. However, it is increasingly common for parties to a transaction to agree on a "go-shop clause", under which the seller waives a possible auction sale and grants the seller exclusivity for the negotiations. In return, the purchaser grants the seller a limited amount of time after the signing to "go and shop" for a substitute buyer. If the seller sells to the substitute buyer, a break-up fee is due to the initial buyer. This may be suitable for private equity companies striving to get an exclusive right of negotiation as fast as possible and aiming at covering pre-transaction-costs, such as due diligence costs, if they are not able to close a transaction successfully. Reps & Warranties Insurances become more and more common in the Swiss market and the share purchase agreements are tending to become, in the current sellers' market, seller friendly.

Exits

Invest Europe's statistics recorded that private equity companies exited 35 portfolio companies based in Switzerland in 2018, with a total amount divested of about EUR487 million. Recorded divestment activities by such companies remain at a comparable level to 2017 when a total of 31 Swiss-based portfolio companies were subject to divestments worth a total of EUR563 million. Only four investments in Swiss-based portfolio companies together worth EUR11 million were reported as a write off.

The following key indicators applied in 2018:

- Trade sales of shares held in Swiss-based portfolio companies accounted for 24% of the value (EUR115 million at cost).
- Divestments of shares held in Swiss-based portfolio companies by public offering accounted for approximately 18% of the value (EUR89 million at cost).
- Secondary sales to another private equity house accounted for 53% of the value (EUR257 million).

Deals included the sales of Sportradar AG and of Heptagon Advanced Micro-Optic by the former shareholders (including private equity firms) as detailed in *Question 1*.

FUNDING SOURCES

3. How do private equity funds typically obtain their funding?

Statistically recorded fund raising by Swiss private equity vehicles significantly decreased to an aggregate amount of about EUR2,400 in 2018 compared to EUR4,400 million in 2017 but remains strong compared to about EUR700 million in 2016 and EUR1,300 million in 2015 (*Invest Europe*).

Swiss private equity firms raised funds predominantly in Europe in 2017, with 52% of funds being European-sourced (55% in 2017), 29% were contributed by domestic investors compared to 15% in 2017. The statistics further indicate significant private equity and venture capital investments in Switzerland from outside of Europe, with 25% in 2018. For approximately 23% of the funds, the geographical origin could not be determined.

Funds were mainly sourced from the following types of investors:

- Pension funds: 21% (28% in 2017).
- Corporate investors: 12% (8% in 2017).
- Funds of funds: 10% (4% in 2017).
- Family offices: 8% (12% in 2017).
- Insurance companies: 6% (9% in 2017).
- Private individuals: 3.5% (5% in 2017)
- Sovereign wealth funds: 3.5% (2% in 2017).
- Banks: 3% (1.5% in 2017).

The statistics suggest that pension funds and insurance companies were among the main sources for investments, showing the importance of large institutional investors for the private equity sector. Pension funds, in particular, were regularly ranked among the main sources for funding historically. The authors assume that investments of large institutional investors in the Swiss private equity market will continue to increase because of the economic situation (that is, low interest rates and the change in the regulatory framework for investments in the public sector for pension funds).

The Ordinance against Excessive Compensation with respect to Listed Stock Corporations (OaEC) has imposed various obligations, which have the potential to increase the cost of investments in public companies. This, in turn, may boost the attractiveness of private equity investments in Switzerland.

TAX INCENTIVE SCHEMES

4. What tax incentive or other schemes exist to encourage investment in unlisted companies? At whom are the incentives or schemes directed? What conditions must be met?

Swiss-tax resident corporate shareholders

In general, income obtained by a Swiss corporate shareholder is subject to income taxes at the federal, cantonal and communal level. However, dividend income from and capital gains on the sale of qualifying participations are (nearly) tax-free due to a participation exemption. The participation exemption is available on dividend income from (Swiss/non-Swiss) investments, which amount to at least 10% of the capital or whose market value is at least CHF1 million. On capital gains, the participation exemption is available if the (Swiss/non-Swiss) investment cumulatively amounts to at least 10% of the capital and if the investment has been held for at least one year.

Swiss-tax resident individual shareholders

While capital gains from the sale of investments (including movable property or investments through a fund treated as transparent for tax purposes) are usually tax-free for Swiss resident individual shareholders, dividend income is subject to income taxes at federal, cantonal and communal level. However, if the dividend income is obtained from an investment which amounts to at least 10% of the capital, a partial taxation applies.

The sale of investments may be subject to income taxes in certain cases. This applies especially to individuals who frequently buy and sell such investments or where an investment is sold to a corporate entity (or an individual holding the acquired investment as business asset) and the investment sold distributes funds to the new shareholder within five years after the sale (so-called indirect partial liquidation). To clarify such exposure, a tax indemnity clause is usually part of a share purchase agreement and a pre-discussion with the tax authorities resulting in a binding tax ruling is recommended.

FUND STRUCTURING

5. What legal structure(s) are most commonly used as a vehicle for private equity funds in your jurisdiction?

Swiss Limited Partnership (Swiss LP)

The primary legal structure for collective private equity investments under Swiss law is the Swiss Limited Partnership for Collective Investment (Swiss LP) (*Article 98 et seq., CISA*). In addition, the Swiss Code of Obligations (*CO*) is applicable subsidiarily.

The launch of a Swiss LP is subject to a regulatory approval process (and subsequent prudential supervision) by Swiss Financial Market Supervisory Authority (FINMA). FINMA evaluates the proper business conduct of the members of the board and the managers, as well as the organisation, internal regulations, and regulatory compliance of the Swiss LP (*see Question 9*).

A Swiss LP is a partnership whose sole object is collective investment. It conducts investments in risk capital (and may also invest in other alternative investments, or in real estate development, construction or infrastructure projects). It is subject to extremely flexible investment guidelines.

A Swiss LP is based on a partnership agreement. At least one member of a Swiss LP is subject to unlimited liability (general partner), while the other members (limited partners) are liable only up to a specified amount (limited partner's capital contribution). The general partner must be a company limited by shares with their registered office in Switzerland and can only be appointed as a general partner of a single Swiss LP. Limited partners must be qualified investors, as defined in the CISA (*see Question 11*).

In addition, a prospectus must be published. The Swiss Fund & Asset Management Association (SFAMA) and the Swiss Private Equity & Corporate Finance Association (SECA) have produced a model prospectus with an integrated partnership agreement which should represent the basis for the document filed with FINMA.

Swiss Investment Company with Fixed Capital (SICAF)

A SICAF is a company limited by shares (*Articles 620 et seq., CO*). It is regulated under Article 110 CISA and, as a general principle, subject to regulatory approval by FINMA (and respective prudential supervision). The sole purpose of a SICAF is the investment of collective capital.

