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### PIPEs in the Age of SPACs

Reference: CapLaw-2021-57

Two acronyms have been echoing throughout international capital markets: PIPEs and SPACs. While private investments in public equity "(PIPEs)" have been a traditional financing technique, Switzerland's regulator FINMA has finally given the green light to SIX Swiss Exchange ("SIX"), Switzerland's largest stock exchange, to allow listings of special purpose acquisition companies ("SPACs"). International DE-SPAC deals have demonstrated that PIPEs play an essential role in the SPAC life cycle.

*By Ralph Malacrida / Thomas Reutter*

#### 1) Private Investment in Public Equity (PIPE)

A PIPE transaction involves a private placement of equity or equity-linked securities in a listed company. PIPEs are minority investments that are offered to one or more institutional investors, private equity and strategic buyers with or without involvement of underwriting banks.

##### a) Popularity of PIPE Deals

PIPEs are an increasingly popular source of funding in the current global economy, on the one hand for listed companies seeking new capital but facing difficulties in raising it by way of a traditional pro rata rights issue due to COVID-19 and volatile stock markets, and, on the other hand, for potential investors seeking to deploy record levels of dry powder. In particular, PIPEs have proven to be a very useful and widely accepted capital raising tool in the context of acquisition financings. PIPE investors usually are professional investors as defined by the Swiss Financial Services Act (FinSA) (including insurance companies, entities under prudential supervision, enterprises and investment structures for high net worth individuals with a professional treasury unit as well as large corporates), as well as hedge funds and private equity firms.

From an issuer's perspective, PIPE deals have a number of advantages. In particular, they can be completed quickly, involve lower transaction costs compared to public offerings, require preparation of limited offering documentation, may be marketed on a confidential basis, and result in increased holdings among institutional (long-term) investors. Disadvantages include the fact that investors sometimes ask for a discount to market on the issue price (to be compensated for lock-up obligations), the offering cannot be made to the public, and not more than 20% of new shares can be placed without triggering a prospectus requirement.

Potential PIPE subscribers may be interested in investing in a SPAC in connection with a DE-SPAC process because it offers the opportunity to acquire a sizeable stake in a listed company at a negotiated (and discounted) price.

### **b) Deal Process**

While financial sponsors would generally expect to conduct comprehensive due diligence when acquiring a significant interest in a privately-held company, access to non-public information of a public company is limited for a minority investor in a PIPE due diligence. This is because the listed issuer publishes financial statements and is subject to ad hoc disclosure obligations on any material developments and hence the relevant information for an investment decision should already be in the public domain. However, this is not always the case. Notable exceptions often include acquisition financings. In addition, a PIPE investor usually must agree to standstill restrictions which limit, among other things, the investor's right to buy additional securities of the issuer and/or specify lock-up periods during which the acquired securities may not be transferred.

As PIPE transactions are designed to move quickly, the transaction documentation is limited. It includes an engagement letter and a placement (accelerated book building) agreement between the issuer and the placement agent (with respect to share offerings), or a purchase agreement between the issuer and the investors as well as terms and conditions (regarding equity-linked instruments), confidentiality agreements, legal opinions, placement memoranda (if any), capital increase documentation, and press releases.

### **c) Corporate Requirements**

No shareholders' approval is required for a PIPE transaction if the board has existing shareholder authorities to issue new shares. Most Swiss listed companies have created authorized share capital that can be used for this purpose. The shareholders typically delegate the decision as to whether pre-emption rights should be disapplied to the board of directors, subject to some fundamental principles determined by the shareholders. In practice, international proxy advisory firms recommend to support these authorizations if the non-preemptive capital issuance is limited to 10% of the issued share capital.

In the absence of existing authorities, new share capital must be created and existing shareholders' pre-emption rights must be withdrawn, requiring a shareholders' resolution by a majority of two thirds of the votes represented at the meeting and the majority of the nominal value of the shares represented (unless provided otherwise in the articles of incorporation). Pre-emption rights apply to capital increases for both cash and non-cash consideration. Therefore, cash box structures, which are a common feature in the UK, do not exist in Switzerland.

Corporate law does not specify the discount at which new shares may be issued. In practice, the discount is often in line with international practice in the range of 5% to 10% to the last closing price, but may be higher on the grounds of special circumstances. In our view, a strict limitation to a maximum discount of 5% as

advocated by some writers in Switzerland, is misplaced. It is important to note that the question of the "permissible" discount does not relate to the validity of the share issuance but rather to a potential liability of the board of directors. In light of this, we believe the measures adopted by the board to mitigate the discount, such as e.g. a bookbuilding procedure by reputable banks, are more important than the actual discount resulting from such procedures.

### **d) Prospectus and Capital Markets Requirements**

Under the FinSA, no prospectus is required for an issuance of shares if the issuance represents less than 20% of the number of shares already admitted to trading during the period of the previous 12 months, provided that the placement falls within the scope of a public offer exemption. Therefore, given that the size of a PIPE deal normally involves less than 10% of the existing share capital and is offered to "professional clients" (within the meaning of FinSA) to whom public offers may be made without a disclosure document, it can be marketed and sold without a prospectus. In a PIPE transaction, the issuer often instructs a placement agent to identify potential investors and/or carry out an accelerated book building to place the new shares. In an accelerated bookbuilding, the new shares can be placed within hours after the end of a trading day.

While the NYSE and the LSE require shareholder approval for certain issuance of shares to related parties such as directors, officers, shareholders (and affiliates) as well as entities in which they have a substantial direct or indirect interest, no such related party transaction requirements exist in Switzerland.

As soon as the PIPE investor has entered into the contractual agreement to make an investment, the investor will have to comply with requirements regarding disclosure of major shareholdings. This applies to both equity and equity linked instruments. Under the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FMIA) significant shareholdings in listed companies must be disclosed. The relevant percentages triggering the disclosure obligation are 3%, 5%, 10%, 15%, 20%, 25%, one-third, 50% and two-thirds.

As far as the issuer is concerned, an ad hoc publicity announcement must be made as soon as the issuer has entered into an agreement with the PIPE investors. Under Article 53 of the Listing Rules of the SIX, the issuer must report price-sensitive facts within the sphere of its activity to the market as soon as it becomes ware of them and earmark such disclosure as "ad hoc announcement pursuant to art. 53 LR".

### **e) Takeover Law Requirements**

Normally a PIPE deal will not trigger the obligation to launch a public offer under Swiss takeover laws, unless the percentage of voting securities that are acquired combined with the voting securities already held by the PIPE investor exceeds 33 1/3%.

According to article 135 FMIA, a mandatory offer is triggered if an investor – acting alone or in concert with others – obtains a shareholding in excess of 33 1/3% of the voting rights of a target company, irrespective of whether or not such voting rights may be exercised.

The FMIA allows a listed company to exclude the obligation to make an offer by opting up or opting out of the mandatory takeover regime in the articles of association. If no opting up/out was included in the original articles of association, there is a whitewash procedure similar to the one in the UK. An opting out/up clause may be introduced in the articles if approved by the shareholders by (a) the majority of the votes represented at the shareholders' meeting, being the ordinary quorum applicable at the company for amendments to the articles of association and (b) the majority of the minority shareholders at the same shareholders' meeting. For this purpose, a minority shareholder is a person that neither directly nor indirectly nor acting in concert with others holds a share in the controlling stake of 33 1/3% of the voting rights nor has requested that the board of directors introduce an opting up/out clause in the articles. [tbd: Reference to MCH decision?]

### **f) Corporate Governance**

Due to the issuer's obligation to treat shareholders equally, as a matter of principle the issuer may not give PIPE investors rights that other shareholders do not have, except in limited circumstances or if a separate class of preferred shares is created (which in Switzerland would be very rare in the context of a PIPE deal). In practice, investment agreements sometimes contain board representation rights, veto rights, conversion features, and lock-up obligations.

An agreement between the issuer and the PIPE investor governing matters beyond the purchase of the PIPE instrument (e.g. governance rights, exercise of voting rights, rights of first refusal etc.) likely qualifies as acting in concert and therefore results in an obligation to disclose the aggregate holding of equity securities. PIPE investors and the issuer will make sure that any acting in concert between them will not result in an obligation to launch a mandatory public offer.

### **g) Insider Trading**

Insider trading restrictions may affect the timing and structuring of a PIPE transaction. Under the FMIA, dealing in securities on the basis of, or simply disclosing, information that is not publicly known and would affect the price of securities if it were made public can be both a criminal offence (article FMIA 154) and a breach of administrative laws (article 142 FMIA). It is a criminal offence if made with an intent to realize a financial gain, whereas a person can commit an administrative offence simply by either trading on the basis of, or disclosing, inside information irrespective of the intentions.

The Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FMIO) sets out safe harbor defenses in relation to scenarios in which the use and/or disclosure of insider information is permitted. Safe harbor defenses exist with respect to public share buyback programs, stabilization activities after a public offering, transactions carried out in implementing one's own investment decision and the disclosure of insider information to persons who need the inside information in order to fulfill their legal or contractual responsibilities, or that must receive the information for the purpose of entering into a contract subject to the documented advice that the inside information may not be exploited.

