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7A(c)(10)
802.30

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FEDERAL TRADE COMMISSION
PREMERGER NOTIFICATION OFFICE
2002 MAY 16 A 11:05

May 16, 2002

Via Facsimile Transmission

Mr. Michael Verne,
Premerger Notification Office,
Room H-314,
Federal Trade Commission,
Bureau of Competition,
600 Pennsylvania Avenue, N.W.,
Washington, D.C. 20580.

Re: Request for Informal Interpretation Regarding Applicability of the Notification and Waiting Period Requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 to a Scheme of Demerger

Dear Mr. Verne:

I write to request the opportunity to discuss with you an informal interpretation of the notification and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act") as applied to the scheme of demerger described in this letter. For your convenience, I will fax this letter to you then telephone you to discuss the relevant considerations.

We submit that the arrangement described below should be viewed as a whole for purposes of determining whether the notification and waiting period requirements (the "Requirements") of the Act apply, and that, viewed in that context, the entire demerger scheme is exempt from the Requirements under Section 7A(c)(10) of the Act (15 U.S.C. §18a(c)(10)) and under the exemption from the Requirements provided by Section 802.10 (16 C.F.R. §802.10) of the rules promulgated under the Act (the "Rules). Essentially, as is described below, the scheme of demerger involves a *pro rata* spin-off of shares in two new companies to the shareholders of the existing issuer, which will become a wholly-owned subsidiary of one of the new companies. The conversion of the existing company's shares into shares of a new parent company and the *pro rata*

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distribution of all the shares in the new companies should both be exempt from the Requirements under those provisions.

The steps of the scheme of demerger and the relevant analytical considerations are as follows:

1. A is a corporation organized and incorporated under the laws of a country other than the United States. A is its own "ultimate parent entity" within the meaning of 16 C.F.R. §801.1(a)(3) because no other entity holds 50% or more of the outstanding voting securities of A or has the right presently to designate 50% or more of the directors of A. A maintains its principal offices in the country of its incorporation. For purposes of the Act and the Rules, A is a "foreign person." (*See* 16 C.F.R. § 801.1(e)((1)(ii).)

2. A seeks to implement a scheme of demerger in accordance with the laws of its country of incorporation. Pursuant to that scheme, the shareholders of A would exchange each of their shares of A stock for two new shares of stock (the "New Securities") representing the same underlying assets as those currently held (directly or indirectly) by A. (The New Securities will be "voting securities" within the meaning of 16 C.F.R. § 801.1(f)(1) inasmuch as each holder of those securities would be entitled presently to vote for the election of directors of the issuers of the New Securities.) As is described below, most of the shareholders of A will not receive any consideration for the exchange of their A shares other than the New Securities, which will be distributed to the shareholders of A on a *pro rata* basis.[1] As a result, each shareholder's respective interests in those assets will not change as a result of the demerger.

3. As is described in Point 6 of this letter, although there is a notional cash component involved in one of the steps of the demerger scheme, the shareholders of A will not receive, or be entitled to receive or make any investment decision with respect to the application of, that notional cash component. Rather, the cash component will be applied automatically on behalf of shareholders to acquire one of the sets of New Securities under the scheme.

4. The structure of the scheme of demerger, which involves several related steps, is dictated by legal requirements of the country of A's incorporation. Each

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[1] It is expected that a small number of A shareholders reside in jurisdictions (outside the country of A's incorporation, and including, possibly, the United States for certain shareholders) in which local securities laws prevent shareholders from receiving some or all of the New Securities. The New Securities allocated to those shareholders will be sold on behalf of the shareholders by means of a "vendor placement" and the net sale proceeds will be paid to them *in lieu* of their receipt of the New Securities.

of those steps, which are described immediately below, is contingent upon the occurrence of the remaining steps and will be taken solely in furtherance of the scheme of demerger.

