LOYENS & LOEFF

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Swiss Special Purpose Acquisition Company

Frequently Asked Questions

Loyens & Loeff Switzerland

Content

1. Why do we read so much about SPACs these days?

The number of IPOs in the US more than doubled in 2020 compared to 2019. The reason for this sharp increase can partly be found in the popularity of special purpose acquisition companies (SPACs). In fact, SPAC IPOs accounted for over 50% of US IPOs in 2020.

SPACs have yet mostly been noted in the US and reached a high increase in recent years, both in terms of deal numbers as well as deal volume. The upward trend for SPAC listings is persisting on an impressively high level. In Q1 2021, the number of SPACs listed in the US has already surpassed the annual record set last year.

In Europe, an increasing interest in establishing more SPAC listings on a European stock exchange is observable. Compared to the US, the number of European SPACs is still low but encounters a steady increase. At the date of this publication, still no SPAC has been listed on a Swiss trading venue. However, the first Swiss companies have already gone public on stock exchanges abroad with foreign SPACs. Against this background, the discussions and speculations about a possible Swiss SPAC listing are growing.

2. General FAQ's about SPACs

2.1 What is actually a SPAC?

A SPAC, also referred to as a "blank check company", is a company created for the sole purpose of raising public capital through an IPO and merging with or taking over a private company.

2.2 What is the lifespan of a SPAC?

This lifespan can generally be divided into three main phases which are hereinafter referred to as: (i) the IPO phase, (ii) the accumulation of funds and target determination phase, and (iii) the de-SPACing phase.

2.2.1 What are the characteristics of the IPO phase (first phase)?

The **IPO phase** starts with the incorporation of a shell company, i.e., a company without commercial operations set up by a sponsor – often an experienced and renowned professional – or a team of institutional investors. In order to raise capital, the SPAC is listed on a stock exchange.

Once listed, a SPAC usually issues units at a uniform price. These units typically comprise of a share and a fraction of a warrant. A warrant entitles investors to purchase a share at a predetermined price.

At this point in time, the SPAC does not have any commercial operations. Its intention is to merge with or acquire a target company. The investors have normally not yet identified the target company and are, therefore, investing in the unknown. Typically, to the extent permitted by the applicable laws, investors do however have a right to redeem to get full or part of their investment back, should they decide not to participate in the merger. The sponsor typically takes up to 20% of the IPO shares at a price equal to the nominal value of the shares. Proceeds of the IPO are placed in a trust or escrow account until a target company is found.

2.2.2 What are the characteristics of the accumulation of funds and target determination phase (second phase)?

During the **accumulation of funds and target determination phase**, the SPAC is already listed on a trading venue and the sponsor and its team have a pre-defined period of usually 12 to 24 months in order to identify a target company and, simultaneously, raise further capital to accomplish the merger or takeover.

2.2.3 What are the characteristics of the de-SPACing phase (third phase)?

Once the target company has been identified, the last phase, the so-called **de-SPACing phase**, starts. This requires, amongst other things, the structuring of the transaction, starting with confidentiality undertakings and a clear picture on applicable ad hoc-publicity reporting obligations as well as a detailed assessment from a legal and tax perspective. In addition, various accounting and other reporting aspects have to be considered as well. Further, the target company has to be prepared to comply with the main listing requirements.

Alternatively, this phase may as well consist of the liquidation of the SPAC. See question 2.3.

2.3 What if no target can be found or the shareholders do not get to an agreement?

If no target company can be found, or no agreement amongst the shareholders can be achieved with respect to the contemplated merger with a specific target, the third phase of a SPAC's lifespan mainly revolves around its liquidation. Upon payment of all liabilities, any remaining funds would need to be returned to the shareholders.

3. Swiss law FAQ's

3.1 What company forms are available?

Stock corporations (Aktiengesellschaft) and collective investment schemes (kollektive Kapitalanlagen) can be listed on the SIX Swiss Exchange. As the purpose of a SPAC is to merge with or acquire an operational company a stock corporation has the preference. In addition, unlike collective investment schemes, a SPAC will not use its IPO proceeds for capital investments and income generation. Therefore, a stock corporation is considered the more suitable form. In the subsequent questions, the SPAC is assumed to be a Swiss stock corporation.