As a rule, the fact that the issuer is contemplating a PIPE deal usually is price sensitive non-public information. Therefore, if the placement agent is contacting potential investors, it must inform the investor that the information is price-sensitive and request that the confidential information be kept confidential before disclosing the issuer's identity. On the one hand, the fact that the investor learns about the PIPE transaction does not prevent him from committing to subscribing new shares from the issuer on the grounds that implementing one's own investment decision is not insider trading. On the other hand, if the issuer has postponed the disclosure of price-sensitive information that is not related to the contemplated PIPE, according to Swiss insider laws, the issuer would not be allowed to issue or sell new shares to the PIPE investors (and neither would the PIPE investors be allowed to buy them), without first disclosing the price-sensitive information to the public to "cleanse" it.

The insider trading issue is particularly relevant for PIPE investments made for the purpose of funding the acquisition of a target company of a substantial size. Clearly, the fact of the planned acquisition as well as the contemplated target is price sensitive non-public information. In such a scenario, is it permissible for the issuer to disclose these facts to the PIPE investor? If yes, is it permissible for the PIPE investor to enter into a binding commitment before such information is in the public domain? In our view, in both cases the answer should be yes. However, it should be noted that many scholars and practitioners take a different view, in particular on the second question. Unlike other jurisdictions, Swiss insider trading laws have no express safe harbor or defense if both parties to a transaction are in possession of the same inside information (sometimes referred to as "equal information defense").

However, the disclosure of material (price sensitive) non-public information (MNPI) is permissible based on a specific safe harbor if the recipient needs to receive the MNPI for the purpose of entering into a contract (Art. 128 lit. b FMIO). In our view, a professional investor that is about to enter into a funding commitment, i.e. a "contract", in relation to the subscription of securities in a SPAC needs to receive information about the SPAC's contemplated acquisition target because otherwise the investor would have no information about the investment and would not be in a position to commit making it. The indirect funding of the DE-SPAC transaction through a PIPE so as to allow the SPAC to make the contemplated acquisition is the *raison d'être* of the



investment. In other words, the contemplated acquisition is inherently part of the PIPE investor's investment decision.

In addition, Art. 127 al. 1 FMIO provides for a safe harbor in relation to the investment in securities while in possession of certain inside information (as opposed to the mere disclosure of it). The safe harbor permits the implementation of an investor's own decision to purchase securities despite the fact that the contemplated purchase may qualify as MNPI. The safe harbor is subject to the condition that the investor's investment decision may not be taken due to MNPI other than the investor's own decision to purchase the securities. The rationale of this safe harbor is that the implementation of an investor's own investment decision does not result in an unjust enrichment of the investor compared with other investors and does not jeopardize a level playing field for all capital market participants.

For the same reasons, the safe harbor of Art. 127 al. 1 FMIO should apply to a PIPE investment in the context of a DE-SPAC transaction. The purpose of a SPAC is to look for a target and to effect a business combination with it. The facts that a DE-SPAC transaction is pursued, the existing shareholders of the SPAC have redemption rights, and the DE-SPAC transaction is an essential element of it, are public information. Even if a PIPE investor enters into a commitment to investing in securities of the SPAC based on specific information about the SPAC's contemplated acquisition of a target at a time when the target has not yet been disclosed to the public, does not change the analysis. The PIPE investor will not be unduly enriched and there will be no unlevel playing field for capital market participants. The reason is that the SPAC shareholders need to approve the business combination and benefit from share redemption rights if a business combination is completed; furthermore, completion of the PIPE transaction is conditional on completion of the business combination. The PIPE investors are not misusing inside information for their own benefit but are engaged in validating a contemplated acquisition of a SPAC in the ambit of a DE-SPAC transaction, which is the purpose of the SPAC's existence. The legitimate purpose of PIPE transactions in this context is underlined by the fact that PIPE investors commit themselves to lock-up undertakings for a significant time post-closing of the PIPE investment. Therefore, PIPE investors that enable the implementation of DE-SPAC transactions should be able to avail themselves of the safe harbor of Art. 127 al. 1 FMIO and fall outside the scope of the prohibition to misuse inside information as required for a breach of applicable Swiss insider trading provisions.

## **2) PIPEs in DE-SPAC Transactions**

### **a) The Lifecycle of a Special Purpose Acquisition Company (SPAC)**

A SPAC is formed for the purpose of raising a pool of cash in an initial public offering (IPO) and depositing the cash proceeds into a trust account. The deposited funds must be used to buy an operating company in a business combination transaction by a set date (usually within 18 – 36 months from the SPAC IPO date). The transaction in

which the SPAC is combined with a private target company is generally referred to as a "DE-SPAC" (see Matthias Courvoisier, CapLaw-2021-49; Claude Humbel/Thomas van Gammeren, CapLaw-2021-16).

After formation, a SPAC raises capital by issuing units (usually consisting of a share and a warrant) in an IPO. Subsequently, the search for a suitable acquisition target begins. The target cannot be identified prior to the closing of the IPO. If the SPAC had already selected a target at the time of the IPO, detailed information regarding the target would be required to be included in the IPO prospectus. This would delay the IPO process and jeopardize the advantages of a SPAC IPO versus a traditional IPO. During the next stage, the business combination is negotiated with the target and/or its shareholders and in parallel the (PIPE-)financing transactions are lined up. Finally, following shareholders' approval of the business combination, the DE-SPAC and the (PIPE-)financing transactions are closed. If the SPAC fails to complete a business combination by the set date, the SPAC returns the amounts held in trust to its shareholders and is liquidated.

### **b) DE-SPAC Financing Need**

In many cases, the IPO proceeds of a SPA will fall short of the funds necessary to buy the acquisition target. In addition, one key feature of the DE-SPAC process is that an investor that does not approve of the terms of the DE-SPAC transaction may seek redemption of its shares. In some cases, redemptions may involve a substantial percentage of SPAC shareholders, even close to 100%. In consequence, from the SPAC's perspective, there is no certainty regarding the amount of cash available to pay for the acquisition of the target and provide the liquidity required to run the business.

As a result of this, the funding gap must be filled through debt and/or equity financing, most commonly through PIPEs. Typically, the PIPE deal is contingent on the completion of the business combination in the DE-SPAC transaction.

### **c) DE-SPAC PIPE Structures**

Generally, a PIPE undertaken in connection with a DE-SPAC transaction is the same as a PIPE in relation to a listed company that already runs an operating business. However, a number of issues exist because the listed SPAC is a cash box, and the PIPE must be synchronized with a business combination between the SPAC and the private target company running the (future) business of the combined entity.

In international transactions, the announcements of the DE-SPAC and the PIPE deals are usually timed to occur simultaneously. The PIPE is conditional on the closing of the business combination by a certain date. During the interval between announcement and closing, which typically lasts several months, the PIPE investors bear the price risk. This means that PIPE investors must have entered into binding commitments following the due diligence exercise and the negotiation of the investment agreements



at the time before the deal is announced. This deal structure raises issues under Swiss insider trading laws in the view of many Swiss scholars and practitioners. We believe the deal structure should be permissible in Switzerland as well (see 1(g) above), even more so in the context of a DE-SPAC where the target company rather than the SPAC is economically the investee company. However, some uncertainty remains in the absence of pertinent court decisions.

In an alternative structure, first the business combination between the SPAC and the private target company is signed and all price-sensitive information is disclosed to the market and then the PIPE offering process is started. This sequence of events ensures compliance with insider trading restrictions but is subject to increased conditionality.

A theoretical middle of the road approach would give PIPE investors access to non-public material information about the private target company at the beginning of the process but keep the identity of the SPAC secret. Once the public announcement about the execution of the business combination agreement between the SPAC and the private target company is made, the PIPE Investors will be able to commit themselves quickly.

### **d) The new SIX Disclosure Requirements for a DE-SPAC**

The recently published new rules of SIX on SPACs also contain detailed minimum provisions governing the DE-SPACing process. These include the requirement to publish an information document which is intended to form the basis for the shareholder vote to approve or disapprove the contemplated DE-SPAC.

This information document must include a fairness opinion of an independent body regarding the fairness of the transaction and, in particular, the valuation of the target. In addition, the information document has to contain detailed disclosure about the acquisition target and its financial statements, its corporate governance and the contemplated transaction which have obviously been inspired by the requirements for equity prospectuses pursuant to the Swiss Financial Services Ordinance. Hence, the audited financial statements of the target group for the past three financial years have to be disclosed or incorporated by reference in the information document. These statements do not have to be reconciled to the accounting standard used by the SPAC. However, a description of the main differences between the respective standards has to be included unless the target group already uses IFRS or US GAAP.

The disclosure has to include a discussion of the rationale for and the risks associated with the transaction, a description of (personal) interests of the directors and officers of the SPAC when evaluating the target, a disclosure of potential conflicts of interests (also with regards to members of the banking syndicate) and the expected dilution of the IPO shareholders resulting from the DE-SPAC. The new rules also require the preparation and publication of a "supplement" to the information document in case new facts arise or are established between the time of the publication of the information

document and the shareholder vote which could have a significant influence on the decision of the investors.

