DE-SPACS BETWEEN EUROPEAN TARGETS AND US LISTED SPACS

De-SPAC transactions have become more prominent in the European market in 2021. This briefing in particular discusses certain US law considerations for de-SPAC transactions between European target companies and US listed SPACs.

Key issues

- As a result of a merger between a US listed SPAC and a European target company, various US securities laws and regulations become applicable to the European target, its management, and its shareholders
- The shareholders and the management of the European target should consider the implications of a US stock exchange listing compared to the requirements in Europe
- Due to the large number of US SPAC IPOs in 2020 and 2021 compared to SPACs listed in Europe, de-SPACs with US listed SPACs continue to be relevant for privately-held European companies – in particular tech companies
- The cross-border nature of a de-SPAC between a US SPAC and a European target requires a detailed analysis of corporate governance topics from a legal and market expectation perspective

INTRODUCTION

SPACs are companies without their own business operations that offer so-called "units" to the public and then use the proceeds of their IPO to facilitate a business combination (referred to as a "de-SPAC transaction") with a target not yet identified at the time of the SPAC's IPO. Units are nearly universally offered at $10 per unit. The units typically comprise shares as well as fractions of warrants that entitle their holders to acquire additional shares at a premium to the IPO offering price (often $11.50 per share). The founders of the SPAC are often experienced managers with specific industry or private equity experience. An important element of a de-SPAC transaction is the right of every individual shareholder of the SPAC to opt to redeem their investment at closing of a de-SPAC transaction.

For the targets, the de-SPAC transactions are an alternative to the traditional IPO process. The de-SPAC transaction usually takes place within two years after the IPO of the SPAC.

DEVELOPMENTS IN US SPAC IPOS AND DE-SPACS WITH EUROPEAN TARGETS

The number of SPACs which completed an IPO with a listing in Europe ("European SPACs") is considerably lower than the number of SPACs currently listed in the United States ("US SPACs"). In 2021, the number of SPAC IPOs in the United States reached over 600, more than double the number of SPAC IPOs in the United Sates in 2020.[1] In contrast, SPAC IPOs with European listings in 2021 only numbered around 35.

As a result, privately-held European companies – in particular technology companies – wishing to conduct a de-SPAC transaction in 2022 will continue to encounter a significant number of potential merger opportunities with US SPACs that would result in a listing on a US stock exchange, principally either NASDAQ or NYSE.

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[1] SPAC 2021 Year-End Review and 2022 Preview: Tailwinds, Headwinds, and Regulatory Landscape, January 7, 2022, https://www.jdsupra.com/legalnews/spac-2021-year-end-review-and-2022-6792705/.

In 2021, compared to the over 600 SPAC IPOs in the US, the number of de-SPAC transactions was "only" 267.[2] As a result, a significant number of US SPACs which completed an IPO in 2020 and 2021 are still looking to complete a business combination. In 2021, a significant number of US listed SPACs merged with European targets, in particular with targets in the United Kingdom and Germany. For a list of recent de-SPAC transactions with European targets, see the table in the Annex to this briefing.

For a de-SPAC transaction involving a US SPAC, a European target company will be subject to US securities laws and also to US corporate governance regulations and standards, including those required by the applicable stock exchange rules. Most notably, a European target listed on a US securities exchange will be subject to SEC rules and regulations. In this client briefing, we set out the main consequences that shareholders of a European target company and the management of such target should consider when deciding whether to merge with a US SPAC.

The below overview outlines the main considerations set out in more detail in this briefing that potential European SPAC targets and their shareholders should be aware of when considering a de-SPAC transaction with a US listed SPAC.

