Structuring PIPE Transactions in Key European Jurisdictions

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I. Introduction

Private Investments in Public Equities (PIPEs) represent a relatively inexpensive and efficient means for a publicly-traded company to obtain additional capital funding. PIPE transactions usually involve investments of less than $100 million and are usually made by sophisticated investors in private transactions. PIPE financings in the United States totaled $24.7 billion in 2000, $15.2 billion in 2001, and $12.3 billion in 2002.[1] However, PIPE transactions have not enjoyed the same level of popularity in Europe as in the United States, in large part because the legal and regulatory framework in many European jurisdictions hinder the ease with which such transactions can be completed. Nonetheless, the European landscape is changing and, as current market conditions preclude many companies from accessing traditional public and private sources of financing, PIPEs offer an alternative for European companies seeking to raise capital.

The purpose of this article is to highlight the different strategies required to complete a PIPE transaction in key European jurisdictions given the differences in the local regulatory regimes.

II. Overview of PIPE Transactions

PIPE transactions first gained favor among sophisticated investors in the United States in the early 1990s. In a PIPE transaction, a public company will sell newly issued securities

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1. Placement Tracker Statistics, *available at* http://www.PlacementTracker.com (last visited Aug. 29, 2002). No statistical information is available on European PIPE transactions. However, available market data indicates that public companies in many countries, including Austria, France, Germany, Ireland, Norway, Poland, Sweden, Switzerland, the Netherlands, and England have completed PIPEs.

of the same class as its listed securities to an investor or group of investors pursuant to a private placement.[2] As part of the arrangement, a company will generally undertake to ensure that the privately-placed securities will become freely tradable within a relatively short time—perhaps ninety days or less after the closing of the transaction—a feature that makes PIPEs particularly appealing to private investors because it provides a potentially quicker and easier exit from the investment than other forms of private equity financing. As competition for transactions increased PIPEs became an attractive means for investors to acquire convertible preferred securities of a company, which pay a small dividend and convert into common equity at an agreed price.[3] Compared to follow-on offerings, PIPEs provide an efficient means for public companies to raise capital in amounts of less than $100 million.[4] The discount offered on the price of new shares (5 percent to 15 percent off of the market price of the shares) is generally less than the discount to the underwriter (typically 20 percent to 30 percent) in a typical follow-on offering.

There are two general categories of PIPEs: traditional and structured. Traditional PIPEs usually involve the sale of either common shares or convertible securities (which convert into shares of common equity at a fixed rate). Traditional PIPE issuances typically represent 10 percent to 15 percent of the issuer's outstanding share capital.[5] These securities are sold at a specified discount to the current market price of the issuer's listed shares, usually 5 percent to 15 percent. In addition, the investor usually receives warrants to purchase additional shares typically at a discounted price.

Structured PIPEs usually involve the sale of convertible debentures or convertible preferred shares (where the conversion price is based on the future market price of the common equity), convertible and common equity with a reset feature (where the share price or conversion price is reduced at a later date if the share price goes below a certain threshold), fluctuating convertibles (where the conversion ratio fluctuates based on the market price of the underlying shares), or structured equity lines (where the purchase price is linked to the future market price of the common equity). The securities issued in a structured PIPE frequently represent a larger percentage of the issuer's outstanding share capital than in a traditional PIPE. However, as with traditional PIPEs, the securities are offered at a discount

2. Typical candidates for PIPEs are small-cap or mid-cap public companies (with market capitalizations between $100 million and $1 billion) that cannot easily assume additional debt or obtain additional equity capital from the public markets. In recent years, micro-cap issuers have been frequent recipients of PIPE financings.

3. David Snow, *The PIPEs, the PIPEs are Falling*, Private Equity Int'l, Feb. 2002, at 14–15 [hereinafter *The PIPEs*].

4. The general rule for both public offerings of equity and debt securities is that they must be in an aggregate amount of at least $75 million to $100 million in order for an effective and cost-efficient underwritten public distribution to take place and for a secondary trading market in the securities to develop. Max Smith, *Not a PIPE Dream Anymore*, Specialty Fin., May 2002.

5. While PIPEs typically represent 10 percent to 15 percent of the share capital of an issuer, one of the advantages of PIPEs is the flexibility of PIPE investors to fund smaller or larger capital needs. For example, in October 1999, Buhrmann N.V. issued $350 million of convertible preferred shares, which was approximately 27 percent of Buhrmann's issued share capital prior to the transaction, and left the investors with a 22 percent stake in the company. *See* Press Release, Dow Jones News Serv., EU Commission OK's Buhrmann's Buy of Corporate Express (Sept. 13, 1999) (on file with author). ASSA Abloy AB, a Swedish lock manufacturer, issued 10 million of its common shares to Swedish and foreign institutional investors, raising SK 1.26 billion, approximately 2 percent of its then-issued share capital. *See* Press Release, Bloomberg News, ASSA Abloy Raises SK1.26 BLN in Share Sale for Besam Purchase (May 30, 2002) (on file with author).

to the current market price of the issuer's publicly-traded securities and frequently the investor receives warrants to purchase additional shares.

III. PIPES in Selected European Jurisdictions

The regulatory and legal regimes in the United States are more conducive to structuring and consummating PIPE transactions than those in most European jurisdictions. This is principally due to the prevalence of statutory pre-emptive rights and appeal, or challenge, rights granted to many European shareholders.

Historically, neither European institutional investors nor public companies have recognized PIPEs as a viable investment or financing option for three reasons: (1) PIPEs in key European jurisdictions are generally considered difficult to structure due to regulatory and/or legal barriers, (2) the European PIPE market is relatively underdeveloped in terms of its level of experience and sophistication in overcoming the regulatory and/or legal barriers, and (3) issuers and investors have been reluctant to consider PIPEs as a legitimate financing or investment option due to the perceived negative results some companies have experienced.[6]

PIPEs began to appear in Europe with increasing frequency during the latter half of the 1990s.[7] While the majority of early PIPEs consisted of ordinary share purchases or equity line financings, they also included several convertible debt and convertible preferred PIPEs. More recently, a small but significant number of publicly-listed Western European companies have issued securities through PIPE transactions. Notwithstanding the evolution of the European PIPE market, the European press has helped to limit their popularity by portraying PIPEs as a financing alternative suitable only for small-cap issuers or for companies that have no other financing sources.[8]

The factors that determine the speed with which an issuer can complete a PIPE are similar in each European jurisdiction, namely, whether (1) an issuer has sufficient authorized but unissued share capital, (2) the board of directors (or its equivalent) has been granted the authority to issue shares without pre-emptive rights, and (3) the contemplated PIPE structure is within the authority granted to the board of directors. In general, if each of the foregoing conditions have been met, the parties will be able to structure a transaction that capitalizes on two of the main benefits of PIPEs—speed and confidentiality.

