[redacted]

[redacted]

801.2

[redacted]

November 13, 2007

Via E-mail

Mr. B. Michael Verne
Premerger Notification Office
Bureau of Competition - Room 303
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

2007 NOV 14 PM 12:16

PREMERGER

Dear Mike:

I write to confirm your interpretation relating to the proposed transaction briefly described below and described in greater detail in Appendix A to this letter.

Company A and Company B intend to establish a 50/50 jointly-owned entity ("Newco") to acquire 100% of Company C ("target") through a cash tender offer (the "Offer"). The Offer is a transitional step. As soon as possible after the Offer closes, the target's businesses will be divided between Company A and Company B, with Company A taking control of certain target businesses ("Company A Acquired Businesses") and Company B taking control of the remainder of the target businesses ("Company B Acquired Businesses").

With respect to the Company A Acquired Businesses, we have confirmed that if separately analyzed, the acquisition (whether in a stock or asset transaction) would be exempt from reporting under the HSR Act because these businesses did not in the aggregate generate sales in or into the U.S. exceeding $59.8 million in 2006, and the aggregate total value of their assets in the U.S. does not exceed $59.8 million. The Company A Acquired Businesses are in Europe and Asia and include the remaining 50% interest in a joint venture active in Eastern Europe in which Company A currently owns a 50% interest. Company B's acquisition would remain subject to reporting under the HSR Act.

Based on the structure of the transaction, with Newco acquiring target, both Company A and Company B might technically be obligated to make HSR filings if both would be deemed to control Newco at the time of target's acquisition, and the filing thresholds would be met. However, because the acquisition by Newco is a transitional

[redacted]

step solely for the purposes of dividing target's businesses between Company A and Company B, and the only party making an acquisition that would not otherwise be exempt (Company B) is indeed filing, we believe that it would be consistent with the "continuum" theory for the transitional step to be ignored. The structure described in Appendix A will be legally binding and the division of target's business is certain to occur. Each side will take de facto control over its portion of the target businesses being acquired immediately following closing by taking over all decisions concerning production, distribution, marketing, sales, personnel matters, business plans, financial plans, IP, brands, and material capital expenditures. Given the circumstances, it seems logical to disregard the transitional step and analyze the acquisitions as two separate transactions under the HSR Act. Again, looking past the transitional acquisition by Newco, Company A would not have a reporting obligation because the target businesses it would acquire are exempt as noted above, and Company B, as the party making a non-exempt acquisition, is intending to file.

Exempting Company A's acquisition would also be consistent with principles of international comity, as applied by the PNO to exempt what would otherwise be reportable secondary acquisitions of US issuers in a foreign-foreign transaction. Indeed, we believe that this situation presents an even more compelling case for application of comity, given that the exempted secondary acquisitions might involve US issuers with sales well above $59.8 million, whereas Company A is clearly not acquiring any such business.

I understand that when you recently spoke to [redacted] (Company B's counsel), and as confirmed by our discussion on November 5, 2007, you advised that for the reasons described above, the Offer can be disregarded as a transitory step and therefore, Company A's acquisition of its portion of the target's businesses will be exempt from the reporting requirements of the HSR Act.

Because the proposed transaction has not yet been announced, we request that this letter and Appendix A be given confidential treatment.

Please confirm by email or by calling me at the above-referenced number that the above accurately reflects your advice.

Best regards,

[redacted]

Agree
11/14/07
M Bruno concurs

cc: [redacted]

Attachment: Appendix A

[redacted]

[redacted]

Appendix A -- Detailed Description of the Proposed Transaction:

1. The parties

1.1 **Company A**

Company A is a publicly traded company incorporated in Europe and having its principal offices in Europe.

1.2 **Company B**

Company B is a publicly traded company incorporated in Europe and having its principal offices in Europe.

1.3 **Target**

Target is a publicly traded company incorporated in Europe and having its principal offices in Europe.

2. The proposed transaction

2.1 Company A and Company B will establish a 50-50 jointly-owned company ("Newco") which will make an offer for 100% of the voting securities of the target (the "Offer"). The intention is that, as soon as possible after the Offer closes (the "Closing"), Newco will transfer part of the acquired businesses to Company A (the "Company A Acquired Businesses") and Company B will acquire control over the remainder of the businesses (the "Company B Acquired Businesses").