**e) Due Diligence by PIPE investors**

Even if the information document mandated by the new SIX SPAC rules will be available to PIPE investors in a SPAC, PIPE investors will probably insist on direct access to target information. In the US, prospective PIPE investors are allowed to conduct due diligence on the private target company and to have access to non-public information before the combination is completed and announced to the public. The same should be permissible in case of a Swiss listed SPAC. As mentioned, the target company rather than the SPAC is the PIPE investor's counterparty from an economic point of view. Hence, as in a PIPE transaction of significant size and for the reasons set out in 1(g) above, neither the investors nor the banks on behalf of the investors should be prevented for insider law reasons from getting access to the information required to be disclosed to them in view of their investment decision.

It is an open question whether the banks involved in a PIPE would be comfortable with PIPE investors relying only on the information document required by the new SIX rules for the shareholder meeting deciding on the DE-SPAC. Unless this document is the equivalent of a prospectus and satisfies the needs of the banks to establish a due diligence defense (disclosure letters of lawyers, comfort letters of auditors, etc.), we doubt that this would be the case. Notwithstanding this, if such a (draft) document were available at the time when PIPE investors take their investment decisions, the banks involved in the PIPE placement would enable access to such document by the PIPE investors as part of the investors' due diligence, but the banks can be expected to emphasize that the document was produced by the SPAC issuer without the banks' involvement.

**f) Investment Agreements and Undertakings by PIPE Investors**

- An investment and subscription agreement is entered into on the one hand by the SPAC issuer and on the other by a placement agent acting on behalf of the PIPE investors or by the PIPE investors themselves. The SPAC issuer will have to give representations and warranties and agree to indemnification undertakings.
- At the time when the investment agreement is executed, the SPAC has very limited access to funds because the IPO proceeds are held in a trust account for special purposes. This increases the risk of placement agents that are involved in the offering if the deal is aborted. Once the business combination is completed, the issue concerning the trust account no longer exists.
- To determine the amount of the required financing and to secure the marketing of the PIPE transaction, the SPAC will often seek to obtain commitments from existing SPAC shareholders or affiliates not to redeem SPAC shares in connection with a

business combination. SPAC investors that plan to invest in the PIPE typically agree to this.

- In addition, the SPAC will want some SPAC shareholders to sign lock-up agreements to prevent them from selling SPAC shares during a specified period following completion of the business combination. Typically, PIPE investors will want this period to be longer than any lock-up agreed to by the PIPE investors.
- Supporting agreements with SPAC shareholders must in any event be considered carefully because they may result in the SPAC and the relevant investors acting in concert. This may trigger disclosure obligations and, depending on the arrangement, potentially even an obligation to make a mandatory public offer, which the parties will want to avoid.

### g) Conclusion

The new rules of SIX have paved the way for listings of SPACs in Switzerland. If, as a result of this, listings of SPACs occur, there will also be DE-SPAC transactions down the road and thus PIPE investments. These PIPE investments can be expected to follow international market practice. However, as shown above, some additional complexities and uncertainties may have to be overcome in Switzerland due to its insider trading laws and the specific requirements for a DE-SPAC transaction under the new SIX rules. Nevertheless, we believe that these additional uncertainties and complexities are manageable; they should not prevent the successful completion of DE-SPAC transactions facilitated by PIPE investments.

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## Corporate Law Reform: Delisting

Reference: CapLaw-2021-58

On 19 June 2020 the Swiss parliament approved a bill introducing a new Swiss corporate law (*Aktienrecht*). The new Swiss corporate law is expected to come into force in 2023.

As part of the reform the decision to delist the shares of a listed company will be made subject to a mandatory vote of the (meeting of) shareholders. The following article will discuss what the consequences of this change are and what other laws and rules are of relevance in connection with the delisting of a Swiss company from a Swiss exchange.

*By Lukas Roesler*

### 1) Introduction

#### a) Background

The main purpose of the rules governing a delisting is the protection of (i) the rights and interests of minority shareholders versus the interests of the majority shareholders and (ii) the protection of the interests of the shareholders in general versus the interests of the board of directors and management of the company.

So far, Swiss corporate law did not know specific provisions addressing a delisting and the rules to govern a delisting were based on general governance and competency principles of Swiss corporate law. Specific provisions could only be found in the self-regulatory Listing Rules (LR) of the Swiss stock exchanges SIX Swiss Exchange and BX Swiss (this article will focus on the rules of the preeminent exchange in Switzerland, SIX Swiss Exchange) (see section 3 of this article). Further, given that a delisting is often preceded by a takeover of control by a shareholder or a group of shareholders, the takeover law provisions of the Swiss Financial Markets Infrastructure Act (FMIA) and its ordinances were and remain relevant in connection with a going private (see section 4 of this article).

Lack of specific corporate law provisions and on the basis of the general competency of the board of directors to take all decisions which are not expressly allocated either by law or its articles of association to the (meeting of) shareholders of a Swiss company, the decision to delist a Swiss company used to be (and currently still is) one of the board of directors to take.

The potentially far-reaching economic consequences of a delisting on the shares of the (minority) shareholders and the German 'Macrotron' decision of 2002 sparked a discussion among Swiss legal scholars whether it is adequate that such decision is put into the competency of the board of directors. It was discussed whether such decisions should rather be brought forward to a (voluntary or mandatory) vote of the shareholders, how such vote by the shareholders should be taken and what other protective measures, such as e.g. a duty to make a public offer for the shares of the minority shareholders, may have to be applied.

While the German courts overturned the 'Macrotron' decision by the 'Frosta' decision in 2013 and the German legislator amended the German stock exchange law (Änderung des deutschen Börsengesetzes vom 20. November 2015, BGBl. I (2015), 2029) with a duty to buy out the minority shareholders in case of a delisting, no specific actions were taken by the legislator in Switzerland to make changes in relation to the rules governing a delisting of a Swiss company. Only rather late during the discussion of the reform of the Swiss corporate law, namely in the draft of November 2016, it was proposed to put the competency to decide on a delisting into the hands of the shareholders.

### **b) Reasons for delisting**

A delisting may be sought for several reasons: A listing comes with material costs which can be saved for the company if there is no adequate benefit of a continued listing. Costs include direct costs for listing fees, investor relations work and information of analysts, preparation and disbursement of reports (which have to follow more sophisticated and, therefore, costlier accounting standards) and the organization of the annual general meeting of shareholders, but also indirect costs as a consequence of regulation that only applies to listed companies (such as e.g. the rules governing management compensation and publicity rules).

Further, management or shareholders may be of the view that the value of the company is not adequately mirrored in the share price paid over the exchange and, therefore, seeks for ways to better mirror such price or to protect against takeover attempts at a price that is considered too low.

Costs become particularly relevant if the benefits of a listing are small for the company, e.g. if there is not much interest and trading in the shares and a low free float and/or liquidity in the market for the shares. In such circumstances, the price building for the shares is not efficient and, therefore, the price of the shares may not be a good reflection of their value.

If a delisting in connection with a going private is initiated by a majority shareholder, its reasons may additionally include a simplification of the structure of the company, a restructuring and refinancing (the benefits of which it does not wish to share with other shareholders), the intention to improve its options for a sale of the company, less publicity in general and also more leverage to deal with the rights of the minority shareholders.

### **c) Adverse effects of a delisting**

From the point of view of the company, a delisting has the disadvantage that it loses access to the capital markets to raise funds by way of a share offer and to use its shares as a currency for acquisitions. Further, the structuring of employee participation programs may become more complex.

From the point of view of the (minority) shareholders a delisting has the adverse effect that their exit by way of a sale of their shares may become more difficult because a sale outside an exchange requires more efforts and is more difficult due to less (price-relevant) information available to the parties and generally less liquidity of the private markets. Further, certain rights granted by Swiss corporate law to (minority) shareholders of listed companies do not apply anymore if the company is delisted. All of these aspects may result in a lower price obtainable for the shares of an unlisted company (unless the price of the shares is already very low due to a lack of interest of the market in the listed shares).

### **2) Delisting under the new Swiss corporate law**

#### **a) Vote of a qualified majority of shareholders**

The new corporate law provides that the proposal to delist is not made by the board of directors anymore, but is being put forward to a meeting of shareholders which has to decide in favor of the delisting with a qualified majority of 66 2/3 percent of the votes and nominal amount of the shares cast (article 704 new CO).

No new right of the minority shareholders to be bought out by the majority or the company in case of a delisting is introduced.

In the case of a company with a broad shareholder base, experience shows that it is rather difficult to reach an approving vote of a qualified majority of shareholders as newly required for a delisting decision. Compelling arguments must be presented to the shareholders in order to get sufficient votes.

However, in the case of a company with majority shareholder controlling 66 2/3 percent of the votes and nominal amounts of its shares, the majority shareholder has the power to decide a delisting on its own and against the will of the minority shareholders unless the law provides protective rights of the minority in such a situation (as e.g. an approving vote of the "majority of the minority" or the right to challenge the decision in court, see section 2b) and 2c) of this article).

