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SPACS IN THE AIFMD CONTEXT[1]

Abstract

The growth in the use of Special Purpose Acquisition Companies (SPACs) within the context of the European market economy has been particularly evident in recent months. When structuring SPACs, the question of whether and when SPACs fulfil the objective criteria of the activities indicative of the characteristics of their specific management under the Alternative Investment Fund Managers Directive (AIFMD), arises. SPACs are, in fact, similar in their basics to the alternative investment funds established under this directive and whose investment strategy is directed towards private equity. The aim of this paper is to answer the presented question, which is crucial for current financial market practice. If the intended investment structure of SPACs fulfils the criteria of the AIFMD, it can only be structured under the rules (and restrictions) arising from respective regulations. Any misconduct is otherwise severely sanctioned.

Keywords: Special Purpose Acquisition Companies (SPACs), Alternative Investment Funds (AIFs), Alternative Investment Fund Managers Directive (AIFMD).

JEL Classification: K22, K23

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1. Introduction

The use of Special Purpose Acquisition Companies (**SPACs**), of which the sole business objective is to merge the company with another company with a view to issuing stocks and certificates (warrants) through a public offering, has been growing in popularity over the last few years. In the United States, they raised a record $ 112.7 billion in the first half of this year, well in excess of the $ 83.4 billion raised in 2020 as a whole and the $ 13.6 billion in 2019 [SPAC WIRE LLC d/b/a SPAC RESEARCH]. The popularity of their use has also been growing in Europe in recent months [Gopinath, Balezou 2021].

This is not surprising within the context of the current market economy. Of particular importance has been the impact of current economic growth and the increasing demand for alternative investment opportunities, such as private equity (incl. growth and venture capital), even for less qualified or creditworthy investors [ESMA Annual Statistical Report on EU Alternative Investment Funds 2020 2021: 4][2]. In addition, the increased flexibility surrounding SPACs, as well as the lower regulatory, financial and administrative complexity thereof, stands out. This is especially true when SPACs are directly compared to established operating companies within the context of an initial public offering of shares on the stock market.[3] Last but not least, the current absence of clear public law, interpretation and established legal practice is also worthy of mention [SPACs: prospectus disclosure and investor protection considerations 2021][4]. Special legislation is in place, for example, for the Nasdaq Stock Market[5].

The aim of this paper is to answer the presented question, which is crucial for current financial market practice. Of interest is, if and in what cases does the intended investment structure of SPACs fulfil the criteria of the Alternative Investment Fund Managers Directive (**AIFMD**) as transposed by the member states of the European Union. Such a structure can only be put in place under the rules (and restrictions) arising from respective regulations.

[2] In 2020, investments in private equity (incl. growth equity and venture capital) from all alternative investment funds accounted for approximately EUR 352 billion.
[3] It states that the initial public offering of SPAC takes place without the paperwork and rigors of the traditional initial public offering of an operating company.
[4] The European Securities and Markets Authority has recently partially clarified the obligations of SPACs regarding transparency and information contained in prospectuses.
[5] NASDAQ'S Regulatory Authority, IM-5101-2, defines, among other things, the time for an acquisition as being a max. 36 months, the right to redeem shares, if investors individually or in aggregate request at least 10 % of the shares, and the obligation to approve the planned merger, acquisition or similar transaction with the operating company by a simple majority of the independent members of the management body.

Any misconduct is otherwise severely sanctioned. This question currently arises mainly when the structuring of SPACs.

2. About a SPAC

A SPAC is defined by its designation; it is a type of blank check company (or a form of reverse merger)[6].

It is a company without operating activities and assets [SPACs 2021]. The company's sole business objective is to raise capital from investors and to merge, acquire or undertake a similar transaction with one or more unlisted operating companies (usually a so-called mature company), with a view to issuing stocks and certificates (warrants) through a public offering on the stock exchange[7]. In other words, it is a vehicle used to indirectly get an operating company listed on the stock exchange.

The participation of investors is normally represented through shares and certificates (warrants). Shares are usually divided into founders' shares (known as Class A shares) and investment shares (Class B). The warrants allow access to the equity capital in a target operating company at a later date. Shares and warrants are usually offered as a package in the form of investment units [What You Need to Know About SPACs 2021].

