

Key aspects of private investments in public equity (PIPE) in Switzerland

Niederer Kraft & Frey Ltd



NIEDERER KRAFT & FREY

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This article provides a high level overview of certain key aspects of Private Investments in Public Equity (*PIPE*) in Switzerland with particular focus on private equity investors.

1. Particularities of Swiss takeover law and impact on PIPE transactions

Switzerland is not a member of the European Union ("EU") or the European Economic Area ("EEA"). Consequently, EU takeover law is not applicable. However, Switzerland has its own takeover law regime, which is similar to EU law, but there exist some material differences.

Opting-out or opting-up

Swiss takeover law allows listed companies to include a so-called "*opting-out*" or "*opting-up*" clause in their articles of association. Thereby the duty to make a public tender offer upon exceeding the relevant threshold of 33 1/3% of the voting rights in a listed company can either be excluded (*opting-out*) or the threshold can be raised from 33 1/3% up to 49% (*opting-up*). *Opting-out* and *opting-up* clauses can be adopted *before* a company lists its shares on a stock exchange or *even after*. According to the practice of the Swiss Takeover Board (*TOB*) *opting-out* or *opting-up* clauses can be adopted in the articles of association post listing if (i) shareholders are informed transparently about the introduction of such clause and the consequences thereof before the shareholders meeting, and (ii) the majority of the represented votes as well as the majority of the minority shareholders at the shareholders meeting accepted the *opting-out* or *opting-up* clause. If the *opting-out* or *opting-up* clauses are introduced for a specific transaction or to exempt a specific shareholder from the offer duty (*selective opting-out* or *selective opting-up* clause), shareholders who might have a conflict of interest must not participate in the vote to introduce such an *opting-out* or *opting-up* clause.

From the above follows that PIPE transactions resulting in a shareholding above 33 1/3% of the voting rights (either alone or by acting in concert with existing or other new shareholders) will not necessarily trigger a duty to present a mandatory tender offer, if the target company already has an *opting-out* or *opting-up* in its articles or if such a clause is approved by existing shareholders in the context of the new transaction. This particular feature of Swiss law makes it possible to structure significant PIPE transactions in a manner that will not necessary oblige new investors to make an offer for the entire company.

Delisting

Under Swiss law the power to apply for the delisting of the shares lies with the board of directors of the listed company (i.e. not the shareholders meeting or a court). In addition, generally the delisting requirements of the SIX Swiss Exchange ("SIX") are not very demanding. In case of a public tender, the threat of the offeror to delist the company upon completion of the tender is, thus, real and has to be taken very seriously by shareholders.

It should further be noted that in principle a delisting can even be applied for if no public tender offer has been made before the delisting. Accordingly, under certain conditions it is in principle possible to combine a PIPE transaction with a de-listing without combining this with a public tender offer.

No tax on capital gains by Swiss residents holding shares in their private property

Another particularity of Swiss law is that Swiss resident shareholders who are physical persons and who hold their shares in their private (i.e. non business) property will not be taxed on capital gains if they sell their shares in the tender offer. By contrast, if such shareholders are squeezed out by way of squeeze-out merger after a tender offer, they will incur significant income tax. Physical persons are therefore highly incentivized to tender their shares in the tender offer.

Acceptance condition

Under Swiss takeover law it is normally permissible to make the offer conditional upon at least 66 ⅔% of the voting shares being tendered. If the offeror already holds a significant stake or has secured undertakings from significant shareholders, the Takeover Board may accept a higher threshold, though absent extraordinary circumstances the Takeover Board will normally not accept a threshold of 90%. Under Swiss corporate law a shareholder holding 2/3 of all voting rights will have full control over the shareholders meeting and the composition of the board of directors; however, to do a squeeze-out merger the offeror will need 90% of the voting rights.

Importantly, Swiss tender offer allows an offeror to waive any or all offer conditions at any time. Therefore, if the threshold of 66 ⅔% of the voting rights has not been reached, the offeror may nevertheless declare the offer unconditional. Once the offer has been declared unconditional, an additional 10 days acceptance period will start.

In practice, due to the above described particularities, shareholders will normally tender their shares latest during the additional acceptance period, failing which they face the risk of de-listing, squeeze-out merger and, potentially, very significant tax disadvantages. This is evidenced by the fact that the average success rate of public tender offers in Switzerland (leaving aside special cases) is above 90%.