A. England

PIPEs are not common in England in large part due to (1) legal issues regarding shareholder approval of new issues, (2) disapplication of pre-emptive rights, and (3) the effect of

6. Arguably, many PIPE financings have been made to issuers who were not suitable for the financing or who went public too early in their development. Consequently, an issuer's poor performance after completing a PIPE should not be attributed to the type of financing, but instead to the quality of the issuer. *See* Interview with Harlan Kleiman, Chief Executive Officer of Shoreline Pacific, WALL ST. REP., July 31, 2001.

7. Daniel Green, *Seeking a Backer—Raising Capital is Never Easy,* FIN. TIMES (London) May 9, 1994, § 4 (Survey of Biotechnology), at 11.

8. *See*, *e.g.*, Timothy Sifert, *Euro Cos. Warm to Equity Lines of Credit*, TELETECH FIN. WEEK, Sept. 23, 2001; *The PIPEs*, *supra* note 3. *But see* Dr. Marcus Labbé, *PIPE Transactions (Private Investments in Public Entities) Will Gain Momentum in Europe*, *at* http://www.bfinance.co.uk (last visited Feb. 19, 2003) (on file with author).

mandatory takeover rules.[9] Furthermore, PIPEs are typically structured in ways that intentionally contravene the Guidelines on Pre-emption (Guidelines) issued by the Investor Protection Committee (IPC), a trade body of insurance companies and pension funds that monitors their positions as shareholders and sets guidelines for member companies.[10] Although the Guidelines are not law, they should be considered when structuring a PIPE for an English company.

Most English PIPEs have involved micro-cap and small-cap technology companies seeking to finance acquisitions, retire existing indebtedness, or to use the proceeds for general corporate purposes—a common "catch-all." Equity line financing has emerged as the most popular structure for PIPEs in England.[11] Several English companies, such as Rage Software plc, IQE plc, and SCI Entertainment Group plc completed equity line financings in 2001, and Tadpole Technology plc and On-line plc were among the companies completing equity lines in 2002. Although equity lines are increasingly popular in England, a handful of English issuers have completed convertible debt PIPEs. Companies such as Emerald Energy plc and Danka Business Systems plc were among the English companies that have issued convertible securities through PIPE transactions.

English companies that have taken on equity line financings have benefited from the experience of U.S. issuers and have negotiated added protection for the company against some of the more "toxic" aspects of PIPEs.[12] In June 2001, Rage Software plc (Rage), a

9. While listed companies in England are allowed under section 95 of the Companies Act 1985, as amended by the Companies Act 1989 (Companies Act), to disapply the pre-emptive rights granted under section 89 of the Companies Act, London Stock Exchange rules and Investor Protection Committee (IPC) Guidelines on Pre-emption require that companies seek a "disapplication entitlement" from their shareholders, which must be reviewed annually. *See* Companies Act 1985, §§ 89 & 95 (Eng.) (as amended by Companies Act 1989); Investor Protection Committee, Guidelines on Pre-emption (issued Oct. 21, 1987) [hereinafter Guidelines]; London Stock Exchange Listing Rules, para. 9.20 [hereinafter Listing Rules]. Moreover, issuances under the entitlement are restricted to 5 percent each year and 7.5 percent over any three-year period of issued ordinary share capital. Guidelines, *supra*, §§ 2.1 & 6.1. Any issuances exceeding those percentages must either be preceded by a rights offering or approved by the shareholders. Guidelines, *supra*, §§ 2.1& 6.1

10. Although the Guidelines are not law, the IPC, as a representative of institutional shareholders, exercises a significant amount of influence over its members. Few institutional shareholders vote in contravention to the recommendations made in the Guidelines. According to the Guidelines, shares offered under the disapplication entitlement should be offered at a discount no greater than 5 percent of the middle of the best bid and offer price immediately prior to the announcement of the offer. The definition of discount is the sum of "(a) the amount by which the offering price differs from the market price, and (b) underwriters' gross spread and/or sponsors' fees." Shareholders must approve any share issuance at a discount greater than 5 percent. Guidelines, *supra* note 9, § 3.1.

11. *See* Sifert, *supra* note 8. Mr. Sifert asserts that equity lines are becoming more popular among European telecommunications and technology companies, even though equity lines are a more expensive form of financing than traditional credit facilities. Currently, very few financing options are available to telecommunications and technology issuers. If a company has a choice between a PIPE or a credit facility, it should opt for the credit facility. However, for companies that are not household names nor in out-of-favor industries, the choice may be between a PIPE financing or no financing at all.

12. So-called "death spirals" or "toxic PIPEs" are structured PIPEs in which a hedge fund, for example, purchases convertible securities of an issuer at a predetermined discount to the market price. In some situations, issuers have agreed to allow investors to sell their shares as soon as the registration statement becomes effective while simultaneously permitting them to use the shares to cover short sales, leading a company into the so-called "death spiral." The hedge fund short sells the shares driving the price of the security down and thereby increasing the number of shares it will receive upon conversion. If the market price falls below the conversion price set at the time of issuance, the conversion price is reset downward. Without a "floor" or trading restrictions imposed on the investor, the process is then repeated and the existing shareholders suffer substantial

computer games developer and publisher listed on the London Stock Exchange, entered into a £15 million equity line financing with Gem. The equity line allowed Rage to put its shares to Gem over two years at a price per share equal to 90 percent of the average of the closing bid prices of the ordinary shares during the fifteen days immediately following the day Rage delivered a draw-down notice. With each draw-down, Gem received warrants to subscribe to one-fourth the number of shares that it was required to purchase under the equity line at the same price that it paid for the related equity line shares. The total amount of shares that could be drawn under this facility was approximately 70 percent of Rage's issued share capital at the date of the transaction; and although Rage was not required to issue shares for less than £0.027 per ordinary share it was, however, required to meet minimum subscription levels of £2.2 million in the first seven months after completion and £2.5 million per twelve-month period, or pay Gem the difference between the aggregate subscription price of all ordinary shares subscribed in any twelve-month period and $2.5 million. If the equity line facility was fully utilized, Gem would have controlled roughly 40 percent of the voting power of Rage. However, Rage controlled the timing and amount of the draw-downs and had the option to fulfill the minimum subscription requirements by paying cash rather than issuing shares to Gem. Significantly, the agreement could be terminated at any time by mutual consent and Rage was free to raise equity funds from other sources when market conditions improved or other opportunities arose.

In September 2001, SCI Entertainment Group plc (SCI), a software design company listed on the London Stock Exchange, entered into a £5 million equity line facility with Gem similar to the Rage equity line financing completed earlier that year. SCI controlled the timing and the maximum amount of any draw-downs and reserved the right to take advantage of other fund-raising opportunities as they arose, other than a similar equity line facility. By securing the right to control the timing of the draw-downs, capping the total number of shares that could be drawn under the facility, and negotiating a floor on the issue price, Rage, SCI, and other European equity line issuers were able to protect themselves from the toxic PIPE phenomenon. The Rage and SCI equity line structures have become standard for European equity lines.[13]

Though not as common as equity lines, in recent years a number of English issuers have executed deals involving convertible securities.[14] Generally, English companies issue convertible debentures with a three-year maturity and a small coupon (typically 2.5 percent to 3 percent per annum). To date, the conversion terms have been standard, with the

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dilution. Floorless PIPEs are viewed as a negative signal by investors that the company has run out of financing options. *See*, *e.g.*, Luisa Kroll, *PIPE Dreamer*, Forbes, Sept. 10, 2001, at 12. However, structured PIPEs represent a small portion of total PIPE transactions. *See* Bob Sechler, *Something Ventured. PIPE Dreams: Capitalists Flood the Public Market*, Wall St. J. Online, Apr. 3, 2002, *available at* http://www.wsj.com (last visited Aug. 29, 2002).