#### **b) No vote of a majority of the minority**

Although discussed in the aftermath of the German "Macrotron" decision as one option to protect the interests of the minority shareholders, no requirement of an approving delisting vote of a "majority of the minority" of the shareholders was introduced. In general, Swiss corporate law does not know the exclusion of shareholders from participating in a vote in case of conflicts of interests. Such an exclusion is specifically only provided by art. 695 para. 1 CO for the vote to grant discharge from liability to the members of the board of directors. Further, a vote of the "majority of the minority" is required by the Swiss takeover law of the FMIA in relation to the introduction of an "opting out" (see section 4b) of this article). During the legislative process there was no discussion about the introduction of a vote of the "majority of the minority" in relation to a delisting and no respective provision found its way into the new corporate law.

#### **c) Challenges of shareholders' resolutions**

One consequence of the change of competency to take the delisting decision from the board of directors to the shareholders is that the shareholders may now directly challenge the shareholders' decision in court. A delisting decision of the board of directors under the current law could not be directly challenged in court by shareholders



(unless it was void), and shareholders could only file liability law suits against the members of the board of directors (which are difficult to win).

Decisions by the meeting of shareholders can be challenged directly by the shareholders for violation of applicable laws or the company's articles of association. Further, the execution of the decisions of the meeting of shareholders may potentially be blocked by a preliminary injunction until a decision by the competent court is served.

In the case of a delisting, art. 706 para. 2 cif. 2 or cif. 3 CO may provide the basis for a challenge. According to cif. 2 of this article, resolutions are contestable which improperly deprive or restrict the rights of shareholders in the individual case even if the resolution a such is permissible in principle. A shareholders' resolution is also contestable if it is not in compliance with the principles of 'cautious exercise of rights' (*schonende Rechtsausübung*) or 'proportionality' (*Verhältnismässigkeit*), or if it is in fact inappropriate (*zweckwidrig*), i.e. promotes only the goals of individual shareholders but not those of the company.

However, the hurdles for a successful challenge of a shareholders' resolution based on art. 706 CO are high. If the company succeeds in presenting its legitimate interests in a reasonably credible manner, the courts will generally give preference to these interests. A challenge on this basis can therefore only be successful if the resolution in question causes substantial damages to the plaintiff without these damages being counterbalanced by any recognizable benefit to the company.

As mentioned earlier, a delisting is often made because the costs of the listing are not reasonably offset by the benefits of the listing to the company anymore. If that is the case, it will not be difficult for the company to present its interest in the delisting in a reasonably credible manner. Further, it may be difficult for the plaintiff to argue looming damage if the shares – due to lack of investor interest and low liquidity – already trade at a low price. Furthermore, the company may address the principle of 'cautious exercise of rights' by setting a sufficiently long period between the delisting decision and the last day of trading of the shares. Therefore, in such rather typical circumstances of a delisting, a successful challenge based on art. 706 CO will be difficult to achieve.

### 3) Listing rules

The self-regulatory listing rules of the Swiss stock exchanges base on a delegation by the legislator to stock exchanges (on the basis of the FMIA). Swiss stock exchanges and their governance in turn are licensed and supervised by the Swiss financial markets regulatory authority FINMA.

According to art. 58 of the listing rules of SIX Swiss Exchange (LR), a voluntary delisting requires a written application by the listed company to the regulatory board of SIX Swiss Exchange (the "Regulatory Board"). The Regulatory Board, for its decision, will take into account the interests of stock exchange trading, investors and issuers. In

particular, it may require timely announcement and sufficient time until delisting. In any case, proof must be provided by the issuer that the competent bodies of the issuer are in agreement with the delisting.

SIX Swiss Exchange has further specified Art. 58 LR in the Directive on the Delisting of Equity Securities, Derivatives and Exchange Traded Products of 7 December 2018 (Directive on Delisting, DD). Therein, SIX Swiss Exchange clearly holds that it shall not be the decision of the Regulatory Board whether a delisting actually occurs or not (Art. 3 para. 1 DD: "*In principle, the issuer itself decides on the delisting of securities it has issued.*"). The decision to delist shall be one of the issuer and its competent bodies.

While the Regulatory Board checks whether the decision to delist has been duly taken by the company, its decision will primarily focus on establishing an adequate delisting process, in particular that an appropriate transition period between the announcement of the delisting and the last trading day is granted. In other words, it is not the practice of the Regulatory Board to prevent a delisting, but rather to delay it.

As a rule, the period between the delisting announcement and the last day of trading may be no less than three and no more than 12 months. When setting this time period, the Regulatory Board will particularly take into consideration the free float, liquidity and trading volume of the shares (art. 4 paras 1 and 2 DD). In its recent decision in relation to *Rapid Nutrition plc*, for example, which held a double-listing on SIX Swiss Exchange and in the US, it decided that a period of seven months between the announcement of delisting and the last trading day was appropriate (*Decision of SIX Exchange Regulation AG of 21 December 2020 regarding the delisting of all registered shares of Rapid Nutrition plc, London*).

According to art. 62 para. 3 LR shareholders may appeal to the appeals board of SIX against decisions on applications for delisting within 20 trading days of the publication of that decision on the SIX Exchange Regulation website. In this procedure, shareholders may challenge the delisting decision only in respect of the period between the delisting announcement and the last day of trading. Thereafter, only a challenge in the civil courts is possible.

#### **4) Takeover law**

##### **a) Relevance in relation to a delisting**

The new corporate law requirement that a delisting decision must be taken by a vote of a qualified majority of 66 2/3 percent of the votes and nominal amount of the shares cast in a shareholders' meeting is a rather high hurdle to reach if the company has a broad shareholder base. This is not the case if the company is controlled by a majority shareholder (or a group of shareholders acting in concert) holding 66 2/3 or more of the votes that can take a delisting decision on its own.

This may pose a risk for shareholders that are invested in a listed Swiss company that is already controlled by a majority shareholder or is subject to an "opting-out". If that is not the case, minority shareholders enjoy the protection of the Swiss takeover law of the FMIA (as further specified in the FMI ordinance, the FMI ordinance FINMA and the Takeover Ordinance) that require a shareholder (or a new group of shareholders acting in concert) gaining control over more than a certain percentage of the voting rights in a Swiss company to make a public tender offer for all shares in the company.

### **b) Protection provided by takeover law**

The Swiss takeover law provides for disclosure obligations of shareholders which – when (alone or acting in concert) buying or selling shares (or rights or obligations for the purchase or sale of shares) – exceed or fall below (directly or indirectly) certain thresholds in relation to the company's voting rights (3, 5, 10, 15 etc. percent). Further – provided that the articles of the relevant company do not contain an 'opting-up' or 'opting-out' – it requires shareholders which (alone or acting in concert) acquire control over more than 33 1/3 percent of the voting rights in a company (whether exercisable or not) to make a public tender offer for the shares of all other shareholders which gives the minority shareholders the opportunity to exit their investment in such event.

Companies may, by vote of their shareholders, exclude the obligation to make an offer by including a respective provision into their articles of association ("opting-out"). They can also include an "opting-up"-provision by which the percentage of shares to be controlled that requires an offer to be made may be increased up to 49%. However, once the company is listed, the implementation of an opting-up/opting-out clause must meet the (higher) standards of art. 125(4) FMIA according to which it must not prejudice the interests of the shareholders in the meaning of art. 706 of the Swiss Code of Obligations (CO). According to the current practice of the takeover board (TOB) this is presumed if (i) the shareholders are informed transparently about the introduction of the opting out/-up and its consequences, (ii) the majority of the votes represented at the shareholders' meeting and (iii) the majority of the minority of shareholders agree to the opting out/up. In such case, the TOB will only challenge this presumption and examine art. 706 CO in substance if there are special and exceptional circumstances.

Further, it is the practice of the TOB to apply the takeover law also in relation to a delisting that is made before a takeover in an attempt to circumvent the takeover law.

### **c) Squeeze-Out**

In case of a successful public tender offer, the bidder is most often interested in gaining 100% control over the target company. This may be achieved by a squeeze out of the minority (and may, for example, help save time and money that challenges by minority shareholders against a planned delisting can cost). Once the bidder controls more than 90% of the shares of the Swiss target company, it may force the minority shareholders to sell their shares by way of a squeeze-out merger in accordance with art. 8 para. 2

of the Merger Act (whereby the shareholders have an appraisal right and may file a claim for appropriate compensation in accordance with art. 105 of the Merger Act). If the bidder controls more than 98% of the shares, it may also instigate a squeeze-out action in accordance with art. 137 FMIA filed within three months after the expiration of the offer period against payment of the offer price of the previous tender offer.

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## Sparks – The new SIX equity segment for SMEs

Reference: CapLaw-2021-59

On 1 October 2021, revised regulations of SIX Exchange Regulation (SER) – the self-regulatory supervisory body for issuers listed at SIX Swiss Exchange (SIX) – entered into force. The key part is the enactment of a new regulatory standard *Sparks* where small and medium-sized enterprises (SMEs) can list and trade their equity securities. This article provides an overview of the revised *Sparks* specific regulations.

*By Christian Schneider / Peter Kühn*

### 1) Introduction

The launch of the new equity segment *Sparks* opens the possibility to companies with a lower market capitalization to make use of the advantages of being public. Such advantages include facilitated access to capital (both equity and debt), a higher degree of diversification of investors, enhanced visibility, *i.e.* a higher public profile, stronger brand recognition and reputation enhancement.

