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Is Belgium ready for the rise of the SPAC?

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How can a SPAC merge with a Belgian target and is a SPAC “made in Belgium” possible?

Special purpose acquisition companies (“**SPACs**”) have been present for several decades and have recently gained a boost in popularity on the US markets. On the European markets, SPACs are a lot less prevalent with only a handful of SPACs being incorporated as European companies and listed on a European stock exchange. Nonetheless, the phenomenon appears to be gaining traction.

Encounters with the SPAC structure in Europe will at first instance likely be in the form of business combinations between European target companies and SPACs listed on a US stock exchange (NYSE or NASDAQ). Most of the SPACs listed on a US stock exchange are US (typically Delaware) or Cayman entities. However, SPACs formed in European countries and listed on European stock exchanges can be expected to emerge and the structure has already been successful in some European countries.[1]

Against that background, this paper sets out some selected legal considerations around the following four questions:

1. What is a SPAC?
2. What are special points of attention when a SPAC wants to effect a business combination with a Belgian target?
3. How can a SPAC be structured as a Belgian legal entity?
4. What would be expected focus points of the Belgian regulator and market operator when listing a SPAC on Euronext Brussels?

It should be noted that the incorporation and listing of a SPAC as well as the de-SPAC transactions following such listing are complex and bespoke transactions with evolving market practices, to a large extent unprecedented in Belgium, and this publication does not purport to cover all issues.

1. What is a SPAC?

A SPAC is a company that raises capital from investors in an IPO for the purpose of identifying and negotiating a transaction to acquire a business after the IPO is completed. SPACs are commonly formed by private equity managers and rely on teams of managers and directors recognized for their expertise to identify and implement the business combination transaction for the SPAC (the “**de-SPAC transaction**”).

As part of its IPO, a SPAC is required to prepare and publish a prospectus under the rules applicable to the jurisdiction of the SPAC and the selected listing venue. As the SPAC does not have an operating

1 For example, in the Netherlands, Dutch Star Companies One (2018) and Dutch Star Companies Two (2020) are two recent SPACs that listed on the regulated market of Euronext Amsterdam.

business at the time of its IPO, much of the prospectus disclosure will be more boilerplate in nature, describing the SPAC governance and capital structure as well as focus on the reputations of the sponsors and management team, the business combination strategy, and, if relevant, its intention to focus on a particular industry and/or geography. Given that disclosures are minimal, SPAC listings tend to be completed in a few months in the United States, compared with a traditional IPO that likely takes longer and can expose a company to fluctuations in the market. However, if the SPAC has already identified a target at the time of the IPO, it would need to include disclosures on the target and the process would largely become a traditional IPO process.

Typically, a SPAC would issue SPAC units in its IPO, consisting of ordinary shares and warrants to purchase a fraction of additional shares. The warrants will typically become exercisable upon the completion of the de-SPAC transaction and may be redeemed early if the SPAC's share price exceeds a certain level for a specified period.

Typically, the SPAC's sponsor owns a different class of units from the class offered in the IPO, which include ordinary shares and warrants, and receives ownership of approximately 20% of the SPAC.

The SPAC is required to deposit the proceeds of the IPO in a trust or on an escrow account[2], subject to disbursement for certain limited purposes. If a de-SPAC transaction is not completed within a predetermined time limit (typically 12 or 24 months of the IPO), the SPAC will be required to return the balance of the trust/escrow account to the SPAC's shareholders.

2. What are special points of attention when a US SPAC wants to effect a business combination with a Belgian target?

Given that the SPAC structure is currently much more prevalent in the US, encounters with the SPAC structure in Europe will in the first place likely be in the form of business combinations between European companies and SPACs listed on a US stock exchange (NYSE or NASDAQ). Set out below are some key considerations regarding business combinations with a US SPAC.

When effecting a business combination with a US entity (or with another non-EU country), the rules of the jurisdiction of the SPAC and the target will apply cumulatively and may be contradictory. There are ways around those constrains, such as structuring the transaction as a share purchase, a share exchange, an asset sale or a merger with a local (Belgian) subsidiary of the SPAC.