As an exception to the general rule of a FINMA approval and supervision, an investment company in the form of a company limited by shares is not subject to the CISA where:

- The shares of the investment company are listed on a Swiss exchange.
- The shareholders of the investment company are exclusively qualified investors under the CISA (*see Question 11*).
- The investment company qualifies as an investment club.

The SICAF defines its (private equity) investments, investment policy, and investment restrictions in the articles of association and the investment guidelines. It also publishes a prospectus. Traditionally, listed investment companies have been very popular. However, in recent years the Swiss LP has gained more attention because, among other reasons, in the past investors in listed investment companies had to bear a markdown of the market price with respect to the value of their shares.

Swiss Investment Foundation

Swiss investment foundations have become increasingly popular investment vehicles for Swiss pension funds in recent years (in particular, with respect to investments in private equity, private debt or real estate). Swiss investment foundations are governed by:

- Articles 53g et seq. of the Occupational Retirement, Survivors' and Disability Pension Plans Act (*OPA*).
- The Ordinance on Investment Foundations (*IFO*).

Besides other applicable regulatory legal bases, the rules governing civil law foundations according to Articles 80 *et seq* of the Civil Code (*CC*) are applicable subsidiarily. Swiss investment foundations are subject to (pre-)approval and direct supervision by the Occupational Pension Supervisory Commission (OPSC).

The Swiss investment foundation requires, among other things regulations, articles and a prospectus (in particular, with respect to alternative investments, such as private equity). Investors of Swiss investment foundations are restricted to tax-exempt occupational pension schemes with their domicile in Switzerland (and FINMA-regulated collective investment schemes with the same selling restrictions). Generally, an investment foundation has several investment groups with different investment strategies. The requirements for the investment restrictions of Swiss investment foundations have recently been revised and have become more flexible and more similar to Swiss fund structures.

Further Swiss structures

Swiss fund regulation offers a number of other Swiss fund structures, including contractual funds and investment companies with variable capital (SICAVs). Due to the open-ended character of these vehicles, they are normally not adequate for (illiquid) private equity investments.

Further, a new category of funds, the new Limited Qualified Investor Fund (L-QIF) is expected to be implemented in Switzerland (*see Question 33*). The L-QIF would be reserved for qualified investors (for example, banks, insurance companies, pension funds, or high-net-worth individuals (HNWI) that have qualified investor status). The preliminary draft of the proposed new CISA provisions concerning the L-QIF has been subject to a consultation.

Foreign Limited Partnerships (foreign LPs)

Private equity fund promoters that are active in the Swiss market frequently use off-shore private equity fund structures. For promoters with a focus on the EU, these structures can make sense due to the AIFMD-regulation which may allow them to distribute their funds in every country in the EU without having to obtain an approval or conduct a notification in every single country based on the national private placement regimes. However, Switzerland should also obtain enhanced market access in the future (*see Question 33*).

Sometimes, offshore LPs are selected purely because they are less regulated than Swiss LPs. However, Swiss qualified investors have raised their minimal standard with respect to the regulation of structures that are considered as being "investable" in recent years. As a consequence, it has become very hard to sell unregulated LPs of certain domiciles to many qualified investors in Switzerland for reputational reasons. This has caused a noticeable shift towards collective investment schemes that are domiciled in either Switzerland or a reputable fund hub in the EU.

Ultimately, whether a Swiss or a foreign structure is more convenient depends primarily on the domicile and geographic focus of the promoter, as well as the domicile and type of the target investors. In addition, specific tax aspects must be considered (*see Question 6 and Question 7*).

However, foreign LPs, like any other foreign collective investment schemes for qualified investors must follow a few mandatory Swiss rules with respect to distribution, respectively, offers in Switzerland (see below as well as *Question 33*).

Further foreign structures

Offer to qualified investors. Foreign collective investment schemes for qualified investors in Switzerland must **no longer**, in

principle, appoint a representative and a paying agent in Switzerland unless the offer is made to HNWI which qualify as professional clients according to Article 5(1) FinSA (*Article 120, para. 4, CISA*). In the exceptional case that the requirement of a Swiss representative and paying agent applies, written representative and paying agent agreements must be concluded (*see Question 33*). In addition:

- Appropriate selling restrictions should be implemented in the fund documentation.
- Where an indirect distribution through a distributor is intended, a distribution agreement is recommended.
- The name of the foreign collective investment scheme must not provide grounds for confusion or deception.

With the entry into force of the Federal Financial Services Act (*FinSA*) and the Federal Financial Institutions Act (*FinIA*) new regulatory requirements and important changes with respect to the regulation of fund offers and advertisements in Switzerland have been introduced (*see Question 33*).

Offer to non-qualified investors. An offer of private equity funds to non-qualified investors in Switzerland is only permitted (as with any other collective investment scheme for non-qualified investors) if an approval for the offer of the fund can be obtained from FINMA. This is not possible for many foreign private equity fund structures because they are either:

- Not subject to a regulation which is equivalent to the requirements of Swiss law.
- Only permitted for qualified investors (*see Question 11*).

With the entry into force of the FinSA and FinIA new regulatory requirements and certain changes with respect to the regulation of fund offers and advertisements in Switzerland apply (see *Question 33*).

FinTech and digital assets

Innovative investments, namely, digital assets and transaction Fintech structures, have become quite popular in Switzerland. In particular, ICOs (that is, the offering of digital tokens on a blockchain) and crowd investing (that is, online fundraising for start-ups and projects) have experienced a significant boom period. Although ICOs and crowd investing are typically not offered in a fund structure, regulatory requirements are highly important and should always be carefully examined while setting up these types of investments. FINMA has published ICO guidelines which provide specific guidance on the Swiss regulatory requirements applicable to ICOs.

The following three types of tokens are distinguished by FINMA:

- Payment tokens are a synonym for cryptocurrencies and are not linked to further functions or development projects. For ICOs with tokens that intend to function as means of payment (and can already be transferred), FINMA requires compliance with anti-money laundering regulations. However, such tokens are not treated as securities by FINMA.
- Utility tokens aim to provide access to digital applications or services. These tokens are not treated as securities by FINMA if their only purpose is to confer digital access rights to an application or service (and if the token can already be used in this manner at the point of issuance). However, if a utility token serves as an investment in economic terms, such tokens will be treated as securities by FINMA and, thus, like asset tokens.
- Asset tokens represent assets such as participations in real physical underlying structures, companies, or earning streams, or an entitlement to dividends or interest payments. FINMA qualifies asset tokens as securities. Therefore, regulatory requirements (for example, the prospectus duty or licensing requirements, where applicable) apply to the offering and trading of such tokens.