Foreign Private Issuer

- Non-US target companies should complete an upfront analysis whether they qualify as an FPI, as significant regulatory relief is available for FPIs

Financial Statements

- Potential key lead item for timing of transaction due to PCAOB standards
- Potential of reduced requirements for issuers who are first time adopters of IFRS or qualify as an emerging growth company

Corporate Governance

- Hybrid application of US market practice and home country rules often results in complications setting up the governance structure
- US stock exchange rules will also impact corporate governance

Shareholder agreements and reporting

- Shareholder agreements including registration rights agreements, voting agreements and transfer requirement are typically required to be publicly filed with the SEC
- Shareholder reporting involves more detailed disclosure requirements than in the EU

Structuring of SPAC merger

- Commercially, lock-ups can vary significantly for SPAC mergers compared to traditional IPOs
- Minimum cash condition, PIPE fundraising, and additional financing should be considered upfront
- Merger structure often complicated and requires extensive tax input

US filings for the merger

- Several US filings required, typically including the filing of an F-4 registration statement
- Potential increased liability to shareholders, target and target directors for filed registration statement and proxy
- Hardened D&O insurance market

[2] SPAC 2021 Year-End Review and 2022 Preview. See link above.

FOREIGN PRIVATE ISSUER STATUS

We would expect most European target companies seeking a merger with a US SPAC to intend on being treated as a "foreign private issuer" ("FPI") under US securities laws. Various SEC filing requirements and exemptions to statutory disclosure and other requirements are available for FPIs listed on a US stock exchange. As a result, an FPI analysis is necessary early on in a de-SPAC process.

Two test requirement to determine FPI status

A foreign private issuer is a company that is organized outside of the United States that can satisfy the conditions of one of the following two tests at the time it files an SEC registration statement and in subsequent years on the last business day of its second fiscal quarter:

1. 50% or less of the company's voting securities are directly or indirectly owned by US residents; or

2. when more than 50% of the company's voting securities are directly or indirectly owned by US residents, the company needs to pass a so-called "business contacts test" described below.

How to carry out the FPI determination

A US listed company is responsible for determining at the time of its registration statement (i.e. IPO or listing in the US) and subsequently on an annual basis (as of the last business day of its second fiscal quarter), whether it qualifies as an FPI.

For purposes of the 50% US shareholder test, the company needs to evaluate how many of its shares are beneficially owned by US residents, applying a “look through” approach. The company must undertake a good faith effort to accumulate relevant information on shareholders in its home market and the United States through (i) public filings and (ii) approaching named shareholders and intermediaries to make this assessment. There is certain SEC guidance on “how deep” the look through assessment has to go, which should, if it cannot be easily assessed that more than 50% of the shareholders are definitely non-US persons, be completed on a formal, diligent and documented basis.[3] If a company determines, after its good faith efforts, that fewer than 50% of the shares of a US listed class of equity securities are held by US residents, it does not need to consider the business contacts tests and qualifies as an FPI.

If more than 50% of the company’s outstanding shares are directly or indirectly owned by US residents, the company needs to evaluate the following business contacts tests, all of which would need to be satisfied to qualify as an FPI and remain satisfied to remain as an FPI:

- The majority of its directors should not be US citizens nor US residents;
- The majority of its executive officers (i.e., senior members of management with major managerial responsibilities or significant policy making functions) should not be US citizens or US residents;
- The geographic location of a majority of the company’s assets should be outside of the United States. According to SEC guidance, an accounting

[3] SEC Guidance, https://www.sec.gov/corpfin/securities-act-rules.

approach should be used to determine whether this test is met (i.e., it requires an accounting analysis of the company's balance sheet); and

- If the company's business is administered from the US or if its principal managerial decisions are made from inside the US, the company will not be considered an FPI. This requirement is generally understood to refer to the physical location where policy decisions and important managerial decisions are made and refers to the majority of key decisions, as well as the ongoing managerial oversight of the company.

FPI status may change in case of an expansion of business and assets in the US and management ties to the US after de-SPAC completion

As a result of the two test requirement to determine the FPI status, in particular if there already is a significant (or majority) shareholding by a US shareholder (directly or beneficially) in the target company before the de-SPAC, the business contacts test becomes critical. For instance, technology companies or industrial companies with a large share of its assets in the US or management with US citizenship or residence, should put in place policies to ensure that the FPI status is monitored and not involuntarily lost in subsequent years.

