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REVISIONS TO THE CROSS-BORDER TENDER OFFER, EXCHANGE OFFER, AND BUSINESS COMBINATION RULES AND BENEFICIAL OWNERSHIP REPORTING RULES FOR CERTAIN FOREIGN INSTITUTIONS, SEC RELEASE NO. 34-57781 (MAY 6, 2008)

MEMORANDUM OF COMMENTS TO THE SECURITIES AND EXCHANGE COMMISSION

Bredin Prat, De Brauw Blackstone Westbroek, Hengeler Mueller, Slaughter and May and Uría Menéndez are leading independent firms in France, The Netherlands, Germany, the UK and Spain, respectively. Our close relationships are based on an extensive track record of working together and enable us to provide seamless and integrated legal advice on cross-border transactions.

This memorandum sets out our response to the proposals of the US Securities and Exchange Commission (the **"Revision Proposals"**) and the requests for comment in SEC Release No. 34 – 5778 (the "**Release**").

1. Overview

We welcome the initiative of the SEC in making the Revision Proposals. We recognise and endorse the objective of introducing sufficient flexibility into the US rules applicable to cross-border tender offers, business combinations and rights offerings to encourage parties to structure transactions between foreign (i.e., non-US) companies in a way that will include US holders of securities in the target company. We also recognise that protecting US investors is a primary objective for the SEC.

Although the exemptions introduced by the Cross Border Adopting Release were successful in opening many cross-border transactions to participation by US securities holders, particularly where the target company had a very low level of US ownership, many transactions involving foreign companies still exclude US securities holders. Where US securities holders are included, compliance with the US rules imposes significant burdens on the companies involved and from the perspective of companies outside the US, which have confidence that the regulatory system in which they operate provides effective protections for investors, those burdens are disproportionate.

As identified in the Release, the principal problems with the existing US rules arise from the difficulty of determining whether a transaction will benefit from the Tier I exemptions and that is where our comments are focused. US securities holders are most likely to be excluded from transactions where the level of ownership by US holders is known to be close to the 10% threshold but where it cannot be determined with precision. In these cases, where the support of US holders is not required for successful implementation of the transaction, the benefits to foreign companies of including US holders are likely to be relatively low compared to the costs and inconvenience of compliance with the US rules (even with the benefit of Tier II exemptions) and it will often be a more rational decision to exclude US holders.

Our principal comments are:

Eligibility

- for purposes of assessing the proportion of US ownership we would favour including the acquiror's holding and the holdings of significant non-US holders; we also suggest that significant US holders should be excluded

- the Tier I level should be increased to 15%

- the difficulties posed by the "look through" principle, particularly in relation to bearer shares should be recognised and presumptions should be available (for example, that shares held by a financial institution located outside the US should be assumed not to be held by US holders, unless it is known that this is not the case)

- we support the change to the announcement date as the reference point for assessing US ownership

- the uncertainties created by the practical difficulties of applying the eligibility criteria in the case of hostile (non-negotiated) transactions could be mitigated if acquirors were allowed to seek, on a confidential basis, no-action confirmation from the SEC

- adopting a different eligibility test, based on US ADTV, for both negotiated and hostile transactions would be consistent with the objective of protecting US "domestic" investors and transactions between foreign companies whose US shareholder base arises through investing activities outside the US.

Mandatory Put Rights

We suggest that there should be a general exemption available for put rights that arise as a matter of law, if that law provides for appropriate investor protections.

Mutual Recognition

We recognise that protecting US investors is a primary objective of the SEC but we venture to question whether that objective requires the application of the protections afforded by US law <u>in addition to</u> foreign regulatory systems that provide substantially similar protections. The jurisdictions in which we operate (France, the Netherlands, Germany, the UK and Spain) provide a robust regulatory framework for tender offers and business combinations, designed to protect investors.

