

An Overview Of European Private Investments in Public Equity

By **Arnaud Berdou, Stephan Rauch and Matthew Triggs** (December 18, 2023)

In the more challenging market and financing conditions of 2022 and 2023, many European-listed companies have looked to additional sources of liquidity.

Private investments in public equity, or PIPEs, i.e. issuing shares or other instruments to private investors at a discount, have proved an appropriate solution for some issuers.

PIPEs can facilitate equity investment more quickly and at a lower cost than a public offering or traditional private placement, particularly when market conditions are unfavorable.

For investors, PIPEs present an opportunity to gain both economic exposure and influence over decision making. Investors typically expect to receive governance rights in return for sizable investments.

PIPE transactions have a strong local flavor. Successful execution requires engagement with the legal and regulatory regimes that apply to the issuer, as well as an understanding of governance norms and market practice in the issuer's jurisdiction.

This article spotlights recent PIPEs and considers the regulatory landscape for PIPE transactions in the U.K., Germany and France, concluding by considering common negotiation points advisers should keep in mind to facilitate PIPEs across borders.

U.K. Considerations

Recent examples of PIPEs in the U.K. market include the Yew Tree Consortium, Saudi Arabia's Public Investment Fund and Geely's investments in Aston Martin Lagonda Global Holdings PLC in 2020, 2022 and 2023, respectively, and Clayton, Dubilier & Rice's acquisition of a 29% interest in SIG PLC in 2020.

The U.K.'s robust preemption rights regime has traditionally been a key challenge for executing U.K. PIPEs. Recent and proposed changes to U.K. capital markets regulation should, however, make PIPEs easier to execute going forward.

Subject to the issuer's existing shareholder authorizations to allot shares and disapply statutory preemption 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



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specified capital investment or acquisition in the last six months. According to Practical Law What's Market data, in 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 U.K. Takeover Code, the PIPE investor and the issuer may seek from the Takeover Panel a waiver of the obligation to make a mandatory offer.[1]

Additional considerations apply if the issuer 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 acquires 30% or more of the issuer's voting rights, the U.K. Listing Rules' controlling shareholder regime will apply. Among other things, this would require the election of independent directors to be approved by a majority of the noncontrolling 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 U.K. Listing Rules' related party transactions regime. As part of a reform of the U.K. listing rules, the Financial Conduct Authority is consulting on removing this requirement.

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

While U.K. PIPE investments typically comprise subscriptions for ordinary shares, investments in preferred shares, warrants or convertible bonds are possible alternatives.

German Considerations

Recent examples of PIPEs in the German market include a PIPE transaction in connection with KKR & Co. Inc's €768 million (\$844 million) take private of OHB SE this year 2023; Silver Lake Technology Management LLC's €344 million investment in Software AG in 2022; and the €105 million PIPE investment in connection with the de-SPAC transaction of Frankfurt-listed 468 SPAC I SE, now tonies SE in 2021.

There are two key legal issues to consider when launching a PIPE in Germany:

- A capital increase will be required in order to issue new shares. Issuers typically use a resolution of the general meeting on an authorized 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.

- In the case of a capital increase from authorized capital, a corresponding authorization to exclude subscription rights is also required. 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%-5% below the last closing price.

The management board of a company seeking a PIPE investment may therefore arrange to have authorized capital preapproved by the general meeting. Although it is possible to obtain an approval of the general meeting for a capital increase for a specific PIPE, this is usually less attractive because the requirement to hold a general meeting may threaten the swift and timely implementation of the PIPE.

In order to avoid the 10% limitation on 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.

As an alternative to issuing shares, issuers may also rely on a resolution of the general meeting on a conditional capital to issue convertible bonds or stock options.

A trend in Germany is the combination of PIPEs with takeover transactions or mergers. In a number of transactions, the bidder has agreed to subscribe for a capital increase of 10% of the target company in connection with a subsequent takeover offer.

A recent example includes KKR's offer for OHB, a company providing satellites to the EU's Galileo navigation constellation and components to the European Space Agency's Ariane rocket program.

French Considerations

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

French PIPEs are usually carried out via a capital increase reserved for specifically designated persons or a category of investors with similar characteristics.

In both cases, a shareholder vote with a two-thirds majority approval is required. The offering being reserved to certain persons, existing shareholders will waive their statutory preemptive rights over the new shares or instrument to the benefit of those specific investors.

When the offering is made for 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 on 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 for 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 SA, a global clinical stage biopharmaceutical company, which completed private placement financings in 2022 and 2019.

In addition, the capital increase must be carried out within 18 months of 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 backstopped by the PIPE investor may also be contemplated, but there is a risk that the private placement will be sufficiently subscribed, and that the investor's backstop commitment would 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' volume-weighted average price.

Although the issuance of new shares is the most common way to proceed with a PIPE transaction, the issuance of equity warrants or convertible or exchangeable bonds may also be considered.

As PIPE investors would be able to exercise or convert or exchange their instruments over a period of time, the need for a further general meeting can be avoided.

In a distressed context, the PIPE investor may cross, alone or in concert with the existing controlling shareholders, the 30% mandatory tender offer threshold under French law.

A specific waiver from the French financial markets authority could be sought in advance, depending on the specific circumstances of the transaction.

Negotiation Issues

Governance rights, anti-dilution protections and conversion and redemption rights are generally the key terms investors focus on in significant European PIPE transactions, beyond pricing.

The governance rights negotiated often depend on the expected depth and duration of the relationship between the issuer and PIPE investors.

The larger the equity stake, the more robust the governance rights. Usually, they include:

- 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 or 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.

Issuers may wish to ensure that the rights granted are consistent with past practice, so as not to set new precedents that could be opposed by the issuer's existing or new key shareholders.

Issuers will also be concerned to confirm that the composition of the reconstituted board will align with local corporate governance codes, such as the U.K. Corporate Governance Code 2018, or shareholder expectations.

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 also be requested.

If the investor operates, directly or through a portfolio company, in a competing business to that of the issuer, measures may need to be put in place to prevent the disclosure of competitively sensitive information and to avoid interlocking directorships with a competitor.

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.

Conclusion

Although still fairly rare, PIPEs may continue to be an attractive option for some European issuers seeking to secure equity financing, particularly if current market and financing conditions continue into 2024.

When planning a PIPE, key issues for advisers to consider are the various structuring options presented by the local regulatory regime, shareholder approval requirements and local norms that will drive the discussion on governance.

Looking ahead, it will be interesting to see whether PIPE investors will look to divest positions acquired in recent years. Although issuers will not receive further financing in these cases, they would present opportunities for issuers to engage with new investors.

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[1] <https://www.thetakeoverpanel.org.uk/the-code>.