3.2 What are the main characteristics of a stock corporation?

For a stock corporation, the share capital has to amount to at least CHF 100,000 (whereby the SIX Listing Rules prescribe a minimum capital requirement of CHF 2.5m). Additionally, a registered office in Switzerland is required at the seat of the company. The choice of the location of the seat often depends on logistical or fiscal reasons. Further, at least one member of the board must have his/her (permanent) residence in Switzerland.

3.3 Is it possible to issue authorised capital allowing investors to acquire shares without any additional shareholder meetings?

Yes, if the articles of association of the SPAC allow it, the board of directors may increase the share capital within a period of two years. No further shareholders' resolution is required. However, under Swiss law the authorised capital must not be higher than 50% of the existing share capital.

3.4 Is there a right to redeem shares?

As mentioned in question 2.2.1, shareholders of a SPAC typically have a right to redeem their shares to get their investments back. In recent cases, the redemption right reached up to 100% of the originally purchased shares. Under Swiss law, the SPAC will not be entitled to buy back 100% of its own shares since the total nominal value of treasury shares must not exceed 10% of the total share capital. In addition, the SPAC may only acquire its own shares if freely usable equity capital in the amount of the funds required for this purpose is available.

The sponsor or the other shareholders may, however, agree on repurchasing the part that is exceeding the 10% threshold. As the shares are generally being repurchased after the listing of the SPAC, the obligation for a public takeover offer may be triggered.

3.5 May a SPAC merge with any other company?

Yes, in principle a SPAC is entitled to merge with any other corporate form under Swiss law.

As concerns cross border mergers, Swiss law does not differentiate between jurisdictions. A SPAC may merge with any foreign company (in-bound merger), provided that the merger is also permitted by the law applicable to the foreign company and complies with any Swiss law merger requirements.

Similarly, a SPAC may as well be involved in an outbound cross-border merger, provided it can demonstrate that (i) all its assets and liabilities are assumed by the foreign company in connection with the merger and (ii) the membership rights of the SPAC's shareholders are adequately protected by the foreign company.

3.6 What are the requirements for listing a SPAC on the SIX Swiss Exchange?

In principle, for an admission to the SIX Swiss Exchange, the listing rules require the SPAC to have:

i. a minimum equity of CHF 2.5m on the first day of trading;

ii. an adequate free float at the time of listing (i.e., at least 20% of the outstanding securities in such company have to be publicly traded); and

iii. a track record of existence of the company of at least three years, including submission of financial statements of the three business years preceding the request of admission.

However, according to several (online) sources, the Swiss Financial Market Supervisory Authority FINMA has suggested that the SIX Exchange Regulation shall supplement the current listing rules with separate SPAC rules before admitting SPACs to the SIX Swiss Exchange. These will have to be consulted additionally once these are available.

3.7 What are the current options to address the three-year track record requirement?

Currently, and in the context of listing a SPAC, the admission body of the SIX Swiss Exchange may grant exemptions to the track record requirement provided that (i) the investors would not suffer any disadvantages and (ii) the issuer can prove to have all information available for the investors to assess the company and the securities. As of now, the SIX Directive on Track Record specifies in a non-exhaustive list that new market players might be eligible to be exempted from the three year track record requirement.

3.8 Does a prospectus need to be published with regard to the shares of a SPAC to be listed on the SIX Swiss Exchange?

Yes, when seeking admission of a SPAC’s shares to trading on a trading venue in Switzerland, a listing prospectus needs to be published in advance. The prospectus needs to contain the essential information for the investor's decision such as further details on the issuer, the securities to be offered and the type of placement and estimated net proceeds and must be reviewed and approved by a reviewing body before publication. The scope of the review does not only comprise formal completeness of the content, but also coherence and understandability. The approved prospectus must be published at least six business days prior to the end of the subscription period.

3.9 What reporting obligations apply to a listed SPAC?

Being listed on the SIX Swiss Exchange leads to certain reporting obligations being applicable. Typically, and similarly to many other stock exchanges, these relate to (i) the acquisition of a certain amount of the shares in the listed company exceeding a pre-defined threshold of voting rights, (ii) management transactions within the listed company, which would have to be publicly disclosed, and (iii) ad hoc publicity in relation to any price-sensitive facts emanating from or to be expected by the listed company such as takeover bids or mergers as soon as the company is aware of the main points of such price-sensitive facts.