Compliance with the general Swiss financial market regulations (including, but not limited to, anti-money laundering regulations, potential prospectus duties, and licensing requirements) must be ensured, if they are applicable to innovative financial technologies, digital assets and investment structures. In addition, the optimal transaction structures for a particular investment must be elaborated on a case-by-case basis.

6. Are these structures subject to entity level taxation, tax exempt or tax transparent (flow through structures) for domestic and foreign investors?

Swiss LPs, Swiss Investment Company with Variable Capital (SICAV) and contractual fund

Income of the fund. Swiss LPs, SICAVs and contractual funds are treated as transparent for tax purposes and are therefore not subject to corporate income tax. Income taxes are generally levied at the level of the investors (regardless of whether income is distributed or retained). An exception applies for funds with directly held real estate, where the fund is subject to income tax on income from such real estate. This income is generally not subject to income taxes at the level of the Swiss-resident individual investors.

Distributions by the fund. Distributions made by a Swiss LP, SICAV or contractual fund are subject to Swiss withholding tax at 35%. Exceptions apply for distributions deriving from capital gains and directly held real estate. Swiss tax resident investors should receive a full refund. Non-Swiss tax resident investors may be entitled for a full or partial refund based on a double taxation treaty between Switzerland and the country of their tax residence. In addition, a full refund for non-Swiss tax resident investors or a notification procedure (instead of a refund procedure) may be applicable if at least 80% of the underlying income is derived from non-Swiss sources (affidavit procedure).

Swiss Investment Company with Fixed Capital (SICAF)/other Swiss investment companies

Income. A SICAF is treated as non-transparent for tax purposes and therefore subject to corporate income tax (at rates of 12% to 24%, depending on the place of tax residence). The participation exemption applies (*see Question 4*). Swiss investment companies (other than SICAF and SICAVs) are subject to corporate income tax (at rates of 8% to 24%, depending on the place of tax residence).

Dividends. Dividend payments are subject to withholding tax (at a tax rate of 35%). Swiss tax resident investors should receive a full refund. Non-Swiss tax resident investors may be entitled for a full or partial refund based on a double taxation treaty between Switzerland and their country of tax residence.

Swiss Investment Foundation

Swiss investment foundations, being auxiliary vehicles of pension funds, are not subject to direct federal and cantonal/communal income taxes.

7. What (if any) structures commonly used for private equity funds in other jurisdictions are regarded in your jurisdiction as being tax inefficient (whether by not being recognised as tax transparent or otherwise)? What alternative structures are typically used in these circumstances?

Swiss tax law does not distinguish between Swiss and foreign funds with regard to income tax for investors tax resident in Switzerland. However, a foreign fund classifies as fund (collective

investment scheme) for Swiss tax purposes if one of the following criteria is met:

- The foreign fund is licensed for distribution in Switzerland by FINMA. The foreign fund is under supervision of a recognised foreign regulator.
- The purpose of the foreign fund is collective investment on a contractual or corporate basis. For an open investment scheme, it is additionally required that the investors have the right to redeem at net asset value at least once a year. If one of these criteria is met, the foreign fund classifies as transparent, unless if it is comparable to a SICAF, in which case the fund is treated as non-transparent.

FUND DURATION AND INVESTMENT OBJECTIVES

8. What is the average duration of a private equity fund? What are the most common investment objectives of private equity funds?

Duration

The average duration of a private equity fund is ten to 12 years (with a possible extension of three years). The subscription period lasts up to one year (with a possible extension of another year). The investment period typically lasts five to six years. Subsequently, the divestment period is initiated. However, a private equity fund may also be set up for a longer or an unlimited period of time.

Investment objectives

Typical investment objectives of private equity funds include achievement of substantial (long term) capital appreciation by investing in a portfolio of private companies based on an individual investment strategy.

The range of possible private equity investment strategies is quite broad and includes:

- Financing highly risky start-up companies (seed financing or development financing) with the purpose of achieving an occasional major exit (venture capital).
- Focusing on later financing stages (growth or expansion financing) with a reduced risk due to the target companies having succeeded in the market testing phase.
- Investing in participations of venture capital investors that require liquidity (secondary investments).
- Focusing on investing in more established start-up companies right before a planned IPO (bridge financing or established financing), the investment strategy with the relatively lowest risk profile.
- Special cases, such as a focus on takeovers of companies by its management (management buyouts) or on the restructuring of failing companies (turnaround).

The typical target payoff structure of a private equity fund is best described by the so called "J-curve", which includes negative returns in the first few years, followed by a phase of increasing returns that lead to substantial cash flows and/or capital gains on exit. Historically, an average annual rate of return of 10% to 20% is a representative range for certain market periods.

FUND REGULATION AND LICENSING

9. Do a private equity fund's promoter, principals and manager require authorisation or other licences?

Managers of collective assets

Swiss fund management companies or managers of collective assets are, in principle, subject to a mandatory licence requirement in Switzerland (*Article 5(1), Article 2(1) lit. c and d, Article 32, and Article 24, FinIA*). Certain exceptions may apply for managers of collective assets for qualified investors, if the assets under management are below the thresholds of CHF100 million (with leverage), respectively, CHF500 million (without leverage) (*Article 24(2), FinIA*). The members of the board and the managers of these licensees must:

- Prove that they have a good reputation.
- Ensure proper business conduct.
- Meet certain professional qualifications.

In addition, FINMA evaluates the organisation, internal regulations, and regulatory compliance of the regulated entities (in the case of regular asset managers with the involvement of a separate supervisory body). The regulatory requirements are higher for fund management companies when compared to managers of collective assets and are even lower for (regular) asset managers.

However, the Swiss LP and its general partner are subject to a separate set of rules. As a special case, the general partner is approved together with the Swiss LP in a regulatory approval proceeding that leads to a combined institute authorisation and product approval by FINMA (*see Question 5*). In this context, the members of the board and the managers of the Swiss LP are evaluated similarly to those of managers of collective assets.

Further licensing requirements exist for Swiss representatives of foreign collective investment schemes.

Swiss financial markets regulation (including certain rules for managers of collective assets) is subject to a major reform (*see Question 33*). Managers of collective assets are currently implementing these reforms in regulatory change projects.

Promoter

The promoter of a collective investment scheme, although regarded as the guiding spirit of the product, is not, in principle, subject to Swiss regulation unless it engages in specific regulated activities, such as fund management or management of collective assets, representation of foreign collective investment schemes, or conducting of financial services in Switzerland.

10. Are private equity funds regulated as investment companies or otherwise and, if so, what are the consequences? Are there any exemptions?