The founders' shares remain with the founders (known as initiators or sponsors). These are usually professional consultants operating in the financial market, but can also be the current shareholders or directors of the target operating company. On the whole, the founders usually tend to be members of the management team and supervisory bodies. Often, they claim a significant share in the target operating company for a minimum purchase price as a reward should the merger, acquisition or similar transaction (known as 'business combination') be successful [Bayaz, Hajduk, Paus, other members 2021][8].

The main task of the founders is to acquire or merge with the target operating company (known as 'initial business combination'). However, at the time of the initial public offering, the target operating company is usually not directly identified. In many cases, neither the

[6] For an additional discussion on SPACs see [D'Alvia 2020: 107–124].

[7] Cf. a binding legal definition of SPAC in Article 6 para. 12 of the Enforcement Decree of The Financial Investment Services and Capital Markets Act; further e.g. NASDAQ'S Regulatory Authority, IM-5101-2 and others.

[8] Bundesanstalt für Finanzdienstleistungsaufsicht (**BaFin**) draws attention to a possible conflict of interest, especially in those cases where the founders are not partners of the target operating company and claim a high remuneration (costs) for a completed business combination or even uncompleted one, whereby the remuneration is paid for the effort and not the result or subsequent further development of the target operating company.

investors nor the founders know in which operating company the obtained capital will subsequently be invested. Accompanying documentation, such as a prospectus issued in connection with the public offering, therefore often states that the directors will seek to acquire one or more operating businesses or companies in a particular geographic market, specific industry or business, but with a disclaimer that it is not obligated to pursue a target in the identified industry [What You Need to Know About SPACs 2021]. Within this context, it should be considered the directors´ (or founders´) duty to identify the specific target operating company in such documentation prior to the initial public offering process if this is known beforehand.[9] However, this would eliminate the advantage of the possibility to place the capital almost without restrictions.

Completion of the initial business combination is limited in terms of time (known as 'initial business combination deadline'). This is usually from 18 to 24 months after the initial public offering. The directors must complete or at least commence with the initial business combination within the initial business combination deadline, subject to the agreed rules.

Until that time, the raised capital must be held on a trust account by an independent third party. This is to ensure that if a SPAC fails to complete the initial business combination within the initial business combination deadline, the accumulated capital is returned to investors together with any interest on deposits and adjustments for costs (usually 10% of the raised capital). If this occurs, the SPAC then usually goes into liquidation.[10]

Once the initial business combination is identified, the directors should provide investors with information on the target operating company (e.g. based on legal due diligence) in line with any pre-agreed conditions, whereupon the SPAC´s investors/shareholders are given the opportunity to redeem their shares or vote on the initial business combination transaction. In making their decision, investors are often dependent on information that is in the public domain and/or provided by directors. In practice, however, investors usually do not get the aforementioned right to vote. In the main, the initial business combination requires (only) an affirmative vote from the founders or directors on the basis of the financial report, and the reports of other experts, certifying that the target company has sufficient

[9] The argument is the general principles of completeness and accuracy of information in connection with the initial publication offering resulting from Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, repealing Directive 2003/71/EC, and related regulations.

[10] At present, it is suggested that more than 300 SPACs must complete the Initial Business Combination by the end of this year. Given that not so many potential (good quality) target operating companies are available, founders have a strong incentive to close deals, even if this is at the expense of investors. For possible risks in connection with the number of SPACs without goal or target [Naumovska 2021].

financial means in the form of equity capital and authorized credit lines to carry out the initial business combination. Under certain circumstances, in order to prepare its report on the resources available to the company to proceed with the initial business combination, it may prove necessary for the SPAC to interview certain investors to confirm their support for the contemplated transaction. Although investors are usually presented with the opportunity to redeem their shares or sell them on the 'second' market (whether at a loss or profit), the appreciation (or success) of the investment is directly linked to the success of the value of the investment units (shares and certificates) [*Ogier* 2021].

3. Uncertainties surrounding the application of the AIFMD

When it comes to the financing of operating companies, SPACs could represent an alternative form in private equity funds and by their very nature could fall within the scope of the AIFMD and related (directly applicable) regulations [Cliffwater LLC 2021].

The essence of private equity funds is (similar to SPACs) to pool capital from investors with a view to investing in accordance with a defined investment policy and to generate a pooled return for those investors[11].