2. PIPEs involving the issuance of new shares of a listed company

In case that a PIPE transaction involves the issuance of new shares in a Swiss listed company the following points are noteworthy:

Authorized capital

Under Swiss law listed companies can issue new shares out of so-called "authorized capital". Authorized capital means capital, which has not yet been issued but in respect of which the shareholders meeting has resolved (with a two thirds majority of the shares represented at the meeting) to authorize the board of directors to issue new shares without further shareholder approval. Such authorized capital may not exceed 50% of the issued and outstanding share capital. In addition, authorized capital must be issued within a maximum of two years failing which the authorization will expire. Existing shareholders retain a pre-emptive right if new shares are actually issued out of authorized capital, provided that the board may exclude such pre-emptive rights for valid reasons if such reasons have been specifically reserved in the articles of association (e.g. "bringing in a strategic investor", "financing an acquisition"). Unlike other jurisdictions, in Switzerland pre-emptive rights cannot simply be excluded on the basis that the new shares represent less than a certain percentage (e.g. 10%) of the outstanding shares.

Conditional capital

Swiss listed companies can further issue new shares out of so-called "conditional capital", which may be used to source shares in connection with convertible loans and warrants. For this the shareholders meeting must resolve (with a two thirds majority of the shares represented) on the creation conditional capital in the articles of association. Like authorized capital, conditional capital may not exceed 50% of the issued capital (art. 653a CO) and existing shareholders have pre-emptive rights on instruments tied to conditional capital which can be excluded for valid reasons set out in the articles of association (art. 653c para. 2 CO). Conditional capital is the appropriate means for PIPE transactions involving option or conversion rights.

Treasury shares

If a listed company holds shares in treasury such shares can offered by the company to investors in PIPE transactions. The aggregate nominal value of all shares held in treasury must not exceed 10% of the share capital. Importantly, as a rule existing shareholders do not have pre-emptive rights if the company decides to sell treasury shares.

Listing prospectus

In case that a PIPE transaction involves the issuance of new shares in excess of 10% of the existing listed capital a listing prospectus will be required. In this context needs to be noted that the EU Prospectus Directive is not applicable because Switzerland is not a member of the EU/EEA. Instead the prospectus must comply with the less restrictive listing rules of SIX.

3. Insider law restrictions

Given that Switzerland is not a member of the EU/EEA, the EU Market Abuse Regulation (*MAR*) is in principle not applicable (unless the securities of the Swiss target company are not trading on a trading venue in the EU).

However, Switzerland has its own market behavior rules, including regarding insider dealing, which in part differ significantly from respective rules in the US or the EU. For example, unlike in the US, in Switzerland dealings between insiders are not per se exempted, which can make an important difference in PIPE transactions.

Consequently, in the context of PIPE transactions potential investors must be cautioned at an early stage that there exist some Swiss law particularities regarding insider dealing that have to be considered to avoid that an investor becomes accidentally "pregnant" with material non-public information and thereby can no longer pursue the investment until the price sensitive fact has been disclosed to the public. Likewise, it can become difficult to reconcile an investor's interest to fix the price of a PIPE in advance (while in possession of insider information other than the fact that the investment is being considered) with the need to comply with insider laws. In PIPE transaction it is therefore important to address such issues and agree on the structure, the due diligence and the disclosure approach at an early stage.

4. Conclusions

Based on the particularities set out above Swiss tender offers typically reach a very high final acceptance rate (on average above 90% of the voting rights), which allows offerors to squeeze-out remaining shareholders after the tender offer by way of squeeze-out merger (if >90%) or even by simple court decision (if >98%).

If a PIPE investor does not wish to acquire the entire company and wishes to maintain the listing, the *selective opting-out* or *selective opting-up* can provide further flexibility and options on how to structure a PIPE transaction.

The authorized and conditional capital provide an investor with a tailor-made instrument to adjust the issuance of new shares to the specific PIPE transaction structure and give the board of directors of the target company great flexibility with regard to the creation of new shares.

The described features of Swiss law make Swiss listed companies also interesting targets for private equity investors as well as other investment companies. In this context Swiss law particularities regarding insider dealing require that the bidder and the target company agree at an early stage on the due diligence and disclosure approach.

Niederer Kraft & Frey Ltd - Dr. Philippe A. Weber