We believe that, in the longer term, full mutual recognition, with broad exemptions for transactions subject to a system of regulation that is accepted as providing equivalent protections for investors, will provide a better solution. This approach would be consistent with the other initiatives of the SEC in the direction of mutual recognition of prospectuses for public offers of securities (and the acceptance of financial statements prepared in accordance with IFRS), which are also welcomed. The initiatives are closely linked: many of our concerns arise particularly in relation to exchange offers. A system of "passportable" prospectuses of the kind

that applies within the European Union would be of significant benefit (and we note that certain EU regulators are moving in that direction).[1]

In the shorter term, the Revision Proposals represent an important step forward.

2. Eligibility

2.1 Eligibility standards for negotiated transactions – concerns

(A) Securities held by the acquiror

The exclusion of securities held by the acquiror significantly reduces the availability of the Tier I exemptions in cases where the acquiror holds a significant proportion of the target's shares and we would be in favour of dispensing with this exclusion.

(B) Securities held by 10% holders

We can see no basis for continuing to exclude non-US holders who hold 10% or more and which are not otherwise affiliated with the acquiror (issuer). Institutional holdings may frequently exceed 10% and yet properly should be regarded as part of the free float. We therefore suggest that such holders should not be excluded.

We think there is a strong case for excluding US holders with 10% holdings from the calculation of US ownership, on the basis that investors with holdings of that size may be assumed to be sufficiently sophisticated to understand the risks associated with ownership of securities in a foreign company and to accept that protections offered to it will be those of the pricing market in which that foreign company operates. It may be that this approach requires also the imposition of a value limit and should only be available for target companies with a market capitalisation of at least $250m. An alternative approach would be to exclude all US holders with a holding of 10% or that has a value that exceeds a stated minimum (perhaps $25m).

This approach to the availability of Tier I and Rules 801 and 802 would be in the interests of U.S. investors as it would reduce the number of transactions in which US holders are excluded.

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[1] The Netherlands regulator: see www.afm.nl under financial markets - offering / listing of securities - fast track procedure; the French regulator: Décision de l'AMF en matière de reconnaissance des standards américains pour une admission à la négociation sur un marché réglementé, AMF Press Release (October 1, 2007.

(C) Raising the Tier I level

Raising the Tier I level to 15% would bring a significant number of transactions within Tier I. There are many transactions where the level of US ownership is below 10% but uncertainty about the precise level of US beneficial ownership leads to caution regarding the availability of the Tier I exemptions.

(D) The "look through" principle

The "look through" requirement of Exchange Act Rule 14d-1, Instruction 2(iii) to paragraphs (c) and (d)[2] is in practice unworkable for companies from countries, such as France, where companies do not maintain a share register of the owners of their securities. Appendix 1 sets out in more detail the practical problems caused by this requirement for French issuers. Similar problems arise for German issuers, which also normally have bearer shares without a share register. Even where there is a share register, the beneficial holder cannot necessarily be determined because often the shares are registered in the names of financial institutions which hold these shares for undisclosed clients. In Germany and Spain such intermediaries are not subject to a legal duty to disclose information regarding the underlying owners.

Perhaps the most significant problem (and one which is true also in the UK, where the issuer has a legal entitlement to obtain the required information) is that the process would likely compromise the confidentiality of the proposed transaction. The benefits of certainty offered by changing the reference point to the announcement date are lost if the "look through" investigation cannot in practice be conducted without a breach of confidentiality.

We suggest therefore that it should be sufficient to identify the first tier of holders (i.e. for securities held in Euroclear, the institutions who hold the securities in accounts with Euroclear) and include as US holders only those financial institutions whose address recorded by Euroclear is in the US.

2.2 Eligibility standard for negotiated transactions – proposed changes

We generally support the proposed changes. In particular, the change to announcement date as the reference point for determining the availability of the exemption would increase certainty for offerors, again encouraging acquirors to make use of the exemptions and include US securities holders in their offers. We would favour a range rather than a date certain and we think 60 days should provide adequate flexibility.

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[2] Also Securities Act Rule 800(h)(3).