Private equity funds in the form of a Swiss LP or SICAF are subject to FINMA authorisation and approval (*see Question 5*). As an exemption, Swiss investment companies that are restricted to qualified investors, as well as listed Swiss investment companies, are not required to obtain a FINMA authorisation or approval (*see Question 5*). However, listed Swiss investment companies must comply with the prospectus duty of the FinSA as well as the listing rules of the Swiss exchange where they are listed (SIX Swiss Exchange or BX Swiss).

Foreign investment companies can qualify as foreign collective investment schemes from a Swiss regulatory perspective and require a FINMA approval if they must be offered to non-qualified investors (which would be the case if they require to be listed in

Switzerland). A regulatory assessment of foreign structures must be made on a case-by-case basis.

11. Are there any restrictions on investors in private equity funds?

A Swiss LP or an unlisted investment company are only accessible for qualified investors. The term "qualified investors" of the CISA includes professional clients according to the FinSA (*Article 10(3), CISA in connection with Article 4(3) to (5) and Article 5(1) and(4), FinSA*):

- Regulated financial intermediaries, such as banks, securities houses, fund management companies and managers of collective assets or regular asset managers (as defined in the BA, the FinIA and the CISA).
- Regulated insurance institutions.
- Foreign clients subject to prudential supervision (as the persons listed under bullet 1 and 2 above.
- Central banks.
- Public entities with professional treasury operations.
- Occupational pension schemes and other institutions whose purpose is to serve occupational pensions with professional treasury operations.
- Companies with professional treasury operations.
- Large companies.
- Private investment structures with professional treasury operations created for high-net-worth retail clients.

Further, the term "qualified investors" includes HNWI (and private investment structures without professional treasury operations created for them) which opt to be treated as professional clients (*Article 5(1), FinSA; Article 10(3), CISA*). A HNWI is defined as any natural person (or private investment structure established for such) who provides evidence at the time of subscribing to the collective investment that he or she has both:

- The necessary knowledge to understand the risks associated with the investments on the basis of training, education and professional experience or on the basis of comparable experience in the financial sector.
- Disposable assets of at least CHF500,000.

Alternatively, the HNWI can confirm in writing that he or she holds assets of at least CHF2 million. Moreover, investors with a permanent written asset management or investment advisory agreement with a regulated financial intermediary according to Article 4(3) lit. a of FinSA (or a foreign financial intermediary with equivalent prudential supervision) are qualified investors, unless they declared in writing that they do not want to be treated as such (*Article 10(3) ter, CISA*).

The SICAF is not necessarily restricted to qualified investors (apart from a CISA-exempt investment company for qualified investors, or purely optional contractual selling restrictions for efficiency purposes).

In addition, any Swiss collective investment scheme must generally have at least two investors. However, in some cases one-investor funds are permitted, if the investor is a regulated insurance company, a public entity or a retirement benefit institution (pension fund) with professional treasury operations.

Investors of Swiss investment foundations are restricted to Swiss tax-exempt occupational pension schemes and FINMA-supervised collective investment schemes with the same selling restrictions (*see Question 5*).

Further specific selling restrictions may be required or implemented on an optional basis (for example, due to regulatory reasons or in order to enhance the efficiency with respect to the distribution process) on a case-by-case basis.

Swiss financial markets regulation (including certain rules on client segmentation) has been subject to a major reform (*see Question 33*). Managers of collective assets and external asset managers must implement the new rules in their internal guidelines and product documentations.

12. Are there any statutory or other maximum or minimum investment periods, amounts or transfers of investments in private equity funds?

There are no legal restrictions on the term of investment or on investment amounts. The regulatory selling restrictions set out in *Question 11* also amount to transfer restrictions for investments in private equity funds. Partnership agreements or articles of association may provide for further restrictions of this kind. In particular, minimum investments of, for example CHF100,000 or CHF500,000 are typical. (For investment periods see *Question 8*.) Further contractual restrictions may be required due to tax reasons or foreign rules and regulations.

13. How is the relationship between the investor and the fund governed? What protections do investors in the fund typically seek?

The relationship between investors and the fund is governed by a partnership agreement or articles and a prospectus, which must fulfil certain investor protection requirements (especially, with respect to investment restrictions, information, and transparency) set out in the Swiss regulation (specifically, the FinSA and the Federal Collective Investment Schemes Act (CISA)). In addition, there are FINMA circulars and guidelines and self-regulatory guidelines, codes of best practices and product documentation templates issued by the SFAMA or the SECA. Thus, investors seeking protection benefit from these already sophisticated regulatory and contractual investor protection measures which are integrated in standardised product documentations.

INTERESTS IN PORTFOLIO COMPANIES

14. What forms of equity and debt interest are commonly taken by a private equity fund in a portfolio company? Are there any restrictions on the issue or transfer of shares by law? Do any withholding taxes or capital gains taxes apply?

Most common form

Private equity funds typically take equity interests, sometimes combined with debt interests. Usually, private equity funds acquire the majority of the equity and the management is granted a right to acquire a minority equity interest.

The main advantage of equity interests is that the investor participates in the increase of the value of the shares as reward for taking entrepreneurial risks and for successful management of the target company.

In addition, the investor has increased control rights. As shareholder, it has the right to, for example, vote for the election of the members of the board of directors. Private equity funds tend to acquire a majority stake in the target company that allows it to control the decisions taken on the level of the shareholders' meeting. If they acquire a minority stake, control rights can also be conferred to them by way of either preferential shares or covenants

in a shareholders' agreement governing the exercise of the voting rights at the shareholders' meeting.

The advantages of debt interests are:

- Relatively simple repayment to the investor, meaning the requirements for payment of dividends do not apply (*see Question 29*).
- Preferential treatment in case of a bankruptcy.

However, debt interest is typically subordinated as against bank debt and senior financings. Often, such loans provide for the possibility of a conversion into shares (*see Question 26*), if the investor exercises the option or in the case of mandatory conversion.

Restrictions

Swiss corporate law provides for certain restrictions on the issuance of new shares.

If shares are issued in an ordinary share capital increase, the increase requires an approval by the absolute majority of the voting rights represented in a shareholders' meeting.

An approval by at least two-thirds of the votes represented and an absolute majority of the par value of shares represented at the respective shareholders' meeting is required for:

- Any authorised share capital increase.
- Any conditional capital increase.
- Ordinary share capital increases where:
  - newly issued shares are not paid up in cash but by contribution in kind, by way of set-off, or by conversion of freely available equity;
  - an acquisition of assets from any subscriber or any party related to a subscriber is made or planned in the context of the share capital increase;
  - the subscription rights of the shareholders are not fully granted;
  - particular advantages are granted.

Further restrictions apply under the company's obligation to treat its shareholders equally. Existing shareholders in principle have a right to subscribe for newly issued shares, pro rata to their existing shareholdings. Therefore, if a company issues the shares for the benefit of an investor, the shareholders meeting must partially or fully exclude the subscription rights of the existing shareholders. Such exclusion is only allowed if done for valid a reason.