Regulatory relief for FPIs

The FPI status of a non-US company exempts such company from a number of requirements:

- No requirement to comply with SEC rules for proxy solicitations in connection with shareholder meetings or follow SEC rules for presenting shareholder proposals;
- Annual reports do not have to be filed within 90 days as is the case for US domestic companies;
- Officers, directors and 10% shareholders are not required to file reports of beneficial ownership under Section 16 of the US Securities Exchange Act of 1934 (the "Exchange Act");
- No “short swing” trading liability is imposed on insiders who purchase and sell securities within a 6 month period;
- More limited compensation disclosure is required and no requirement to disclose individual compensation unless it is disclosed publicly elsewhere;
- No requirement to apply US GAAP for the company's financial statements;
- Free choice of reporting currency, so no requirement to report in U.S. dollars;
- No requirement to comply with Regulation FD, which is the SEC's prohibition on selective disclosure of material information;
- Special exemption for Exchange Act registration and reporting if they have made no affirmative efforts to enter the US capital markets (relevant in case of Level 1 American Depositary Receipt (ADR) programs); and
- Fewer restrictions on offers and sales of securities outside the US for companies relying on “safe harbors”.

FINANCIAL STATEMENTS

If a European target meets the FPI requirements set out above, it can, but does not need to, apply US GAAP when compiling its financial statements (including any registration statement filed in connection with a de-SPAC). Instead, it can apply IFRS issued by the International Accounting Standards Board (IASB). Regardless of the relevant accounting standard, such financial statements, even if using IFRS as an FPI, must be audited under the standards promulgated by the United States Public Company Accounting Oversight Board (PCAOB). For many European targets complying with this requirement prior to the de-SPAC can be potentially time consuming and costly, including requiring a re-audit of historical financial statements. European targets should take into account the potential timing impact of the PCAOB audit of their IFRS financial statements in its assumptions about timing and cost of a de-SPAC transaction with a US-listed SPAC.

Many de-SPAC targets qualify as emerging growth companies (EGCs) as defined in Section 2(a)(19) of the Securities Act. For purposes of financial statement filing requirements with the SEC, EGC status provides significant relief as only two full years of financial statements will need to be included in a registration statement. Similarly, first time adopters of IFRS may, under certain circumstances, only include two years of IFRS financials when first filing a registration statement on Form F-4. The extent and number of years to be covered by the target company for purposes of the SEC filings has a significant time and cost impact and should be determined early on in considering and negotiating a de-SPAC transaction.

COMPLIANCE WITH SARBANES OXLEY RULES

Both US domestic companies and FPIs are subject to the Sarbanes-Oxley Act of 2002. However, FPIs are exempt from various provisions of the Act.

Most notably, the Sarbanes Oxley Act requires management of an FPI to file with the issuer's annual report on Form 20-F an internal control report. The Form 20-F must be signed by both the issuer and include certifications under Sections 302 and 906 of the Sarbanes-Oxley Act and Rule 13a-14(b) by its principal executive officer and its principal financial officer indicating that the Form 20-F fully complies with the requirements of the Exchange Act and that the information contained in the report fairly presents, in all material respects, the financial condition and results of operation of the issuer. Both civil and criminal liability attached to false certifications. The report includes various statements regarding the composition and effectiveness of internal controls at the company.

CORPORATE GOVERNANCE

The board of a company that is listed on the NYSE or NASDAQ is subject to a number of regulations under the Exchange Act and the rules of the New York Stock Exchange or the NASDAQ Rules. The FPI status of a company can alleviate a number of rules otherwise applied to companies listed in the US.

One vs two tier board structures

While the vast majority of US listed companies have a single-tier board structures, there is no requirement that a company listed on a US stock exchange have a single-tier board. The two-tier board structure for listed companies is widely prevalent across Europe, for instance in Germany and the Netherlands. Such two-tier board structures include a management board and a supervisory board. There are SEC rules that stipulate that for an FPI with a two-tier board, all SEC rules and NYSE / NASDAQ rules refer to the supervisory board.

