

COMPLETED ACQUISITION BY DIAGEO PLC OF UNITED SPIRITS LIMITED

UNDERTAKINGS GIVEN BY DIAGEO TO THE COMPETITION AND MARKETS AUTHORITY (CMA) PURSUANT TO SECTION 73 OF THE ENTERPRISE ACT 2002

WHEREAS:

- (A) Diageo plc completed on 4 July 2013 the acquisition of a shareholding and voting rights and other associated rights in United Spirits Limited via a combination of existing shares from other shareholders (including some from a mandatory public tender offer) and newly issued shares such that Diageo and USL ceased to be distinct for the purposes of the Enterprise Act 2002;
- (B) The CMA believes that, as a consequence of that transaction, a relevant merger situation has been created in the UK;
- (C) The CMA has a duty to refer a completed merger for further Phase 2 investigation where it believes that it is or may be the case that the creation of that merger situation has resulted or may be expected to result in a substantial lessening of competition within any market or markets in the UK for goods or services;
- (D) Under section 73 of the Act the CMA may, instead of making such a reference and for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has or may have resulted from it or may be expected to result from it, accept undertakings to take such action as it considers appropriate, from such of the parties concerned as it considers appropriate. In particular, the CMA shall have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it;
- (E) The CMA considers that, in the absence of appropriate undertakings, it would be under a duty to refer the Acquisition for a Phase 2 investigation;
- (F) The CMA further considers that the undertakings given below by Diageo are appropriate to remedy, mitigate or prevent the substantial lessening of competition, or any adverse effect which has or may have resulted from it, or may be expected to result from it, as specified in the Decision of 25 November 2013 under section 22 of the Act; and

- (G) Diageo gave initial undertakings which were accepted by the OFT on 16 July 2013 in respect of the Acquisition pursuant to section 71 of the Act for the purposes of preventing pre-emptive action. Pursuant to section 71(6) of the Act, these initial undertakings cease to be in force on the acceptance by the CMA of the undertakings in lieu given below by Diageo.

NOW THEREFORE Diageo hereby gives to the CMA the following undertakings for the purposes of remedying, mitigating or preventing the substantial lessening of competition, or any adverse effect of which has or may have resulted from it or may be expected to result from it.

1 EFFECTIVE DATE OF THE UNDERTAKINGS

- 1.1 These undertakings shall take effect from the date that, having been signed by Diageo, they are accepted by the CMA.

2 DIVESTMENT OF THE WHYTE & MACKAY BUSINESS

- 2.1 Prior to the acceptance of these undertakings by the CMA, Diageo shall seek that United Spirits (Great Britain) Limited enter into a legally binding agreement at the least to divest to the satisfaction of the CMA the Whyte & Mackay Business as a going concern to the Proposed Purchaser, Emperador UK Limited, on terms approved in advance by the CMA.

- 2.2 Without prejudice to the generality of paragraph 2.1 above, Diageo shall seek that United Spirits (Great Britain) Limited use all reasonable endeavours to ensure the transfer of Key staff with the divestment of the Whyte & MacKay Business.

- 2.3 Diageo shall only be deemed to have complied with its obligations at paragraphs 2.1 and 2.2 if, prior to acceptance of these undertakings by the CMA, United Spirits (Great Britain) Limited entered into a legally binding agreement with the Proposed Purchaser, conditional on:

- (a) formal CMA approval of the Proposed Purchaser for the purposes of paragraph 3.1 below; and
- (b) acceptance by the CMA of these undertakings.

provided that the completion of the divestment of the Whyte & Mackay Business to the Proposed Purchaser contemplated by such agreement takes place by 9 November 2014.

- 2.4 Without prejudice to the generality of paragraph 2.1 above, Diageo shall procure that USL take the following measures, to the extent they may be necessary in the opinion of the CMA, to effect the sale of the Whyte & Mackay Business in accordance with the provisions of these undertakings:

- (a) the transfer or vesting of property, assets, rights, personnel, liabilities or obligations (including without prejudice any contracts, licences, authorisations, permits or consents);
- (b) the adjustment of contracts, whether by discharge or reduction or assignment of any liability or obligation or otherwise;
- (c) the creation, allotment, transfer, surrender or cancellation of any shares, stock or securities; and
- (d) the formation or winding up of a company.