5. **A** has directed the establishment of a new company, **B**. At the time of **B**'s formation, a single share of **B** (the "Founder's Share") was issued to a partner of the law firm of **A** that is assisting **A** with the demerger. (The acquiring individual is a resident and citizen of the country of **A**'s incorporation.) **B** is effectively a shell company that was formed solely to effect the scheme of demerger. **B** neither holds, nor controls an issuer that holds, assets located in the United States having an aggregate value of more than $50 million. Similarly, **B** neither made, or controls an issuer that made, sales in or into the United States in excess of $50 million during the most recently completed fiscal year. As is described below, it is intended that, as a result of the scheme of demerger, **B** will be inserted as a holding company above **A**, which will continue to hold a portion of its existing assets.

6. A scheme of demerger will be proposed between **A** and its shareholders. That scheme is subject to approval of both **A**'s shareholders and the court of the jurisdiction of **A**'s incorporation. Under (or contemporaneously with) the demerger scheme, one of **A**'s wholly-owned subsidiaries, **C**, will acquire a category of **A**'s assets (and certain voting securities that **A** holds in other entities controlled by **A**) in return for the issuance to **A** of new shares in **C**. **B** will acquire from each shareholder of **A** a designated percentage of the shareholder's shares in **A** in exchange for new shares in **B** and a notional amount of cash. The notional cash component will be automatically applied by **B** on behalf of each shareholder to effect the shareholder's acquisition of shares in **C** from **A**. The remaining shares in **A** held by the existing shareholders of **A** (other than **B**) will then be cancelled pursuant to a capital reduction, with no consideration payable by **A**; although **B** will issue a specified number of new **B** shares to the existing shareholders of **A** (other than **B**) in return for that cancellation. Collapsing these steps, all of which occur pursuant to (or, in the case of the internal restructuring of a category of **A** assets under **C**, contemporaneously with and for the sole purpose of) the scheme of demerger, the scheme involves the segregation of **A**'s assets into two entities and the distribution of the shares in those entities *pro rata* to the existing shareholders of **A**. The **A** shareholders will not provide any consideration in exchange for the New Securities other than the exchange of their shares in **A**.

7. The ordinary shares of **B** and **C** will be listed for trading on the national stock exchange of the country of **A**'s incorporation.

8. **B** will complete a nominal capital reduction to cancel the Founder's Share.

9. Shortly before or contemporaneously with the scheme of demerger, **A** will reorganize its US subsidiaries in order to facilitate the scheme. That

reorganization will proceed as follows: **D** is a corporation organized and incorporated under the laws of the United States. **A** is **D**'s "ultimate parent entity" within the meaning of 16 C.F.R. §801.1(a)(3) because **A** holds 50% or more of the outstanding voting securities of **D**, or owns 50% or more of the outstanding voting securities of an entity holding 50% or more of the voting securities of **D**. **D** currently serves as a holding company with respect to **A**'s US subsidiaries. As part of the demerger scheme, **A** will direct the establishment of a new company, **E**. **D** will own 100% of the voting securities of **E**. **E** effectively will be a shell company that will be formed solely to effect the scheme of demerger. **E** will be inserted as a shell company immediately below **D**, and 100% of the voting securities of certain of **D**'s existing subsidiaries will be transferred to **E**. **D** will then cause the voting securities of **E** to be transferred as a dividend or as a return of capital to **A** or to an entity of which **A** holds 50% or more of the outstanding voting securities. All of the voting securities of **E** will be among those transferred to **C** as described in Point 6 of this letter.

