[redacted]

Mike - Dave -
your thoughts?

801.1(f)
802.31

[redacted]

[redacted]

CONFIDENTIAL

March 21, 2001

VIA FACSIMILE & HAND DELIVERY

Marian Bruno, Esquire
Assistant Director, Premerger Notification
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Tender Offer Transaction Under French Law

Dear Ms. Bruno:

About a month ago we spoke to Tom Hancock and you regarding our concern about a potential conflict between French tender offer law and the requirements of the Hart-Scott-Rodino Act. This conflict could arise because French law requires that the offeror take up the shares for which it tendered soon after the expiration of a period of up to 35 market days after the offer is announced. If the transaction were reportable under the HSR Act and the reviewing agency issued a Second Request, the French law could require the taking up of the shares prior to the expiration of the HSR waiting period.

We told you that we believed the operation of the European Community Merger Regulation ("EC Merger Regulation"), which permits the taking up of shares in just such a circumstance but prohibits the voting of those shares until the European Commission has cleared the transaction, effectively rendered the shares convertible non-voting securities, the acquisition of which is not reportable under 16 C.F.R. § 802.31. You told us that your preliminary view was that the shares were voting securities, and that the operation of the EC Merger Regulation did not change their status. You urged us, however, to put the matter in writing so that you and your staff could consider it further. In addition, since if you disagree with our analysis there will exist a potential legal, or at a minimum, commercial conflict due to the intersection of French law and the HSR Act, we would appreciate it if you could consider and discuss with us ways to avoid that conflict consistent with the requirements of the Act.

Since we last spoke with you regarding this issue we have tried to learn more about the exact requirements of the French rules and the commercial impact of any modification of those rules. We have also undertaken some additional research on the operation of the HSR rules in

this context. We believe we now have sufficient information to permit you to examine this issue thoroughly and to permit us collectively to discuss it with all the available facts and law before us. We want to say in advance how much we appreciate your attention to this matter.

Background

The transaction at issue is a tender offer for all of the outstanding shares of a French issuer headquartered in France. The offeror is a private European entity. Both entities have operations worldwide and have sufficient assets in and sales in and into the United States to meet the filing thresholds of the HSR Act. The transaction also meets the EC filing thresholds (as well as those of a number of other jurisdictions). The majority of the parties' collective sales, including in affected segments, are in Europe, however, they will probably report in their HSR filings limited 4-digit SIC code revenue overlaps in their U.S. operations. The transaction will likely have a value in excess of $1 billion, and the offeror has had annual revenues in excess of $6 billion.

Because this transaction involves the acquisition of French-registered shares traded on the Paris Stock Exchange, it is governed by French law. Under French law, as we understand it,[1] a party making a tender offer must take up the shares for which it makes the offer soon after a period of up to 35 market days from the public announcement of that offer. When we spoke with you last month we understood that the French law did not permit conditioning of the offer under any circumstances. However, we have since been informed that, in fact, the French regulators will permit conditioning, but the effect of the condition is not to extend the offer period should that be necessary (that is, if the HSR waiting period has not expired by that time). Instead, the condition will delay the start of the offer period until the condition (in this case, the expiration of the HSR waiting period) has been satisfied. The investment bankers working on the offer have told the offeror that this delay in starting the tender offer period, which is invoked only very rarely in France (indeed, as the letter from French counsel notes, it has only been used once to their knowledge in similar circumstances), would create significant market confusion and uncertainty and endanger the commercial success of the offer.

Perhaps because of the existence of this and other similar tender offer schemes in Europe, the EC Merger Regulation provides for precisely the situation where a tender offer has a legal time limit that may be shorter than the waiting periods under EC law. As you know, Article 7(1) of the EC Merger Regulation prohibits the consummation of any reportable transaction until the Commission issues a decision declaring it to be compatible with the common market.[2] However,

---

1 We have attached a letter from French counsel for the offeror that provides some information on the French law and related practices and certain commercial consequences.

2 Article 7(1) states:

> A concentration as defined in Article 1 shall not be put into effect either before its notification or until it has been declared compatible with the common market pursuant to a decision under

apparently recognizing that there are situations where the waiting period might conflict with tender offer (called "public bids") law, Article 7(3) explicitly permits an offeror to take up shares in a public bid before the EC has completed its investigation, *but prohibits the offeror from voting those shares until the EC has issued its decision granting clearance to the transaction.*[3] The Commission can grant exceptions to this bar on voting the securities, but that authority has been used very rarely, and usually in cases where there is severe financial distress.[4] Accordingly, while the offeror may hold the shares, it holds them in a legally non-voting state, and can only vote them if and when the Commission issues its decision clearing the transaction. Should the Commission block the transaction outright, the offeror would have to sell the shares without having ever gained voting rights. If an offeror were to vote the shares during the EC waiting period, it would be in violation of Article 7(1) which would subject it to fines under Article 14(2)(b) of up to ten percent of its aggregate worldwide turnover. In this case, that would mean a fine of up to more than $600 million.