SIX is generally perceived as the *Swiss stock exchange par excellence* and has existed since the *Helvetic Big Bang* twenty-five years ago. In contrast, the other authorized stock exchange in Switzerland, BX Swiss at Berne, is limited to local and smaller issuers and focuses on real estate companies and structured products. A listing at SIX can be attractive for various reasons. As SIX is one of the leading exchanges in Europe some of the largest companies in the world in various sectors are listed there. A listing at SIX provides access to international financial markets and to well-funded domestic and international investors as well as the benefits of Switzerland as a stable financial center. Hence, a listing can potentially give a significant boost to SMEs.

Despite of the advantages of a stock exchange listing at SIX, they currently seem to be struggling to attract new issuers. This applies in particular to the last year as there were only two successful IPOs (V-Zug, Ina Invest). In the first three quarters of 2021, there were three IPOs (PolyPeptide, Montana Aerospace, medmix), whereby currently there appear to be several further IPOs in the pipeline. In addition, many Swiss companies were listed abroad. To counteract the trend towards fewer IPOs, SER, has

revised its regulations to support SME listings while safeguarding investor protection and market integrity. The introduction of a SME specific equity segment at SIX is not only closing what might be a gap to the Berne stock exchange but can also be seen as a reaction to international developments: For example, the Alternative Investment Market (AIM) of the London Stock Exchange (LSE) was launched in June 1995 as a sub-exchange growth market for smaller companies. Further, in the European Union (EU), the Markets in Financial Instruments Directive (MiFID II) provides, since January 2018, for so-called SME growth markets (GMs), *i.e.* multilateral trading facilities (MTFs) designed to allow SMEs to raise capital in public offerings. So far, around 17 MTFs are registered in the EU as SME GMs.

The existing segments at SIX which are designated as regulatory standards – *i.e.*, International Reporting Standard, Swiss Reporting Standard (together *Main Market*), and the specific standards for investment companies, real estate companies, global depositary receipts and collective investment schemes – have been supplemented on 1 October 2021 with the new equity standard Sparks (*Sparks Segment*), applicable to issuers with a market capitalization at the time of listing of CHF 500 million and less (see 2) below). Further, the Listing Rules (LR) of SER have been revised as of 6 December 2021 introducing an additional regulatory standard SPACs to allow special purpose acquisition companies (SPACs) to go public in Switzerland. The latter is not the subject of this article.

## 2) Revised regulations for the Sparks Segment

With the introduction of Sparks on 1 October 2021, the LR have been selectively simplified for issuers at the Sparks Segment (see a) and b) below). Further, the following implementation provisions have been adapted accordingly: (i) Directive Corporate Governance (DCG), (ii) Directive Financial Reporting, (iii) Directive Regular Reporting Obligations, (iv) Directive Distribution Equity Securities, (v) Directive Track Record, (vi) Directive Procedures Equity Securities, and (vii) List of Charges under the LR.

The SIX trading regulations, *i.e.* some directives and guidelines, have also been revised and entered into force on 1 October 2021, establishing a separate trading model for the Sparks Segment, tailored specifically for companies with smaller market capitalization (see d) below).

### a) Sparks listing requirements for the issuer

For a listing on the Sparks Segment of SIX, an issuer must comply with the following requirements:

- *Market capitalization*: The market capitalization of the equity securities of the issuer must not exceed CHF 500 million (article 89a LR). The purpose of this threshold

(which does not exist for the Main Market) is to enhance visibility and to establish more relevant peer groups for smaller companies.

- *Track record:* As a rule, the issuer must (i) have existed as a corporate for at least two years (article 89b LR) and (ii) have prepared its annual financial statements for the two full financial years preceding the listing application in compliance with the accounting standard applicable to the issuer (article 89c LR). For the Main Market a three-year rule applies instead. This means that the minimum company and financial track record periods have been shortened for the Sparks Segment by one year in order to facilitate access for smaller companies.
- *Recognized accounting standard:* Issuers of equity securities listed in the Sparks Segment must have applied one of the following recognized accounting standards for the last two years: IFRS, US GAAP, Swiss GAAP FER, standard under the Swiss Banking Act. Except for the Sparks Segment, Swiss GAAP FER is only permitted under the Swiss Reporting Standard and the Standard for Real Estate Companies, and the Standard under the Swiss Banking Act is only permitted under the Swiss Reporting Standard.
- *Minimum equity:* The reported equity capital of the issuer must amount to at least CHF 12 million on the first trading day in accordance with the applicable accounting standard, of which at least CHF 8 million must come from a capital increase (against cash contribution) in connection with the listing. If the reported equity capital of the issuer on the first trading day amounts to at least CHF 25 million, no capital increase is required (article 89d LR). For the Main Market, this minimum equity capital requirement also changed from 1 October 2021, it increased from CHF 2.5 million to CHF 25 million (article 15 (1) LR).
- *Auditors, audit reports:* Further, a Sparks issuer must also comply with the general listing requirements regarding the licensing of its auditors (article 13 LR) and compliance of its audit reports (article 14 LR) which apply to both the Sparks Segment and the Main Market.

### **b) Sparks listing requirements for the securities**

For a Sparks listing of equity securities, the relevant securities must comply with several listing requirements. In this respect, the minimum percentage of securities which must be in public ownership has been decreased for the Sparks Segment such that a sufficient free float is deemed to be achieved at the time of the listing if at least 15% of the issuer's securities outstanding in the same category are publicly held, their capitalization amounts to at least CHF 15 million, and these securities are allocated to at least 50 investors at the time of listing (article 89e LR). In comparison, the amount required for a free float on the Main Market is 20% with a capitalization minimum of



CHF 25 million (article 19 (2) LR). The Main Market, however, has no requirement as to the minimum number of investors to which the equity securities have to be allocated.

In addition, the following general requirements apply to securities whether they are to be listed on the Main Market or on the Sparks Segment:

- *Legal validity and listing by class:* At the time of the listing, the securities must have been issued, and their form must be, in accordance with applicable law (article 17 LR). The listing must comprise all of the issued securities in the same category (article 18 LR).
- *Tradability:* The securities must be tradable on the SIX and the issuer must have established rules on legal ownership (article 21 LR).
- *Denominations:* The denominations forming the total value of a security must enable an exchange transaction in the amount of one round lot (article 22 LR).
- *Clearing and settlement:* The issuer must ensure that transactions can be cleared and settled via the settlement systems that are permitted by SIX (article 23 LR).
- *Paying agent:* The issuer must ensure that services pertaining to interest and capital, as well as all other corporate actions, are provided in Switzerland (article 24 LR).

### **c) Change of the regulatory standard**

The revised LR provide that a unicorn, *i.e.* an issuer whose average capitalization amounts to more than CHF 1 billion over the previous twelve months (as of 31 December of a calendar year) is obliged to transfer from Sparks to another regulatory standard for equity securities (article 89f (1) LR). Notwithstanding such a mandatory change of standard, an issuer listed on Sparks may apply for a change to another regulatory standard for equity securities if the issuer concerned has been listed at least twelve months at SIX (article 89f (4) LR). *Vice versa*, an issuer listed under a regulatory standard other than Sparks, may request a change to Sparks if it had an average capitalization of less than CHF 500 million over the previous twelve months as of 31 December of a calendar year (article 89g LR).

### **d) Sparks specific trading times**

Taking into account the lower liquidity of Sparks shares on the secondary market, a separate trading model has been set up for them with the aim of bundling liquidity. This model provides for a shortened trading window with continuous daily trading; opening auction at 3:00 p.m.; continuous trading until 5:20 p.m.; and a closing auction until 5:40 p.m.. This should enable participants, investors and issuers to benefit from improved pricing and the best possible execution of trades in the Sparks shares. It

remains to be seen though how the market participants will respond to such a rather short trading window.

### 3) Prospectus requirement

As a general rule and subject to certain exemptions and relaxations for selected issuers and financial instruments, the Financial Services Act (FinSA) provides that any person in Switzerland who makes a public offer for the acquisition of securities or who seeks the admission of securities to trading on a trading venue (*i.e.* a stock exchange or a multilateral trading facility) must first publish a prospectus which has been approved by a reviewing body. The reviewing body checks if the prospectus is complete, coherent and understandable. Currently, SER and the Berne stock exchange, BX Swiss, are the only reviewing bodies authorized by FINMA.

Further, the LR provide that an issuer who applies for a listing at SIX (including on the regulatory standard Sparks) must provide evidence that it has a prospectus that has been approved by a reviewing body (*e.g.* SER) or that is deemed to be approved in accordance with the FinSA (unless an exemption applies). In practice, these two processes – *i.e.* the prospectus approval prior to publication and the application for the listing at SIX – operate in parallel.

There are currently neither unique SME specific exemptions nor relaxations from the prospectus requirement in place of which SMEs, respectively issuers with a lower market capitalization on a trading venue, could make use of when applying for a listing – as would be possible under article 47 (1) respectively 47 (2) (a) FinSA. In our view, although this is basically comprehensible in itself, because ultimately the aim is to protect investors and not to simply save the (albeit smaller) issuer effort, it is somewhat in contrast to SIX's efforts to promote more listings of Swiss SMEs through Sparks.