3 PURCHASER APPROVAL AND TERMS OF DIVESTMENT

3.1 For the purposes of the CMA approving a Proposed Purchaser for the Whyte & Mackay Business in accordance with these undertakings, Diageo and/or the Proposed Purchaser shall satisfy the CMA that:

- (a) the acquisition by the Proposed Purchaser of the Whyte & Mackay Business, on the terms set out above, remedies, mitigates or prevents the substantial lessening of competition concerned or any adverse effect which has or may have resulted from it, or may be expected to result from it, in particular, having regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it;
- (b) the Proposed Purchaser is independent of and unconnected to Diageo and the Group of Interconnected Bodies Corporate to which Diageo belongs and any Associated Person or Affiliate of Diageo or such Group of Interconnected Bodies Corporate;

- (c) the Proposed Purchaser has the financial resources, expertise (including the managerial, operational and technical capability), incentive and intention to maintain and operate the Whyte & Mackay Business as a viable and active business in competition with Diageo and other competitors from the date of completion of the divestment;
- (d) the Proposed Purchaser is reasonably to be expected to obtain all necessary approvals, licences and consents from any regulatory or other authority; and
- (e) the acquisition by the Proposed Purchaser of the Whyte & Mackay Business does not create the realistic prospect of a substantial lessening of competition within any market or markets in the UK.

3.2 The CMA may require Diageo and/or the Proposed Purchaser to provide it with such information and documentation as it may reasonably require to satisfy the CMA that the Proposed Purchaser will fulfil the requirements in paragraph 3.1 above.

4 **INTERIM ACTION**

Pending the completion of the divestment of the Whyte & Mackay Business to the satisfaction of the CMA in accordance with the provisions of these undertakings, save as otherwise agreed in advance in writing by the CMA, Diageo shall minimise as far as possible any risk of loss of competitive potential of the Whyte & Mackay Business and in particular ensure that:

- (a) without accepting any duty to make any substantial capital investment additional to investment arrangements in place at the time of the Acquisition, the Whyte & Mackay Business is maintained as a going concern and sufficient resources are made available for the development of the Whyte & Mackay Business on the basis of its pre-merger plans and no change is made to the pre-merger industrial or commercial strategy or the investment policy of the Whyte & Mackay Business;
- (b) except in the ordinary course of business, no substantive changes are made to the organisational structure of the Whyte & Mackay Business or the management responsibilities within the Whyte & Mackay Business;

- (c) the Whyte & Mackay Business is maintained and preserved, including facilities and goodwill;
- (d) the nature, description, range and standard of goods and services currently supplied by the Whyte & Mackay Business are maintained and preserved;
- (e) the Whyte & Mackay Business continues to trade separately and separate trading name, separate sales and brand identity of the Whyte & Mackay Business is maintained;
- (f) except in accordance with clause 2 above, no assets of the Whyte & Mackay Business are disposed of, and no interest in such assets is created or disposed of, other than in the ordinary course of business;
- (g) there is no integration, or further integration of the information technology used by Diageo with that used by the Whyte & Mackay Business and the software and hardware platforms of the Whyte & Mackay Business shall remain essentially unchanged, except for routine changes and maintenance (and other than to the extent necessary to enable Diageo to maintain the Whyte & Mackay Business as a going concern pursuant to these undertakings);
- (h) all reasonable steps are taken (including appropriate incentive schemes (based on industry practice)) to encourage all Key Staff to remain with the Whyte & Mackay Business; and
- (i) to the extent it has not already occurred and except as detailed below, no Confidential Information relating to the Whyte & Mackay Business shall pass, directly or indirectly from the Whyte & Mackay Business (or any employees, directors, agents or Affiliates of the Whyte & Mackay Business) to Diageo (or any of its employees, directors, agents or Affiliates), or vice versa, except where strictly necessary in the ordinary course of business or in any of the following circumstances:
 - (i) the transfer of any aggregated financial and accounting information necessary to allow the Executive Management and the Board of Diageo to monitor and review the financial performance of the Whyte & Mackay Business provided that such accounting information is not passed on to any other person within Diageo;
 - (ii) the transfer of any information required in connection with Diageo's dealings with the CMA;