Analysis

The offeror in this transaction will be making a tender for securities that will have voting rights. However, while the EC merger review is pending, the shares taken up by the offeror will be non-voting by operation of EC law. The offeror gains voting rights only if and when the EC issues a decision clearing the acquisition. Because the shares when acquired will not have voting rights for the holder, and the offeror will only obtain voting rights upon receipt of an approval whose happening and timing is uncertain, the shares upon their acquisition appear to us to be convertible voting securities as defined in 16 C.F.R. § 801.1(f)(2) (convertible voting securities are ones that "*presently* [do] not entitle [their] owner or holder to vote for directors of any entity" (emphasis added)). As you know, under 16 C.F.R. § 802.31, the acquisition of convertible voting securities is exempt from the requirements of the HSR Act and, thus, the holding of

---

Article 6(1)(b) or Article 8(2) or on the basis of a presumption according to Article 10(6).

3 Article 7(3) provides:

> [Article 7(1)] shall not prevent the implementation of a public bid which has been notified to the Commission in accordance with Article 4(1), *provided that the offeror does not exercise the voting rights attached to the securities in question* or does so only to maintain the full value of those investments and on the basis of a derogation granted by the Commission under [Article 7(4)]. (emphasis added).

CAN BE VOTED UNDER CERTAIN CIRCUMSTANCES?

4 *See* BELLAMY & CHILD COMMON MARKET LAW OF COMPETITION ¶ 6-110 (1993 & Supp. 2000); Barry E. Hawk, Henry L. Huser EUROPEAN COMMUNITY MERGER CONTROL: A PRACTITIONER'S GUIDE ¶ X.2.1.2 (1996).

convertible voting securities is not a violation of the Act since the acquisition of those securities is not a reportable event.[5]

Our view, then, is that as long as the EC merger review process is underway, and the voting ban of Article 7(3) is therefore in effect, the taking up of the shares by the offeror[6] consistent with French law does not violate the HSR Act. By operation of law during the EC merger review period, the holder of the shares "presently [is] not entitle[d] . . . to vote for the directors of any entity," 16 C.F.R. §801.1(f)(2), and thus the shares are clearly within the definition of non-reportable convertible voting securities, with the conversion event being the issuance of a decision by the European Commission clearing the transaction. Indeed, we believe that to hold otherwise would be to give no effect of the clear language and intent of Article 7(3) of the Merger Regulation.

We understand that you expressed concern that the operation of the EC law was akin to the operation of a side contract affecting the voting rights of securities, which the staff has held is not sufficient to cause voting securities to be considered convertible nonvoting securities. We respectfully disagree with this conclusion. First, the legal bar imposed by the EC law is not akin to a side contract between the parties which is a purely voluntary restriction negotiated by private parties; the legal bar, by contrast, is imposed, involuntarily, on the parties by a governmental entity with enforcement powers. Second, we believe that the EC law should be considered akin to an S.E.C. rule or order that prohibited the voting of a certain type or block of registered securities. Third, we believe that failure to give full credit to the voting bar in the EC law would ignore principles of comity. We note that the Statement of Basis and Purpose for §802.51 states that comity considerations should be given particular attention when, as here, the transaction involves two foreign persons.

This conclusion is consistent with not only the strict language of the HSR Rules, but also with its accompanying material and various prior informal rulings by the FTC. Example 1 accompanying 16 C.F.R. § 801.1(f) says that §802.31 exempts the acquisition of debentures convertible into voting securities "provided that they have no present voting rights," and the Example provided along with 16 C.F.R. §802.31 states that convertible voting securities are exempt from the requirements of the Act "regardless of the dollar value of the voting securities

---

5 Of course, conversion of convertible voting securities can be a reportable event. 16 C.F.R. § 801.32. Accordingly, if EC completes its investigation and decides to clear the transaction, when it issues its decision the legal ban on voting will be lifted and the shares will have converted to legal status. At that time, if the applicable HSR Act waiting periods have not expired, the holding of the shares would appear to violate the Act. This would be true if the EC issued a derogation under Article 7(4). However, we are not asking today for the FTC's view of what would happen if the EC were to issue a decision before the HSR waiting period expires.

6 This is the language of the Interim Rules now in effect. Prior to the Interim Rules going into effect the Example stated that convertible voting securities are exempt "regardless of the dollar value . . . held or to be acquired and even though they may be converted into 15 percent or more of the issuer's voting securities."

held or to be acquired." Thus, it seems clear that the definition of a convertible voting security turns solely on the *present right to vote* regardless of the dollar value of the acquisition, and there is no indication in the Rules that the percentage of voting rights that would be acquired when or if the right to vote were to attach affect the scope of the exemption. Under Article 7(3) of the EC Merger Regulation the shares that would be taken up by the offeror *would not have the present right to vote* under penalty of law, enforced by a punitive fine provision.

