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CLIENT MEMORANDUM

FSMA Clarifies Rules and Issues Good Practice Recommendations About Contributions In Kind, Mergers, Divisions and Equivalent Operations In Listed Companies

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On December 23, 2016, the Belgian Financial Services and Markets Authority ("FSMA") released a FAQ addressing practical questions and good practices relating to contributions in kind, mergers, divisions and equivalent operations in listed companies that can give rise to conflicts of interest on the part of the persons initiating the operation. The FSMA's FAQ targets in particular business combinations involving two companies with the same reference shareholder.

The FSMA recommends that the listed companies follow certain rules to ensure that the decision-making process leading to the valuation of the companies involved in the combination and the resulting exchange ratio, safeguards the interests of all the shareholders in the company arising from the combination and, in particular, the minority shareholders.

In such FAQ, the FSMA first briefly reviews the applicable rules under Belgian law. More specifically, the FSMA reiterates the obligations of the board of directors and the statutory auditor to draw up specific reports, as well as the quorum and voting rules applicable to the shareholders when approving such decisions.

More interestingly, the FSMA identifies what it considers to be the fundamental principles and good practices in those circumstances.

- Role of independent directors

The FSMA highlights the essential role of the independent directors in ensuring that listed companies are managed in the interests of all shareholders. To that effect, the FSMA strongly recommends that independent directors be assisted by their own legal advisors and/or valuation experts.

- Conflict of interest rules for intra-group decisions (art. 524 of the Companies Code)

While it is widely accepted that the conflict of interest rules contained in art. 524 of the Companies Code are only applicable to decisions to be taken by the board of directors and do not per se apply to contributions in kind, mergers, divisions and equivalent operations, which decisions are the prerogatives of the shareholders' meeting, the FSMA considers that these conflict of interest rules should be applied voluntarily or "by analogy" to these operations when a conflict of interest may occur on the part of the persons initiating them. According to the FSMA, this is already often done in practice in listed companies: the board of directors voluntarily applies conflict of interest rules, with the aim of assessing whether the operation is carried out in arm's-length conditions. The FSMA is of the opinion that this practice should be followed as it forces the independent directors to take a clear position regarding the operation.

- Fairness opinion

Although not mandatory, the FSMA considers as good practice the appointment by the independent directors of an independent financial expert to draw up a fairness opinion on the proposed exchange ratio. It is recommended that the criteria for the appointment of an independent valuation expert that is set out in the takeover legislation be followed for the appointment of the expert who will prepare the fairness opinion.

The mission of the expert should be as broad as possible and should include the review of the business plan, forecasts and hypothesis underlying the valuation.

- Information on the justification of the exchange ratio to be included in the legal reports

In order to allow the shareholders to make an informed decision and to form an opinion on the fairness of the exchange ratio, the FSMA considers that the main hypothesis on which the exchange ratio is based should be expressed in figures.

- Prospectus obligation and other communications regarding the operation

Listed companies are not required to publish a prospectus when they request the listing of new shares resulting from a contribution in kind, merger or division, but they must provide the public with information equivalent to the information included in a prospectus.

The publication of the document containing such equivalent information is mandatory only at the time when the new shares are listed (i.e., after the approval of the operation by the shareholders' meeting). Nonetheless, the FSMA

recommends that listed companies make available to the shareholders, even before the shareholders' meeting, as much relevant information as possible (such as pro forma information about the combined entity and historical information on the entities concerned, prepared in line with IFRS). This information can be made available via the special reports or via separate documents whose availability is announced in a press release.

If the listed company wishes to circulate information (press releases, interviews, etc.) additional to what is legally required, the FSMA stresses the importance for the company of ensuring that this additional information is fair, accurate, true and not misleading.

The FSMA's main focus is to ensure that all shareholders who are to decide on the operation receive complete and accurate information. It must be kept in mind that the FSMA may *a posteriori*, after the publication of the legal reports, issue a warning if it is of the opinion that information made available by the listed company is inadequate or misleading, or that there could be a threat to the equal treatment of securities holders.

The FAQ can be found on the FSMA's website at the following address: http://www.fsma.be/fr/Site/Repository/faq/faq_info.aspx.

If you have any questions regarding this memorandum, please contact Xavier Dieux (+32 2 290 18 20, xdieux@willkie.com), Didier Willermain (+32 2 290 18 20, dwillermain@willkie.com) or the Willkie attorney with whom you regularly work.

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