A change to announcement as the reference point will require consideration of what constitutes an "announcement". UK rules encourage early announcement of possible transactions where there is rumour or speculation or a significant movement in the target's share price. Such an announcement may only refer in general terms to the possibility of an announcement and may not identify the acquiror. Nevertheless, we suggest such an announcement should be used as the reference point.

We recognise that there may be a prolonged period between an announcement of a possible offer and the time the offer is commenced and it may therefore be appropriate to set a time limit. However, in order to provide certainty to the acquiror, that time limit should be sufficiently long to accommodate all but the most exceptional circumstances. We suggest six months. We do not think that changes to the target security holder base in response to an announcement should be allowed to determine whether the exemptions are available.

2.3 Non-negotiated or hostile trader offer

Again we generally support the proposed changes to the presumption for non-negotiated transactions. We would encourage the SEC to provide as much clarity as possible on the scope of the "reason to know" requirement. Ideally it would be clear that this only requires publicly available information to be taken into account. We would support a change to the date of announcement as the reference date for applying the test. In order to obtain the certainty that acquirors need the date to assess knowledge for purposes of the "reason to know" test should be some time prior to announcement (which would be consistent with the approach suggested for negotiated transactions). This would allow time for proper assessment of the information publicly available. Changes after that date should not be relevant.

The "reason to know" standard will still require complex judgments to be made and we suggest that a procedure that would allow potential acquirers to seek "no-action" confirmations on a confidential basis prior to announcement would be of significant practical benefit.

2.4 Possible new eligibility standards for negotiated and hostile transactions

We do not think the result of the review by SEC staff, that shows a low correlation between the ADTV-based measure and the level of beneficial ownership, are surprising. Many foreign issuers in which US investors hold shares are not actively traded in the US and the US investors who hold shares in those issuers have accessed non-US markets to do so. Holders who have sought to access foreign securities markets to make their investments may be taken to have accepted the regulatory system applicable to those markets and should not expect the protections of he US regime in addition. This approach is consistent with the approach to takeover regulation in the EU under the EU Takeover Directive.[3]

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[3] The EU Takeover Directive does not seek to regulate transactions involving non-EEA incorporated companies

We believe, therefore, that an ADTV-based measure would be a more appropriate test for eligibility. We also believe that, as a matter of principle, ADTV on its own should be sufficient test. However, we recognise that at a certain level of US ownership it is not unreasonable to apply US regulation to an off-shore transaction but we suggest that this level should be somewhat higher than 10% and in applying the test significant US holders (holders that own more than 10% or whose holding has a value of US$25m or more) should be excluded from the calculation.

If a test along the lines we suggest is adopted, we would support the adoption of the suggested "primary trading market" requirement.

3. Tier II exemptions

We are concerned regarding one issue that is not raised in the Release, which is the application of the US tender offer rules to provisions in foreign law that provide target shareholders with a "mandatory put" right. Rights of this kind, such as those under German law that arise when a "domination and profit transfer agreement" is adopted or the "sell-out" right introduced into national legislation pursuant to the EU Takeovers Directive, typically provide certain protections for shareholders (e.g. court supervised appraisal rights). However they operate in a way that is inconsistent with application of the US tender offer rules (such as the prohibition in Rule 14e-5 on purchases of shares outside the tender offer).

Appendix 2 contains a more detailed description of the mandatory put right that arises under German law when a domination and profit transfer agreement is imposed, and the problems that arise when US tender offer rules are applied.

We suggest that it would be appropriate for the SEC to adopt a general exemption where foreign law confers a right on shareholders in a foreign issuer to require a person to acquire their shares, where the shareholders have rights to apply to court to test the fairness of the consideration offered.

Appendix 1

Application of the "look through" principle to French targets – practical issues

- There is no share register
  - the target must request a special report from Euroclear (a *Titres au Porteur Identifiables* ("TPI") report)[4]
  - typical production time of a TPI report is three to four weeks
  - the TPI report identifies the financial institutes that have accounts with Euroclear so the target must then request information from these institutions[5]
  - further rounds of enquiry may be necessary if the information identifies a further layer of nominee holders
  - total time is typically six to eight weeks
- undertaking these necessary enquiries may compromise confidentiality of the transaction
- only the target can require the TPI report and the information obtained is confidential; disclosure to the acquiror could result in criminal sanctions
- the period between announcement of the transaction and commencement depends on AMF review of the documentation (which may take weeks or months) and during this period shareholdings will change, so at the time the transaction is announced and documentation filed with AMF it is not possible to know whether which exemptions will be available.