Disclosure of price-sensitive facts is a particularly important aspect for a SPAC when negotiating with a potential target and disclosure may only be postponed if (i) the fact is based on a plan or decision from the issuer, and (ii) its dissemination might prejudice the legitimate interests of the issuer.

3.10 Are there any disclosure requirements?

Purchasing additional shares that are listed on a Swiss stock exchange may trigger certain disclosure obligations. Any person who directly, indirectly or by acting in concert with third parties acquires shares of a company whose shares are listed and thereby reaches or exceeds a certain threshold of voting rights must inform both, the company and the stock exchange accordingly. The thresholds are as follows: 3%, 5%, 10%, 15%, 20%, 33 ⅓%, 50% and 66 ⅔%. The notification must be made within four business days after a certain threshold has been exceeded.

3.11 Are there any mandatory takeover provisions that might apply in a SPAC transaction?

If the shareholders of the target company are offered a certain portion of the shares in the public SPAC, the public takeover offer provisions might be affected if a single shareholder directly, indirectly or by acting in concert with others reaches a threshold of 33 1/3%of the voting rights. Yet, the provision to initiate a public takeover by exceeding the aforementioned threshold might be excluded in the SPAC's articles of association.

3.12 What are relevant attention points from a Swiss tax perspective for the fund-raising (second phase)?

Despite the fact that a Swiss SPAC could be structured in a way to be achieve a rather low corporate income tax (12 16% effective rate on average in Switzerland), the fund-raising needs attention.

First, Switzerland levies a 1% stamp tax on equity contributions, providing for a (minimal) one-time exemption on the first CHF 1 million on nominal share capital. Equity injections can however be structured in a way to avoid the stamp tax.

Second, Switzerland also levies a 35% interest withholding tax on certain debt instruments if such instruments have been issued for collective financing and thus are deemed to be bonds or debentures for Swiss tax purposes. Even for non-Swiss sponsors in a jurisdiction with a double tax treaty providing for a 0% rate on interest, the withholding tax, if applicable, will lead to an actual cash-out of 35% as there is no exemption at source mechanism available under Swiss law. Therefore, if the initial fund-raising prior to the IPO would involve a (partial) debt financing from sponsors, tax structuring should be carefully reviewed to ensure that no interest withholding tax is triggered in the process.

3.13 What are relevant attention points for Swiss taxes in connection with redemption rights and the allocation of warrants?

A repurchase of shares from shareholders by a Swiss incorporated SPAC may trigger withholding tax in certain scenarios (e.g., repurchase for cancellation) if the repurchase is not fully covered and accounted for against nominal share capital or reserves from capital contributions (additional paid-in capital). Non-Swiss shareholders may be entitled to a full or partial refund of such tax depending on an applicable double tax treaty.

Similarly, the allocation of warrants by a Swiss SPAC to shareholders may also have withholding tax implications to the extent such warrants are allocated at a consideration below fair value.

3.14 What is to be considered when liquidating a SPAC?

If a SPAC is not able to identify a target company, it needs to be dissolved and liquidated since the SPAC's purpose cannot be achieved anymore. In principle, the SPAC can be dissolved based on a respective resolution by the general meeting of shareholders to be passed by a qualified majority. Alternatively, to avoid convening a shareholders' meeting, the articles of association may provide for specific reasons for dissolution or limit the existence of the SPAC to a specific period of time. Upon expiry of the pre-defined period, the SPAC would automatically enter the stage of dissolution and liquidation.

As a consequence of entering into liquidation, SIX Swiss Exchange may delist the shares of a SPAC upon written request by the liquidators or competent authority.

3.15 Do you expect Swiss law and practice to further develop in the near future?

Until today, no Swiss SPAC has been listed yet. Given that the continuously growing SPAC market and FINMA's recommendation to the SIX Exchange Regulation to supplement the listing rules before admitting SPACs to the market, it is very likely that the tax and capital market practice will further develop at a rapid pace.

We recommend reviewing the development of the capital market rules and regulations closely. If you have any question on the subject or if you are interested to receive more information, please do not hesitate to contact us.

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