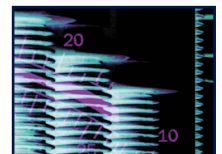
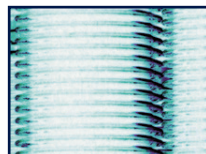
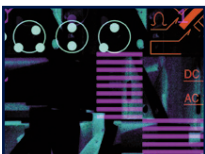


Public Procurement



“Technology is a strong area, and the team is involved in a substantial amount of public procurement in this and other commercial sectors.”

Chambers and Partners, 2006

About Bird & Bird

Bird & Bird is a full service international commercial law firm with a reputation for excellence in chosen industry sectors and areas of legal practice. As detailed below, we offer a full range of legal services to bodies in the public sector, companies bidding to the public sector, and institutions financing public sector projects. In this area, we are proud to be working for some of the world’s most important, innovative and technologically advanced organisations, each of which depends on cutting-edge legal advice to realise its business and policy goals.

With offices in Beijing, Brussels, Düsseldorf, Frankfurt, The Hague, Hong Kong, London, Lyon, Madrid, Milan, Munich, Paris, Rome, Stockholm and close ties with firms in the rest of Europe, Asia and the United States, we offer our clients local and cross-border expertise with a global reach.

Our team and approach

Our procurement law experts are located in all the key markets of Europe enabling us to provide integrated advice on cross-border and national transactions regulated by EU and similar procurement rules.

We have an impressive track record in public procurement acting for public entities, bidders and funders. This gives us a deep understanding of the business and policy issues that arise in public procurement transactions as well as the more politically sensitive aspects of working in complex, legally regulated and high profile public projects.

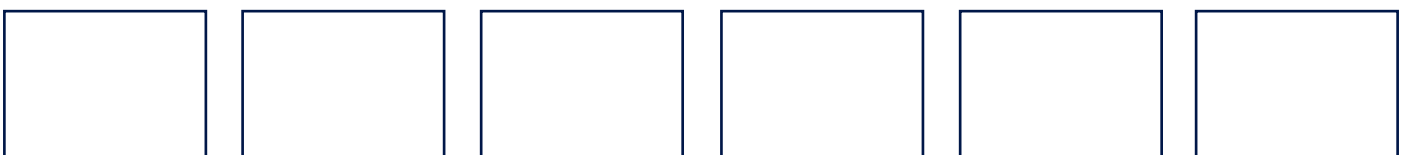
We are able to advise throughout the lifecycle of any transaction:

- planning and advertising of the procurement
- negotiation from shortlisting stage to contract award (including making and defending legal challenges)
- management of the contract to ensure that benefits are realised and disputes avoided or resolved.

As a full service law firm we advise on all areas of law that impact upon public procurement transactions. Because we have experience acting for the public sector, industry and funders we understand and can anticipate the needs of all parties to enable projects to be delivered.

A core belief which underpins our business strategy in the public sector is that it is helpful to the outcome of any project to be able to see the issues from all perspectives - whether customers, suppliers or funders. That is why, subject to professional conflict rules, we act for contracting authorities as well as bidders, customers and suppliers. It is our belief that the knowledge we gain acting on both sides of the public procurement process is of benefit to all our clients.

Our International Public Procurement Practice Group acts as one integrated international group that shares best practice and know-how and is therefore better able to service the needs of our clients nationally and internationally.



“no-nonsense, sensible and pragmatic approach” and “ensures that the deal gets done on time”

Chambers and Partners, 2006

Whether providing advice on financing, structuring consortia bids or helping to resolve any disputes that may arise, our lawyers seek to find the solution most appropriate to our clients' business objectives.

In advising our clients we seek to help develop commercially workable solutions that deliver more than just correct legal answers. We believe in investing in the client relationship - for example we help draft standard form documents which can be re-used and often give client tailored training sessions to share our knowhow with the client organisation.

Our procurement law experts are experienced in and enjoy doing projects fast. We do not pad out chargeable hours or write unhelpful essays on marginally relevant legal issues at the expense of our clients.

Where appropriate, we develop a partnership relationship with our clients and close working relationships with the clients and lawyers on the other side. We do not waste our time or our clients' money by causing confrontational negotiations.