2.2 On October 7, 2007, Company A and Company B signed a letter of intent (the "LOI") which sets out the parties' intention to shortly enter into a legally binding consortium agreement (the "Consortium Agreement") which will regulate the conduct of the Offer and provide for the assets and liabilities of the target to be divided between the parties and the terms on which this will be done. The LOI sets out the principal agreed terms and conditions to be included in the Consortium Agreement and, while the LOI is not legally binding, it is intended by the parties that the Consortium Agreement will be broadly consistent with the LOI.

2.3 Newco will be established prior to the announcement of the Offer and owned and governed by Company A and Company B as to 50% each. The board of Newco will initially consist of four directors, two appointed by Company A and two by Company B. All decisions will be reserved to the board and require the consent of the majority of the board including at least one Company A and one Company B director. Company A and Company B will have joint conduct of the Offer.

2.4 The joint ownership structure referred to above will continue until the Company A Acquired Businesses located in France and the remaining 50% interest in a 50-50 Eastern European joint venture between Company A and target have been transferred to Company A at which point Company B will acquire a majority interest in Newco. Following such transfers Company A will continue to have control of all Company A Acquired Businesses that continue to be held within target.

2.5 As soon as legally possible after closing of the Offer, Company B will assume control of the Company B Acquired Businesses and Company A will assume control of the Company A

[redacted]

[redacted]

Acquired Businesses. The board of Newco will delegate control of target accordingly. Control for these purposes means that so far as is practically possible Company A and Company B, as the case may be, will be responsible for all decisions concerning production, distribution, marketing, sales, the appointment or dismissal of employees, business plans, financial plans, IP, brands and material capital expenditure, with respect to their respective portions of the target businesses.

2.6 It is the parties' current intention that the Consortium Agreement will first be initialed and will be signed immediately before the announcement of the Offer. The reason for the period between initialing and signing is to ensure that if discussions with target disclose facts that may require changes to the detail of the Consortium Agreement such changes can be reflected in the final version of the agreement. However, there is no intention of changing the overriding purpose of the Consortium Agreement which is to bring about the break-up of target and the division of its businesses between Company A and Company B.

2.7 The agreed division of target between Company A and Company B will mean that Company A acquires roughly 53% of the target business by enterprise value and Company B acquires the remainder.

2.8 The arrangement between Company A and Company B will terminate in certain defined circumstances including if either party notifies the other prior to announcement that it does not wish to proceed, or there is no announcement of the Offer by January 31, 2008. The arrangement between Company A and Company B is exclusive for a period of 6 months from October 7, 2007. This means, inter alia, that each party may not make an alternative offer for target or acquire any part of the target's business other than in accordance with the agreed arrangements during this period.

3. Separation

3.1 The LOI allocates the target's businesses to each party based on the country where the businesses are located. The Company B Acquired Businesses include the target's businesses in the United States.

3.2 Subject to certain exceptions not relevant to the United States, where a brand allocated to one party is sold in a country allocated to the other party then all rights in the brand belong to the party allocated the brand (unless the parties agree otherwise) and all assets and employees in the country are allocated to the party allocated the country; all liabilities relating to intellectual property in the brand are allocated to the party allocated the brand. Where a brand allocated to one party is licensed in a country allocated to the other then unless agreed otherwise the license will terminate as soon as possible, and in any event by not later than the later of August 31, 2008 or six months after Closing, without compensation being payable.

3.3 The Consortium Agreement will contain legally binding provisions requiring the transfer of the Company A Acquired Businesses to Company A. It is intended that the consideration will be offset by Company B acquiring Newco shares. Company A's ownership interest in Newco will be commensurately reduced on each transfer by repayment or transfer of shares

[redacted]

[redacted]

in Newco to Company B. However, at all times Company A will, under the terms of the Consortium Agreement, have control of the Company A Acquired Businesses.

3.4 The Company A Acquired Businesses will be acquired by Company A as soon as possible following Closing. The Company B Acquired Businesses will be acquired by Company B (to the extent desirable) from target as soon as possible after Closing. The slightly different treatment of Company A and Company B reflects the fact that Company A's interest in Newco will diminish as Company A Acquired Businesses are transferred out of Newco leaving Company B with control over the Company B Acquired Businesses that remain in Newco (Company B will at no point have control of the Company A Acquired Businesses).

3.5 Where necessary target businesses will be internally reorganized to facilitate the transfer of the appropriate businesses to Company A and Company B.