With a certain literary license, it can be said that it is in the interest of a SPAC to avoid the rules resulting from regulation. If the intended (investment) structure is found to fall within the scope of such regulation, this can significantly impact the total costs and business plans. In many cases, such a finding can lead to a SPAC´s collapse. Within this context, any misconduct can be severely sanctioned by the supervisory authorities.

4. Alternative Investment Funds (Managers)

The AIFMD has subject to some form of special regulation all collective investment undertakings. This includes investment forms which are not UCITS funds[12] and which, irrespective of their legal form or structure [Zetzsche, Preiner 2017: 42], raise capital from

[11] For investors, SPACs may be more attractive than private equity funds because they have the opportunity to redeem their shares or vote on the initial business combination transaction. This is not the case for (closed) private equity funds, which therefore has a negative impact on their attractiveness and on the amount of capital they attract. SPACs also open up opportunities to a wider range of less qualified or creditworthy investors [Bayaz, Hajduk, Paus, other members 2021].

[12] Within the meaning of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), incl. later versions, but related regulation.

investors with a view to investing it in accordance with a defined investment policy for the benefit of those investors (comp. Article 4 para. 1 letter a), resp. b) of the AIFMD)[13].

With regards to the material concept of the scope of the AIFMD, any collective investment undertaking which manages capital (e.g., private equity) falls within scope if the fund it manages fulfils such features. This basis is further "imprinted" by the member states in their own domestic regulations.

The phrase collective investment undertaking has been further described by the European Securities and Markets Authority (**ESMA**) [ESMA 2013]. According to the authority, it is an undertaking which (i) does not have a general commercial or industrial purpose, where (ii) the unitholders or shareholders of the undertaking – as a collective group – have no day-to-day discretion or control, and which (iii) pools together capital raised from its investors for the purpose of investment (under a defined investment policy) with a view to generating a pooled return for those investors.

5. General commercial or industrial purpose

The relatively broad definition of an alternative investment fund is thus initially moderated by an exception for general commercial or industrial purposes. This predominantly concerns commercial activities, such as the purchase, sale, production or exchange of goods, industrial activities or the supply of non-financial services [ESMA 2013: 3].

The obvious purpose of this exception is to avoid ambiguities in interpretation in the case of ordinary business activities outside the financial sector.

When considering what can be understood as activities in the financial sector to which the cited exemption does not apply, it is appropriate to proceed from the objectives of the AIFMD and specific domestic regulations. With a certain degree of simplification, it is possible to state that the financial sector is represented by such companies that have received public authorization to provide financial services on the financial market (e.g. banking license, authorization of investment companies) [Jiška 2013]. In other words, companies dealing with the purchase, sale, exchange or creation of financial instruments (instead of consumer goods) and/or the provision of financial services [Verfürth, Emde 2019: para. 78]. On this basis, it cannot be applied to SPACs. After all, within the context of current

[13] It may be added that the AIFMD targets managers who manage alternative investment funds, not alternative investment funds themselves. For the purposes of the analysis below, I work with the terms identically.

market practice, a SPAC is not a company that has received special public authorization to provide financial services on the financial market (or is obliged to obtain it)[14].

For the rest, the wording of the exception seems to be sufficiently general and does not restrict general business activities [Cuník 2019]. That said, an overly broad interpretation of this exception it would weaken the purpose thereof, if not ignore it altogether.

Within this context, the German interpretation, which makes reference to an operationally active company (*operativ tätiges Unternehmen*), helps [*Kapitalanlagegesetzbuch* [German Investment Code]: Sec. 1 para 1]. In order to therefore benefit according to the cited exemption, a company must meet the requirement of adding value in the real economy. An operationally active company represents a general counterweight to (passive) investment activities.

At the same time, the company must be consistently operationally active, not only for a certain period of time [BaFin 2015].

If a company fulfills these preconditions, there is nothing to prevent it from making investments (e.g. also in investment instruments or other equity instruments) in terms of ancillary activities [BaFin 2015]. The purpose is to ensure that the ancillary or auxiliary activities of the company are not subject to fund regulation, even if the activity falls within scope.