The scope of our public sector experience

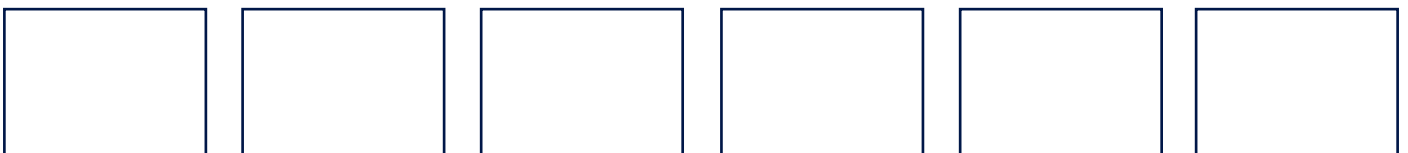
Bird & Bird has an excellent reputation internationally for commercial work in the public sector. We are particularly experienced in advising clients on sophisticated technology based projects and in large, complex infrastructure projects across a range of sectors including: aviation & aerospace, defence, communications, IT, energy, transport and logistics, construction and facilities management and health services.

For example, we have recently advised a world leader in defence communications in a major digital radio system procurement project in Germany and assisted the German health insurance telematic joint venture company in its procurement of IT equipment and services for a nationwide health chip card.

Although the burden of complying with public procurement law lies with the government entity, all parties need to be certain that the applicable rules have been complied with. This provides a maximum of investment certainty, both for the public side and bidders in often costly bid preparations.

We ensure that public procurement responsibilities between Government entity, prime and sub-contractors are transparent, non-discriminatory and comply with relevant procedures.

Ancillary rules and regulations on state aid and competition law must be observed so that any subsidies and grants received are compliant with the appropriate rules.



“The firm’s procurement practice maintains its pole position in the field of IT outsourcing partnerships.”

Chambers and Partners, 2007

As well as advising on public procurement law at EU and national levels, we find that competition law and state aid issues are increasingly coming to the fore as the boundary between public and private provision of government services becomes more blurred. We offer cutting-edge advice on the latest development in European and domestic competition and state aid law.

The lifecycle of a public procurement project

We offer legal advice and support to the participants in public procurement projects throughout the lifecycle of the project - from design to delivery. Certain services are unique to public entities whilst other services are common to all participants. We find that it is helpful to the outcome of any project to be able to see the issues from all perspectives - whether customers, suppliers or funders. Bird & Bird’s strength is our experience gathered on both sides of the transaction.

We set out below the range of services that we deliver at each stage of a project before considering some special situations that apply uniquely to public entities, bidders or financiers.

Project design & governance

At the beginning of a project, it is necessary for all partners to understand the key factors which will influence project design decisions - applicable law, procurement process, type of contract, evaluation criteria and so on.

For all participants it is also necessary to agree project governance at the beginning:

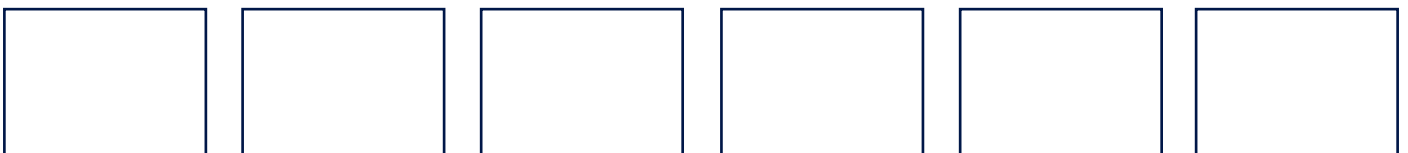
- team composition and reporting lines internally and between different advisers in order to reach a maximum efficiency regarding the entire project organisation.
- how to successfully steer the proceedings through political decision-makers and other stakeholders.
- how to handle any press/media attention

We like to be involved in the initial blue sky or white board planning phase of a project.

Advertising requirements

We advise contracting entities on how to comply with legal advertising requirements to maximise their flexibility over the lifecycle of the project. Where advertising is not legally required but may be desirable, we advise on how best to reach potential and suitable bidders in the relevant marketplace. Getting the advert right is a key success factor in public sector procurement.

We also advise bidders and funders on how to interpret and respond to public sector advertisements.



"Famed for its aptitude in public sector procurement"

Chambers and Partners, 2007

Bid structure

We help prepare and structure bids to ensure that they are compliant with the procuring entities' regulations. We work with commercial / tax / accounting / financial advisers to design contract, corporate and cash flow structures in the most efficient manner, allowing effective investment, performance and distribution of payments.