Typically, shareholders' agreements provide for an obligation to vote in favour of a share capital increase and an obligation to waive subscription rights in defined circumstances, such as a co-operation with a new private equity investor.

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 detailed provisions on permitted and restricted share transfers.

Taxes

Equity. Contributions in cash and in kind from shareholders into the equity of a Swiss company are subject to a one-time stamp duty of 1% (with a one-time tax-free amount of CHF1 million for contributions made at foundation or in the course of a nominal capital increase). Exceptions apply for qualifying re-organisations and in some cases where the company is over-indebted. The repayment of such equity contributions is not subject to Swiss withholding tax (if properly booked and reported).

Debt. Thin capitalisation rules apply on related-party debts. The Swiss Federal Tax Administration has published safe-haven rules, under which the maximal allowable debt-equity ratio for related party debts is determined by the categories of assets, based on the balance sheet of the relevant Swiss company. For example, receivables can be debt-financed up to 85% and participations (investments) up to 70%. If the maximum allowed debt amount is exceeded, and it cannot be demonstrated that the debt-equity ratio is at arm's length, the exceeding amount is treated as hidden equity and subject to the annual capital tax.

Interest on loans (and on loans from related parties, if not treated as hidden equity) is tax deductible and in general is not subject to Swiss withholding tax, provided that the interest rates applied for related parties loans are in line with the interest rates annually published by the Swiss Federal Tax Administration. An exception applies if loans are treated as bonds and notes (this includes loan facilities in relation to which the total number of creditors that are not qualified banks exceeds ten (with the same terms and conditions) or 20 (with different terms and conditions)). In such a case, interest payments are subject to Swiss withholding tax at a rate of 35%.

BUYOUTS

15. Is it common for buyouts of private companies to take place by auction? If so, which legislation and rules apply?

It is common for buyout transactions to take place by auction. If the target company is listed on the SIX Swiss Exchange, the Swiss takeover regulations apply. If the target company is not listed, the transaction follows the rules generally applicable to any buyout transaction.

16. Are buyouts of listed companies (public-to-private transactions) common? If so, which legislation and rules apply?

Although a number of listed companies have a net asset value per share, which is higher than the price at which the companies' shares are traded, public-to-private transactions are rare in general, but especially so with the involvement of a private equity house.

The legal framework for public-to-private transactions is set out in the following legislation:

- For public takeovers:
  - Financial Market Infrastructure Act (FMIA);
  - Financial Market Infrastructure Ordinance (FMIO); and
  - FINMA-Financial Market Infrastructure Ordinance (FMIO-FINMA).
- For the taking private (delisting): SIX Swiss Exchange Listing Rules.

Principal documentation

17. What are the principal documents produced in a buyout?

The principal documents produced in a buyout transaction typically are:

- A non-disclosure agreement.
- Process letters (if the transaction is done by auction) or a term sheet (if the transaction is not done by auction).

- A share sale and purchase agreement (in a share deal) or an asset purchase agreement (in an asset deal).
- An escrow agreement, if applicable, to secure claims of the purchaser under the share sale and purchase agreement.
- A shareholders' agreement among the private equity investor, the management of the target company and potential further investors.
- A further escrow agreement to enforce the share transfer restrictions by placing the shares held by the managers in the target company with an escrow agent.
- Financing agreements (such as credit facility agreements with financing banks).
- Security agreements to secure the financing banks' rights under the credit facility agreements.
- New employment agreements with management.
- Loan agreements with the shareholders, managers, sometimes the seller, or other parties investing into the target company via debt.
- Corporate documents of the target company, if applicable, such as
  - capital increase documents;
  - articles of incorporation;
  - organisational regulations;
  - new employment agreements with the managers (or amendments to the existing ones); or
  - incentive plans.

Buyer protection

18. What forms of contractual buyer protection do private equity funds commonly request from sellers and/or management? Are these contractual protections different for buyouts of listed companies (public-to-private transactions)?

In buyout transactions, buyers typically require all of the following from the seller:

- A full set of representations and warranties concerning all aspects of the target (title, good standing, compliance with laws, taxes, financial statements, and so on).
- Specific indemnities for materialised risks (for example ongoing or potential litigation) as well as for taxes.
- Escrow (10% to 20% of purchase price).

Further protective devices have a direct impact on the determination of the purchase price, such as:

- Purchase price adjustments, such as net debt or working capital adjustments.
- Locked-box anti-leakage provisions.

Generally, representations and warranties should not be required from the target company, as they are generally not enforceable. In public-to-private transactions, representations and warranties are limited due to disclosure obligations and the notion that the company's situation is reflected in the stock exchange price. In venture capital transactions, dividend and liquidation preferences (in a moderate form, that is, usually no double dip) are quite common.

In buyout transactions (moderate) break fees are normally agreed on in the binding part of a memorandum of understanding/term sheet to cover costs incurred in the due diligence exercise. In public-to-private transactions they are included in the transaction agreement with the target company.

Provisions by which the buyers put back their investment to the sellers are rare. If they are agreed on, then they are in the form of a put-option by the buyer at a very low price.

Contractual anti-dilution protections are normally only agreed on in venture capital transactions where future financing rounds are expected. They then come in the form of full ratchet or on weighted average basis. Alternatively, the investment documentation may provide for the investor with a veto right against further capital increases, which allows the investor to negotiate a tailor-made solution.

19. What non-contractual duties do the portfolio company managers owe and to whom?

The managers of a portfolio company must, in their capacity as employees of the portfolio company as well as in their function as members of the executive management of the portfolio company, carry out their tasks with due care and must loyally safeguard the portfolio company's legitimate interests in good faith. These duties include specifically:

- A confidentiality obligation and a duty to safeguard business secrecy.
- A non-competition obligation.
- A duty to act in the best interests of the portfolio company and its shareholders, which includes the principle that in situations of conflict of interest the portfolio company's interests must prevail and the manager must inform the board of directors of the portfolio company of such conflicts of interests.
- A duty to safeguard shareholders' equal treatment.

20. What terms of employment are typically imposed on management by the private equity investor in an MBO?

In buyouts and venture capital transactions, senior managers are usually required to participate in the equity of the target, normally at preferred conditions (sweet equity). The specific terms included in the manager's shareholder's agreement (and not the employment agreement) generally include the following features:

- Vesting conditions (where the participation vests over a certain time period and the manager forfeits his participation on a pro rata basis if leaving the company).
- Re-purchase rights of the company or the investor(s) whereby the re-purchase price depends on the reason for the manager's departure (good leaver/bad leaver provisions).
- Non-competition and non-solicitation covenants, usually for time periods of 12-24 months after termination of the employment with the company and often combined with a liquidated damages clause, since non-competition and non-solicitation covenants are difficult to enforce in Switzerland.
- Employee participations. These trigger intricate tax issues and generally require a tax ruling.