This view is reinforced by some of the FTC's prior conclusions reported in the ABA's Premerger Notification Practice Manual.[7] More important, Interpretation 98 notes that the FTC staff has advised that nonvoting preferred stock, which gives its holders voting rights only upon the occurrence of certain events, is not "voting securities" covered by the requirements of the Act "unless or until the stated events gave the holders a present right to vote for directors of the issuer." The Interpretation goes on to note that questions have arisen about so-called "white square" shares that provide the holder the right to vote on all matters *other than* the election of directors. Apparently, such shares frequently convert to full voting status upon expiration of the HSR waiting periods. The Interpretation reports that the FTC has treated such securities as nonvoting since they do not provide the right to voting for directors, the key to the definition contained in §801.1(f)(1), and that the staff has treated the expiration of the HSR waiting period as a conversion under the Rules. This seems nearly on all fours with the situation we present: the shares will be taken up, they lack the right to vote for directors of the issuer, but convert on the expiration of an antitrust waiting period, although in our case it is the EC, not the HSR, waiting period.[8]

We understand that these Interpretations are not binding on the FTC. However, the overwhelming weight of these statements along with the language of the Rules and the

---

[7] References are to ABA ANTITRUST SECTION, PREMERGER NOTIFICATION PRACTICE MANUAL (1991).

[8] Other Interpretations, while not as directly on point, reinforce our view of the issue. Interpretation 90 states that the acquisition of convertible voting securities with certain veto rights is exempt from the requirements of the Act because the presence of veto rights, without the right to vote for directors, is not sufficient to create a reportable acquisition of voting securities. Interpretation 92 reports that acquisitions of nonvoting, nonconvertible preferred stock along with warrants to purchase 70 percent of the voting common stock is not reportable because the warrants do not have the present right to vote. Interpretation 96 involves securities issued to a Small Business Investment Company (SBIC) that are nonvoting while held by the SBIC but can be converted to voting when transferred to a subsequent holder not affiliated with the SBIC. The Interpretation reports that the shares are not currently voting securities because they do not possess the present right to vote and cannot be converted by the current holder. Further, the acquisition of these shares by a non-SBIC person would be exempt because they would still be convertible voting securities at the time of the acquisition. Only when the new owner exercised conversion rights would there be a reportable event.

accompanying examples (which are binding) makes it clear, we believe, that the definition of "voting security" turns exclusively on the existence of the "present" right of the holder to vote the shares for the election of directors of the issuer. In our case, if the offeror is required by French law to take up the shares prior to the expiration of the HSR waiting period, it will be taking up shares that, due to the operation of Article 7(3) of the EC Merger Regulation, do not possess the "present" right to vote for directors of the issuer. Accordingly, we believe it is clear that the taking up of these shares, prior to the expiration of the legal restrictions on voting contained in Article 7(3), is not a reportable event and thus would not constitute a violation of the HSR Act. We understand that you had tentatively reached a different conclusion; however, we hope that you will revisit the issue in light of this letter.

If you do not agree with our conclusion on the law, we would like to discuss with you how to handle the possibility that the offeror will be required to take up shares prior to the expiration of the HSR waiting period. As we noted before, both French counsel and the French investment bankers working on this transaction have informed the offeror that placing a condition on the offer that it would not be effective until the HSR waiting period had expired would create severe commercial problems for the offer because of the unfamiliarity of the relevant markets with such an alternative. At the same time, the offeror has no interest in risking that the HSR waiting period will not have expired when, absent a condition, it would be required to take up the shares. Accordingly, we believe it would be appropriate to consider whether the offeror could place the shares in escrow if it were forced to take them up before the HSR waiting period expires. As you know, the Rules do contemplate escrow arrangements in certain circumstances (see, e.g., §801.31(d); Interpretation 112), and while we do not claim that this situation fits squarely into the Rules or an existing Interpretation, we believe that to accommodate the commercial and cultural differences between the operation of the French law and practice and the HSR Act an escrow provision, which would assure that offeror cannot exercise any authority over the shares pending expiration of the HSR waiting period, would be eminently reasonable and not inconsistent with the letter or spirit of the HSR Act or Rules.

I HAVE NO OBJECTION TO AN ESCROW ARRANGEMENT.

We would appreciate discussing all of this with you further after you have had a chance to review the matter. Because this matter involves the intersection of U.S., EU and French law, we have provided a copy of this letter to [redacted]

Again, we greatly appreciate your attention to thi[redacted] We look forward to discussing it with you. If you have any questions, contact [redacted]

Sincerely yours,

[redacted]

cc: [redacted] By Hand)

WE CONSIDER THESE TO BE VOTING SECURITIES (NOT CONVERTIBLE), WILL ALLOW THEM TO BE CLOSED INTO E/ESCROW WITH UNWIND PROVISION. N. OUKA, J. PARISI, M. BRUNO AGREE.

3/22/01