Partnering

Parties involved will often need to form and implement a partnering strategy. The risks of large transactions will often need to be shared and getting the right mix of skill sets may be key in selecting or being in the winning team.

We advise on a full range of M&A activity and joint ventures. In complex consortia it is also often crucial to achieve a successful "marriage" of different corporate cultures and establishment of team corporate governance.

Complex consortium structures go through a number of steps:

- Memorandum of Understanding / Letters of Intent - which parts are legally binding under which legal systems?
- Advice on areas of law that impact upon consortia arrangements: employment, tax, corporate, unfair competition and anti-trust
- Teaming Agreements - exclusive and non-exclusive arrangements which are compliant with the applicable procurement law requirements
- Shareholders Agreement if a corporate JV structure is to be created.

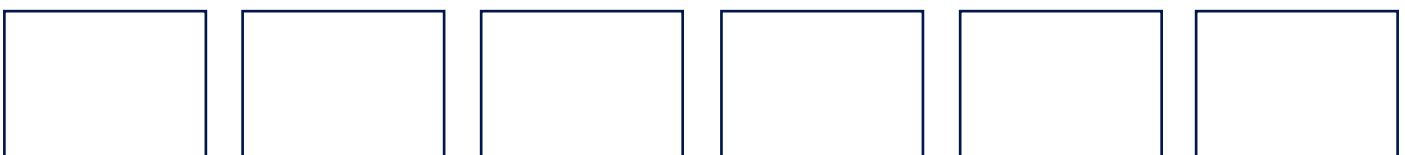
Longlisting and shortlisting evaluation

Except in the so-called "you procedure", contracting authorities will want to draw up a longlist and a shortlist of those who have expressed an interest in the advertised opportunity. However, longlisting and shortlisting decisions are highly regulated in terms of the permitted process and criteria. We will assist public bodies in drawing up and applying legally sound qualification processes. Equally important, we will advise bidders on how to respond and maximise their chances of being selected.

Contract drafting and negotiation

At the outset, we can help contracting authorities and bidders to develop their key commercial principles consistent with government contracting policies and commercial best practice. We can draft all required contract documentation to reflect those key principles - from legal boiler plate to detailed service levels. And we have the capacity to provide a full range of negotiation support services - from face-to-face negotiations to backroom drafting - at the client's discretion. Complex public procurement projects often involve sophisticated payment mechanisms which are crucial for financing and for sponsors to understand the risks they assume. We play an active role in agreeing, drafting and explanation of payment mechanisms.

We advise on gearing, committed equity and parent company guarantees as well as collateral support such as Standby Letters of Credit.



“The group recently supplemented its traditional UK practice by developing a cross-European practice aiming, in particular, at supporting multinationals and organisations bidding for procurement work outside their own jurisdiction.”

Chambers and Partners, 2007

It is a truism that any risk should be allocated to the party best able to understand, manage, mitigate and/or cost it. We advise all parties on allocation and management of risk and limitation of liability. We assist clients with the preparation and use of risk registers and in explaining complex risks to key stakeholders.

We advise on “flow down” of risk into sub-contracts and back-to-back commitments.

Following selection of the successful bidder, we can provide all the services necessary to document the winning bid and contractualise the deal, from prime contract to subcontract and all related funding agreements, including parent company guarantees and the like.

Due diligence

Whether acting for contracting authority, bidder or funder, we can support the due diligence activity which is a critical success factor for all procurement projects, helping all parties to understand the customer’s requirements and sharing information on the assets, accommodation and staff available for transfer to the successful bidder.

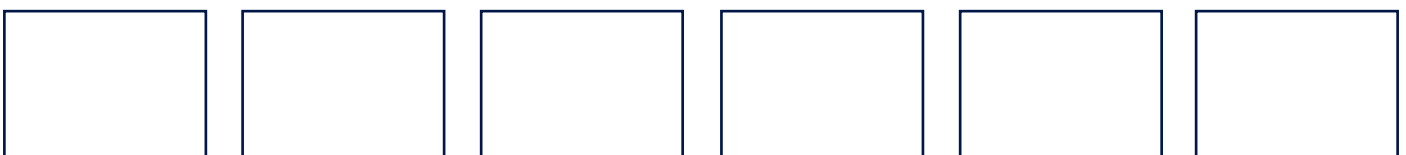
We have particular expertise in conducting due diligence exercises in the context of complex retendering projects, helping to ensure a level playing field between incumbent contractor and competing bidders, and ensuring a smooth transition from incumbent to replacement contractor. This includes advising on the complex legal issues surrounding the transfer of employees under the EU Acquired Rights Directive, pension rights, and third party agreements.

