

## **COMPLETED ACQUISITION BY DIAGEO PLC OF UNITED SPIRITS LIMITED**

### **Notice under Paragraph 2(1) Schedule 10 of the Enterprise Act 2002 of proposed undertakings in lieu of reference pursuant to section 73 of the Enterprise Act 2002**

#### **CMA's duty to refer**

1. On 25 November 2013 the Office of Fair Trading (OFT) announced its decision to suspend its duty to refer the completed acquisition by Diageo plc (Diageo) of United Spirits Limited (USL) for phase 2 investigation under section 22 of the Enterprise Act 2002 because it was considering whether to accept appropriate undertakings from Diageo in lieu of reference. The text of the OFT's decision (the decision), published on 6 February 2014, provides details of the OFT's findings.<sup>1</sup>
2. The Competition and Markets Authority (CMA) is the UK's lead competition and consumer authority. On 1 April 2014 it came into operation taking over the competition and some of the consumer functions of the OFT as well as the functions of the Competition Commission including merger reviews.
3. The OFT found that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition (SLC) in relation to the supply of in relation to bottled blended Scotch whisky in the UK to the off-trade channel (including private label blended Scotch whisky and branded blended Scotch whisky).<sup>2</sup> Accordingly, the OFT found itself under a duty to refer the merger for phase 2 investigation.

#### **Divestment undertakings offered by Diageo**

4. To address the OFT's concerns, Diageo offered to divest the entirety of the Whyte & Mackay Limited (Whyte & Mackay) business apart from two malt distilleries, Dalmore and Tamnavulin, and the associated brands of those two distilleries ('the Divestment Business'). The OFT noted that it did not identify any competition concerns with respect to the malt products produced at

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<sup>1</sup> [OFT Diageo / United Sprits decision](#)

<sup>2</sup> Paragraph 135 of the decision

Dalmore and Tamnavulin. Specifically, the proposed UIL involves the sale of all of Whyte & Mackay's blended Scotch whisky brands including the 'Whyte & Mackay' brand as well as Whyte & Mackay's private label operations. Blended Scotch whisky products can include both grain whisky and malt whisky. The UIL comprises the entirety of Whyte & Mackay's Invergordon grain distillery and associated inventory and the entirety of Whyte & Mackay's Jura and Fettercairn malt distilleries. The proposed divestment incorporates all of Whyte & Mackay's existing operations and contractual arrangements (save for the two excluded distilleries) including its coopering and warehousing operations, bottling plants, sales and marketing arrangements and customer relationship teams, all procurement and supply arrangements, staff and centralised functions such as finance and HR.

### **Upfront buyer for the Divestment Business**

5. As set out in the decision (paragraphs 231 to 233), the OFT decided that any UILs that it accepts should include an up-front buyer provision. In particular, the OFT was concerned that the number of possible buyers could be low, a number of interested purchasers may raise competition concerns in their own right, and the possible buyer may not be interested in maintaining the private label business of Whyte & Mackay.<sup>3</sup>
6. Diageo has proposed Emperador UK Limited (Emperador) as the purchaser of the Divestment Business from USL. For commercial reasons USL has agreed to sell the entirety of Whyte & Mackay, including the Dalmore and Tamnavulin distilleries and associated brands and personnel ('the additional assets').
7. USL and Emperador have entered into a sale and purchase agreement to transfer the Divestment Business and the additional assets, conditional on USL shareholder approval as required under Indian law (which was obtained on 2 July 2014) and approval of the Reserve Bank of India.<sup>4</sup> In addition, the sale is conditional on CMA acceptance of the UILs and its approval of Emperador as purchaser of the Divestment Business.
8. The number of conditions for completion of the sale in this case is unusual. CMA guidance says 'the CMA will not accept the UILs unless a sale agreement, generally conditional from the buyer's perspective only on acceptance of the UILs by the CMA has been agreed with a buyer for the divestment business and the CMA considers that the buyer would be

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<sup>3</sup> Paragraph 231 of the decision

<sup>4</sup> Reserve Bank of India approval is required in order for USL Holdings Limited BVI to write-off part of the loans from USL

acceptable'.<sup>5</sup> However, given the good faith endeavours of the parties in this case to dispose of the Whyte & Mackay business, the requirements of Indian law and regulations, and that initial undertakings are in place as is a monitoring trustee, the CMA has decided that it will continue to pursue a phase 1 remedy in this case.