Cross-border business combinations are hence complex transactions and the ultimate transaction structure will depend on a variety of considerations, such as tax, accounting and corporate law matters of the jurisdictions of both the SPAC and the target. For instance, the business combination should be structured in a way which achieves tax neutrality to the largest extent possible and allows for an efficient distribution of income going forward. Whilst the incorporation of a SPAC in the Cayman Islands or a similar jurisdiction is likely to cause additional complexities in this respect, the extent thereof will depend on the exact set-up and the tax residence of the SPAC.

2.1 Key Business Combination Terms

Once a target has been identified by the SPAC, the negotiation process for the business combination will be largely similar to a regular M&A deal. Prior to negotiating the definitive transaction documentation and raising financing for the de-SPAC transaction, the parties typically enter into a confidentiality agreement, as well as a letter of intent outlining the principal economic and financial terms of the de-SPAC transaction

2 Hence, unlike private equity transactions, SPAC investors are required to deposit the funds and not just commit to releasing them at the time of the transaction with a target.

(which may include a term sheet). Following the negotiation of the letter of intent, the SPAC and the target will then negotiate a definitive transaction agreement.

Although the form of the definitive transaction agreement will depend on the structure (i.e., (cross-border) merger, share transfer/exchange, asset sales, etc.), it will be largely similar to a definitive transaction agreement for regular M&A deals[3]. The target shareholders and management will typically control the SPAC after the business combination, and the transaction agreements will reflect this in terms of governance.

US style transaction documents for SPACs will include customary termination rights for public M&A deals, including a termination right in case of (a) failure of the business combination to close by a negotiated date and (b) failure for the SPAC to obtain shareholder approval. This tracks the fact that SPACs commit to their investors to complete a business combination before a given date and that the shareholders of the SPAC need to approve the business combination.

2.2 SPAC Shareholder Vote

Typically, a SPAC needs to obtain shareholder approval for a de-SPAC transaction. For a SPAC listed on a US stock exchange, such solicitation of shareholder votes means that the SPAC will likely have to comply with the applicable laws and regulations governing proxy rules. This may require substantial disclosures for both the SPAC and the target, and the target's readiness to produce such disclosures (particularly with respect to financial statements) will significantly impact the timeline.

SPAC shareholders will have the right to redeem their shares in connection with the de-SPAC transaction, allowing SPAC shareholders to be reimbursed and exit the vehicle. The SPAC constitutional documents may provide that shareholders can redeem their shares irrespective of whether they vote for or against the de-SPAC transaction, which makes obtaining shareholder approval relatively easier but raises the likelihood that a significant portion of shareholders will elect to redeem their shares.

2.3 Pricing and Financing; PIPE transaction

Compared to a traditional IPO, a de-SPAC transaction can offer a target more certainty with respect to price, since the target is negotiating a fixed valuation with only one party, the SPAC.

However, even if a transaction is approved by the SPAC's shareholders, the financing remains uncertain as shareholders may have a right to redeem their shares in connection with the de-SPAC transaction (cf. section 2.2 above).

SPAC sponsors use different approaches to mitigate such redemption risk, including entering into forward purchase agreements to finance the de-SPAC transaction, or seeking back-end financing such as bridge loans or private investment in public equity ("**PIPE**") transactions. In a PIPE transaction, an investor or group of investors agrees to provide additional capital to the SPAC in exchange for a private placement of the SPAC's public securities at a price typically equal to the IPO price. Such third-party investors may also be willing to enter into alternative purchase agreements with the target, commit to purchase SPAC common stock on the market (and agree not to redeem them), and fund transaction fees and expenses. The PIPE deal usually takes place prior to execution of definitive transaction agreements, and settlement of the PIPE deal is contingent on consummation of the business combination. PIPE deals also provide the SPAC with a market-testing of its acquisition; if the SPAC is successfully marketing the PIPE, it is highly likely to receive shareholder approval, and a failed PIPE will often convince the SPAC and its target to abandon the transaction.

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3 For example, the definitive transaction agreement will include (i) mutual housekeeping and business representations and warranties made by the parties to the definitive transaction agreement, (ii) customary covenants, including relating to (a) efforts to obtain the shareholder approval and any other regulatory approvals and (b) deal protection and (iii) customary conditions to closing, including obtaining the requisite corporate and regulatory approvals.