### 4) Regulatory requirements for maintaining listing at the Sparks Segment

As a consequence of a (Sparks) listing, issuers must comply with the same increased regulatory requirements that apply to any other listed company in Switzerland. This will often result in a paradigm shift in the corporate culture of an SME. Once listed, the SME must in particular:

- Publish an annual report and an interim report (semi-annually), in each case in accordance with a recognized accounting standard of SIX as well as a corporate governance report annually. The revised DCG provides that Sparks issuers may publish the required corporate governance related information – which issuers listed in the other regulatory standards must publish in the annual report – in a separate template provided by SIX that is not part of the annual report but which, however, needs to be published on the same day as the annual report. This should

contribute to standardized reporting and make it more efficient. Whether this is possible without actually facilitating the content, however, remains to be seen.

- Inform the market of price-sensitive facts, *i.e.* facts whose disclosure is capable of triggering a significant change in market prices (*ad hoc* publicity).
- Disclose all transactions of the members of the board of directors and the executive committee and their related persons in shares of the issuer or related financial instruments.
- Further, the issuer must comply with the Ordinance against Excessive Compensation in Listed Companies (OaEC) and any other capital market rules (*e.g.*, the disclosure of significant shareholdings, the prohibitions of insider trading and market manipulation as well as the application of the mandatory tender offer regime (unless the articles of association of the issuer provide for an opting-out)).

### 5) Outlook

The new equity standard Sparks meets the need for a regulated trading venue tailored for SMEs at SIX and has the potential to open new opportunities for both SMEs and investors. The listing in this equity segment increases the visibility of the SMEs while the tradability of the equity securities will enable SMEs to raise capital more efficiently. In contrast to the SME growth markets in the EU, the revised SER regulations enable SMEs to *list* their shares (and not only to seek *admission to trading* at a multilateral trading facility) and thus, to benefit from the advantages of a listing (including being within far more institutional investors' investment universe). Venture capital investments in particular, which have increased enormously in recent years, could become even more attractive through a possible listing in the Sparks Segment at the horizon, especially since this would create an additional option for an exit by the investors. Further, this new segment could be particularly interesting for Swiss biotech and life sciences companies, which seem to be on the ascendency.

The success of this new equity segment will depend heavily on how banks, advisers and investors will react to it in real life. The decision of an SME, respectively its key investors, to pursue an IPO (instead of *e.g.* a trade sale) will also depend on the associated costs. Whether the (largely success-based) fees of the investment banks – who support the issuers in marketing and placing its shares and, usually, also act as underwriters – will decrease in Sparks listings more than as in proportion to the lower transaction volumes, appears questionable. In addition, a (standard) prospectus is still required for a SME listing and the post-listing regulatory requirements remain the same. Accordingly, a decrease in legal fees will primarily depend on whether, to a certain extent, there will be standardized listing documentation in place tailored for SMEs, respectively Sparks listings. After all, we expect Sparks to have a more successful future than the 1999 SWX New Market which was abolished in 2003.

Since 15 October 2021 trading of digital securities in the form of tokens and their integrated settlement and custody is facilitated in Switzerland as FINMA authorized SDX Trading Ltd (SDX) to operate the first digital stock exchange in Switzerland and granted an authorization to SIX Digital Exchange Ltd as central securities depository. According to the recently published SDX listing rules, Sparks shares are not eligible for an SDX listing. Nevertheless, we share SIX's view that Sparks and SDX can supplement each other and contribute to a growing and well-functioning ecosystem for the raising of public equity capital in Switzerland.

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## Ad hoc Reporting and Supplements under the Financial Services Act

Reference: CapLaw-2021-60

The Financial Services Act and its implementing ordinance require prospectuses to be supplemented in case a new price-sensitive fact has arisen between the time of approval of the prospectus and final completion of a public offer or opening of trading on a trading venue. Such supplements have to be approved by the competent Reviewing Body, unless the information containing the price-sensitive fact is included in an ad hoc notice, in which case the supplement can be merely filed with the Reviewing Body without approval. The revision of the ad hoc rules per 1 July 2021 abolished the *per se* reportable facts, which has an impact on issuers dealing with certain price-sensitive information prior or around the time of an issuance of securities.

*By René Bösch / Benjamin Leisinger*

### 1) Duty to Supplement Approved Prospectuses

According to article 56 of the Financial Service Act (FinSA), a supplement to a prospectus must be prepared if any new facts arise, or are established, between the time of approval of such prospectus and final completion of a public offer or opening of trading on a trading venue, as applicable, which could have a significant influence on the assessment of the price of the securities offered or admitted to trading. Such supplement must be filed for approval with the Reviewing Body that has already approved the prospectus immediately upon occurrence or establishment of the new fact. After review and approval of the supplement by the Reviewing Body the supplement must be published immediately. The time for review and approval by the Review Board may be up to seven calendar days.

Events already included or envisaged in the prospectus or in the final terms, such as required approvals under applicable company law or by certain authorities, the

stipulation of the price or the volume of the securities offered or possible alternatives to a capital increase, do not trigger a duty to publish a supplement. The duty to supplement a prospectus is triggered by facts which, taking the concrete circumstances of the particular case into account, are capable of materially influencing the average market participant in their investment decision (article 63(1) of the Financial Services Ordinance (FinSO)). This is a standard that is comparable to the standard under the listing rules of the SIX Swiss Exchange (Article 53 SIX Listing Rules) or the BX Swiss (Clause 16 BX Listing Rules) for ad hoc notices.

### 2) Approval vs. Mere Filing of Supplements

Certain supplements do not have to be reviewed and approved by, but can be merely filed with, the Reviewing Body to be effective. Specifically, notifications of facts which, according to the rules of the respective Swiss or foreign trading venue or DLT trading facility are made public and are possibly price-sensitive, may be reported as a supplement without approval (article 63(4) FinSO). Such a supplement has to be published at the same time as the report is made to the competent Reviewing Body.

The Reviewing Bodies maintain and publish a list of facts which by their nature are not subject to approval (see in more detail CapLaw-2020-21). In line with the FinSO, the current list mentions (i) final issue price and issue volume and (ii) notifications to the market relating to the occurrence of new facts which, according to the rules of the respective Swiss or foreign trading venue, are made public and are possibly price-sensitive – this does not include new facts that entail or result in changes to published annual, semi-annual or quarterly financial statements of the companies concerned. Both SIX Exchange Regulation and BX Swiss also provide an analogous standard for issuers whose securities are not (yet) admitted to trading.

### 3) Revised Ad Hoc Regime

Effective 1 July 2021, the SIX Swiss Exchange revised its Listing Rules, specifically its ad hoc regulations in article 53 Listing Rules and the Directive on Ad hoc Publicity (for more information, see CapLaw-2021-48). One of the new features of the revised rules is that, with the exception of financial statements, it abolishes the previously known *per se* ad hoc facts. Under the former ad hoc rules, certain fact patterns were *per se* reportable by ad hoc releases, including in particular changes in the board of directors or executive management.

Under the new ad hoc rules, ad hoc notices only are required if the new fact is price-sensitive, *i.e.* if its disclosure is capable of triggering a significant (considerably greater than the usual price fluctuation) change in market prices, without listing *per se* reportable fact patterns. Such notices must also be flagged as ad hoc notices. It is explicitly prohibited to report and flag a notice that is purely of a marketing nature as an ad hoc announcement; misuse of flagging may be sanctioned. Issuers, however, still have a certain discretion in reaching a determination on whether a fact is

price-sensitive and still can, in doubt, apply a cautious standard, err in favor of disclosure and flagging the announcement, without being sanctioned for wrongly applying the flag (see CapLaw-2021-48).

#### **4) Impact of revised Ad Hoc Regime on Form of Supplements**

The possibility to simply report ad hoc notices as a prospectus supplement under the FinSA/FinSO may also have a certain effect on the determination whether to publish and flag a specific report as ad hoc. Issuers may wish to determine whether or not to file a change in the composition of the board of directors or the executive committee by way of an ad hoc release rather than a simple news release to benefit from the exemption to have a supplement to the prospectus reviewed and approved, a determination which may be highly relevant around the time of a planned or already announced issuance of securities.

However, such decision should take into account two considerations: (1) As mentioned, it is not permissible to report all new facts by way of ad hoc notices; rather, such facts need to be price-sensitive; (2) the Reviewing Bodies have established a practice to accept a number of other supplements that are not subject to approval – their list (see above at 2)) is not exhaustive. They have done so in consideration that it is impossible to examine certain facts by their very nature for completeness. For example, a mere resignation of a member of the executive management or the board of directors, or new key financial figures should not be subject to approval if filed as a supplement – even if they are not price-sensitive in the specific case and, therefore, not published as an ad hoc release. In such a case, it may be best to include the new press release in the prospectus as an additional document incorporated by reference.

In summary, the question of whether a press release should be published (and flagged) as an ad hoc notice should be answered based on an interplay of its price-sensitivity and the possibility to use it as a supplement for prospectuses without review and approval by a Reviewing Body. Issuers continue to have a certain discretion, but must bear in mind that mere marketing notices must not be published as an ad hoc statement (and may not be the best standard for disclosure in a prospectus, either).