21. What measures are commonly used to give a private equity fund a level of management control over the activities of the portfolio company? Are such protections more likely to be given in the shareholders' agreement or company governance documents?

The basic prerequisite to exercise control is information. In the context of a private equity investment, this means that the private equity 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 private equity investors' needs and, accordingly, reflected in the shareholders' agreement.

Private equity investors often acquire a controlling stake in the portfolio company, which enables them to appoint/elect their representatives on the board of directors by virtue of their voting rights. In addition, the right to appoint board members is typically substantiated in the shareholders' agreement. Shareholders' agreements also usually include supermajorities for certain important shareholder and board matters, and veto rights or voting requirements in favour of private equity investors. However, it is only possible to a very limited extent to mirror these governance provisions of the shareholders' agreement in the company's corporate documents.

DEBT FINANCING

22. What percentage of finance is typically provided by debt and what form does that debt financing usually take?

Under the Swiss legal framework, tax law under the thin capitalisation rules provide for limits on the debt/equity ratio (see *Question 14*). While Swiss corporate law does provide some guidelines, there are no specific ratios. The main guideline to be taken into account is the general obligation of a portfolio company's board of directors to provide for a financing structure that is adequate for their company (in particular in view of cash flow, liquidity, long-/short term needs and so on).

Generally, more conservative leverage ratios are seen in Swiss deals than are seen, for example, in US/UK transactions.

Lender protection

23. What forms of protection do debt providers typically use to protect their investments?

Security packages for debt providers are comparable to those in international transactions, in particular in relation to:

- Share pledges.
- Bank account pledges.
- Pledges on intellectual property rights.
- Assignment of claims under the acquisition documentation.
- Intra-group issues.
- Insurance.
- Trade receivables.

The following main issues must be taken into account:

- The is no floating charge on movable assets under Swiss law and perfection requirements for common security rights (such as the requirement for possession by the pledgees) usually make it impracticable to grant security on movable items.
- Security on real estate in favour of non-Swiss banks triggers source tax, which usually prevents parties from including real estate assets in the security package.
- Security to be granted by the acquisition target and its subsidiaries is subject to the Swiss limitation rules (*see Question 24*).

Financial assistance

24. Are there rules preventing a company from giving financial assistance for the purpose of assisting a purchase of shares in the company? If so, how does this affect the ability of a target company in a buyout to give security to lenders? Are there exemptions and, if so, which are most commonly used in the context of private equity transactions?

Swiss limitation rules

There is no Swiss concept directly equivalent to "financial assistance" in connection with providing security for acquisition financing. However, the Swiss maintenance of share capital rules usually have the same effect.

Under Swiss rules on the maintenance of share capital, a Swiss company cannot distribute funds, unless and to the extent it has freely distributable reserves. Distributable reserves are the total equity minus nominal share capital and statutory reserves. Statutory reserves include reserves for up- or cross-stream loans that are not on arm's length terms. Therefore, this limitation applies to:

- Funds flowing up-stream (to the shareholder/parent).
- Funds flowing cross-stream (to subsidiaries of the parent).
- Direct distributions (dividends).
- Loans that are not at arm's length terms.
- The granting of security.

Within these limits, a Swiss company can grant security for acquisition financing provided to its parent, provided that granting such a loan is in such company's (own) corporate interest and (usually explicitly) covered by its corporate purpose.

While the authority to grant security vests with the board of directors (and the executive management), often an explicit approval by the shareholders meeting is requested, in particular if the enforcement of the security would result in a (partial) liquidation of the company's (main) assets.

Exemptions

There are no exemptions from these limitations.

Insolvent liquidation

25. What is the order of priority on insolvent liquidation?

Secured claims have an independent status and are paid off out of the net proceeds from realising collateral. If a secured claim cannot be fully covered by the proceeds from realising collateral, the residual claim is ranked with the unsecured claims. A surplus is used to satisfy unsecured claims.

The gross liquidation proceeds from liquidating unsecured assets of the company are used to pay the liquidation expenses and the liabilities incurred after the declaration of bankruptcy. Unsecured claims are ranked in three classes (in order of priority):

- The first class, which comprises employees' claims based on their employment agreement, which accrued during the six months before the declaration of bankruptcy, and other claims by and for the benefit of employees (and other claims that are less relevant for the private equity sector).
- The second class, which consists of claims for social security and insurance contributions and, in an insolvent liquidation of a financial institution, customer deposits up to CHF100,000 (and other claims that are less relevant for the private equity sector).
- The third class comprises all remaining claims.

Creditors that agreed to a subordination of their claims are paid after all other claims have been satisfied. All creditors' claims rank above equity.

Equity appreciation

26. Can a debt holder achieve equity appreciation through conversion features such as rights, warrants or options?

A debt holder may achieve equity appreciation by way of conversion features. A lender and the provider of other debt instruments can be granted the right to convert shares into equity or can be granted option rights to purchase new shares. These instruments typically require the creation by the target company of conditional share capital in its articles of incorporation. Alternatively, the shareholders can contractually agree to resolve a capital increase at the relevant time or, if the target company has sufficient freely disposable reserves, it can purchase treasury shares up to 10% of the share capital.

PORTFOLIO COMPANY MANAGEMENT

27. What management incentives are most commonly used to encourage portfolio company management to produce healthy income returns and facilitate a successful exit from a private equity transaction?

The most fruitful strategy in incentivising the management of a portfolio company is to align as far as possible the interests of the managers with those of the private equity investor (reduction of the principal-agent conflict of interest). The most effective way to achieve this goal is to ensure that the manager invests a fair amount of his or her net worth in the portfolio company. Such investment should be on similar terms as the private equity investor's investment, as far as appropriate. In standard market practice, the following forms of incentives are most commonly used:

- Share options.
- Restricted shares/restricted share units.
- In some circumstances, performance share units.

For tax reasons, phantom and similar virtual stocks are less common in Swiss private equity environment.

In addition, market standard remuneration elements 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.

28. Are any tax reliefs or incentives available to portfolio company managers investing in their company?

In general, there are no incentives, such as specific tax reliefs for portfolio company managers investing in their fund. However, capital gains at the level of the fund (if treated transparently) are generally tax-free for portfolio company managers resident in Switzerland. Where a fund is not treated transparently (such as a SICAF, or in the case of an investment company other than investment companies with variable capital), capital gains through the sale of the investment shares are generally also tax-free for such investors. Due to the close relationship of the portfolio company managers to the fund (or investment company), it is advisable to ensure by prior discussion with the tax authorities that such capital gains are seen as return of their investment and not due to their function for the fund (for example, through a higher participation in the gains of the fund as other investors or through an inadequate remuneration for their services rendered to the fund), which might otherwise result in capital gains being re-qualified as employment income and being subject to income taxes as well as to social security contributions.