## Suitability of the proposed purchaser

9. In approving a purchaser, the OFT's starting position is that it must be confident without undertaking a detailed investigation that the proposed purchaser:
  - will remedy, mitigate or prevent the SLC or any adverse effect which has or may have resulted from it;
  - is independent of and unconnected to the merger parties;
  - has the necessary expertise, financial resources, incentive and intention to maintain and operate the divested business as an effective competitor in the marketplace;
  - is reasonably expected to obtain all necessary approvals, licences and consents; and
  - acquiring the Whyte & Mackay business does not create a realistic prospect of a SLC on any market in the UK.<sup>6</sup>
10. Emperador is one of the largest suppliers of brandy in the world (with distilleries in the Philippines and Spain). Emperador has experience in supplying the off-trade in both branded and unbranded products. Emperador submitted to the CMA that it will maintain the private label business of Whyte & Mackay.
11. To ensure existing expertise at Whyte & Mackay is not lost, Emperador has indicated that the relevant skilled personnel and management team would transfer as part of the acquisition.
12. The CMA considers that Emperador will remedy, mitigate or prevent the SLC or any adverse effect which has or may have resulted from it.

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<sup>5</sup> [Mergers: Guidance on the CMA's jurisdiction and procedure](#), CMA2, January 2014, paragraph 8.33

<sup>6</sup> Office of Fair Trading, [Mergers: Exceptions to the duty to refer and undertakings in lieu of reference guidance](#), OFT 1122, December 2010, paragraphs 5.25-5.26, as adopted by the CMA

13. The CMA examined whether Emperador is independent of and unconnected to Diageo and USL including licensing agreements (where Emperador has a distribution agreement with Diageo for Smirnoff Ice in the Philippines). There are no common directors or major shareholders. The CMA is satisfied that Emperador is independent of and unconnected to Diageo and USL.
14. Emperador is listed on the Philippine stock exchange with a market capitalisation of around £2.3 billion and cash reserves of £290 million. Moreover, Emperador's major shareholder, Alliance Global Group Inc, will provide additional funding for the transaction. It has cash reserves of £1.1 billion. The CMA has examined Emperador's financial position and considers that it has sufficient finances to undertake the acquisition and to compete post effectively post transaction. Further the CMA considers that it will have the incentive and expertise to compete. The sale agreement includes (amongst other factors) the management team and relevant staff, customer contracts, customer records, intellectual property rights, stock of bulk whisky and brand names. The CMA considers that Emperador has the necessary expertise, financial resources, incentive and intention to maintain and operate the divested business as an effective competitor in the marketplace.
15. All licences, permissions, consents, authorisations and permits are being transferred as part of the sale. The CMA is not aware of any reason why Emperador would not obtain all necessary approvals, licences and consents.
16. Emperador does not have any existing operations in whisky or vodka which would overlap with the products currently supplied by Whyte & Mackay. The CMA therefore considers that the divestment of the Whyte & Mackay business to Emperador would not create a realistic prospect of a SLC in the UK.
17. Therefore, subject to the outcome of this consultation, the CMA considers Emperador to be a suitable purchaser of the Divestment Business.

### **Proposed decision and process going forward**

18. The acceptance by the CMA of the proposed undertakings in lieu is dependent on this public consultation.
19. The CMA considers that the proposed undertakings offered by Diageo and the purchase of the Divestment Business by Emperador are clear cut and, in the circumstances of this case, appropriate to remedy, mitigate or prevent the competition concern identified in the decision.
20. The CMA therefore gives notice that it proposes to accept undertakings in lieu in the form of the proposed undertakings. Download the [proposed undertakings](#) in lieu.

21. Before reaching a decision as to whether to accept the proposed undertakings, including Emperador as purchaser of the Divestment Business, interested parties are invited to make their views known.

Representations should be made in writing to the Competition and Markets Authority by 1 August 2014 and be addressed to:

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37 Southampton Row  
London WC1B 4AD  
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Telephone: 0203 738 6561

Deadline for comments: 1 August 2014