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## FINMA's New Climate Risk Disclosure Requirements as a Step Towards a More Comprehensive Mandatory ESG Disclosure Regime in Switzerland

Reference: CapLaw-2021-61

Recent years have seen regulatory institutions around the world introduce mandatory corporate disclosure regimes related to climate and environmental, social and governance ("**ESG**") matters, largely as a response to the increasing materialization of ESG risks, in particular global heating and climate-driven natural catastrophes, as well as the growing awareness of the importance of full and transparent disclosure of the impact these risks have on corporations' business and financial stability. They are also intended to create transparency around the effect that rapidly changing legislation and government policy in respect of environmental matters, such as the prioritization of renewable energy over fossil fuels, have on corporate entities within certain sectors.

The global trend towards disclosure regimes of this kind is rapidly accelerating. In Switzerland, a number of initiatives have been introduced that represent first steps towards the corporate disclosure of ESG risks. Most recently, the Swiss Financial Market Supervisory Authority FINMA ("**FINMA**") introduced a new climate risk disclosure regime earlier this year. This article first examines the requirements and impact of FINMA's new regime, and follows by situating this initiative within the broader context of Swiss and international ESG disclosure regimes.

By Deirdre Ni Annracháin

### 1) Overview of FINMA's New Climate-related Risk Disclosure Regime

The new climate risk disclosure regime implemented by FINMA takes the form of a revision to two FINMA circulars: Circular 2016/1 "Disclosure – Banks" ("*Offenlegung – Banken*") and Circular 2016/2 "Disclosure – Insurers" ("*Offenlegung – Versicherer*"). The revisions were announced by way of a press release on 31 May 2021 and entered into force as of 1 July 2021.

The rationale for the new regime is based on FINMA's mandate of supervising compliance with the legal requirements that apply to the financial market sector. As part of this mandate, FINMA is required to protect creditors, investors and insured parties and to protect the functioning of the financial markets. FINMA has indicated that the introduction of the new disclosure regime is part of its efforts to order to fulfil this mandate, in particular by increasing transparency in the marketplace. Specifically, the new disclosure regime is intended to be a first step towards meaningfully identifying, measuring and managing climate-related risks. The requirement to clearly identify climate-related risks should result in increased transparency which, over time, will bring about improved comparability between different entities, thereby strengthening the protection afforded to creditors, investors and insured parties.

The new disclosure regime introduced by the revisions apply only to large banks and insurance companies (Supervisory Category 1 and 2 entities). At least for the time being, other entities under FINMA supervision are not subject to the new requirements.

The rules introduced by the new regime require disclosure in the annual reporting (for banks) or in the financial condition report (*Bericht über die Finanzlage*) (for insurance companies) of information in respect of the management of climate-related financial risks. Specifically, the disclosure must include:

- the central features of the entity's governance structure which serve to identify, assess, manage and monitor climate-related financial risks, and to report on these risks;
- a description of the short-, medium- and long-term climate-related financial risks, their impact on the entity's business and risk strategy, and their impact on existing risk categories;
- the risk management structures and processes for the identification, assessment and management of climate-related financial risks; and
- quantitative information (key figures and targets) in respect of climate-related financial risks, as well as the methodology applied in calculating these.

Affected entities must also disclose the criteria and assessment methodologies they used in assessing the significance of climate-related risks.

The above set of requirements is clearly based on a principle-oriented approach, as is generally FINMA's practice. FINMA has indicated in its explanatory report (see *Offenlegung klimabezogene Finanzrisiken: Teilrevision der FINMA-Rundschreiben 2016/1 "Offenlegung – Banken" und 2016/2 "Offenlegung – Versicherer (Public Disclosure)" – Erläuterungen*; "**Explanatory Report**") that it does not intend to specify the requirements in any greater detail than as set out above. This is to grant affected entities discretion on how to implement the requirements in light of their individual size, complexity, structure, business activities and risks. In particular, affected entities may determine themselves how extensive their disclosure should be and how this should be integrated into their existing reporting framework.

However, FINMA has provided some guidance on how to interpret and apply the new disclosure requirements in practice (see Explanatory Report). As a starting point, FINMA has emphasized that the new rules are based heavily on the disclosure framework set out by the Task Force on Climate-related Financial Disclosure ("**TCFD**"), a body established in December 2015 by the Financial Stability Board, which is an independent international entity that promotes financial stability. FINMA has indicated that the majority of Category 1 and 2 entities in Switzerland (i.e. the entities that are subject to the new disclosure regime) have already voluntarily committed to comply

with the TCFD disclosure principles, and that therefore for entities who already comply with the principles, no significant additional impact is to be expected.

In addition, in its Explanatory Report, FINMA has expressed its view on the following topics of questions that may be of concern to entities that are required to comply with the new regime:

### **a) Definition of climate-related financial risks**

An important question for entities subject to FINMA's new regime is what exactly the term "climate-related financial risks" means. FINMA notes that there is no express legal definition of the concept that it can rely on. However, given the close alignment of the new disclosure regime with the TCFD standards, FINMA will rely on the latter to offer some insight as to what the term encompasses.

According to the TCFD standards, climate-related financial risks can be loosely grouped into two categories of physical risks and transitional risks. Physical risks include economic damage caused by climate-related natural catastrophes and by changing climate conditions. For example, climate change can result in increased claims against insurance companies; meteorological conditions such as decreased snowfall in mountain and ski regions can trigger a loss in value of a bank's mortgage portfolio and increase its credit risk; and operational disruptions to key service providers in vulnerable regions can result in multi-sectoral outages.

On the other hand, transitional risks comprise the disruptive impact that climate laws and regulation, changing customer preferences or new technology breakthroughs can indirectly have on financial institutions. For example, new laws or guidelines in respect of CO<sub>2</sub> emissions can trigger asset value adjustments and impact banks' and insurers' market risk; increasingly stringent energy standards can reduce the value of real estate and, concurrently, increase the risk of mortgage defaults; and the creditworthiness of companies in unsustainable sectors such as the coal and oil industries can fall, thereby increasing counterparty default risks.

Any of these risks can directly or indirectly increase the risk profile of a bank or insurer, and their impact may be significant. Without appropriate disclosure, however, the extent of the potential impact of materialized climate-related risks on these entities may not be readily perceived by external stakeholders and the investment community.

Incidentally, FINMA has made clear that "climate-related financial risks" should not be considered as a new category of risk that entities are required to disclose. Instead, entities should describe the impact of climate-related financial risks on *existing* risk categories (e.g. credit, liquidity, market or operational risks), as well as the effect these risks have on the entity's business strategy and risk profile. In doing so, the entity should specify not only whether the identified risks are short-term, mid-term or

long-term in nature, but also what it deems "short", "mid" and "long" term to mean in terms of years.

### **b) Prominence of disclosure in respect of climate-related governance structures**

A key element of FINMA's new disclosure regime is the description of the governance structures that are used to identify, assess, manage and monitor climate-related financial risks. However, the rationale for placing such emphasis on governance structures may not be immediately clear.

FINMA explains that its emphasis on governance structures is due to the central importance of internal governance in establishing a "tone from the top". It is this "tone from the top" which largely determines the quality and scope of an entity's engagement with climate-risked financial risks. FINMA further clarifies that, in addition to disclosing how climate-related financial risks are identified, assessed and monitored, the relevant reporting channels must be disclosed, as must the responsibility taken by the board of directors for climate-related financial risks.

### **c) Rationale for the inclusion of quantitative information**

Under FINMA's new regime, entities are required to disclose quantitative information (key figures and targets) in respect of climate-related financial risks. They are also required to disclose the methodology applied in calculating these figures and targets. The rationale for these requirements has been justified by FINMA on the grounds that there are currently several different methodologies by which quantitative information on climate-related risks can be calculated. Therefore, disclosure of the methodology actually used by each individual entity will assist in making the quantitative information more comprehensible, while still giving the entity a degree of discretion in which methodology to choose.

### **d) Assessment of "significance"**

FINMA does not provide any guidance as to how the significance of climate-related financial risks should be assessed by disclosing entities. Instead, however, as set out above, it requires disclosure of the criteria and methodologies used in assessing the significance of climate-related risks. This, it explains, is because there is no established, standardized or internationally-recognized methodology for measuring the significance of such risks. Therefore, as a departure from the approach taken by other FINMA disclosure requirements (where insignificant risks do not need to be disclosed), if a climate-related financial risk is deemed to be immaterial, the entity in question must still disclose the methodology and criteria used to reach such conclusion.

According to FINMA, this rule is intended to promote serious contemplation of the significance of climate-related risks. It is also designed to prevent entities from making a blanket denial that any material risks exist.

## 2) Landscape in Switzerland and Internationally

The new disclosure regime introduced by FINMA should not be viewed as an isolated measure. Instead, it is part of a global shift towards the introduction and standardization of mandatory climate-related and ESG disclosure regimes.