In many cases after shortlisting, the bidders raise extensive questions to the awarding authority. We assist in the co-ordination of technical, commercial and legal advisers in order to respond quickly and efficiently to bidders. We appreciate the critical need to ensure that questions are answered correctly and exhaustively in order to avoid the risk of any challenges which can arise at this stage.

Bid evaluation models

We support our clients in formal and substantive assessments and the decision to exclude incomplete or untimely bids. We then assist in comparing bid prices and clarifying any undue deviations from the average price range.

As part of this process, we help public sector clients to communicate with bidders as well as commercial experts. If necessary (in negotiated procedures or competitive dialogue) we provide legal, logistical and organisational support, mostly with the shortlisted bidders, with whom exclusive negotiations can be conducted until the final award decision. We also present any pre-award decisions in internal client meetings and provide communication support in relation to stakeholders, the public and the media.



“The group recently supplemented its traditional UK practice by developing a cross-European practice aiming, in particular, at supporting multinationals and organisations bidding for procurement work outside their own jurisdiction.”

Chambers and Partners, 2007

Contract award - challenging or defending a decision?

We defend contracting authorities and bidders in situations where a competitor challenges a decision to shortlist or make a contract award. We also represent bidders who wish to attack award procedures that may not be compliant.

After award of the contract, we help to prepare any relevant EU or national award notices and post-award notifications. We also deal with antitrust (merger control) and EU & competition law both at EU and national levels.

Following the decision of the European Court of Justice in the Alcatel case, we find that legal challenges to award decisions are becoming more common in those countries - such as the UK - where they used to be quite rare. Our experiences of mounting and defending such challenges in countries - such as Germany - where they have been quite common for many years is an invaluable resource which we can use to good effect across different jurisdictions within the EU.

Contract management

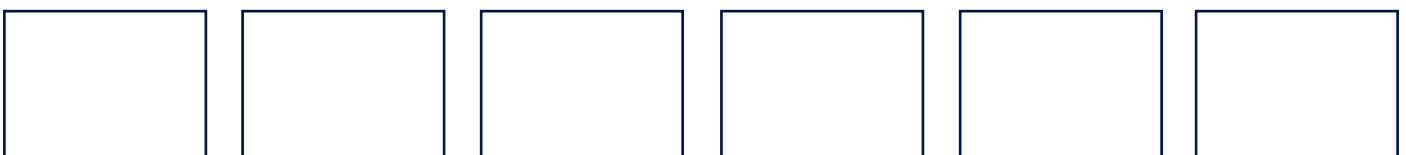
Our services do not stop at contract management. Our philosophy is to help our clients from project design to project delivery, helping to ensure through robust contract management that the benefits contemplated by the contract - for customer and supplier alike - are actually delivered. To this end, we offer a “contract management toolkit” - including training and written guidance - to help all parties avoid the legal pitfalls of poor contract management.

When issues arise, as they inevitably do over long term contracts, we help the parties to manage them through dispute avoidance techniques, alternative dispute resolution mechanisms (such as expert determination and mediation) and, where all else fails, through full blown arbitration and / or litigation of disputes.

Throughout the entire proceedings we deal with any formal bidder complaints, legal actions and interventions by the EU Commission which are increasingly having an impact on the outcome of transactions. If litigation arises, we represent public sector organisations in all court proceedings and defend the transaction against other actions such as from accountancy supervisory bodies.

Retendering

Having been active in the contracting out of public services for many years, we have in-depth experience of “second generation” and even third or fourth generation retenders of the original public sector contract. Prior to any significant retender exercise, we can offer contracting authorities and incumbent contractors our “Retention Roadtest” toolkit. This includes a gap analysis of existing contracts to ensure that they are fit for retender. During the retender exercise itself, we can advise all the parties - the customer, the incumbent supplier and potential replacement suppliers - on how to ensure a level playing field through appropriate due diligence (see above). And if the contract is awarded to a non-



“The department covers the whole range of public law with a focus on the contractual aspects (public markets, allegations and the like), regulation and public-private issues, in all the areas where the firm specialises: telecoms, IT, health and life sciences, defence and aviation.”