The German Federal Financial Supervisory Authority (BaFin; *Bundesanstalt für Finanzdienstleistungsaufsicht*) further defines the conditions under which a company adds value on the basis of specific examples [BaFin 2015]. For the sake of simplification, it can be concluded that if the primary goal of a company is to 'buy - hold - sell', for example, a share in another company, i.e. a situation where a passive exclusively speculative element is evident, value added is missing. On the contrary, if a company aims, for example, to purchase a share in another company and invest in its subsequent development, when the activity is directed towards further production, this is an activity of a commercial nature which adds value. An operational company is one with a predominantly permanent group of partners (shareholders), whose outputs are of fundamental importance for the creation of societal values.

It can be said that the value-added criterion is generally understandable and makes it relatively easy to make such a subtle, but important distinction.

[14] This is one of the reasons why it is appropriate to examine SPACs within the context of the AIFMD, as these structures usually do not possess a fully-fledged permit and registration is enough, for as long as they do not meet the preconditions for mandatory public authorization.

A SPAC is usually not operationally active until it completes the business combination. Value added is therefore missing. The SPAC only acquires the status of an operating company at the point the business combination is completed and only subject to it concerning a merger with one or more operating businesses or through asset acquisition; not if it becomes the majority shareholder.[15] Its primary activities until then are limited to organizational activities and the preparation of the initial public offering and seeking the initial business combination. In this respect, its activities are not very different from those of private equity fund managers who are looking for suitable investment opportunities. This weakens the potential application of this exception.

This is at least the case within the context of the German interpretation. However, the AIFMD (or, for example, Czech Fund Regulations) does not explicitly make reference to the permanence of the value added a company generates. Given the purpose of this exception, it can be assumed that it must be fulfilled regardless of whether it is explicitly defined [ESMA 2013]. A different interpretation would eliminate any difference between operating activity and passive (investment) activity and would therefore weaken the purpose of the cited exception.

The application of the cited exception for "the future" must also be rejected. In other words, the application of this definition cannot depend on the fact that a SPAC plans to be an operating company in the following months and years and, until then, plans to look for potential investors or specific investments and raise capital. The conclusion that a SPAC could apply this exception in terms of the actual fulfilment thereof in the future, and would fictitiously be considered an operating company, only to lose this fictitious status if the planned business combination did not take place, is not sustainable[16].

The exclusion of SPACs from the scope of the AIFMD which activities fall under general commercial or industrial purposes cannot be concluded with certainty given their non-operational nature, at least at the early stages of a merger with one or more operating businesses or through asset acquisitions.

[15] There is no need to talk about other forms of acquisition by holdings, as the condition of being an operationally active company when it comes to acquiring a majority stake in the target company will not be met. This does not preclude the application of an exception for holdings (see below).
[16] In addition, the current situation suggests that a large number of SPACs on the market will not find a suitable *business combination* in the next two years [Cf. Naumovska 2021].

6. Day-to-day discretion or control

The scope of AIFMD does not include entities in which all investors participate in the management and administration of the company/fund[17]. In other words, the investors as a collective group must not have day-to-day control or discretion [ESMA 2013: 5]. Otherwise, it is not a collective investment undertaking.

The day-to-day control or discretion can be explained as "a form of direct and on-going power of decision – whether exercised or not – over operational matters relating to the daily management of the undertakings' assets and which extends substantially further than the ordinary exercise of decision or control through voting at shareholder meetings on matters such as mergers or liquidation, the election of shareholder representatives, the appointment of directors or auditors or the approval of annual accounts" [ESMA 2013: 3-4].

At first glance, the above definition of day-to-day control or discretion does not correspond to the status of SPAC's unitholders/shareholders. This remains the case even if they have the right to vote at shareholder meetings, the subject of which is voting on the initial business combination. This competence, even within the context of general corporate law, typically falls within the competence of the general meeting (shareholders), whereby the legal regulation presupposes its participation in matters of a long-term nature or that it is capable of significantly influencing their position. In other words, purely exercising shareholder rights is not deemed to be an exercise of day-to-day control or discretion [*Zetzsche*, *Preiner* 2017: 51]. However, this does not represent day-to-day control or discretion, which, on the contrary, lies with the directors (founders)[18].