13. *See*, *e.g.*, Press Release, ADVFN.COM PLC, Draw Down Facility for £5 Million Equity Line of Credit (Jan. 24, 2002) (on file with author); Press Release, ADVFN.COM PLC, Issue of Equity and Warrants (Feb. 20, 2002) (on file with author); Press Release, Glow Communications plc, Glow Communications plc Announces Agreement to a £5 Million Equity Line of Credit (Jan. 11, 2002) (on file with author); *see* Press Release, NetGem, Société Générale Puts in Place a Capital increase Facility of 30 million Euros in Favor of NetGem (May 14, 2002) (on file with author); Press Release, Financial Times Information, ASM International Announces Extension of US$65.0 Million Equity Line Agreement (July 5, 2002) (on file with author).

14. *See*, *e.g.*, Emerald Energy, *infra* note 15; Press Release, Scoot.com plc, Scoot.com plc Acquisition of Database Rights and up to £9.6 Million Private Placement of Unsecured Convertible Debentures (Mar. 1, 1999); Press Release, Scoot.com plc, £15.5 million Private Placement of Unsecured Convertible Debentures and £2.9 million Final Draw Down Under Existing Convertible Debenture Arrangements (July 22, 1999).

debebtures converting into ordinary shares at either a fixed or floating rate, subject to a cap on the number of shares that can be issued. Often the conversion rate is set at the lesser of the share price at completion plus a premium, and a price based on recent market performance prior to receipt of the conversion notice. Typically, the convertible debentures have redemption clauses, which allow the company in certain circumstances to redeem the notes with cash at a premium (usually 125 percent), or with shares based on their market price. The redemption provision allows a company that has performed well to call the debentures at the appropriate time and to maintain a certain degree of control over the number of shares issued under the PIPE agreement.

An example of a typical convertible debt PIPE in England is the £6 million convertible debt PIPE issued by Emerald Energy plc (Emerald) in February 1999. Emerald, an English energy exploration and production company, issued convertible debentures with a 2.5 percent coupon and a floating conversion rate to Gem in two tranches. At completion, the ordinary shares underlying the convertible debentures represented approximately 13 percent of Emerald's issued share capital. The debentures were convertible at a price equal to the lesser of 140 percent of the market price at completion (3.5p) and the average of the three lowest closing bid prices for the thirty days preceding the date of Gem's notice of conversion. Gem received warrants for up to 10 percent of the total amount of the investment in two tranches, the exercise price of which was tied to the conversion price of the relevant tranche of convertible debentures. Such provisions ensure a maximum conversion price for the investor (4.9p in this case), while at the same time tying the conversion price to the company's share performance. In the event that Emerald's share price fell below a certain threshold, Emerald had the option to redeem with cash that portion of the notes that exceeded the agreed upon dilution floor.[15] Floor provisions, which have become a standard term of convertible debt PIPEs, are designed to protect the company and its shareholders from dilution of their share capital and against the risk of the death spiral.

More complex convertible preferred PIPEs have been done in England. These PIPEs can be structured using ordinary shares or convertible preferred or debt securities with highly negotiated terms. The type of investors attracted to this form of PIPE are medium-term to long-term investors seeking more typical private equity terms including board representation, dividends payable in cash or in kind, warrants, and liquidation preference. As shareholder approval is required in England for capital increases, allotments of shares, or amendment to the articles, complex PIPEs have proven less desirable.

1. *Approval of New Issues and Disapplication of Statutory Pre-emptive Rights*

Each shareholder of an English company has a statutory pre-emptive right over any newly issued equity shares or debt securities convertible into any equity security issued for cash consideration.[16] Therefore, unless shareholders waive their pre-emptive rights under sec-

15. In the case of Emerald Energy, any conversion that would result in the conversion of the notes at 65 percent of the market price at completion triggered the anti-dilution provisions. Press Release, Emerald Energy plc, Prospectus Relating to Proposed Placing and Open Offer by Teather & Greenwood Limited of up to 316, 720,618 New Ordinary Shares of 1p each at 3½p per share and Subscription of up to £6 million Convertible Loan Notes with Warrants (Feb. 3, 1999) (on file with author) [hereinafter Emerald Energy].

16. Companies Act 1985, § 89 (Eng.) (as amended by Companies Act 1989). In the case of a convertible preferred security in England, pre-emptive rights attach not to the preferred security, but to the underlying ordinary share into which it is convertible. Pre-emptive rights do not attach as a matter of the operation of the Companies Act to new issues for which no cash consideration will be paid, such as a bonus share or dividend share allotment.

tion 95 of the Companies Act, securities cannot be issued in a PIPE transaction without first being offered to existing shareholders.[17]

Listed company shareholders in England frequently pass a resolution giving the directors the authority to allot shares equal to between 5 percent and 10 percent of the company's share capital in accordance with section 80 of the Companies Act at the annual general meeting. Usually the authority to allot shares is coupled with the authority to disapply pre-emptive rights in respect of between 5 percent and 10 percent of the company's share capital in accordance with section 95 of the Companies Act. If the board of directors does not have the requisite pre-existing authorization, the PIPE is structured to require more shares than the pre-approved limit, or the transaction is not otherwise within the authority granted to the board, the board must obtain shareholder approval of a capital increase and a disapplication of pre-emptive rights.

In order to disapply pre-emptive rights, the board of directors must recommend the resolution to its shareholders and deliver to its shareholders a written statement by the board of directors stating the reasons for making the recommendation, the amount of consideration to be paid to the company, and the directors' "justification" of that amount.[18] Non-pre-emptive issues of more than 10 percent become problematic under the Guidelines, which address, among other things, the shareholder approval process, limits on exercise of the disapplication entitlement, discounts at which shares can be offered, monitoring requirements, and the form of ordinary and special shareholder resolutions.[19] In theory, the more that a PIPE offering differs from the provisions set forth in the Guidelines, the more difficult it will be to obtain shareholder approval for such issuances.

2. *Mandatory Takeover Offer Rules*

In England, care must be taken to structure PIPEs so as not to trigger the key provisions of the City Code on Takeovers and Mergers (City Code).[20] If the offered securities, in the aggregate, have greater than 29.9 percent of the voting rights of the company or an investor acquires more than 29.9 percent of the voting rights of a company, rule 9 of the City Code requires the investor to make a general cash offer to all holders of any class of equity security in the company at the highest price paid by the investor or any person acting in concert with the investor over the last twelve months.[21] Given the high ownership thresholds involved, the risk of triggering rule 9 is not likely in most PIPE transactions. Moreover, the use of "floors" to control the price at which shares are issued, the ability of the company to seek alternative sources of financing as they become available, and the ability of the company to pay the investor in cash, rather than in shares, are features of most English PIPEs that prevent the inadvertent application of these requirements.