In this respect, the European Union has been at the forefront of many of the most recent developments. Since 2014, its Non-Financial Reporting Directive (Directive 2014/95/EU, "**NFRD**") has required a degree of disclosure for certain large, public-interest companies in respect of ESG topics. More recently, the EU has introduced a new ESG-based legislative agenda that rests on three main pillars: first, a proposal made in April 2021 to introduce a Corporate Sustainability Reporting Directive. This is intended to would amend and improve the existing ESG-related disclosure rules set forth in the NFRD, including by extending the scope of the NFRD and specifying in greater detail the information to be reported. Second, the Taxonomy Regulation (Regulation (EU) 2020/852), which became entered into force on 12 July 2020, introduces a system for classifying environmentally sustainable activities and requires entities to disclose key indicators about the environmental sustainability of their operations. Third, the Sustainable Finance Disclosure Regulation (Regulation (EU) 2019/2088), which entered into force on 10 March 2021, introduced a sustainability risk disclosure framework for asset management firms and financial services institutions.

The United States has also taken steps to introduce a mandatory ESG disclosure regime. Specifically, in March 2021 the U.S. Securities and Exchange Commission ("**SEC**") announced that its examination priorities would include a greater focus on climate-related risks (see <https://www.sec.gov/news/press-release/2021-39>) and that it was establishing a Climate and ESG Task Force within its Division of Enforcement (see <https://www.sec.gov/news/press-release/2021-42>). The SEC proceeded to initiate a process to seek feedback from market participants on mandatory climate disclosures (see <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures>). It has since then repeatedly indicated that the introduction of an ESG disclosure regime is imminent. This action by one of the most powerful regulatory authorities in the world serves as a clear indication of the spotlight that will be placed on ESG-related disclosure rules in the coming years.

Within Switzerland, certain measures have also been introduced that indicate a shift towards the increased ESG disclosure. It is true that the Responsible Business Initiative (*Konzernverantwortungsinitiative*), which in 2020 proposed a far-reaching set of ESG disclosure obligations, and the proposed CO<sub>2</sub> law (*CO<sub>2</sub>-Gesetz*), which in 2021, *inter*

*alia*, would have required FINMA and the Swiss National Bank to regularly review the financial risks connected with climate change and to report on their conclusions, were both defeated and will not enter into force.

However, the softer alternative to the Responsible Business Initiative – the *Gegenvorschlag* – will enter into force on 1 January 2022. This change in law will introduce an obligation on certain large companies domiciled in Switzerland to publish an annual ESG report, as well as an obligation on all Swiss companies that import minerals from conflict or high risk areas, or whose products or services may have a connection to child labour, to carry out certain due diligence processes on their supply chain and to report on these processes.

In addition, FINMA on 3 November 2021, FINMA published guidance on preventing and combatting greenwashing (see *FINMA-Aufsichtsmittteilung 05/2021 Prävention und Bekämpfung von Greenwashing*). In its guidance, FINMA described what it considered greenwashing to consist of in the context of Swiss collective investment schemes and indicated that greater transparency would be required for sustainability-related Swiss collective investment schemes. FINMA also outlined the factors that it would take into account when assessing the organisational structure of institutions that manage sustainability-related collective investment schemes.

Further, in 2017, Switzerland's main trading exchange, SIX Swiss Exchange, introduced the possibility for listed companies to inform it on a voluntary basis that they have opted to produce an annual sustainability report in accordance with an internationally recognized standard. Currently, 30 companies listed on SIX Swiss Exchange have opted in to this regime.

It is therefore clear that in Switzerland as in the rest of the world, the trend is moving towards the introduction of increasingly stringent ESG-related disclosure obligations.

### 3) What is next?

FINMA has been clear in stating that its new disclosure regime should be considered as a first step towards a potentially more comprehensive climate-related disclosure regime. Prior to the publication of the new rules, it carried out a consultation process with stakeholders and market participants, several of which urged FINMA to adopt a more expansive regime (see *Rundschreiben 2016/1 "Offenlegung – Banken" und 2016/2 "Offenlegung – Versicherer (Public Disclosure)" Teilrevision: Bericht über die Ergebnisse der Anhörung vom 10. November 2020 bis 19. Januar 2021*). The proposals included a potential extension of the rules to other (smaller) types of supervised entities, the requirement to carry out and publish "scenario analyses" based on different assumptions, such as global heating of 2°C or greater, and the suggestion that the disclosure obligations should extend not only to climate-related risks, but also



"environmental risks" (e.g. biodiversity loss). Certain respondents went so far as to suggest that the disclosure requirements should encompass the overall climate *impact* of financial activities, and not merely climate risks, which FINMA rejected as being beyond the scope of its mandate.

In light of these proposals, and FINMA's position that it is open to extending the newly-introduced rules, it is likely that FINMA's requirements in respect of the disclosure of climate-related risks will become more stringent and comprehensive in the near future. It remains to be seen to what extent some version of these requirements eventually become applicable, via other legislative means, to non-FINMA supervised entities.

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## IPO of Switzerland's First SPAC

Reference: CapLaw-2021-62

On 6 December 2021, VT5 Acquisition Company AG (VT5), a special purpose acquisition company (SPAC), announced the launch of its initial public offering and the listing of its Class A Shares and redeemable warrants on SIX Swiss Exchange, which is scheduled for 15 December 2021. VT5 plans the acquisition of one or more operating companies or businesses in the industrial technology sector within 24 months of listing.

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## Novartis sells stake in Roche

Reference: CapLaw-2021-63

On 3 November 2021, Novartis agreed to sell 53.3 million Roche bearer shares in a bilateral transaction to Roche for a consideration of CHF 19 billion. Novartis had acquired the stake between 2001 and 2003. The transaction is subject to the approval by the shareholders of Roche.

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## IPO of SKAN Group

Reference: CapLaw-2021-64

On 27 October 2021, SKAN Group AG, a global market leader in high-quality isolator systems for aseptic production processes in the (bio)pharmaceutical industry, announced the pricing of its IPO, consisting of 1,731,494 newly issued shares and

2,768,506 existing shares and an over-allotment option of up to 500,000 shares, at CHF 54 per share, implying a total market capitalization of CHF 1.214 billion. SKAN's shares started trading on SIX Swiss Exchange on 28 October 2021.

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### Spin-off and IPO of medmix

Reference: CapLaw-2021-65

On 1 October 2021, the shares of medmix AG were listed at SIX Swiss Exchange following the spin-off of medmix from Sulzer AG. Concurrently, medmix conducted a capital increase raising gross proceeds of CHF 315 million.

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### UBS Group Notes Issuances

Reference: CapLaw-2021-66

Between 3 and 9 November 2021, UBS Group AG successfully completed the issuance under its Senior Debt Programme of EUR 1.25 billion in aggregate principal amount of 0.250 per cent. Fixed Rate/Fixed Rate Callable Senior Notes due November 2026, and EUR 1.25 billion in aggregate principal amount of 0.875 per cent. Fixed Rate Senior Notes due November 2031, CHF 440 million in aggregate principal amount of 0.435 per cent. Fixed Rate Callable Senior Notes due November 2028 and GBP 400 million in aggregate amount of 1.875 per cent. Fixed Rate/Floating Rate Callable Senior Notes due 2029 under its Senior Debt Programme. The Notes are bail-inable (TLAC) bonds that are eligible to count towards UBS Group AG's Swiss gone concern requirement. The Notes are governed by Swiss law and have been admitted to trading on the SIX Swiss Exchange.

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### Santhera Pharmaceuticals equity financing

Reference: CapLaw-2021-67

On September 22, 2021, Santhera Pharmaceuticals Holding AG announced an equity financing of CHF 20 million via a private placement of shares, a placement of private convertible bonds of CHF 15 million and upsizing of an existing financing arrangement of up to CHF 10 million. In addition, Santhera agreed to issue warrants to participating investors.

### IPO of On Holding on NYSE

Reference: CapLaw-2021-68

On 15 September 2021, On Holding AG, an athletic shoe and performance sportswear company, successfully completed its initial public offering on the New York Stock Exchange (NYSE). The offering consisted of 31,100,000 Class A ordinary shares, of which 25,442,391 were offered by On Holding AG and 5,657,609 were offered by the selling shareholders, and an over-allotment option granted to the underwriters of an additional up to 4,665,000 Class A ordinary shares (which was exercised in full on 15 September 2021). The issuance price was USD 24 per Class A ordinary share. Trading of the shares on NYSE commenced on 15 September 2021 under the ticker symbol "ONON".

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### Swiss Life Green Bonds Issuance

Reference: CapLaw-2021-69

On 15 September 2021, Swiss Life issued EUR 600 million 0.500 per cent guaranteed green bonds due 2031. The bonds have been issued by Swiss Life Finance I AG and are unconditionally and irrevocably guaranteed by Swiss Life Holding AG. Swiss Life intends to apply an amount equal to the net proceeds of the bonds to finance or refinance green assets.

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### IPO of Sportradar on Nasdaq

Reference: CapLaw-2021-70

On 14 September 2021, Sportradar Group AG successfully commenced trading on the Nasdaq Global Select Market with a total market capitalization of approximately USD 8 billion. Sportradar is a leading global provider of sports betting and sports entertainment products and services, and the number one provider of business-to-business solutions to the global sports betting industry based on revenue.

In light of the new data protection laws, CapLaw has released a privacy statement. The privacy statement, as updated from time to time, is available on our website (see <http://www.capl原因law.ch/privacy-statement/>). For any questions you may have in connection with our data processing, please feel free to contact us at [privacy@caplaw.ch](mailto:privacy@caplaw.ch).