At the same time, the fact that investors voluntarily appoint (elect) one or more shareholders, but that not all of the aforementioned shareholders are granted day-to-day discretion or control, should not be taken to show that the undertaking is not a collective investment undertaking or alternative investment fund [ESMA 2013: 5].

[17] According to Article 8 of the preamble to the AIFMD, the directive does not apply to *joint venture* structures.

[18] I leave aside the question of the domestic regulation of possible restrictions placed on directors concerning the decision-making process. Within the context of the Czech regulation cf. *Judgement of the High Court in Prague, 31 January 2019*, Ref. No. 14 Cmo 23/2018 critically [Havel, Csach, Lasák 2019].

7. Holding companies

In the event that there is no merger with one or more operating businesses or asset acquisitions in favor of a SPAC, another exception needs to be considered.

The AIFMD further excludes the activities of an investment nature if they are carried out by a holding company with shareholdings in one or more other companies, the commercial purpose of which is to carry out a business strategy or strategies through its subsidiaries, associated companies or participations in order to contribute to the long-term development of these companies and (i) which is not established primarily to generate profit for investors by selling its subsidiaries or associated companies, as evidenced by the annual report or other official documents (Article 2 para. 3 letter a) in connection with Article 4 para. 1 letter o) of the AIFMD).

The requirement to contribute to the long-term development of the companies in which the holding company holds a business share is intended to ensure that the exception does not affect cases of acquisitions of companies for the purpose of further divestment as a passive, purely speculative element [Králík 2015: 11]. In essence, this reflects the value added criterion in the real economy (*vide supra* Section 4), which in this case is reflected in the requirement to actively contribute to the development of the controlled companies, rather than passively expecting the growth of their market price [Pihera 2017: 243].

The participation of the holding company should be to such an extent that it is capable of affecting the controlled companies and carrying out the defined (business) strategy with a view to their long-term development. However, what the minimum level of participation of a holding company should be is not determined explicitly. With regards to general corporate principles, a general rule based on a direct or indirect simple majority of the company's equity or voting rights, or the sum of these, achieved by any means, may be considered.[19] A lower level of participation may not make it possible to effectively enforce the defined (business) strategy. However, this is always case specific as there may be other commitment measures designed to manage companies effectively.

A SPAC usually acquire a majority share, resp. even more than three-quarters, with a view to long-term development. In addition, in cases where the SPAC is established directly by the target operating company with the aim of facilitating access to the stock exchange for financing purposes, it is assumed that the SPAC is its sole shareholder.

[19] Depending on national regulations and the expressions of autonomy of the parties within the founding documents and further agreements, the rule will differ. However, for the purposes of this contribution it can be considered as the general rule.

The growing popularity of SPACs is also linked to their emerging use to obtain lower shareholdings in several companies (e.g. due to the acquisition of individual components of the distribution network). In such cases, it is necessary to consider whether the participation is sufficient for the holding company to be able to promote the interests of the holding company over the long term through a unified strategy.

For cases where this it is not applicable, the AIFMD further excludes holding companies that contribute to the long-term development of subsidiaries which carry out those activities on their own account[20] and whose shares are admitted for trading on a regulated market in the European Union (Article 2 para. 3 letter a) in connection with Article 4 para. 1 letter o) of the AIFMD).

A SPAC will fulfil this premise by entering the stock exchange and participating in the target operating company.

However, according to recital 8 of the AIFMD, neither private equity funds nor their managers or alternative investment funds, which SPACs tend to be, whose shares are admitted for trading on a regulated market should be excluded from the scope of the AIFMD.

Regarding this, the European Commission states that "Article 4(1)(o) has to be read as a whole and jointly with recital 8. Consequently, private equity as such should not be deemed to be a 'holding company' in the sense of Article 4(1)(o). (…) It is inherent in the concept of a holding company that all other operations apart from those related to the ownership of shares and assets are done via its subsidiaries, associated companies or participations. The exclusion of a holding company in Article 2(3)(a) was meant to exclude from the AIFMD large corporates (…)" [European Commission: 5].

Dirk Zetzsche, Christina D. Preiner state that the exception is applicable only if this structure or companies do not meet the definition of alternative investment funds (see the following section for a positive comparison of SPACs and alternative investment funds) [Zetzsche, Preiner 2017: 30].