3. *Private Placement and Listing in England*

An issuer must place the securities with the investors in a non-public offering in accordance with the Public Offers of Securities Regulations 1995 (Regulations). An "offer to the

17. If a pre-emptive offer is made it must remain open for twenty-one days. Companies Act, §§ 89–90.

18. Companies Act, § 95(5).

19. Guidelines, *supra* note 9, § 6.1.

20. City Code on Takeovers and Mergers, Rule 9 [hereinafter City Code].

21. *Id*. Persons are acting in concert when under an agreement or understanding (whether formal or informal) they actively cooperate, through the acquisition by any of them of shares in a company, to obtain or consolidate control of that company.

public" is defined as an offer to persons in England, or any section of the public (e.g., existing security holders of a corporate entity).[22] A private placement can be accomplished by using an exemption to the public offering rules. The exemptions most likely to be used in PIPE transactions would be offers: (1) to institutional investors, (2) to less than fifty persons, (3) to a limited number of "sophisticated" investors, or (4) with a high minimum subscription or minimum denomination.[23]

In England, unlike in the United States, if the privately placed securities are ordinary shares, the ordinary shares (or if the securities are convertible into ordinary shares, the underlying shares) must be approved and admitted to the Official List of the London Stock Exchange prior to or at the same time the shares are issued. Upon admission to the Official List of the London Stock Exchange, these shares will be freely tradable. Short-term investors will seek to negotiate as few contractual restrictions on trading the company's shares as possible. At completion, investors will be free to trade the shares or to hold them for investment.[24] If, however, the privately placed securities are of a class for which the issuer has not obtained registration or listing, the parties will seek to negotiate appropriate exit strategies. The goals of the investors will determine the focus and terms of the exit opportunities they seek. For example, investors with short-term investment horizons, such as hedge funds, will typically seek to negotiate as short a lock-up period as possible and will view selling the shares on the open market as the only exit route. However, investors with a medium-term to long-term strategy, such as private equity funds, will tend to look at more traditional private placement exit strategies. These strategies can include seeking American-style registration rights if the issuer has substantial interests in the United States or wishes to increase its liquidity by listing its shares in the United States, but are more likely to include a requirement to list the new class of shares on the London Stock Exchange within a specified amount of time.

B. Germany

Based upon available public information, relatively few PIPE transactions have been completed by German issuers. Examples include: a €1.0 billion convertible bond issuance completed by Allianz AG, a large-cap multinational insurance and asset management company, in November 2001; a €34.5 million private placement of ordinary shares completed by Süss MicroTec, a small-cap microelectronics manufacturer, in January 2002; a €10.62 million private placement of ordinary shares by IXOS Software AG, a German software company, in August 2002; a €4.0 million private placement of ordinary shares in Advanced Medien, a German film rights buyer; and a handful of equity line financings.[25] The principal

22. Public Offers of Securities Regulations 1995, § 6 (Eng.) [hereinafter Regulations].

23. An investor must notify the company when it acquires 3 percent or more of the share capital of a public company and any changes in ownership interests of 1 percent thereafter. Companies Act 1985, § 98 (Eng.) (as amended by Companies Act 1989). A listed company so notified must in turn notify the Company Announcements Office. Listing Rules, *supra* note 9, at 9.11–9.14.

24. Such an investor will typically require a representation to the effect that the company has not disclosed any price sensitive information to it, the purpose of which is to maintain its position as a non-insider and its freedom to trade the shares as it desires.

25. German equity line financings have been made to small-cap internet, technology and entertainment companies. The facilities tend to be relatively small, ranging between 5–10 million. *See*, *e.g.*, *Metabox: Investors Pay in DM 12M*, Borsen-Zeitung, Mar. 6, 2001 (on file with author); Bret Okeson, *Micrologica says Investment will be less than Expected, Delayed*, Bloomberg News (Frankfurt), Feb. 22, 2001 (on file with author); Press

regulatory barriers limiting the popularity of PIPEs in Germany include: (1) shareholder approval of new issues and the exclusion of statutorily based pre-emptive rights, (2) dissenting shareholders' rights, and (3) board members' personal liability.

German public companies have a two-tiered management structure that consists of a supervisory board and a management board.[26] The supervisory board is made up of representatives of significant shareholders, other outside directors who may have relevant industry knowledge, and, in some cases, employee representatives. The supervisory board monitors the management board, has certain information rights, and can hold veto rights over extraordinary events, but may not give directions to the management board with respect to the day-to-day management of the company.[27] The management board of a public company is an independent body that oversees the day-to-day operations of the company.[28] The management board is appointed by the supervisory board, but supervisory board members representing a single class of securities in principle do not have the right to appoint members of the management board as long as the articles of association do not provide otherwise.[29] Both boards must approve any PIPE transaction.

1. *Approval of New Issue and Exclusion of Statutory Pre-emptive Rights*

Under German law, each shareholder has statutory pre-emptive rights over any newly issued shares, regardless of whether they hold ordinary or preferred securities.[30] According to the German Stock Corporation Act (GSCA), all shareholders must be treated equally. In the case of a capital increase, each shareholder has the right to subscribe for its pro-rata portion of any newly issued shares as long as such pre-emptive right is not explicitly excluded. Shareholder approval for the capital increase and for exclusion of the pre-emptive rights must be obtained at a shareholders' meeting.[31]

An issuer can obtain a capital increase in two ways: by an "ordinary" share capital increase, whereby shareholders approve the negotiated terms and conditions of a new issue to a specific investor; or by an "authorized" share capital increase, whereby shareholders grant the management board authority to negotiate the terms of a new investment and to issue the newly authorized shares to an unspecified investor without further shareholder action.[32] Both procedures have certain common features: (1) each can be used to authorize an increase in an existing class of securities or to create a new class of securities; (2) notice of a special shareholders' meeting must be published in the federal journal and other newspapers

Release, Micrologica, New Private Investor Boasts Liquidity (Feb. 22, 2001) (on file with author); Vika Bekker, *Popnet Says U.K. Investors Bought EU 10 MLN in Shares*, Bloomberg News (Frankfurt), Mar. 14, 2002 (on file with author); Press Release, Spendid me dien AG, Investment Fund Getting on Board at Splendid Medien (May 2, 2001) (on file with author).

26. Supervisory board members are appointed by the shareholders' meeting and generally serve staggered terms of roughly five years, subject to removal by shareholders. Management board members also serve five-year terms, subject to removal by the supervisory board (not shareholders).

27. German Stock Corporation Act of Sept. 6, 1965, as last amended by Act of June 19, 2002.

28. *Id*. § 76.

29. Pursuant to section 101 of the German Stock Corporation Act, the articles of association of a stock corporation can provide that individual shareholders or shareholders representing a specific class of shares are entitled to appoint up to one-third of the supervisory board members.