European Legal 500, 2006

incumbent, we can support a transition of incumbent staff, assets and accommodation from the incumbent to the replacement contractor.

Dispute resolution

We assist our clients throughout the lifetime of their contracts including in the event of termination. We are experienced in advising on contractual disputes and have successfully assisted on disputes based either on the application of WTO, EU, NATO or national regulations.

We recognise that organisations often want to find conciliatory ways of resolving contractual disputes. We assist private and public entities in negotiation, mediation and arbitration proceedings. For example, we frequently represent our clients before the CCNRA (French Committee for the Amicable Settlement of Public Procurement Contracts).

If and when necessary, we assist clients in litigation. Our team is skilled in all types of litigation related to public procurement contracts.

WTO and other international procurement procedures

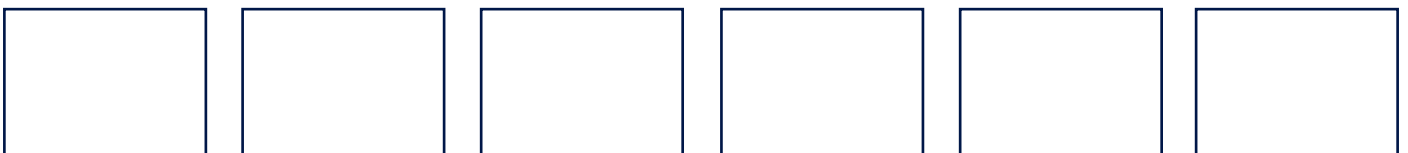
Most companies today have established subsidiaries in Europe and therefore have to comply with European and national public procurement rules. However, procuring entities and companies that do not have a subsidiary in an EU Member State are also required to comply with the provisions of international agreements on public procurement. Although our advice is most often focused on the WTO's Government Procurement Agreement, we also provide advice on all other major WTO agreements. Additionally, we offer advice to private bidders on how to use the WTO General Agreement on Trade in Services (GATS) to establish and offer services in countries that are not EU Member States.

We assist in developing case strategies, prepare briefs, argue cases, and develop implementation and litigation strategies for companies or defence strategies for public entities. This includes assisting clients in evaluating the legal, political, commercial and practical considerations associated with possible WTO dispute resolution.

Our services also include advising lenders/ borrowers with regard to the application of the procurement policies and rules of regional development banks such as the European Bank for Reconstruction and Development.

Award of EU contracts and contracts financed by the EU

EU Financial Regulation provides specific rules for the award of EU contracts or the beneficiaries of EU aid programmes whose projects have been funded by the EU. We assist private bidders and beneficiaries of all types of EU external aid financed from the EU general budget and the European development budget in securing EU procurement contracts that are compliant with EU rules.



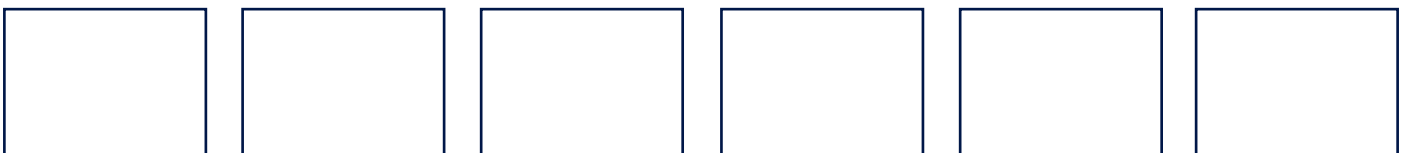
Financing issues

Increasingly across Europe, Governments are requesting innovative private financing proposals for all major public expenditure and a number of large complex projects are tendered on terms structured to enable external debt financing.

The UK has led the way with the development of the Private Finance Initiative. Bird & Bird has always been at the forefront of developments acting on the most innovative PFI/PPP projects in the UK including innovative projects in the aerospace and defence sectors.

The introduction of external financing introduces complex legal and business issues for all parties which must be understood at all stages in public procurement: The customer buys a service not an asset. Third party revenue is obtained which assists parties in achieving off balance sheet treatment.

We provide advice on a wide range of complex financings supporting PFI or PPP strategic partnering arrangements. We have acted for procuring authorities, service providers and funders and are very familiar with drafting finance documents (loan and leasing arrangements), direct agreements, guarantees, performance bonds, termination compensation arrangements and step-up/step-in agreements.