2.4 Disclosures

Various disclosures will need to be made in the context of the de-SPAC transaction. These will largely depend on the laws and regulations applicable to the SPAC and the target. Assuming a business combination of a US listed SPAC with a private Belgian target, this will include:

2.4.1 Proxy Statement/Exchange Offer Registration Statement

In case the de-SPAC transaction requires shareholders' approval, the main regulatory disclosure document will be the proxy statement for the SPAC's shareholders' meeting to approve the de-SPAC transaction.

Such statement will include narrative disclosure and financial statement requirements similar to those required in a traditional IPO and the proxy statement must also include pro forma financial information (unaudited) reflecting the closing of the de-SPAC transaction. The proxy statement for a de-SPAC transaction will typically also include projections for the target business for approximately five years.

Depending on the transaction structure, an exchange offer registration statement on Form F-4 or S-4 may be necessary or appropriate; the proxy statement will do double duty as the registration statement, and this will trigger modest incremental disclosures.

2.4.2 Due Diligence

The absence of underwriters alters the dynamics of a de-SPAC transaction relative to a traditional IPO. Among other things, there are no accountants' comfort letters or lawyers' disclosure letters ('10b-5' letters). The SPAC, however, is engaging in an acquisition of the target and has a fiduciary obligation to its existing shareholders to diligence the target adequately.

In practice, the due diligence carried out by SPACs varies among transactions but can generally be said to combine elements of IPO-like diligence with elements of M&A-style diligence.

3. How can a SPAC be structured as a Belgian legal entity?

- The **proceeds of the SPAC IPO are typically placed in a trust or escrow account** to ensure they are available to repay the shares redeemed by dissenting shareholders or to pay the liquidation proceeds when no acquisition target is found within the deadline. A trust concept does not exist under Belgian law. Therefore, an escrow account would likely be used for a Belgian SPAC, unless the SPAC would revert to a foreign trust structure.
- Typically, an amount less than the full proceeds of the IPO is placed in escrow, ensuring that a portion (e.g. 1%) of the proceeds remains available to cover expenses. Additionally, the sponsors may commit to provide additional funding to cover expenses.
- The **shareholders get the opportunity to vote on the business combination**. However, under Belgian corporate law, it is the management body (in most companies the board of directors) who has the power to decide on all matters, unless they are reserved by law or by the articles of association to the shareholders' meeting. Depending on the transaction structure chosen for the business combination (e.g. if it would take the form of an acquisition of shares or assets), it would therefore typically be the board of directors that decides on the business combination.

  However, it is possible to provide in the articles of association of the SPAC that any business combination would need to be approved by the shareholders, as a so-called "reserved matter" whereby the attendance and majority requirements can be tailored.

- Shareholders who have **voted against the business combination are often given the option to redeem their shares**. The following Belgian corporate law constraints in relation to share buybacks are relevant in this respect and it should be ensured on a case by case basis that the redemption does not trigger adverse tax consequences for the investors or the SPAC:

  (i) The option to redeem is typically granted at a price set out in the prospectus. Belgian law, however, provides that the price for which shares in a listed company can be bought back from investors can, in principle, not be higher than the highest current independent price for the shares on the stock exchange. For this reason, a Belgian company will not be able to guarantee a fixed price for share redemption to the investors.

  (ii) When a Belgian company acquires its own shares, it is required to book a non-distributable reserve for the amount for which the shares are recorded in the inventory of the company. This reserve must be maintained for as long as the shares are kept on the company's balance sheet. This means such amount cannot be used to pay the consideration for the business combination.

  (iii) Under Belgian law, the funds used by the SPAC to acquire its own shares, need to be available for distribution (and hence cannot qualify as capital or as non-distributable reserves). In principle, IPO proceeds are not available for distribution. However, there are ways to ensure that the IPO proceeds are (to a large extent) available for distribution and hence available to fund the acquisition of own shares.

  (iv) When the SPAC would hold after the repurchase more than 30% of its voting securities, this could trigger the requirement to launch a public take-over offer on all shares of the SPAC.

