

## Quarterly Update (October 2023)

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### 1. European Private Investments in Public Equity Overview

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As is often the case in more challenging market or financing conditions, many European-listed companies are looking to access sources of additional liquidity, either through capital increases or by seeking “anchor” – financial or strategic – investors (such as CMA CGM’s subscription in 2022 of a 9% stake in Air France-KLM). Private investments in public equity, or “PIPE” transactions, may be an appropriate solution for some European companies, as they can facilitate equity investment more quickly and at a lower cost than a public offering or private placement, particularly when market conditions are unfavorable. Governance rights, anti-dilution protections and conversion and redemption rights are generally the key terms investors focus on in significant PIPE transactions, beyond pricing.

With respect to governance, the rights negotiated often depend on the expected depth and duration of the relationship between the issuer and PIPE investor(s), and should generally be consistent with the issuer’s past practice so as not to set new precedents that could be opposed by the issuer’s existing or new key shareholders. The larger the equity stake, the more robust the governance rights. Usually, these rights include, *inter alia*:

- board rights (meaning the right to appoint, or the support of the issuer in the appointment of, a specified number of directors to the board/committees);
- voting and consent rights (which may include veto rights over key corporate actions taken by the issuer); and
- where relevant, registration rights (to provide for future liquidity of the stock to be issued if a PIPE investor subscribes to an instrument).

Issuers may also seek to negotiate standstill provisions or lock-up agreements. A public statement from the investor that it supports the management and its strategy may be requested too. Further consideration should be given if the investor operates, directly or through a portfolio company, in a competing business to the issuer. In particular, measures may need to be put in place to prevent the disclosure of competitively sensitive information and to avoid interlocking directorates with a competitor.

As an illustration, in September last year, Aston Martin Lagonda granted Saudi Arabia’s Public Investment Fund two board seats as part of a transaction that saw the Public Investment Fund acquire a 16.7% stake via a placing (and subscribe for further shares *pro rata* via a connected rights issue). As part of CNP’s investment in AKKA Technologies in December 2020 (representing a

21.4% stake), the Belgian fund Compagnie Nationale à Portefeuille was granted one board seat as well.

Depending on the jurisdictions involved, PIPE transactions will often involve a subscription to an instrument other than shares that has the ability to convert into shares. Protective features inherent to the instrument itself may include dilution protection, conversion measures and optional or mandatory redemption.

## 2. PIPEs: UK Considerations

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Recent examples of PIPEs in the UK market include CD&R's acquisition of a 29% interest in SIG plc (2020) and the Yew Tree consortium, Saudi Arabia's Public Investment Fund and Geely's recent investments in Aston Martin Lagonda (2020, 2022 and 2023, respectively). The UK's robust pre-emption rights regime has traditionally been a key challenge for executing UK PIPEs. However, recent and proposed changes to the UK's capital markets rules, discussed below, should make UK PIPEs easier to execute going forward.

Subject to the company's existing shareholder authorizations to allot shares and disapply statutory pre-emption rights (and the extent to which they have been used), an issuance of up to 10% of share capital should be possible without additional shareholder approvals. Up to a further 10% may be issued if the investment can be justified as financing a specified capital investment or acquisition by the company within the last 12 months. If the transaction would exceed the existing authorizations, a new vote of the existing shareholders would be required. Before November 2022 these limits were lower, at 5%, with a further 5% available for a specified capital investment or acquisition in the last six months. According to PLC What's Market data, this AGM season 43% of companies have sought disapplication authorizations that take advantage of the additional headroom now permitted.

If the PIPE investor would cross, alone or together with its concert parties, the 30% mandatory offer threshold under the UK Takeover Code, the PIPE investor and the issuer may seek from the Takeover Panel a waiver of the obligation to make a mandatory offer. This will involve obtaining consent from a majority of the issuer's independent shareholders (*i.e.*, excluding the PIPE investor and its concert parties).

Additional considerations apply if the company has a premium listing on the London Stock Exchange:

- Shareholder approval will be required to offer shares at a discount of more than 10%.
- If, having obtained a waiver from the Takeover Panel, the PIPE investor will acquire 30% or more of the company's voting rights, the UK Listing Rules' controlling shareholder regime would apply. Among other things, this would require the election of independent directors to be approved by a majority of the non-controlling shareholders in the first instance. If the vote is not passed, a second vote requiring approval by a majority of all shareholders can be held (but no sooner than 90 days and no more than 120 days after the initial vote).
- Depending on the size of the investment, a subscription by a PIPE investor who already holds 10% or more of the issuer's voting rights may need issuer shareholder approval under the UK Listing Rules' related party transactions regime. As part of a wide-ranging reform of

the UK Listing Rules, the Financial Conduct Authority is consulting on removing this requirement – see our Memo on the consultation [here](#).