Finally, it should be mentioned that the position of a holding company, as in the case for an operating company (operationally active company), forms gradually[21]. Until the time of the business combination, a SPAC is, in principle, not a holding company[22]. This weakens the

[20] This means that the holding company is a separate legal entity that carries out the business of owning and holding equity shares of other companies without the intent to dispose of such shares.
[21] Cf. Dirk Zetzsche, Christina D. Preiner state that there are four criteria for holding companies, in addition to the aforementioned pursuit of one or more business (not investment as a passive speculative asset) policies or commercial activities [Zetzsche, Preiner 2017: 49].
[22] Otherwise it would lack the benefits associated with the less complex administration of the initial public offering process.

potential application of this exception. The conclusion that the SPAC could apply this exception in terms of the actual fulfilment thereof in the future, and would fictitiously be considered a holding company, only to lose this fictitious status if the planned business combination did not take place, is not sustainable. The application of the aforementioned exception may not therefore be inferred with sufficient certainty here either.

8. Defined investment policy

Finally, the positive definition of an alternative investment fund states that it is a collective investment undertaking that pools together capital raised from its investors for the purpose of an investment strategy or policy with a view to generating a pooled return for those investors.

For the purposes of further analysis, most of the assumptions concerning alternative investment funds can be considered satisfied in the case of SPACs. They are not considered questionable, with exception to the assumptions for the defined investment strategy[23].

The defined investment strategy is a natural feature of the investment structure. By contrast, investment structures cannot be considered to be those that receive capital from a large number of investors, but do not do so with the aim of investing or placing it in accordance with a certain investment strategy [ESMA 2013: 2].

The investment strategy is the plan for allocating the raised capital to various investment instruments (e.g. growth equity and venture capital) over a period of time in order to generate the pooled return for the investors[24].

The investment strategy must be pre-determined, definite and oblige the managers of collective investment undertakings to manage the entrusted capital in accordance with it [ESMA 2013: 2][25].

The first assumption is therefore the existence of a binding agreement that defines it [ESMA 2013: 7]. Typically, this is corporate documentation, a prospectus (incl. issue conditions), but

[23] Therefore SPACs (1) raise capital (2) from a number of investors (mostly the general public), (3) with a view to investing it in accordance with a defined investment policy (see below) (4) for the benefit of those investors (not pro else). However, the context of national regulation (e.g. on the issue of the plurality of investors, etc.) must always be taken into account. For more about these aspects within the context of alternative investment funds [Zetzsche, Preiner 2017: 25-61].

[24] The purpose of a SPAC is to also provide a pooled return for the investors in the event of a successful business combination.

[25] Dirk Zetzsche, Christina D. Preiner state that an investment policy must also be fixed while later amendments are not opposed. However, this condition is also fulfilled within the context of a SPAC through the policy set out in the prospectus [Zetzsche, Preiner 2017: 38].

also an investment contract or shareholder agreement, which investors accept or to which they accede.

Secondly, from the point of view of the certainty of the investment strategy, it is not necessary to limit oneself to strategies which are obviously professional. The second assumption of certainty is also fulfilled. After all, the subject undertakes to dispose of the assets at least within the framework defined [ESMA 2013: 2, CNB 2021]. In particular, it contains the definition of the assets in which the capital will be placed, geographical focus, investment horizon and more [BaFin 2015].

A SPAC's prospectus or other documents usually contain a provision stating that the management body will seek to acquire one or more operating businesses or companies in a particular geographic market, specific industry or business. This coincides with the generally defined way of dealing with capital in common investment structures in practice.

Thirdly, the defined investment policy (including any changes) must be binding for the managers of the collective investment undertaking [ESMA 2013: 7]. In general, going beyond the remit is not allowed [Moloney 2016: 194]. However, the binding presumption is even doubted by the ESMA itself. The ESMA states that leaving the unrestricted discretion to the managers of the capital raised does not exclude the possibility of classifying the certain structure as an investment (therefore also an alternative investment fund) [ESMA 2013: 7]. Restrictions in the form of the selection of assets, market or geographical sectors in which the capital is to be placed then lose their significance. Nor does the addition that the management body is not obligated to pursue a target in the identified geographic market, specific industry or business, preclude the presence of an investment strategy within the context of that interpretation. After all, this corresponds to the general definition of investment strategies in current practice, where the manager can invest in almost anything that will bring the desired pooled return for the investors.