It is not uncommon that European companies that are listed on the NYSE or NASDAQ use two-tier boards.

Director Independence

Generally a majority of a NYSE-listed issuer's board must consist of directors who are independent as determined under the NYSE Rules. A director is "independent" if the issuer's board affirmatively determines that he or she has no material relationship with the listed issuer (either directly or as a partner, stockholder or officer of an organization that has a relationship with the issuer). The NYSE Rules include a number of detailed "bright-line" criteria that automatically disqualify a director as being independent.[4]

FPIs may follow their "home country practice" instead of this general standard but must disclose in their public filings that they follow their home country practice and describe the significant differences between such home country practice and the applicable general standard.

Should the target company opt for a two-tier structure, the board director independence rules of the NYSE Rules apply to the supervisory board and not the management board.

Audit Committee

All NYSE listed issuers, including FPIs, must have an audit committee on their board. The audit committee must have a charter that tasks the committee with, among other things, assisting the board with oversight of the issuer's financial statements, complying with legal and regulatory requirements and the performance of independent auditor and internal auditors, as well as reviewing and discussing the issuer's financial disclosures and independence auditor reports regarding internal control procedures and risk management policies. The audit committee must be composed of at least three board members, each of whom must be financially literate and one of whom must have accounting or related financial management expertise. Directors appointed to the issuer's audit committee must meet the independence standards of both the NYSE Rules that are applicable to all independent directors and of Exchange Act Rule 10A-3 that is applicable to members of an audit committee. To be "independent" under the Exchange Act, a director may not be an affiliate of the issuer or any subsidiary of the issuer and may not accept any consulting, advisory or other compensatory fee from the listed company, other than in his or her capacity as a member of the committee, the board, or any board committee.

A director of an FPI is exempt from the requirement that he or she be independent as long as he or she is not an executive officer of the issuer and is either elected or named to the board or audit committee pursuant to the issuer's governing law, constitutional documents or a collective bargaining agreement or similar document. An FPI that relies on one of these exemptions must disclose on its annual report on Form 20-F its assessment of

[4] Examples of such criteria include (a) the director is an employee of the Company or has immediate family members as an executive officer, (b) the director, or an immediate family member, received more than USD 100,000 per year in direct compensation from the company, other than director and committee fees, or (iii) the director was affiliated with or employed by, or a member of the director's immediate family was affiliated with or employed in a professional capacity by, the company's present or former auditors.

whether (and, if so, how), such reliance will materially adversely affect the ability of the audit committee to act independently and satisfy the other requirements of Exchange Act Rule 10A-3(b).

Typically, home country rules in Europe also impose independence and other requirements on the audit committee members. For instance, the German corporate governance code has specific rules for audit committee members, their independence and their qualifications.

Nominating Committee / Compensation Committee:

A U.S. domestic listed company the board must have both a nominating committee and compensation committee composed entirely of independent directors. A nominating committee must, among other things, identify individuals qualified to become directors as well as selecting or recommending nominees for the issuer's board. A compensation committee must, among other things, evaluate the CEO's performance and approve his or her compensation, as well as make recommendations to the board regarding the compensation of other executive officers.

FPIs may follow their home country practice instead of these committee requirements but must disclose in their public filings that they follow their home country practice and describe the significant differences between such home country practice and the applicable general standard.

COMMON DE-SPAC TRANSACTION ELEMENTS RELEVANT FOR MERGERS WITH US SPACS

The following table includes common elements relevant for mergers with US listed SPACs.

