CENTRE DE DROIT
BANCAIRE ET FINANCIER

Special Purpose Acquisition Company

De-SPAC as seen by STB

Par Lukaz Samb le 5 December 2023

In its decision 858/01 of November 1, 2023 in the case of VT5 Acquisition Company AG, the Swiss Takeover Board (STB) was asked to establish its practice with regard to De-SPACs (transactions whereby a Special Purpose Acquisition Company (SPAC) acquires its target). This decision was eagerly awaited, given that VT5 Acquisition Company AG (VT5) is the first SPAC under Swiss law.

First of all, for a brief reminder of what a SPAC is and its specific features, please consult the SIX FAQ and decision 782/01 of March 19, 2021 in the VT5 Acquisition Company AG case.

On October 2, 2023, VT5 announced that it was in advanced discussions concerning the acquisition of R&S Group, a supplier of electrical products. It was further stated that an acquisition of R&S Group was expected by the end of 2023. On October 10, 2023, VT5 filed a request with the STB to clarify the rules applicable to its De-SPAC transaction.

In its petition, VT5 indicated that it had entered into discussions with several of its major shareholders with a view to having them sign commitment letters. The company's aim was to increase the likelihood of approval of the De-SPAC and any measures required to this end, to avoid the exercise of their redemption right, and to confirm their willingness to subscribe for additional shares in order to maintain their shareholding.

Accordingly, VT5 first asked the STB to confirm that investors signing commitment letters could not be considered as a group of shareholders subject to the obligation to submit an offer if the threshold of 33? % of voting rights (art. 135 al. 1 LIMF) were exceeded. Finally, even if the investors were to qualify as a shareholder group, an exemption from the obligation to submit an offer based on art. 136 LIMF and 41 OIMF-FINMA would be appropriate.

The STB began by analyzing the opting-out clause in VT5's articles of association, concluding that it was doubly selective. In fact, this opting-out clause applied only to VT5, and specifically to the acquisition of shares in connection with the exercise of investors' right of withdrawal. From the outset, therefore, the STB noted that major investors signing a commitment letter would not be able to avail themselves of this clause. Next, the STB recalled the conditions for retaining a group of shareholders, namely (i) concerted behavior ; (ii) with the object of acquiring or exercising voting rights ; and (iii) with a view to dominating the company.

In the present case, the major shareholders were not directly consulting each other.

Nevertheless, the STB considered that VT5 was acting as a mediator, since each shareholder entered into a contract with the same counterparty. Although they had no direct contact with each other, a concerted effort had to be made. The commitment letters also stipulated that the signatories would approve the transaction and subscribe to additional shares if necessary. The second condition was therefore met. Lastly, the criterion of domination is recognized in particular when shareholders consult each other with a view to influencing the company's strategy. Here, the De-SPAC was a central element of VT5's strategy (since it was its main goal). The criterion of domination was therefore also met. On this basis, the STB found that the signing of the commitment letters would lead to the formation of a group of shareholders subject to the obligation to submit an offer if the threshold of 33? % of voting rights were exceeded.

The STB then questioned the possibility of granting an exemption from the obligation to submit an offer. This is because the principle of a mandatory offer is intended to protect minority shareholders in the event of a change of control that they would consider detrimental to their interests. In certain circumstances, such an obligation may prove counter-productive, which is why the legislator has given the STB the power to grant derogations. According to the STB, minority shareholders already have the right to withdraw from a SPAC. Investors are informed of this right at several stages. Nor does the signing of commitment letters have any influence on this right. On the contrary, by informing the public of the signatories, other shareholders are all the more aware of the outcome of the forthcoming vote, and can vote and exercise their right of withdrawal in full knowledge of the facts. In such circumstances, the STB concluded that all the conditions for a waiver had been met.

In this case, the STB has shown that it can be pragmatic enough to arrive at the most desirable solution for investors. It is unusual for the STB to make use of the general clause in art. 136 para. 1 LIMF. This decision demonstrates its usefulness. It is true that the principle of the mandatory offer was introduced for the sole purpose of protecting shareholders against changes of control. Nevertheless, when the investment structure is organized in such a way that shareholders are granted an unconditional right of repurchase, and when they are extensively informed of future prospects, it is in our view perfectly correct to withdraw this protection. With this decision, the STB's practice with regard to SPACs is now established. Any future Swiss SPACs will thus be able to develop in full knowledge of the rules to which they will be subject.