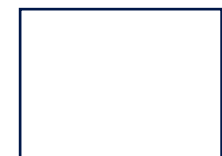
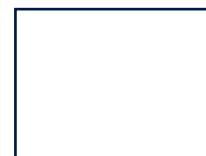
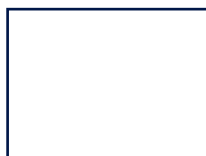
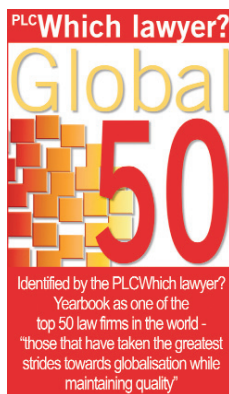
Summary

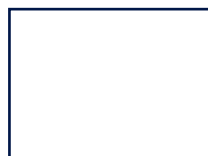
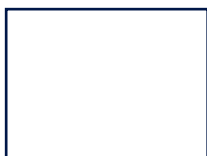
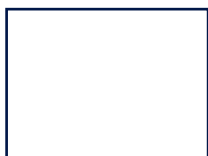
We provide a full range of legal services to contracting authorities, suppliers and funders in relation to public procurement projects including:

- Compliance with all applicable EU & national public procurement, competition and state aid laws
- Advertising, evaluation and award decisions
- Contract drafting and negotiation
- Contract management to deliver project benefits

Contract management

- Tax
- PFI/PPP and other innovative financing mechanisms
- Dispute resolution and mediation - relating both to public procurement challenges and contract disputes
- Employment law and practice
- Corporate (structuring consortia bids and structuring public bodies)





Contacts

Belgium - Marc Martens
France - Jean-Dominique Bloch
Germany - Jan Byok
Italy - Eutimio Monaco
The Netherlands - Elies Steyger
Spain - Raquel Ballesteros
Sweden - Henrik Nilsson
UK - Peter Elliott

BIRD & BIRD

www.twobirds.com

Beijing 3614 China World Trade Centre, Tower 1 1 Jianguomenwai Dajie Chaoyang District Beijing 100004, PRC Tel: +86 10 6505 6667 Fax: +86 10 6505 9469	Brussels Avenue d'Auderghem 22-28 bte 9 1040 Brussels Belgium Tel: +32 (0)2 282 6000 Fax: +32 (0)2 282 6011	Düsseldorf Carl-Theodor-Straße 6 40213 Düsseldorf Germany Tel: +49 (0)211 2005 6000 Fax: +49 (0)211 2005 6011	Frankfurt Tanusanlage 1 60329 Frankfurt am Main Germany Tel: +49 (0)69 74222 6000 Fax: +49 (0)69 74222 6011
The Hague Van Alkemadelaan 700 2597 AW The Hague P.O. Box 30311 2500 GH The Hague The Netherlands Tel: +31 (0)70 353 8800 Fax: +31 (0)70 353 8811	Helsinki Mannerheimintie 8 00100 Helsinki Finland Tel: +358 (09) 622 6670 Fax: +358 (09) 622 6677	Hong Kong 33/F, Three Pacific Place 1 Queens Road East Hong Kong Tel: +852 2248 6000 Fax: +852 2248 6011	London 15 Fetter Lane London EC4A 1JP UK Tel: +44 (0)20 7415 6000 Fax: +44 (0)20 7415 6111
Lyon 23 boulevard Jules Favre Lyon 69006 France Tel: +33 (0) 4 78 65 6000 Fax: +33 (0) 4 78 65 6011	Madrid Jorge Juan, 8. 1° 28001 Madrid Spain Tel: +34 91 790 6000 Fax: +34 91 790 6011	Milan Via Montenapoleone, 10 20121 Milan Italy Tel: +39 02 30 35 6000 Fax: +39 02 30 35 6011	Munich Pacellistrasse 14 80333 Munich Germany Tel: +49 (0)89 3581 6000 Fax: +49 (0)89 3581 6011

Paris Centre d'Affaires Edouard VII 3 square Edouard VII 75009 Paris France Tel: +33 (0)1 42 68 6000 Fax: +33 (0)1 42 68 6011	Rome Via di San Sebastianello, 9 00187 Rome Italy Tel: +39 06 69 66 7000 Fax: +39 06 69 66 7011	Stockholm Norrandsgatan 15 Box 7714 SE-103 95 Stockholm Sweden Tel: +46 (0)8 506 320 00 Fax: +46 (0)8 506 320 90
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