Key element	Description
Lock-up	In an IPO of a US listed company, underwriters will nearly universally expect a six-month lock-up on key shareholders. In US de-SPAC transactions target shareholders and SPAC sponsors will typically agree to lock-up obligations for the benefit of the ultimate listed company. While target shareholders in US de-SPAC transactions are often locked-up for six months, and sponsors typically for twelve months, there is considerable variance in the market with numerous instances in which the same lock-up is applied to both the target shareholders and the sponsors and with extended lock-up periods. De-SPAC lock-ups are often subject to early termination if certain price milestones are met.
Minimum Cash Condition	The amount of SPAC investors redeeming their shares at the closing of a de-SPAC transaction will have a significant effect on the transaction and its value to the target and target shareholders. As a result, minimum cash conditions, which require a certain level of funds to be raised in connection with the de-SPAC, are a typical condition to closing in a business combination agreement for a de-SPAC. Such a minimum cash condition often refers to a combination of the non-redeemed investments of the initial SPAC investors, any PIPE proceeds and potentially further proceeds from forward purchasing agreements of the sponsors or other financing to be issued by the post-combination company including convertible debt/preferred equity. In light of high redemptions in recent transactions, many de-SPAC parties have waived the minimum condition and proceed to closing while others have elected to terminate the transaction.

	Shareholders of targets typically do not control a waiver of the minimum cash condition, but this is a point that should be considered if key target shareholders consider the amount of proceeds to be critical to a de-SPAC transaction.
PIPE transaction	It is common for additional investors to commit to purchase additional shares in the ultimate public company when the business combination agreement is signed in a PIPE (private investment in public equity) transaction. The PIPE process can be critical for a successful de-SPAC transaction. Given market trends, including increasing redemptions in connection with de-SPACs, PIPE investors can have significant influence over transactions, even receiving discounts to their subscription price or negotiation down the implied enterprise value of targets.
Structure for the acquisition	There is a vast range of structures for the acquisition of a non-US target company, which is typically driven by a mixture of tax considerations, corporate law of the target's jurisdiction of incorporation and characteristics of the target's shareholder base. Generally, de-SPAC transactions between European targets and US listed SPACs are structured as a "double-dummy" merger, specifically a new holding company is created that acquires both the target and the SPAC. Additionally, some acquisitions are structured such that the target acquires the SPAC and the target becomes a public company. The typical structure in the US where SPAC acquires the target is relatively rare for de-SPAC transactions between US listed SPACs and European targets.
Purchase price adjustments and indemnities	Unlike in traditional M&A transactions, de-SPAC transactions with non-US targets rarely included purchase price adjustments or indemnities or any other meaningful post-closing recourse against the SPAC sponsors or SPAC shareholders.
Partial cash-out	Most de-SPACs are structured as all stock transactions where target shareholders' consideration is exclusively stock in the listed company, but there a number of transactions where target shareholders receive a partial cash-out in a secondary transaction as part of the de-SPAC.
Registration rights	Typically, the target company, the SPAC sponsors and the target shareholders will enter into a registration rights agreement governing the registration of shares in the Company after the successful merger and US listing to allow for such shares to be traded publicly. This agreement grants shareholders (including the SPAC sponsors) certain rights with respect to the shares including obligating the surviving company (i) to register the shares of such shareholders for resale, (ii) to assist with any underwritten offering of shares of the company, (iii) to allow the shareholders to participate in any other registration/offering pursuant to "piggyback" registration rights and (iv) to assist with any block trade of shares by the shareholders.
D&O insurance	While this is often not a major consideration for a purely European IPO transaction, due to the relatively litigious environment in the US for US listed companies, D&O insurance for management and board members can be a critical element of a successful transaction. For US SPAC mergers, the D&O insurance market has increasingly hardened in 2021 and remains stretched in early 2022.

SHAREHOLDER REPORTING REQUIREMENTS

As a result of a de-SPAC transaction, the shareholders of a European target will hold shares (directly or indirectly) of a company listed on a regulated exchange. In Europe, the most notable consequence – depending on the jurisdiction – are shareholder notifications stating the number of shares held by the shareholders in case certain thresholds are reached. E.g. in Germany, the thresholds are 3%, 5%, 10%, 15%, 20%, 25%, 30%, 50% or 75% of the voting rights in a listed company.