- (iii) the transfer of any information necessary for compliance with any statutory or accounting obligations to the extent that such compliance cannot be achieved separately by each of the businesses and including for the avoidance of doubt the compilation of consolidated accounts in line with the existing accounting practices of Diageo and the Whyte & Mackay Business;
- (iv) any steps necessary in order for Diageo to comply with these undertakings, including the transfer of information necessary for the divestment process; and
- (v) save as otherwise agreed with the CMA,

provided that, upon divestment of the Whyte & Mackay Business, any records or copies (electronic or otherwise) of Confidential Information held by Diageo in relation to the Whyte & Mackay Business (or vice versa) shall be returned to the relevant business and any copies destroyed (except as may be necessary for the purposes of compliance with the obligations in sub-paragraph 4(i)(iii) above).

5 CONTINUED SEPARATION

5.1 Except as provided for in clause 5.2 below or alternatively with the prior written consent of the CMA, for a period of 10 (ten) years following the divestment of the Whyte & MacKay Business pursuant to these undertakings, Diageo:

- (a) shall not, directly or indirectly, hold, acquire or re-acquire an Interest in the Whyte & MacKay Business;
- (b) shall procure that no employee or director of Diageo for as long as they are an employee or director of Diageo holds or is nominated to any directorship or managerial position in the Whyte & MacKay Business; and
- (c) shall not participate in the formulation of, or (other than in the ordinary course of business) influence or attempt to influence, the policy of the Whyte & MacKay Business, save that nothing in these undertakings will restrict Diageo from entering into trading or supply arrangements for bulk whisky with the Whyte & Mackay Business.

5.2 By way of exception to clause 5.1, and without the need to obtain consent of the CMA, the prohibition on reacquisition provided for in clause 5.1(a) shall not:

- (a) apply to pension fund investments made on behalf of Diageo employees (both current and former); and shall not
- (b) apply to financial investments made on behalf of Diageo in any parent company of the Whyte & Mackay Business provided that 1) any shareholding does not exceed 3% and 2) any shareholding is not combined with other rights such that Diageo has material influence over such parent company.

6 **COMPLIANCE**

6.1 Diageo shall comply promptly with such written directions as the CMA may from time to time give:

- (a) to take such steps as may be specified or described in the directions for the purpose of carrying out or securing compliance with these undertakings; or
- (b) to do or refrain from doing anything so specified or described which it might be required by these undertakings to do or to refrain from doing.

6.2 Diageo shall co-operate fully with the CMA when the CMA is:

- (a) monitoring compliance with the provisions of these undertakings; and
- (b) investigating potential breaches of the provisions of these undertakings.

7 **PROVISION OF INFORMATION**

Diageo shall furnish promptly to the CMA such information as the CMA considers necessary in relation to or in connection with the implementation and/or enforcement of and/or the compliance with these undertakings, including for the avoidance of doubt, any Confidential Information.

8 **EXTENSION OF TIME LIMITS**

The CMA may, in response to a written request from Diageo, or otherwise at its own discretion, grant an extension to any time period referred to in these undertakings.

9 INTERPRETATION

9.1 The Interpretation Act 1978 shall apply to these undertakings as it does to Acts of Parliament.

9.2 References in these undertakings to any English law term for any legal status, interest, concept or thing shall in respect of any jurisdiction other than England and Wales be deemed to include what most nearly approximates in that jurisdiction to the English law term.

9.3 In these undertakings the word "including" shall mean including without limitation or prejudice to the generality of any description, definition, term or phrase preceding that word and the word "include" and its derivatives shall be construed accordingly.