  Some possible responses to the foregoing limitations in relation to share buybacks are:

  a) The shareholders could be granted a put option allowing them to sell their shares at a predetermined price to the sponsor of the SPAC. However, this would deviate from the common practice where the redemption is funded by the SPAC and hence would require careful attention when drafting the transaction documentation.

  b) It could also be envisaged to make use of a new feature offered by the new Belgian Companies and Associations Code. For a BV/SRL (which is another type of Belgian legal entity with full legal personality), the articles of association can provide that shareholders can exit the company by remitting their shares to the company against payment of an exit fee. The circumstances under which shareholders can exit and the amount of this exit fee can be determined freely in the articles of association. One could use this structure this as an exit right for dissenting shareholders in the event of a business combination. This would require the SPAC to take the company form of a BV/SRL, given that this procedure of "exit at the expense of the company's assets" (*uittreding lastens het vennootschapsvermogen/démission à charge du patrimoine social*) is not available in the NV/SA (which is the common legal form for a Belgian listed company). Whereas it is possible under the new Companies and Associations Code to have a BV/SRL listed on the stock exchange, this has not yet taken place.

- If no business combination is realised, the **SPAC is liquidated whereby the founders typically do not receive proceeds in the transaction**. This feature can be structured by issuing different classes of shares, whereby the articles of association will provide that the founder shares rank lowest in the chain of distribution in the event of liquidation.

- Upon incorporation, the founders of a Belgian company need to present a **business plan** (*financieel plan/plan financier*) to the notary, in which they justify the amount of the starting capital in light of the intended activities of the company for the next two years. Essentially, the plan will set out the company's working capital requirement for the first two years after its incorporation. The financial plan will need to contain an opening balance sheet and a projected balance sheet after 12 and 24 months as well as an opening P&L statement and a project P&L statement after 12 and 24 months. Careful consideration should be given to the fact that the SPAC will typically aim to complete the business combination within this period.

4. What would be expected focus points of the Belgian regulator when listing a SPAC on Euronext Brussels?

As indicated above, the SPAC structure is unprecedented on the Belgian markets, meaning that the Belgian regulator has no established practice for the review of offer prospectuses for SPACs. Nevertheless, the fact that SPAC structures have been set up in other member states of the European Union, demonstrates that a SPAC can pursue an IPO in compliance with the EU Prospectus Regulation, which provides for a harmonized legal framework across the European Union.

Nonetheless, the FSMA can be expected to extensively scrutinize the SPAC IPO prospectus, including the following sections:

- The **Risk Factors**, which will need to rigorously set out the risks of investing in, to some extent, a blank check company such as a SPAC. This will include that the SPAC has no operating history, that no specific targets have yet been identified, that it is dependent on key persons and that the SPAC is subject to single business concentration risk. In example prospectuses, we also see that risk factors are included on potential lines of business in which the SPAC could become active after the business combination.

- The **Business Description**, which will need to explain the parameters that the SPAC will consider when seeking out a business combination.

- The **Offering** section, in which detailed information will need to be given on the set-up and functioning of the SPAC-structure.

- The sections containing the **description of the management team** (sponsors, founders, promotors, etc.), because this will be an important factor to assess the investment experience of the SPAC's governing bodies and hence an important driver of valuation. These sections will also need to set out information on the economic relationship between the management team and the SPAC.

Given that the SPAC will not yet have any business activities or financial history, the financial sections of the Prospectus can be very limited. Hence, the drafting and review of the financial sections will consume less time than in a traditional IPO.

The articles of association and the prospectus could provide for a requirement to prepare a detailed information note to the shareholders at the time of the shareholders' meeting resolving on the business combination. This information note would not be subject to approval by the FSMA (absent a legal requirement to that effect) but would serve to increase transparency of the business combination and could temper potential concerns by the FSMA.

In any case, the SPAC will be subject to the same rules in relation to the disclosure of inside information under the Market Abuse Regulation as any listed company. Since an M&A process consists of various steps, the SPAC will need to assess when to make public announcements in respect of a contemplated

transaction. Given the importance of an acquisition for its business model, the first announcement might have to come earlier compared to other listed companies.

SPAC structures are currently quite prevalent in the US. Encounters with the SPAC structure in Europe will in the first place likely be in the form of business combinations between European companies and SPACs listed on a US stock exchange. This paper contains some selected considerations in respect of (i) a US SPAC wanting to effect a business combination with a Belgian target and (ii) the set-up of a Belgian SPAC.

There are no examples yet of Belgian SPACs listed on Euronext Brussels or abroad. The structure is hence untested on the Belgian market. Since SPAC vehicles have a relatively complex structure, due attention should be given to aspects of Belgian corporate law as well as to the rules and practices applied by the Belgian regulator (the FSMA).

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