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[4] The survey required to produce such a report is only possible if permitted by the by-laws of the target.

[5] The intermediaries are required by French law to provide this information.

Appendix 2

Mandatory put rights under German law - domination and profit transfer agreement

A domination and profit transfer agreement ("Agreement") is a standard means under German corporate law to integrate a corporation into a group and to form a fiscal unity between two companies, regularly between parent and subsidiary. The Agreement provides that the management of the controlled company must follow the instructions of the dominating company in all respects relating to the management of the controlled company, even if they are disadvantageous to it as long as they are in the interest of the group. Absent such Agreement, German stock corporation law allows the integration of a subsidiary in the corporate form of a stock corporation only to a very limited extent. The Agreement also provides that all annual profits of the controlled company are to be transferred to the dominating company. In return, the dominating company assumes any annual losses of the controlled company.

German stock corporation law provides that the Agreement must contain certain mandatory provisions aiming to protect the interests of the minority shareholders of the controlled company. Most importantly, the dominating company must, during a certain period of time and at the request of any minority shareholder of the controlled company, purchase such shareholder's shares in the controlled company for a cash compensation specified in the Agreement. Thus, the minority shareholders are entitled to mandatory put rights. These put rights compensate for the loss of regular dividends resulting from the implementation of the Agreement and other potential disadvantages of holding shares in a dominated company. Furthermore, as long as they hold shares in the controlled company, the minority shareholders are entitled to receive, as a recurring payment by the dominating company, a guaranteed dividend as compensation for the regular dividend.

Both the amount of the guaranteed dividend and the amount payable for the put right must be "fair". "Fairness" must be confirmed by court-appointed auditors. Rather than ending two months following the announcement of the registration of the Agreement as contemplated by German law, the exercise period of the mandatory put rights is extended by operation of law if a minority shareholder initiates an appraisal proceeding to challenge the fairness of the put price. The exercise period for the mandatory put rights ends as late as upon the expiration of a two-month period following the public announcement of the final resolution of the appraisal proceeding. Such proceedings are likely to take five years at a minimum, ten years on average and up to fifteen years in extreme cases. As a consequence, minority shareholders can typically exercise their put rights for many years.

Conflict with Tender Offer Rules under Federal Securities Laws

In recent discussions with the SEC, the staff took the position that mandatory put rights constituted a tender offer under the Securities Exchange Act of 1934 and the rules thereunder, including Rule 14e-5 – even though these mandatory put rights are not considered as a tender offer under German law. This result, absent relief, would leave the dominating company in the untenable position of being precluded from purchasing any shares other than through the exercise of mandatory put rights for an indefinite period of time. This would (i) preclude the dominating company from the exercise of its right under German law to purchase shares other than those offered under the mandatory put rights, (ii) block willing sellers from being able to sell

their shares at the best price (as typically the dominating company would be offering the highest price), and (iii) make it virtually impossible for the foreseeable future for the dominating company to achieve the 95% shareholding it needs under German law to accomplish a squeeze-out of the minority shareholders. Furthermore, it must be taken into account that, other than in tender offers under certain jurisdictions, the dominating company cannot limit the mandatory put rights to shareholders outside the US.

There is no reason for the strict application of US tender offer rules as

- equal treatment of all shareholders including US shareholders is guaranteed by German corporate law;

- the fairness of the compensation has been confirmed by an independent auditor and is reviewed by a court in the course of the appraisal proceeding;

- there is no commercial justification to prohibit the payment of different prices for shares over a period of several years during which the value of the company and the stock market quotations of the shares may significantly change; and

- the prohibition of parallel purchases does not improve the position of or provide any protection to US shareholders.