29. Are there any restrictions on dividends, interest payments and other payments by a portfolio company to its investors?

Dividends can only be paid out of the portfolio company's balance sheet profit and its freely disposable reserves (that is, the total equity capital minus share capital and statutory reserves) (*see Question 24*) The balance sheet profit and the freely disposable reserves are calculated based on the portfolio company's financial statements, which must not be older than six months. The portfolio company's shareholders meeting must:

- Approve the financial statements.
- Take notice of the auditor's report.
- Resolve the dividend payment.

Interest payments and payments based on other legal grounds are generally not subject to these restrictions, provided that the payments are based on agreements concluded on arm's length terms.

30. What anti-corruption/anti-bribery protections are typically included in investment documents? What local law penalties apply to fund executives who are directors if the portfolio company or its agents are found guilty under applicable anti-corruption or anti-bribery laws?

While the importance and awareness of anti-bribery measures continues to grow, specific anti-corruption or anti-bribery protections are rarely included in transaction documents, apart from confirmations to be provided by the buyer that the funds used to finance the transaction stem from "clean sources" and a representation and warranty clause by which the seller confirms that the target company is in compliance with these provisions.

Fund executives who serve as directors on the boards of portfolio companies or their agents may become personally liable if the company or its shareholders suffer damage caused by the director's negligent or wilful misconduct. Such negligence may include the breach of the director's duty to supervise the persons entrusted with the management of the company. Criminal sanctions are rare because they generally require a direct involvement of the director in the criminal behaviour.

Where corruption occurs within a company and the criminal behaviour cannot be attributed to a specific individual, the company may be sanctioned if it cannot be proven that all reasonably required organisational measures to avoid the criminal behaviour were implemented. Such measures typically include a "message from the top", the implementation of a code of conduct, and the continuous instruction and training of the employees. The

Swiss criminal code contains sanctions for the bribery of public officers and, since 1 July 2016, sanctions for bribery of employees, consultants and so on of a third party in the private sector. Sanctions include fines and imprisonment of up to three years for bribery in the private sector and up to five years in the public sector. The Swiss Federal Act on Unfair Competition contains similar rules regarding bribery in the private sector.

EXIT STRATEGIES

31. What forms of exit are typically used to realise a private equity fund's investment in a successful company? What are the relative advantages and disadvantages of each?

Forms of exit

The exit lies at the heart of every private equity transaction. Therefore, exit strategies are considered by a private equity fund 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.

Advantages and disadvantages

The advantages of trade sales are:

- The private equity investor achieves maximum liquidity, meaning its entire participation is sold. The selling private equity investor receives the entire sale price immediately. Subject to special considerations, private equity sellers will be reluctant to accept amounts deposited in escrow or earn-outs.
- A sale to a strategic buyer can create synergies and may increase the company's options to develop its business. Both should have a positive impact on the sale price.
- The buyer usually also provides the funds necessary for the repayment of senior, mezzanine or similar debt granted by the private equity investor beside its equity investment.
- The sale can be carried out confidentially and the transaction costs may be lower.

The disadvantages of a trade sale are:

- The selling private equity investors lose the opportunity to participate in future benefits of the portfolio company.
- Possible disputes and liability for breaches of representations and warranties, although these are rare as private equity 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, and even these risks can be mitigated by R&I insurance.
- In certain rare cases, private equity investors may have to keep part of the proceeds in escrow as a security.

The advantages of an IPO are:

- In most cases, the IPO process leads to a higher selling price per share.
- The IPO process leads to an increased public awareness not only for the company itself but also for the private equity house invested.
- The selling private equity investor does not have to give representations and warranties in an IPO. For the private equity investor, it is therefore a clean, even if only a partial, exit.
- Current shareholders, including the private equity investor, may continue (subject to a lock-up) to hold a stake in the portfolio company and accordingly participate in future benefits of the portfolio company.
- Once, the lock-up period ends, a market sale may be easier.
- Although the IPO will be subject to market conditions, it may well add some certainty to the process.

The disadvantages of an IPO include:

- The private equity investor main goal to achieve maximum liquidity is impeded by lock-up provisions which usually prevent the private equity investor (and other shareholders) from selling their shares during a period of up to 18 months after the IPO.
- The IPO is usually very 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.
- In Switzerland, being listed also means that board and management compensation is subject to shareholders' approval.

32. What forms of exit are typically used to end the private equity fund's investment in an unsuccessful/distressed company? What are the relative advantages and disadvantages of each?

Forms of exit

In distressed portfolio companies, a regular trade sale is only possible to specialised buyers and the IPO route is no longer available. Accordingly, the following exit strategies/options will be considered:

- Write-off.
- Secondary deal to a private equity investor with a focus on distressed transactions.
- Management buyout.
- Liquidation of the portfolio company.

Advantages and disadvantages

Due to fact that it can be implemented immediately without any public attention and further costs, the write-off is a very lean and efficient but of course not a very satisfactory exit strategy in the case of a distressed portfolio company. To save at least part of the investment wherever possible, either a management buyout or a secondary sale to a private equity investor with a focus on distressed transactions should be considered. A liquidation of the portfolio company is more costly, time-consuming and comes along with a certain visibility to the public. Accordingly, it is generally used as a last resort. Redemptions, which are available in some jurisdictions, are not admitted under Swiss law, at least in the strict sense. Only share buy-backs at the company's, not at the investors' discretion, are permitted but are not a viable exit strategy in distressed situations, due to the very limited admitted scope and rigid pre-requisites such as sufficient freely distributable reserves. A special focus must be put on the mitigation of the considerable risks presented by exits in distressed companies.

REFORM

33. What recent reforms or proposals for reform affect private equity in your jurisdiction?

Federal Collective Investment Schemes Act (CISA)

The CISA has partially been revised with the entering into force of the FinSA and the FinIA on 1 January 2020 (*see below*).

Among other changes, the Swiss distributor licence and the requirement for a Swiss representative and paying agent for foreign funds that are offered to qualified investors in or from Switzerland has been abolished in the revised CISA (except offers to HNWI, which still require a Swiss representative and paying agent).

In addition, the CISA term "distribution" has been replaced with the FinSA term "offer". Further, external asset managers and asset managers of pension schemes will, in principle, become subject to a regulatory licensing requirement as asset managers of collective investments (with special provisions for "small" asset managers). Consequently, market participants in the fund and asset management industry are currently in the process of implementing the new rules. In particular, internal guidelines and product documentations must be updated and regulatory licensing proceedings initiated (where required).