Section 13(d) of the Exchange Act requires any person who acquires beneficial ownership of more than 5% of a class of shares registered under the Exchange Act to publicly file, within ten days after that acquisition, a statement containing the information required by Schedule 13D under the Exchange Act. This requirement applies to beneficial ownership stakes in both U.S. companies listed on a US exchange as well as an FPI listed on a US exchange. The filing requirement also applies in case shares of the FPI are first listed on a US exchange, even if the shareholder has previously owned the shares. Under certain conditions, shareholders can be exempt from the filing requirements of Schedule 13D and can file the less burdensome short form Schedule 13G.

Beneficial Ownership

"Beneficial ownership" means, indirectly or directly, having or sharing the power to vote or to direct the vote of the shares; and/or the power to dispose (i.e., sell or otherwise transfer) or to direct the disposition of the shares; or having a right to acquire any such power within 60 days.

If a shareholder agrees to act in concert with other shareholders, they may be deemed to have formed a group and each group member would be deemed to jointly beneficially own the shares held by the group.

Schedule 13D

Schedule 13D requires a statement of facts related to the shares and the holdings of the reporting person, the source of funds for the acquisition, any plans that reporting person has regarding the company of the shares and any understandings with others with respect to the securities of the company. The initial Schedule 13D filing is currently required to be made within 10 days of exceeding the 5% threshold.

Schedule 13D is not filed by the listed company, but rather has to be completed by and filed by the shareholder. The filling shareholder (or someone on the filer's behalf) builds the schedule electronically by entering information into specified fields directly on the EDGAR system. Section 13(d) reporting persons must obtain their own individual EDGAR filing codes for purposes of these filings because they, not the issuer of the securities, are making the actual filing. Schedule 13D filings are publicly available via EDGAR after they are filed.

Schedule 13D filings can be quite long and complex. A report on Schedule 13D must be amended “promptly" in the event of a material change in the information disclosed in the schedule, including a change in or, in the view of the SEC, the selection of one particular purpose from the previously disclosed plans. Any acquisition or disposition of 1% or more of the relevant class of securities is deemed material for this purpose, while a lesser change in holdings may be material, depending on the circumstances.

Schedule 13G

The short form Schedule 13G is available, in lieu of Schedule 13D, to any “passive” investor who beneficially owns less than 20% of the class; and who has not acquired and do not hold the securities for the purpose of or with the effect of changing or influencing the control of the company of the securities. The initial Schedule 13G filing is currently required to be made within 45 days after the end of the calendar year in which the reporting obligation arises.

These investors must amend the Schedule 13G within 45 calendar days after the end of the calendar year to report any change in the information previously reported. They must also amend the Schedule 13G during the year if they acquire greater than ten percent of the subject securities.

Schedule 13G is completed in the same way as Schedule 13D. The filer (or someone on the filer's behalf) builds the schedule electronically by entering information into specified fields directly on the EDGAR system.

Proposed Changes

On February 10, 2022, the SEC announced changes to shareholder reporting requirements under Rules 13D-G. In particular, the SEC is proposing to significantly shorten deadlines for filings of both Schedules 13D and 13G as well as adding to the definition of "group" and certain other technical changes. In particular, the initial Schedule 13D filing deadline shall be reduced from 10 days to five days and the initial filing deadline for a Schedule 13G filing shall be reduced from 45 days after year-end to five business days after the end of the month. Subsequent filing deadlines have also been proposed to be shortened. The amendments are currently in a public commenting phase.

SHAREHOLDER AGREEMENTS

Shareholder voting agreements are not uncommon in the United States. Unlike in many European jurisdictions, according to SEC rules, shareholder agreements must be disclosed and publicly filed on the SEC's EDGAR system. A coordinated voting behavior would usually be specified as follows on the basis of US market practice:

- Shareholders board nomination rights: In US shareholder agreements it is common to define arrangements for the nomination of board members. In two-tier board structures, that would refer to the nomination rights for board seats on the supervisory board. For de-SPACs it is common to grant SPAC sponsors one or more director seats, despite their often relatively low overall shareholding after the completion of the de-SPAC.
- Agreements on board committees (number of committee members, election of members), the number of board meetings and the duration of board member nominations. In the US, it is common to have one year durations or staggered boards, while in certain European jurisdictions longer periods for supervisory board members are common.
- Arrangements for important business: large M&A measures, large sales of business units, capital measures such as capital increases, creation of large joint ventures, entry into other business areas, abandonment of business areas, any change of control measure, taking on high liabilities, relocation of headquarters, persecution or dispute resolution of major legal disputes, budget / business plan approval, or other comparable important, business-changed measures.
- Coordination of voting behavior or influence on the appointment of top management: In two-tier boards, top management is appointed by the supervisory board. Voting clauses for indirectly influencing the appointment of top management should therefore not be necessary, but procedures in

relation to top tier management can be included similar to US shareholder agreements.

- Other points are often a restriction on the transfer of shares of one of the controlling shareholders to third parties, provisions on dispute resolution, information exchange between shareholders and confidentiality provisions on the exchange of information between shareholders.

In the US context, the European target company is typically a party to the shareholder agreement in order to receive a cooperation commitment from the company.

Due to the flexibility of US shareholder agreements from US listed companies, the question of the structure and rights is also important for post-de-SPAC market acceptance due to Environmental Social Governmental (ESG) principles becoming increasingly important in the US.

LIABILITY OF SHAREHOLDERS

U.S. securities law, in particular the Securities Act and the Exchange Act imposes civil and criminal law consequences for securities laws violations. The principal addressees of such liability are the company as well as the management of the company which is listed in the US. Such liability of management does not differ between a US domestic issuer and a non-US company and a detailed description therefore is beyond the scope of this client briefing.

Unlike in many European jurisdictions, the US also knows liability for controlling shareholders. Such “control person liability” of significant shareholder(s) is set out in Section 20 (a) of the Exchange Act and means that controlling shareholders can be liable for incorrect information or material omissions of information to investors by the listed company, provided that the controlling shareholders have not "*acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action*". This liability standard therefore involves "gross negligence" on the part of the controlling shareholder.

According to US capital market laws and regulations, control in the sense of the "controlling shareholder" concept is *de facto* control. While such *de facto* control is definitely the case with 50% of the voting rights, it can also exist with significantly fewer voting rights. According to US rules, there is no fixed limit. According to the Exchange Act "control" is defined as follows: "*power to direct or cause the direction of the management and policies of [target company], whether through the ownership of voting securities, by contract, or otherwise*."

As SPACs have exploded in popularity as an alternative method for companies to raise funds and become publicly traded, the increased intention by US regulators and investors has also led to various litigation that is SPAC-specific. On July 29, 2021, the US Department of Justice and the US Securities and Exchange Commission announced criminal and civil charges against Trevor Milton, the former CEO of the Nikola Motor Company. Nikola, which holds itself out as an innovative developer of alternative fuel trucks with zero emissions, went public by merging with a SPAC in June 2020. The charges filed in US federal court alleged that Milton committed securities fraud by making false or misleading public statements about Nikola's products and technology to drum up investor demand in Nikola stock during the period leading up to and after its de-SPAC process. The case illustrates certain litigation risks surrounding the use of SPACs over a traditional IPOs. [5]

MANDATORY TAKEOVER OFFERS

In European jurisdictions such as Germany or the Netherlands, statutory law requires that large shareholders which exceed a certain voting rights threshold of a publicly listed company are required to undertake mandatory takeover offers.

In contrast, there is no mandatory takeover offer under US law for companies listed on a US stock exchange. However, US capital market regulations exist which govern the implementation of a voluntary tender offer (offer period, filings with SEC, US restrictions, etc.) for shares of a US listed company.

The threshold for a squeeze-out, i.e. the right to "buy out" the remaining shareholders of a publicly listed company, is determined by the jurisdiction of where the European target remains headquartered. It is this jurisdiction that governs the squeeze-out thresholds and squeeze out procedures, even in case of a US listing of the shares. For instance, for a Dutch company headquartered in the Netherlands with a US listing, Dutch law governs the squeeze-out threshold and squeeze-out procedures.