30. German Stock Corporation Act § 186.

31. If pre-emptive rights are not to be excluded, a pre-emptive offer to shareholders must remain open for at least two weeks. *Id*. § 186(1).

32. *Id*. §§ 182, 202.

(or mailed to shareholders if the shares are registered shares) at least four weeks in advance; (3) at least 75 percent of the shares duly represented in person or by proxy at a properly composed shareholder meeting must vote in favor of the increase; and (4) no prospectus is required in connection with the proposal to approve the issuance of the new securities.

PIPE transactions, by their nature, are more likely to be facilitated by an authorized share capital increase than by an ordinary share issuance. The GSCA permits an issuer's management board to establish "storage" authorized share capital.[33] Shareholders may authorize the issuance of additional equity in an aggregate amount not to exceed 50 percent of the value of the outstanding share capital on the date the shareholder resolution is passed. Such shareholder authorization is valid for five years. In addition, provided the issuer complies with certain conditions during the five-year period, the issuer may issue new shares for capital investment in relation to which pre-emptive rights may be excluded.

Section 186 of the GSCA explicitly allows for the exclusion of pre-emptive rights when the following two conditions are met: (1) the increase in capital is for cash consideration and does not exceed 10 percent of the outstanding share capital, and (2) the issue price for the new securities (or the securities into which they are convertible) is not substantially lower than the current stock exchange price for the quoted securities. The meaning of "substantially below market value" is unclear; however, the current view suggests that a range of 3 percent to 5 percent is acceptable.[34] Even though capital increases with an exclusion of pre-emptive rights in excess of 10 percent are not prohibited by this provision, issuances of more than 10 percent of the outstanding share capital of a company are more likely to draw a shareholder appeal.[35]

It is common for large-cap and mid-cap companies to establish a shareholder resolution that authorizes new issuances of share capital, without pre-emptive rights, on terms to be negotiated by the management board and subject to the approval of the supervisory board. It is less common for small-cap issuers to establish this type of "storage" authorization. Provided that substantial negotiations with a potential investor have not yet occurred, even a small company's management board can request that the shareholders authorize additional share capital in very broad terms and exclude shareholders' statutory pre-emptive rights. Such a resolution would typically authorize the company's management board to look for potential investors and to negotiate the specific terms of the newly authorized shares with the board. The resolution would also typically empower the supervisory board to amend the company's articles of association upon the issuance of any new shares, including preferred shares, to reflect such new issuance.

2. *Dissenting Shareholders' Rights and Personal Liability of Supervisory and Management Boards*

Once an agreement has been reached with a potential investor or group of investors regarding the terms of and conditions to the issuance of the securities out of the authorized

33. *Id*. § 202.

34. Hüffer, Legal Commentary on the German Stock Corporation Act of Sept. 6, 1965 (as amended), § 186. In Germany, if the discount to market price at which shares are issued is greater than 5 percent, there is a greater chance that a shareholder will challenge the transaction's fairness. Supervisory board members of German listed companies can be held personally liable under German law. German Stock Corporation Act of Sept. 6, 1965, § 116 (as last amended by Act of July 19, 2002). Therefore, it is likely that the issuer's board may request a fairness opinion where the discount is greater than 5 percent.

35. In Germany, the mandatory takeover offer rules are triggered when a shareholder acquires control over the company, meaning at least 30 percent of the voting rights of a company. Securities Acquisition and Takeover Act of December 20, 2001 (as last amended by Act of July 23, 2002), §§ 29(2), 35.

share capital, both the company's management board and supervisory board must approve the agreement by simple majority. Following such approval no further shareholder action is required; however, the issuer is required to notify shareholders of the specific terms of the securities that were issued at the next annual meeting. Prior to the next annual meeting, the management and supervisory boards prepare a report to shareholders explaining the terms of each such transaction.

The management board report must justify the decision to exclude the pre-emptive rights of the existing shareholders.[36] Although board decisions are held to a prudent businessperson's standard, the members can be held personally liable under German law if the terms and conditions of the agreement are not on an arm's length basis; in other words, the management agrees to any terms and conditions that are not economically reasonable and, therefore, places the company at an economic disadvantage versus the new investor. Moreover, in case of a dispute, the burden of proof that the terms of the PIPE were arm's length rests with management.[37]

While each shareholder has a right to challenge any shareholder resolution, the risk of appeal is relatively low for two reasons: (1) a company's management board is explicitly entitled by law to negotiate with third party investors and to issue new shares as long as it is acting pursuant to a valid resolution,[38] and (2) a shareholder, in the event such shareholder loses the appeal, faces the penalty of paying for all of the costs that the company incurs in connection with defending against the claim.

3. *Private Placement and Listing of the Shares in Germany*

Newly issued shares do not come into existence in Germany until the respective capital increase is registered on the Commercial Register. Once registered, new shares (of a class previously admitted to trading) must also be registered with the Board Controlling the Admission of Securities before they can be traded on the stock exchange.[39] Unless a company can avail itself of an exemption, the company must, *inter alia*, submit an offering memorandum before the newly issued shares will be admitted for trading.[40]

Shares issued in a PIPE must be placed with an investor in a transaction exempt from the public offering requirements. Under German securities law, issuers are entitled to an exemption for certain types of offerings if the shares are not initially traded on the stock market but are directly offered to institutional investors. The most commonly used exemptions are for offers (1) to persons who professionally and on a regular basis acquire or dispose of securities on their own or another's account; (2) to other professional investors, i.e., pension and investment funds; (3) for a minimum consideration or minimum denomination of €40,000; or (4) that are part of an issue for which a sales prospectus has already been published.[41]

If the new shares are issued for immediate trading on the stock market, such shares are exempt from prospectus delivery requirements if they are the same class as any securities then listed on a domestic stock exchange, and their number, estimated market value, or

36. German Stock Corporation Act of Sept. 6, 1965, § 186(4) (as last amended by Act of July 19, 2002).
37. *Id.* § 93.
38. This principle was recently confirmed by the German Supreme Court. BGHZ 136, p. 133.
39. German Act on Stock Markets, §§ 36–1 (as last amended July 9, 2001).
40. *Id.* § 30.
41. German Act on Offering Memoranda, § 2 (1998).

nominal value is less than 10 percent of the corresponding value of the same class admitted to trading on a domestic stock exchange.[42] However, to be exempt from the prospectus delivery requirements, investors must have access to the most recent financial information that a sales prospectus would contain.

C. The Netherlands

PIPE transactions for Dutch issuers, especially equity line financings, are becoming increasingly prevalent due to legal and regulatory requirements that are less burdensome than in other European jurisdictions. The primary legal issues to consider while structuring a PIPE in the Netherlands relate to shareholder approval of a capital increase and new issue and the waiver of pre-emptive rights. Unlike England and many continental European jurisdictions, the mandatory takeover legislation recently adopted in the Netherlands does not apply to securities issued in PIPE transactions.