Federal Financial Services Act (FinSA)

The new FinSA regulates the financial services and products of all financial services providers and products producers. It aims to provide a level regulatory playing field for all these market participants. Among other things, it comprises:

- A new regulatory code of conduct (including appropriateness and suitability duties) at the point of sale (which replaced certain provisions in the CISA).
- A new general client classification that distinguishes the terms institutional clients, professional clients and private clients (and allows for exceptions from the code of conduct duties concerning institutional clients and, to a limited extent, professional clients).
- Registration duties for client advisers of financial services providers (also of foreign financial services providers with client advisers that advise clients in Switzerland) which are not subject to a (recognised) regulatory licence and prudential supervision.
- Organisational rules for financial services providers.
- A prospectus duty for all financial instruments.

The new law entered into force on 1 January 2020.

Federal Financial Institutions Act (FinIA)

The new FinIA regulates the activities of financial institutions in Switzerland. In particular, it contains new rules on the approval process for fund management companies, managers of collective assets, and (regular) asset managers (which replace respective CISA-provisions).

The bill represented a significant change for external asset managers in Switzerland because they have become subject to a regulatory approval duty and prudential supervision for the first time. Mere investment advisers are not subject to prudential supervision under the FinIA. However, client advisers of such "unregulated" financial services providers must be registered in the register of client advisers stipulated in the FinSA. The FinIA entered into effect on 1 January 2020.

Federal Financial Market Infrastructure Act (FMIA)

As part of the new Swiss financial markets architecture, the FMIA primarily regulates financial markets infrastructure (including trading venues) as well as derivatives trading. Therefore, its relevance for private equity is limited. However, the FMIA and its derivatives trading rules may be applicable for market participants who conduct derivatives trading. If that is the case, the code of conduct for derivatives trading of the FMIA is, in principle, applicable (including the duty to create an internal guideline for derivatives trading as well as certain exemptions). The FMIA became effective as of 1 January 2016.

Alternative Investment Fund Managers Directive (AIFMD)

Directive 2011/61/EU on alternative investment fund managers (AIFM Directive) is an EU and not a Swiss regulation. However, the third-country rules in the AIFMD (and the respective approval requirements in each country) have a significant impact on Swiss managers of collective assets. The European Securities and Markets Authority (ESMA) published official advice in relation to the application of the AIFMD passport to non-EU Alternative Investment Fund Managers (AIFMs) and Alternative Investment Funds (AIFs), as well as an opinion on the functioning of the passport for EU AIFMs and the national private placement regimes.

In this context, due to the revision of the CISA, the Swiss regulation of managers of collective assets has been recognised as equivalent by the ESMA. The advice and opinion are being considered by the European Commission, Parliament and Council. Swiss-domiciled managers of AIFs (including private equity funds) should benefit from an enhanced EU-market access (passport) in time.

New: Swiss Limited Qualified Investor Fund (L-QIF)

A new Swiss Limited Qualified Investor Fund (L-QIF) will be introduced in the CISA to increase the attractiveness of Switzerland as a domicile for the establishment of collective investment schemes. An L-QIF can be set up in the legal form of open-end structures such as the Swiss contractual Investment Fund or the Swiss Investment Company with Variable Capital (SICAV) or closed-end structures such as the Swiss LP, or the SICAF. This means that the L-QIF must be structured in the legal form of one of the existing legal wrappers of the CISA. L-QIFs are restricted to "qualified investors" in terms of the CISA.

Special and more flexible investment restrictions apply for the L-QIF. In principle, all thinkable investments will be permitted (including private equity and venture capital). An L-QIF must likely delegate its fund administration to a FINMA-authorised fund management company. However, an exception to this will apply for L-QIFs in the legal form of a Swiss LP if the general partner is a bank or insurance company. Similar to the Reserved Alternative Investment Fund (RAIF) in Luxemburg the L-QIF does not require an authorisation or a product approval by FINMA. Consequently, the L-QIF has a great time-to-market and is a relatively cost-efficient investment vehicle. The legal name (*Firma*) of the L-QIF must include the designation "L-QIF" as well as the selected legal form.

The entering into force of the new CISA provisions concerning the L-QIF is currently expected in 2021.

Corporate Tax Reform

As of 1 January 2020, Switzerland will abolish its preferential tax regimes which were granted by the cantons, such as the holding privilege. As consequence the cantons will reduce the corporate tax rates for all companies to remain attractive for multinational enterprises.

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Areas of practice. International and domestic mergers and acquisitions; public takeovers; private equity, venture capital and finance; corporate law and governance; capital markets; recognised issuers' representative at the SIX Swiss Exchange; financial products, fund structuring.

Recent transactions

- Advising Sportradar AG and the major selling share-holders (including private equity companies) as Swiss transaction counsel in the EUR2.1 billion sale of Sportradar AG to Canada Pension Plan Investment Board (CPPIB) and Silicon Valley-based growth equity firm TCV (2018).
- Advising Capvis Equity II LP on the sale of its portfolio company Lista Holding AG to the Chinese GreatStar Group (2018).
- Advising Swiss group companies of Thomson Reuters in a major, complex cross-border restructuring process resulting in Thomson Reuters selling its Financial & Risk business, no branded Refinitiv, into a joint venture managed by Blackstone for a price of USD17 billion.
- Advising the former shareholders (including private equity companies) of Heptagon Advanced Micro-Optic on the sale of Heptagon to ams AG (2018).
- Advising Capvis Equity V LP, one of the leading private equity companies in Europe, on the acquisition of a majority stake in Variosystems AG, Switzerland (2018).
- Advising the German private investor group Grünwald Equity in the sale of Luwa Air Engineering AG (Luwa) to the Swedish company Nederman Holding AB (Nederman) (2018).
- Advising PARAGON PARTNERS GmbH and the other shareholders on the sale of their shares in KADI AG to Invision AG (2018).
- Advising private equity investor Nordic Capital on the acquisition of a majority stake in the Swiss software company BOARD International SA. The acquisition was executed by Nordic Capital's latest Fund IX (2019).
- Advising LGT Group as an investor on the CHF22 million Series B financing round (valuation of CHF 122 million) of the Zurich-based FinTech start-up Loanboox.
- Advising Invision Private Equity on the amplification of the shareholding circle of the Schneider Group, one of the leading internationally focused Swiss transportation companie (2019).
- Advising CITTTIC Industries AG on the acquisition of AKSA Würenlos AG (2019).

Languages. English, German, French, Italian, Czech, Dutch, Hebrew, Hungarian, Norwegian, Russian, Spanish, Swedish

Publications. See *https://www.nkf.ch/newsroom/news-insights/*