A prospectus will be required if the PIPE transaction constitutes 20% or more of the company's total share capital. Given that UK PIPEs are often used in distressed situations, it is not uncommon for the prospectus requirement to be triggered.

While UK PIPE investments typically comprise subscriptions for ordinary shares, investments in preferred shares, warrants or convertible bonds are possible alternatives. The UK's pre-emption rights and prospectus regimes apply to these alternatives in the same way as they apply to ordinary shares. However, warrants issued by a UK company raise particular tax points for consideration, such as a possible corporation tax charge for the company and somewhat unusual stamp duty treatment. Advice should be sought early.

### 3. PIPEs: German Considerations

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Recent examples of PIPE transactions in the German market include Acciona's investment to acquire approximately 10% in Nordex SE (2022) and Silver Lake's €344 million investment in Software AG (2022). Also noteworthy are the €105 million PIPE investment in connection with the de-SPAC transaction of Frankfurt-listed 468 SPAC I SE (now: tonies SE) and the €75 million PIPE investment in connection with the de-SPAC of Frankfurt-listed Lakestar SPAC I SE (now: HomeToGo SE).

In addition, we have seen a clear trend to combine PIPEs with takeover transactions or mergers. As such, there are a number of transactions where the eventual bidder agreed to subscribe for a capital increase of 10% of the target company in connection with a subsequent takeover offer (the acquisition of home24 by XXXLutz (2022), the acquisition of SLM Solutions by Nikon (2022), or, most recently, KKR's offer for OHB, a company providing satellites to the EU's Galileo navigation constellation and components to the Ariane rocket programme (2023)). A slight variation on this structure based on similar considerations was the acquisition of 10% of the treasury shares of Deutsche Wohnen by Vonovia in connection with their merger.

From the perspective of the issuer, there are two key aspects to consider when launching a so-called "traditional" PIPE transaction: (i) the resolution of the general meeting on the related capital increase and (ii) the question of how to deal with shareholders' subscription rights.

- **Resolution of the general meeting.** The implementation of a "traditional" PIPE requires a capital increase in order to issue new shares. In practice, issuers typically use a resolution of the general meeting on an authorized capital (*genehmigtes Kapital*). The newly issued shares carry *pari passu* dividend rights. However, issuers may also rely on a resolution of the general meeting on a conditional capital (*bedingtes Kapital*) to issue convertible bonds or stock options, which only convert into shares upon the fulfilment of certain conditions.

The already approved capital grants the management board of the issuer the right to issue new shares or convertibles/options within certain predefined limits without the need for a (repeated) approval of the general meeting. With a view on potential future liquidity requirements, it may be advisable for the management board to have an authorized capital or conditional capital pre-approved by the general meeting which creates the basis for potential PIPE transactions before a need or decision to implement a PIPE may arise. That said, it is also permissible to obtain an approval of the general meeting for a capital increase for the PIPE instead of using the authorized capital or conditional capital, but – in contrast to already approved capital – this is typically not considered as an option because the

requirement of a general meeting threatens the swift and timely implementation of the PIPE transaction.

In the case of a capital increase from authorized capital or conditional capital, the management board may be authorized by the general meeting for a maximum of five years to increase the capital stock of the issuer up to a certain nominal amount by issuing new shares. Such authorization requires a majority of at least three-quarters of the vote in the general meeting. Insofar as the authorization does not contain specific provisions on the form of the capital increase, the management board may decide on the content of the share rights and the conditions of the share issue.

- Shareholders' subscription rights. Any restriction or exclusion of current shareholders' statutory subscription rights when issuing new shares must be objectively justified by the management board. In the case of a capital increase from authorized capital, a corresponding authorization to exclude subscription rights is additionally required in the resolution on the use of authorized capital. As such, the standard share issue against cash contributions is limited by law to 10% of the capital stock of the issuer. Additionally, the issue price of the new shares may not be "significantly lower" than the stock market price (usually 3% to 5% below the last closing price).