PIPE issuers in the Netherlands are mostly mid-cap to large-cap companies from a range of industries that are in need of financing to fund acquisitions, expand product markets, and to restructure or retire existing debt. Dutch issuers have completed convertible preferred, convertible debt, and ordinary share PIPEs in amounts ranging from approximately €12 million to €350 million.[43]

Some of the most complex PIPEs completed in Europe have been issued by Dutch companies. One of the first preferred share transactions in the Netherlands, structured as a PIPE, was completed by Buhrmann N.V. (Buhrmann), a Dutch office products company listed on the Euronext Amsterdam Stock Exchange. The $350 million convertible preferred deal was completed in October 1999. The convertible preferred shares were issued to Apollo Management, L.P. and Bain Capital in order to finance the acquisition of Corporate Express, a Colorado-based office products manufacturer. The transaction gave Apollo and Bain a 22 percent collective stake in Buhrmann.

1. *Approval of New Issues and Exclusion of Statutory Pre-emptive Rights*

Dutch corporate law generally grants each shareholder statutory pre-emptive rights over certain newly issued shares.[44] Holders of ordinary shares or preferred shares have pre-emptive rights over new issuances of shares of the same class as the shares they hold or over warrants to acquire shares of the class they hold. Shareholders do not, however, have pre-emptive rights over issuances of a new class of shares if the new shares are not convertible into an existing class of securities. Therefore, shareholders will often be required to waive their rights of pre-emption under section 96(a) of the Netherlands Civil Code in order for a company to issue securities in a PIPE transaction without first conducting a rights offering to its shareholders.[45]

42. German Regulation Regarding the Admittance of New Shares for Trading, § 45 (3b) (1998 as last amended June 21, 2002).

43. *See Tie Uses Navigator's Credit Facility*, Global News Wire, May 23, 2001, at 3; *see*, *e.g.*, Konstantin Richter & Erik Siemers, *Buhrmann Buys U.S.'s Corporate Express*, Wall St. J. (Europe), July 14, 1999, at 3.

44. Netherlands Civ. Code § 2:96a. Subsection 1 indicates that exceptions to the pre-emptive right will be made *inter alia* when shares are issued (1) for non-cash contributions, (2) as the result of a merger, or (3) to the employees of the company. *Id.* § 2:96(a)(i).

45. *Id.* § 2:96a. If the pre-emptive rights are not waived, shares must be offered to existing shareholders. Pre-emptive offers of shares to existing shareholders must remain open for at least two weeks. *Id.* § 2:96a(5).

As in Germany, Dutch law grants shareholders the ability to delegate to the management board[46] the authority, once a capital increase has been authorized by the shareholders, to issue new shares and to exclude pre-emptive rights in relation to the issuance of additional shares of an existing class.[47] The management board must first obtain supervisory board approval before it can propose such a delegation of authority to the shareholders.[48] Listed companies frequently authorize a resolution delegating to the management board the authority to issue a specified number of additional shares without pre-emptive rights. This delegation can remain valid for up to five years.[49] If the management board has not been empowered with the requisite authority to issue additional shares, or the proposed transaction does not fall within the authority granted to the board, the board must obtain shareholder approval for the capital increase and/or creation of a new class as well as the exclusion of pre-emptive rights.[50] This authorization is important to obtain as bypassing the shareholder approval process significantly decreases the amount of time required to complete a PIPE.

The powers granted to the management board pursuant to such a delegation of authority are, however, constrained in several ways. First, the issuer's articles of association indicate the authorized share capital. If the authorized share capital of the issuer is not sufficient to issue additional shares of an existing class or does not contemplate a new class, shareholders must approve an amendment of the articles to increase the authorized share capital and/or authorize a new class of shares before any share issuance may occur.[51] Second, shareholders typically will not empower the management board to create a new class of shares without their prior approval. Furthermore, the supervisory board would also have to approve the creation of a new class of equity securities as such an action is not an ordinary course corporate transaction.[52]

2. *Mandatory Takeover Rules*

Since September 2001, takeovers have been governed by the 1995 Act of the Supervision of the Securities Trade (1995 Securities Act) and the Decree on the 1995 Supervision of the Securities Trade.[53] However, these rules do not apply to transactions where the acquiror receives shares through an issuance, such as a PIPE financing.

3. *Private Placement and Listing in the Netherlands*

An issuer must place the securities with investors in an exempt offering in accordance with the 1995 Securities Act. The 1995 Securities Act contains a general prohibition of

46. The Netherlands has a two-tiered management structure comparable to that of Germany. Under Dutch law, only a *Naamloze Vennootschap* (N.V.) that qualifies as a "large" N.V. must have a supervisory board. In general, a listed company will be a large N.V. for purposes of Dutch law.

47. *Id.* § 2:96.

48. If the debt securities are convertible into an existing class of shares, if the issuer has sufficient authorized share capital and the shareholders have already delegated the right to issue ordinary shares or another existing class of shares without pre-emptive rights to the directors, shareholder approval is not needed. Supervisory board approval, however, would be required.

49. *Id.* § 2:96 subsection 1.

50. *Id.* § 2:96.

51. If requested, shareholders must be given the full text of any proposed amendments to the articles of association free of any costs.

52. *Id.* § 2:164 subsection 1.

53. Until September 2001, the Social and Economic counsel had administered a "non-binding" code of conduct with respect to takeover transactions.

offerings upon issue and certain secondary offerings without an applicable exemption. The private placement aspect of a PIPE can be effected in the Netherlands by taking advantage of certain general exemptions, such as offers to professional investors (natural persons and legal entities that trade or invest in securities in the course of their profession or business),[54] offers to persons outside the Netherlands,[55] offers of new securities of the same class of security that is listed on the Euronext, or offers for a minimum denomination/subscription amount.[56]

If the privately placed securities are listed shares of an existing class, those shares must be listed on the stock exchange prior to or at the same time that the shares are issued and are then freely tradable. In the case of preferred share PIPEs, such as Buhrmann's, the issuer must list the ordinary shares underlying the convertible securities on the Euronext no later than the completion date. The Buhrmann investors had the right to require the issuer to list the preferred shares on the Euronext if the shares met the stock exchange listing requirements and to obtain a U.S. stock exchange listing within two years of the closing date.

D. France

Although still considered a relatively new financing vehicle in France, PIPE financings are gaining popularity in particular for companies that are in recognized financial difficulty.[57] However, as with other European jurisdictions, there are significant legal issues to consider in structuring a PIPE in France, including: (1) obtaining approval for a capital increase and new issue and exclusion of shareholders' statutory preferential (i.e., preemptive) rights over newly issued shares; (2) obtaining approval of the transaction by the *Commission des Opérations de Bourse* (COB), the equivalent of the SEC; (3) complying with reporting obligations; and (4) depending on the structure and size of the PIPE issuance relative to an issuer's outstanding share capital, structuring the transaction so as not to implicate the French mandatory takeover offer rules. Notwithstanding the legal issues to be contemplated, several French issuers have recently completed equity line or convertible debt PIPEs.[58]

In January 2002 Genset, a French genomics company trading on the Noveau Marche, issued 4,000,000 BSA (*bon de souscription d'actions*) warrants to Société Générale Cowen, with each warrant convertible into one share of Genset at a conversion price equal to 90 percent of the average trading value of the share, subject to adjustments Genset controlled the timing and amount of any conversions, subject to a two-year €15 million minimum

54. Restrictive language must be included in the offering document. Act on the Supervision of Securities Trade, § 2 (1995).