9.4 For the purposes of these undertakings:

‘Acquisition’ means the acquisition by Diageo of United Spirits Limited completed on 4 July 2013;

‘the Act’ means the Enterprise Act 2002;

‘Affiliate’ of a person is another person who satisfies the following condition, namely that any enterprise (which, in this context, has the meaning given in section 129(1) of the Act) that the first person carries on and any enterprise that the second person carries on from time to time would be regarded as being under common control for the purposes of section 26 of the Act;

‘Associated Person’ means a person or persons associated with Diageo within the meaning of section 127(4) of the Act and includes any Subsidiary of such a person or persons;

‘business’ has the meaning given by section 129(1) and (3) of the Act;

‘Confidential Information’ means any business secrets, know-how, commercially sensitive information, intellectual property or any other information of a confidential or proprietary nature;

‘Control’ shall be construed in accordance with section 26 of the Act, and in the case of a body corporate, a person shall be deemed to Control it if he holds, or has an interest in, shares of that body corporate amounting to 10 per cent or more of its issued share capital or carrying an entitlement to vote at meetings of that body corporate of 10 per cent or more of the total number of votes which may be cast at such meetings. [For the avoidance of doubt a contract to acquire Control in the future does not constitute control until such rights are actually acquired];

'Decision' means the CMA's decision under section 22 of the Act dated 25 November 2013 in connection with the Acquisition;

'Group of Interconnected Bodies Corporate' has the meaning given in section 129(2) of the Act; references to a Group of Interconnected Bodies Corporate shall be to the Group of Interconnected Bodies Corporate as constituted from time to time;

'Interest' includes shares, an interest in shares and any other interest carrying an entitlement to vote at shareholders' meetings but does not include a contract to acquire shares in the future; and for this purpose "an interest in shares" includes an entitlement by a person other than the registered holder, to exercise any right conferred by the holding of these shares or an entitlement to Control the exercise of such right; **"Key Staff"** means staff in positions of executive or managerial responsibility and/or whose performance affects the viability of the Whyte & MacKay Business;

'Diageo' means Diageo plc;

'CMA' means the Competition and Markets Authority or any successor body;

'OFT' means the Office of Fair Trading

'Proposed Purchaser' means Emperador UK Limited for the Whyte & MacKay Business;

'Subsidiary' shall be construed in accordance with section 1159 of the Companies Act 2006 (as amended), unless otherwise stated;

'UK' means the United Kingdom of Great Britain and Northern Ireland;

'USL' means United Spirits Limited

'Whyte & MacKay Business' means the business of Whyte & MacKay Limited in relation to the production, distribution and marketing of spirits in the UK comprising of the rights, assets, interests and obligations of or associated with that business as operated immediately prior to the date of the Acquisition, limited without prejudice to the foregoing:

- (a) the Invergordon grain distillery and maturing inventory from the Invergordon grain distillery currently owned by W&M, as well as associated management, operations and contractual commitments;
- (b) the Jura and Fettercairn malt distilleries and maturing inventory from these distilleries currently owned by W&M, as well as associated management and operations;

- (c) the Whyte & Mackay blended scotch whisky brand (both for the UK and elsewhere in the world) as well as all other blended scotch whisky brands owned by W&M;
- (d) the Vladivar vodka brand (both for the UK and elsewhere in the world) as well as the benefit of W&M's distribution agreement with Roust;
- (e) all of W&M's existing operations and contractual arrangements including its cooping and warehousing operations, its bottling plants and associated operations, its sales & marketing arrangements and customer relationship teams (across all areas – branded and private label), procurement/ supply arrangements, staff, centralised finance, HR etc.

provided that it is acknowledged by the CMA that the Whyte & MacKay Business does not include:

- (a) the Dalmore and Tamnavulin malt distilleries and all tangible and intangible assets used to run those distilleries;
- (b) the Dalmore and Tamnavulin brands and maturing inventory from these distilleries as well as associated management and operations; and
- (c) the management and staff for Dalmore and Tamnavulin distilleries as well as any supply arrangement specifically associated with either 1) production at the site; and/or 2) sale of product from the site.

"Working Day" means any day of the week other than a Saturday or a Sunday or any day that is a public holiday in England;

unless the context requires otherwise, the singular shall include the plural and vice versa.

FOR AND ON BEHALF OF DIAGEO plc

Signature

Name

Title

Date