10. For the following reasons, we believe that none of the steps of the demerger scheme is subject to the Requirements:

a. The acquisition by the existing shareholders of **A** of voting securities of **B** and **C** would be exempt from the Requirements for various reasons. Most importantly, the acquisition involves both a *pro rata* spin-off of shares of new companies to existing shareholders of **A** and the conversion of **A** shares into shares of a new parent company of **A**, both of which are exempt from the Requirements under Section 7A(c)(10) of the Act (15 U.S.C. §18a(c)(10)) and Rule 802.10 (16 C.F.R. §802.10). This exemption should apply to acquisitions of the New Securities by any of the existing shareholders of **A**. In addition, the acquisition of the New Securities by most of the existing shareholders of **A** will be exempt from the Requirements for the following additional reasons: *First*, only shareholders who would hold in excess of US$50 million of voting securities of **B** and **C** as a result of the demerger scheme could be subject to the Requirements; and it is exceedingly unlikely that many of **A**'s shareholders would acquire that quantity of the New Securities. *Second*, the acquisition by any shareholder that is a "foreign person" (within the meaning of 16 C.F.R. §801.1(e)(1)(ii)) would be exempt from the Requirements under 16 C.F.R. §802.51(b) because no shareholder would hold 50% or more of the outstanding voting securities of **B** or **C** as a result of the demerger scheme or have the right presently to designate 50% or more of the directors of either **B** or **C**. *Third*, the acquisition of 10% or less of the outstanding New Securities by any shareholder that acquires those shares "solely for the purposes of investment" would be exempt from the Requirements under 16 C.F.R. §802.9.

b. The transfer of a portion of **A**'s assets to **C** in exchange for the ordinary shares of **C** is exempt under the "intra-person" exemption (*see* Rule 802.30), because **C** is a wholly-owned subsidiary of **A**, and under Section 7A(c)(10) of the Act and Rule 802.10 for the reason discussed in Point 10.a. of this letter. (This

NO - ASSET TRANSFERS ARE NOT COVERED UNDER 7A(c)(10)

same conclusion should apply if **C** is deemed also to have effected an acquisition of voting securities of a subsidiary of **A** as part of that acquisition.)

c. Even if **B** is deemed not to be included within the **A** person, the formation of **B** is exempt from the Requirements because **B** is merely a shell company that was formed at **A**'s direction solely for the purpose of effecting the scheme of arrangement. Thus, the value of the Founder's Share would not exceed US$50 million and the acquisition of that share would not satisfy the "size-of-the-person" test under the Act. In addition, the acquisition of the Founder's Share by the lawyer-founder is exempt from the Requirements of the Act under Rule 802.51(b). In any event, as is discussed in the following point, the formation of **B** should be considered as an intermediate, and essential, step in the *pro rata* distributions of the New Securities to **A**'s shareholders by means of the demerger scheme. Accordingly, the formation of **B** has no independent significance and should be exempt from the Requirements under Section 7A(c)(10) of the Act and Rule 802.10.

d. **B**'s acquisition of shares in **A** from the existing shareholders of **A** in exchange for the ordinary shares of **B** and the notional cash component (which is then automatically applied to the acquisition by shareholders of shares in **C**) similarly should be deemed to be covered by the exemptions identified in Points 10.a and 10.c. of this letter. Although at the time of the share transfer, **B** is technically owned by the lawyer-founder and is not part of the **A** person, the formation of **B** in that fashion is merely an interim step of the scheme of demerger that lacks any independent economic or commercial significance. Notwithstanding the *form* of the formation of **B**, we submit that the *substance* of that step of the demerger scheme and the ensuing steps of the scheme involving **B** (*i.e.*, the acquisition by **B** from the existing shareholders of **A** of shares in **A** in exchange for **B**'s shares and a notional cash component, as well as the cancellation of the remaining shares held by existing shareholders of **A** in exchange for **B**'s shares) mandate treating those steps for purposes of the Requirements in accordance with the treatment of the corresponding steps involving **C** and as part of a unified scheme of demerger. The eventual cancellation of the Founder's Share to complete the scheme of demerger – so that only existing **A** shareholders are shareholders of **B** immediately after the scheme of demerger is effected – further indicates that the initial ownership of **B** has no economic or commercial significance.

e. The formation of **E**, a wholly owned subsidiary of **D**, the transfer to **E** of 100% of the voting securities of certain wholly owned subsidiaries of **D**, and the transfer to **A** of 100% of **E**'s voting securities are exempt under the "intra-person" exemption. 16 C.F.R. §802.30.

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I look forward to the opportunity to discuss with you the contents of this letter. Thank you for your attention to this matter.

Sincerely,

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WITH THE ONE EXCEPTION NOTED ABOVE, I AGREED THAT THE DEMERGER IS EXEMPT UNDER 802.30 & 7A(C)(10). N. OUUKA CONCURS.

5/17/02