In order to avoid the 10% limitation of capital increases against cash contributions, the capital increase may be structured as a rights issue, with the PIPE investor undertaking to subscribe for unsubscribed shares or the existing shareholders of the issuer transferring their subscription rights to the PIPE investor. Thus, detailed and issuer-specific preparations are required in order to ensure a PIPE structure that is tailored to the issuer's needs and specificities, while also ensuring swift access to the liquidity from the PIPE.

PIPE investors should, in particular, consider that issuers in a PIPE transaction may not be able to grant share price guarantees or similar representations and warranties in a business combination agreement or investment agreement as such provisions could violate the rule prohibiting the repayments of contributions under German law.

**"Modern" PIPEs.** As outlined above, a "traditional" PIPE under German law deviates from typical "structured" PIPE transactions in the U.S. in two major areas: (i) stricter provisions and limitations regarding statutory subscription rights of existing shareholders generally limit the volume of traditional PIPE transactions to 10% of the issuer's share capital and (ii) stricter provisions on discounts on the share price for PIPE investors render the typically substantial discounts for PIPE investors impermissible under German law. In order to make PIPE transactions nonetheless attractive and desirable, so-called "modern" PIPEs have come into focus in Germany in which the PIPE investor does not acquire a participation from the issuer, but rather from third parties. Hence, in a modern PIPE, the issuer does not receive additional funds, but may profit from the participation of an investor with a long-term focus, who supports the strategy and business model of the issuer and who may also represent an important counterbalance to existing or potential activist investors.

#### 4. PIPEs: French Considerations

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Recent examples of PIPEs in the French market include Pfizer's 8.1% investment in Valneva (2022), CMA CGM's 9% investment in Air-France KLM (2022) and Tikehau Ace Capital's 25% investment in Figeac Aero (2022).

French law does not provide for the concept of "authorized capital". Issuers incorporated in France usually carry out PIPEs via a capital increase reserved to specifically designated persons (*personnes nommément désignées*) or a category of investors with similar characteristics (*catégories de personnes répondant à des caractéristiques déterminées*). In both cases, it requires

a shareholder vote with a two-thirds majority approval. The offering being “reserved” to certain persons, existing shareholders will waive their statutory pre-emptive rights (*droit préférentiel de souscription*) over the new shares or instrument to the benefit of those specific investors.

When the offering is made to the benefit of selected investors, their identities need to be specifically provided in the shareholder resolution. If the PIPE investor is already a shareholder of the issuer, it will be prohibited from voting such resolution at the general meeting.

The alternative is for the annual general meeting of shareholders to delegate to the board of directors the power to carry out a capital increase to a “category of persons”. While this avoids having to hold a general meeting specifically for the PIPE, it may be difficult to define in advance a category encompassing all types of PIPE investors. This mechanism works well in certain industries, such as in the pharmaceutical, biotechnological or medical technology sector where investors are solicited on a regular basis, including for instance by DBV Technologies (a global clinical stage biopharmaceutical company) which completed private placement financings in 2022 and 2019. In practice, the board of directors will have the powers to draw up the list of beneficiaries within the categories set by the shareholders at the general meeting.

In addition, the French legal framework requires that the capital increase be carried out within a period of 18 months from the general meeting of the shareholders that decided the share issuance or granted an authorization to the board of directors to that effect.

A private placement which would be backstopped by the PIPE investor may also be contemplated, but the execution of such investment is not certain. There is a risk that the private placement would be sufficiently subscribed and that the investor’s backstop commitment would eventually not be triggered. Also, the price of the offering cannot be freely determined if the placement exceeds 10% of the share capital of the issuer. In that case, the maximum permissible discount under French law amounts to 10% on the preceding three trading days’ VWAP.

Although the issuance of new shares is the most common way to proceed with a PIPE transaction, the issuance of equity warrants (*bons de souscription d’actions*) or convertible and/or exchangeable bonds may also be considered. PIPE investors would be able to exercise or convert/exchange their instruments over a period of time and, as a result, subscribe for newly issued shares of the company without the need to hold a new general meeting of the shareholders.

In a distressed context, the PIPE investor may cross, alone or in concert with the existing controlling shareholder(s), the 30% mandatory tender offer threshold under French law. A specific waiver (*dérogation*) from the French financial markets authority (*Autorité des marchés financiers*) could be sought in advance, depending on the specific circumstances of the transaction.

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