55. Restrictive language and filing with the Authority for the Financial Markets in the Netherlands is required. *Id.* § 3.

56. A copy of the offering circular must be submitted to the Authority for the Financial Markets before the offering is made. *Id.* § 4.

57. Joshua Jaffe, *Viventures in France's Second PIPE*, THE DAILY DEAL, May 4, 2002. However, Mr. Jaffe neglects to account for the equity line completed by Genset in early 2002. *See* Genset SA, *infra* note 59.

58. *See*, *e.g.*, Press Release, Highwave Optical Technologies, Highwave Optical Raises €32 Million (Jan. 30, 2002), *available at* www.highwave-tech.com (last visited Feb. 12, 2003). Highwave issued 32 Million in convertible bonds to Newbury Ventures, Technoventures, and DB Capital Partners in January 2002, in conjunction with a shareholders agreement giving board representation rights to the investors.

conversion requirement. The transaction was concluded subsequent to shareholders waiving their pre-emptive rights to both the BSA warrants and the shares issued pursuant to their exercise. The transaction also required a visa from the French securities regulation authority approving the documents filed pursuant to the transaction.[59]

Unlike in the United States where equity lines are structured as a part of an issuer's securities, in France, the equity line is structured as a call on warrants. The issuer is entitled to require the investor to exercise its warrants over a period, typically two to two and a half years. Furthermore, French regulations limit the volume and frequency of share issues and sales based on factors linked to the price and volume of the shares traded on the market, in addition to any floors or limits negotiated by the issuers.[60]

The most common issuers of PIPEs in France are technology companies. The market capitalization of issuers has ranged from the micro-cap to mid-cap, raising anywhere from €7 to €32 million to fund external growth or product development, to retire existing debt, or to serve general corporate purposes.[61] Generally, the investor group in a PIPE transaction consists of between one and three short-term investors acquiring from 7 percent to more than 40 percent of a company's share capital and expecting to sell the shares in the near term.[62]

1. *Approval of New Issues and Exclusion of Statutory Preferential Rights*

A guiding principle under French law is that all shareholders must be treated equally. Consequently, in the case of a capital increase against cash consideration, each shareholder has the right to a pro-rata subscription (*droit préférentiel de souscription*) for any new shares.[63] The preferential right extends to newly issued ordinary or preference shares as well as convertible bonds and debt instruments with an attached right to subscribe to equity shares of the company.[64]

Despite the overarching principle of equality, it is common for the shareholders of French companies to empower the directors to issue shares and to disapply statutory preferential rights, thus allowing the directors to move quickly in the event of a financing or acquisition opportunity. Shareholders may disapply statutory preferential rights in favor of the public at large or for the benefit of identified beneficiaries.[65]

In order to complete a PIPE in France, the issuer needs an authorization for the directors to issue additional shares without preferential rights. This authorization must also (1) delegate the authority to the board to issue shares up to the authorized amount when appropriate on terms and conditions determined by the directors, and (2) empower the directors

59. *See* Press Release, Genset SA, Genset Announces New Agreement for up to 30 Million Euros Equity Line (Nov. 28, 2001) (on file with author).

60. Regulation No. 90–04.

61. Cast Software SA raised €7 million by issuing convertible bonds to Viventure Partners in a May 2002 PIPE. *See* Jaffe, *supra* note 57.

62. LVL Medical completed an equity line PIPE in February 2002 for 7 percent of its issued share capital. *See* Press Release, LVL Medical, A Credit Line of Eur 21 Million (Feb. 27, 2002) (on file with author), http://www.lvl-medical.com/uk/avis/02/uk_270202.pdf (last visited Feb. 12, 2003). Highwave Optical's €32 million PIPE represented 45 percent of its issued share capital at the close of the transaction. *See* Highwave Optical Technology, *supra* note 58.

63. Code de Commerce [C. Com.] art. L225–132 (Fr.).

64. *Id.* arts. L225–151, L225–161.

65. *Id.* art. L225–135.

to amend the articles of association to reflect the capital increase.[66] Otherwise, at an extraordinary shareholder meeting, the issuer must obtain shareholder approval for a capital increase by a two-thirds vote.[67] When a capital increase or a withdrawal of preferential rights is to be considered, both the board of directors and the statutory auditors must provide a report to shareholders. Those reports must include, *inter alia*, detailed information on the capital increase; the reasons for proposing the capital increase and withdrawing preferential rights; the impact of the issuance of the new shares on existing shareholders; the entity to whom shares are to be issued; the number of shares to be issued; and the price of the shares, if known, or alternatively, the method used to determine the share price.[68]

Article L225–138 III of the French Commercial Code permits shareholders to authorize a capital increase in favor of identified beneficiaries and to delegate the right to issue new shares on the basis of this authorization for a period not to exceed two years.[69] When the preferential rights have been waived by shareholders of a listed company for the benefit of unidentified beneficiaries, the shares must be issued at a price not less than the average market price of the shares during ten consecutive days selected from among the twenty days preceding the day of the issuance.[70] Reference to an average market price is not required when the issue of shares is made in favor of identified beneficiaries, which may be the case for certain PIPEs.

2. *Complying with Reporting Obligations*

In France, investors must comply with reporting obligations relating to the acquisition of shares in excess of a specified percentage of a company's share capital or voting rights.[71] Any individual or entity that holds, whether acting alone or in concert with others, more than 5 percent, 10 percent, 20 percent, 33.33 percent, 50 percent, or 66.66 percent of the capital or voting rights of a publicly-listed French company must immediately report to the company (within fifteen calendar days of the acquisition) and to the *Conseil des Marchés Financiers* (CMF) (within five trading days of the acquisition) the exact amount of shares held.[72] In addition, when the shareholder has reached the 10 percent or 20 percent threshold, the shareholder must declare its intent as to the acquisition of additional stock in the company for the succeeding twelve months.[73] A failure to disclose triggers both civil and criminal penalties. The shares that exceed the threshold and should have been disclosed are deprived of voting rights until proper disclosure is made and for two years following such disclosure.[74] In addition, a commercial court acting at the request of the company, a shareholder, or the COB may decide to suspend for a maximum of five years all or part of the

66. In principle, the articles of association can only be amended by the shareholders at an extraordinary meeting. However, in the event of a capital increase, shareholders can delegate to the board the necessary powers to determine the conditions, the amount, the timing of such increase, and the power to amend the articles. Companies listed on a regulated market are allowed to have their board sub-delegate these powers to their chairmen. *Id.* art. L225–129.

67. *Id.* art. L225–96.

68. Decree n° 67–236 of Mar. 23, 1967, art. 155.

69. Code de Commerce [C. Com.] art. L225–138 (Fr.).

70. *Id.* art. L225–136, 2°.

71. *Id.* art. L233–7.