3.6 Company A will undertake limited due diligence in respect of the Company A Acquired Businesses and Company B will undertake limited due diligence in respect of the Company B Acquired Businesses.

3.7 Subject to the result of any due diligence exercise, the parties intend that if an Acquired Business (A) uses assets or rights (other than brands, as to which see above) belonging to the other Acquired Business (B) or uses services provided by the other Acquired Business then the other Acquired Business will procure that the other party may continue to use the assets, rights or services at cost until 31 December 2008.

4. Two separate acquisitions

4.1 Newco, which at the time of the acquisition of target will be jointly owned and controlled by Company A and Company B, will acquire target solely for the purpose of dividing the target businesses between Company A and Company B in accordance with the arrangements set out in the Consortium Agreement. Following such division of the businesses Newco, and any target businesses remaining in Newco, will come under the sole control of Company B.

Immediately after Closing, pursuant to the terms of the Consortium Agreement, Company B will have responsibility for, and control over, the target businesses that it will ultimately own and Company A will have the same responsibility and control over the businesses it will own. This will mean that, so far as is practical, the current management structure of target will be replaced by a structure under which target employees in the Company A Acquired Businesses will report to Company A group management and target employees in the Company B Acquired Businesses will report to Company B group management.

4.2 We consider that the Offer can be disregarded as a transactional step under "continuum" analysis under the HSR Act because:

(a) The Consortium Agreement will set out legally binding obligations concerning the break up of the target business. There will be detailed requirements concerning the allocation of target's assets to each of the parties on a country by country and brand by brand basis.

[redacted]

[redacted]

(b) The first transaction (the acquisition of target by Newco) is only intended as a transitional step and the Offer will only be made if the parties are certain that they can proceed with the completion of the further transactions (the transfers to Company A and Company B) after Closing. The parties will endeavor to achieve full separation of the Company A Acquired Businesses and the Company B Acquired Businesses within 12 months of Closing and presently believe that such separation is very likely to be achieved within this timescale (although even before formal separation Company A and Company B will separately be responsible for the businesses they will acquire and control the conduct of those businesses accordingly).

(c) Company B, as the only party making an acquisition that would not otherwise be exempt, is indeed filing.

This treatment would also be consistent with the European Commission's approach to these issues. The Commission's Consolidated Jurisdictional Notice ("the Notice") considers the situations in which several operations occur in succession, where the first transaction is only transitional in nature. In particular, paragraphs 30-31 of the Notice state:

> *"30...several undertakings come together solely for the purpose of acquiring another company on the basis of an agreement to divide up the acquired assets according to a pre-existing plan immediately upon completion of the truncation. In such circumstances, in a first step, the acquisition of the entire target company is carried out by one or several undertakings. The question is then whether the first transaction is to be considered as a separate concentration, involving an acquisition of sole control (in the case of a single purchaser) or of joint control (in the case of a joint purchase) of the entire target undertaking, or whether only the acquisitions in the second step constitute concentrations, whereby each of the acquiring undertakings acquires its relevant part of the target undertaking.*
>
> *31. The Commission considers that the first transaction does not constitute a concentration, and examines the acquisitions of control by the ultimate acquirers, provided a number of conditions are met: First, the subsequent break-up must be agreed between the different purchasers in a legally binding way. Second, there must not be any uncertainty that the second step, the division of the acquired assets, will take place within a short time period after the first acquisition. The Commission considers that normally the maximum time-frame for the division of the assets should be one year.*

For the reasons described at the outset of this section, the parties believe that the two criteria set out in paragraph 31 are satisfied.

4.3 The establishment of Newco and the acquisition by Newco of the issued share capital of target will not result in co-ordination of other activities between Company A and Company B, and will not have an effect on their competitive behavior outside Newco. Furthermore, Company A and Company B will implement appropriate safeguards and set up a confidentiality framework to restrict disclosure of commercially sensitive information within Newco. Company A will not be permitted to receive confidential or commercially sensitive information relating to the Company B Acquired Businesses, and Company B will not be permitted to receive confidential or commercially sensitive information relating to the

[redacted]

[redacted]

Company A Acquired Businesses. Similarly Company A directors of Newco will not be given access to confidential information concerning Company B Acquired Businesses and vice versa unless such disclosure is legally required. The parties will seek to establish firewalls within target's systems to ensure that confidential information concerning each party's businesses is not disclosed to the other party.

* * *

[redacted]