INSIDER TRADING

U.S. insider trading rules apply to shareholders of U.S. listed companies. Such rules are complex and are not the focus of this client briefing. Before the completion of the de-SPAC transactions, shareholders and management holding shares should implement required internal policies to comply with U.S. insider trading rules and procedures.

CONCLUSION

It remains to be seen how many US SPAC mergers with European targets will be completed in 2022 and in the next years. 2021 has seen this type of transaction to be well established despite the complexity and cross-border nature of such transactions. The high number of US SPACs that are still being listed and will be looking for targets in the future, make it likely that cross-border de-SPAC transactions between European targets and US SPACs will continue to play a dominant role in Europe, despite European SPAC IPOs and listings which offer an alternative SPAC route to European targets.

A de-SPAC transaction with a US SPAC may offer advantages, especially for European technology companies which considered an IPO in the US. However, despite advantages including transaction certainty, the work and complexity of a business combination with a US SPAC compared to a traditional IPO in Europe, does provide unique challenges that should be planned and addressed early on in the structuring phase of the transaction.

[5] For further information on the Nikola Motor Company case, see the Clifford Chance client briefing "Putting SPACs on the Spot – The case of Nikola Motor Company and its former CEO" https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/08/Putting-SPACs-on-the-spot-the-case-of-Nikola-Motor-Company-and-its-former-CEO.pdf.

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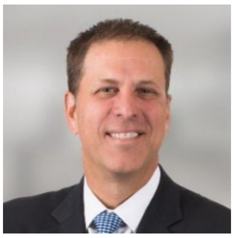

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ANNEX: LATEST DE-SPAC TRANSACTIONS BETWEEN US SPACS WITH EUROPEAN TARGETS

SPAC and Listing	Target	Completion Date
Gores Guggenheim listed on NASDAQ	Polestar (electric car maker) in Sweden	Expected 2022
Sports Entertainment Acquisition Corp. listed on the New York Stock Exchange	Super Group (SGHC) Limited (sports betting and other betting) in the UK / Guernsey	January 2022
European Sustainable Growth Acquisition Corp. listed on NASADQ	ADS-TEC Energy GmbH (battery-buffered technology platforms) in Germany	December 2021
Yucaipa Acquisition Corporation listed on the New York Stock Exchange	SIGNA Sports United (specialist sports webshops) in Germany	December 2021
Broadstone Acquisition Corp listed on the New York Stock Exchange	Vertical Aerospace (maker of vertical take-off and landing aircraft) in the UK	December 2021
Investindustrial Acquisition Corp. on the New York Stock Exchange	Ermenegildo Zegna (Italian luxury group) headquartered in the Netherlands	December 2021
SPAC DD3 Acquisition Corp. II on the NASDAQ	Codere (online gaming business mostly operating in Latin America) in Luxembourg	November 2021
Virtuoso Acquisition Corp. on the NASDAQ	Wejo Group Limited (connected vehicle technology) in the United Kingdom	November 2021
Kensington Capital Acquisition Corp. II. on the New York Stock Exchange	Wallbox N.V. (electric vehicle charging and energy management based on Barcelona) in the Netherlands	October 2021
Montes Archimedes Acquisition Corp. on NASDAQ	Roivant Sciences (biotech) in Switzerland	September 2021
CA Healthcare Acquisition Corp on NASDAQ	LumiraDx (connected diagnostics) in the United Kingdom	September 2021
Qell Acquisition Corp. listed on NASDAQ	Lilium (regional electric air mobility) in Germany	September 2021
AJAX I listed on the New York Stock Exchange	Cazoo Group Ltd. (online car retailer) in the United Kingdom	August 2021
Gores Holdings V, Inc on the New York Stock Exchange	Ardagh Metal Packaging S.A. (supplier of metal & glass packaging) headquartered in Luxembourg	August 2021