In the case of SPACs, the presence of a defined investment policy undermines the shareholders' binding consent (not only advisory one) to the initial business combination, if it is presumed that this has been done in accordance with the investment documentation or corporate rules for the protection of shareholders. In other words, if investors have an influence on the final investment decision, i.e. they vote on the initial business combination, it can be assumed that the investment strategy was in fact never determined[26]. In this case, the investment decision is not made by the directors (managers) but is made by the

[26] To qualify as an alternative investment fund therefore depends on whether the investment decision is taken by the investor or by a manager acting according to a defined investment policy. [*Zetzsche, Preiner* 2017: 32].

shareholders [Králík 2015: 58]. This element of discretion can be considered a (necessary) precondition for a pre-determined, definite and binding investment strategy [Zetzsche, Preiner 2017: 29]. Otherwise, it is not a collective investment undertaking. However, this consideration is applicable only when shareholders have an opportunity to influence an initial business combination. SPACs often moderate or completely rule out such a right.

It is also questionable whether the shareholders' binding consent is defining a general business policy and therefore excludes an investment policy. The general business policy represents a general plan for leading a company to greater profitability or other benefit, which operationally active companies typically have. But in principle, a SPAC is not an operationally active company (*vide supra*). Moreover, from the position of investors participating in the SPAC with a view to future investment appreciation and that of the founders who seek to bring the greatest possible appreciation to investors, the conclusion again tends to be that a policy is set as an investment policy.

9. Conclusion

Based on this analysis of the potential application of AIFMD rules to structures referred to as SPACs, the following conclusions can be drawn.

Firstly, the AIFMD excludes ordinary business activities outside the financial sector. It follows from the very meaning that one of the preconditions for its application is that the assumption of an operationally active company (operating company) is met on a permanent basis. A SPAC is formed gradually, and value added for the economy can only be considered after the business combination is completed by means of a merger with one or more operating businesses or companies or through asset acquisition. Considerations about the fictitious application thereof in the future must be rejected.

Secondly, there is no question of an alternative investment fund if the investors (shareholders) as a collective group have day-to-day control or discretion. The current understanding of day-to-day control or discretion does not correspond to the position of SPAC's shareholders, regardless of the possibility of voting at shareholder meetings on a business combination as a matter of a long-term nature, which is often exclusively within the competence of the highest bodies.

Thirdly, the scope of the AIFMD excludes so-called holding companies. which, through their participation in one or more other companies, contribute to the long-term development of those companies. Until the time the business combination is completed, a SPAC is, in principle, not a holding company. This weakens the potential application of this exception.

Fourthly, the definition of a collective investment undertaking requires a defined investment policy to be in place. This must be pre-determined, certain and binding. Its presence precludes the shareholders' consent to the initial business combination, if it is assumed, as there is no factual discretion on the part of the alternative investment fund manager. Shareholders' consent to the initial business combination is often not assumed and the decision concerning the business combination remains with the SPAC's directors. In such cases, the position of the investors, the purpose of the SPAC and the actions of directors tend to set the policy as investment policy.

The characteristic comparison of SPACs and investment structures within the context of the AIFMD therefore seems to overlap in many respects. When structuring SPACs, it is therefore necessary to take these facts into account together with the specifics of domestic regulation. Any misconduct is otherwise severely sanctioned.

Although supervisory authorities are gradually giving their opinions on regulatory requirements for SPACs, early legislative developments are unlikely[27]. Time and practice will show how supervisory authorities will approach SPACs. Within the context of the AIFMD, and in view of the unclear classification of this structure, it is appropriate to reopen the unanswered question [ESMA 2012: 33] and to consider the possible adaptation of the scope of the AIFMD for structures referred to as SPACs [European Commission 2020]. Indeed, it seems likely that SPACs will continue to qualify as a kind of hybrid listed company.

[27] BaFin states that SPACs are subject to the same legal and regulatory requirements as other listed companies as regards post-acceptance and disclosure obligations, inclusive. German requirements under the Securities Trading Act and the EU Market Abuse Regulation [cf. Bayaz, Hajduk, Paus, other members 2021, SPACs: prospectus disclosure and investor protection considerations 2021 and others].

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