72. *Id.*

73. *Id.*

74. *Id.* art. 233–14(1).

voting rights of the shareholder who failed to disclose.[75] After the COB advises, the shareholder who failed to disclose or its managers may be required to pay a €18,000 fine.[76]

3. *Mandatory Takeover Offer Rules*

In France, the mandatory takeover rules may impact a PIPE transaction for a large equity stake of the company in two ways: first, if, as a result of a PIPE transaction, a person, entity, or a group of persons acting in concert[77] acquires more than one-third of the capital stock or voting rights of a publicly-listed company;[78] and second, if, following a PIPE transaction, a person, entity or a group of persons acting alone or in concert, who already hold directly or indirectly between 33 percent and 50 percent of the total number of equity securities or voting rights of a company, increases such holdings by 2 percent or more of the company's total equity securities or voting rights within a period of less than twelve consecutive months. In both instances, the shareholder(s) must make the mandatory offer for all the outstanding shares and any other securities with rights to subscribe to the shares of the company on terms and conditions acceptable to the CMF.[79] Careful structuring of the investment terms and the use of floors (minimum conversion price) and ceilings to control the price at which shares can be issued in any PIPE transaction will prevent the trigger of the mandatory takeover offer rules. The CMF may grant a waiver to the mandatory takeover rule under certain circumstances, including a subscription to a capital increase by a company in recognized financial difficulty, subject to the approval of a general meeting of its shareholders.[80]

4. *COB Special Recommendation on Equity Lines*

On July 25, 2001, the COB issued a special recommendation on equity lines. The COB also set up a working group whose task was to evaluate (1) the compatibility of equity lines with French law and (2) the importance of such operations for French financial markets. The COB published the report prepared by the group on September 4, 2002.[81]

Under the special recommendation the COB indicated that certain conditions should be met in establishing equity lines, particularly in terms of disclosure of information to the public. The COB indicated that it will approve equity lines only if:

75. *Id*. art. 233–14(4).

76. *Id*. art. 247–2(1).

77. Acting in concert means persons who have entered into an agreement to acquire or transfer some voting rights or to exercise voting rights in order to carry on a common program in a company. The agreement need not be in writing. There is a presumption of an action in concert, which can be rebutted, when the agreement is between a company and its directors, companies controlled by the same entity, or a parent and its subsidiaries. Unrelated entities can be deemed as acting in concert, particularly if they have signed a shareholders' agreement. *Id*. art. 233–10.

78. Monetary & Finance Code art. L433–3(1) (Fr.). The CMF may grant a waiver to the mandatory takeover rule under certain circumstances, which include a subscription to a capital increase by a company in recognized financial difficulty, subject to the approval of a general meeting of its shareholders. C.M.F. Règlement Général art. 5.7. In addition, in the case of transactions subject to the approval of the company's shareholders, the CMF can rule on a waiver application before a general meeting is held, provided that it has precise information about the envisaged transaction. *Id*. art. 5.5.8.

79. C.M.F. Règlement Général art. 5.5.2.

80. *Id.* art. 5.5.7. In addition, in transactions subject to shareholder approval, the CMF can rule on a waiver application before a general meeting is held, provided that it has precise information about the envisaged transaction. *Id.* art. 5.5.8.

81. *See* COB, Press Release, Sept. 4, 2002, presenting the Rapport du groupe de travail sur les nouvelles formes d'augmentation du capital, preside par Jean-Francois Lepetit.

- The market is clearly informed, before the mechanism is set up, that the capital increases are to be mainly and ultimately financed by the market,
- The market is given prior notice before each pricing reference period begins,
- The intermediary acting between the issuer and the market refrain from any intervention in the issuer's securities during the reference periods, and
- The same intermediary refrains from any pre-sales of subscribed securities and any direct or indirect hedging, prior to the effective subscription of the securities.[82]

In order to simplify existing procedures and increase flexibility for companies in need of funding, the working group suggested creating an equity line program, which would permit shares issuances of up to 10 percent of the company's share capital over any eighteen month period. Such a program would require a prospectus subject to the COB's approval. Each capital increase could be structured as a private or public placement at the option of the issuer. In the event of a public offering, a simplified prospectus would have to be submitted to the COB. Otherwise, the public would be informed of the private placement by a press release.

5. *Prospectus Approval by the COB and Listing in France*

Before completing a PIPE transaction, issuers must prepare a prospectus for approval by the COB, which must be obtained prior to the shareholders' meeting granting approval of the PIPE.[83] In addition, the issuer must give prior notice to the market before each pricing reference period begins.[84] New shares issued in a PIPE transaction must be admitted for trading. If the shares are of the same class as the company's currently listed shares, then the issuer could be exempted from preparing a prospectus because one has already been filed.[85]

Generally an issuer must prepare a prospectus for approval by the COB with respect to a PIPE prior to or at the time of listing the issued securities on the relevant regulated market.[86] However, an issuer may submit a less burdensome document stating the terms and conditions of the securities to be issued as well as the reasons for the transaction under certain conditions.[87] The exemption to the obligation to prepare a prospectus is not available where, as the result of the proposed transaction, (1) the issuer's share capital will be increased two-fold or more, (2) the issuer's share capital is increased by at least 50 percent and implies a change of control or an important change in the business carried out by the issuer, or (3) there is a significant change in the structure of the balance sheet of the issuer.[88]

82. COB Special Recommendation dated July 25, 2001.

83. COB Regulation n° 98–01, art. 12–1.

84. *See* COB Special Recommendation, *supra* note 82, at n.111.

85. COB Regulation n° 98–01.

86. *Id.*

87. COB Regulation n° 98–01, art. 12–3. The conditions are as follows: (1) the general meeting that has authorized the transaction has received sufficient information regarding the proposed issuance and has been held less than one year before the date of listing of the relevant securities on the stock exchange; (2) the securities to be issued correspond to less than 10 percent of the securities of the same category already listed on a regulated stock exchange, in number, estimated share exchange value or nominal value; and (3) the issuer has complied with all its information obligations and the quality of the information provided is considered satisfactory by the COB.

88. COB Regulation n° 98–01, art. 13.

IV. Conclusion

PIPEs appear to be gaining favor in Europe due in large part to unstable capital markets, tight bank lending requirements, and the increasing popularity of PIPEs in the United States and elsewhere. In addition, larger and more financially stable companies, such as Allianz AG and Buhrmann N.V., have chosen to do PIPEs when other financing alternatives were available, which lends credibility to the PIPE structure becoming a mainstream financing alternative. There is a growing interest in PIPEs in Western Europe as evidenced by the increasing number of PIPEs that are being consummated in key European jurisdictions and the fact that funds with the primary purpose of investing in PIPEs are being formed.[89] Investment banks are beginning to actively pitch PIPEs to new and existing clients. Most significantly, jurisdictions like France recognize the importance of PIPEs in the marketplace and are taking steps to facilitate companies and investors completing certain types of PIPE transactions.

89. *See*, *e.g.*, Frank Kane, '*Greed is Good' Comes to London*, The Observer, June 2, 2002, *available at* http://www.observer.co.uk/business/story/0,6903,726003,00.html (last visited Feb. 12, 2003).