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European Commission – Merger Task Force  
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## **Case M. [No...] – [Title...]**

### **COMMITMENTS TO THE EUROPEAN COMMISSION**

Pursuant to [Article 6(2), *if Phase I Commitments*] [Article 8(2), *if Phase II Commitments*] [Articles 8(2) and 10(2), *if in Phase II Commitments prior to the sending out of the Statement of Objections*] of Council Regulation (EEC) No. 4064/89 as amended (the “**Merger Regulation**”), [Indicate the name of the Undertakings offering the Commitments] (the “**Parties**”) hereby provide the following Commitments (the “**Commitments**”) in order to enable the European Commission (the “**Commission**”) to declare [Description of the operation: *e.g. the acquisition of...; the creation of a full-function joint venture between...*] compatible with the common market and the EEA Agreement by its decision pursuant to [Article 6(1)(b) of the Merger Regulation, *if Phase I Commitments*] [Article 8(2), *if Phase II Commitments*] of the Merger Regulation (the “**Decision**”).

The Commitments shall take effect upon the date of adoption of the Decision.

This text shall be interpreted in the light of the Decision to the extent that the Commitments are attached as conditions and obligations, in the general framework of Community law, in particular in the light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98.

#### **Section A. Definitions**

For the purpose of the Commitments, the following terms shall have the following meaning:

**Affiliated Undertakings:** undertakings controlled by the Parties and/or by the ultimate parents of the Parties, including the JV [*Only in the case when the proposed operation is a creation of a JV*], whereby the notion of control shall be interpreted pursuant to Article 3 Merger Regulation and in the light of the Commission Notice on the concept of concentration under Council Regulation (EEC) No 4064/89.

**Closing:** the transfer of the legal title of the Divestment Business to the Purchaser.

**Divestment Business:** the business or businesses as defined in Section B and the Schedule that the Parties commit to divest.

**Divestiture Trustee:** one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by [X] and who has received from [X] the exclusive Trustee Mandate to sell the Divestment Business to a Purchaser at no minimum price.

**Effective Date:** the date of adoption of the Decision.

**First Divestiture Period:** the period of [•] months from the Effective Date.

**Hold Separate Manager:** the person appointed by [X] for the Divestment Business to manage the day-to-day business under the supervision of the Monitoring Trustee.

**Key Personnel:** all personnel necessary to maintain the viability and competitiveness of the Divestment Business, as listed in the Schedule.

**Monitoring Trustee:** one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by [X], and who has the duty to monitor [X's] compliance with the conditions and obligations attached to the Decision.

**Personnel:** all personnel currently employed by the Divestment Business, including Key Personnel, staff seconded to the Divestment Business, shared personnel and the additional personnel listed in the Schedule.

**Purchaser:** the entity approved by the Commission as acquirer of the Divestment Business in accordance with the criteria set out in Section D.

**Trustee(s):** the Monitoring Trustee and the Divestiture Trustee.

**Trustee Divestiture Period:** the period of [•] months from the end of the First Divestiture Period.

[X]: *[Indicate the short name of the Undertaking Concerned that will divest its business/es],* incorporated under the laws of [•], with its registered office at [•] and registered with the Commercial/Company Register at [•] under number [•].

## **Section B. The Divestment Business**

### Commitment to divest

1. In order to restore effective competition, [X] commits to divest, or procure the divestiture of the Divestment Business by the end of the Trustee Divestiture Period as a going concern to a purchaser and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 15. To carry out the divestiture, [X] commits to find a purchaser and to enter into a final binding sale and purchase agreement for the sale of the Divestment Business within the First Divestiture Period. If [X] has not entered into such an agreement at the end of the First Divestiture Period, [X] shall grant the Divestiture Trustee an exclusive mandate to sell the Divestment Business in accordance with the procedure described in paragraph 24 in the Trustee Divestiture Period. [*The following sentence should be inserted in case of an “up-front buyer”*]: The proposed concentration shall not be implemented unless and until [X] or the Divestiture Trustee has entered into a final binding sale and purchase agreement for the sale of the Divestment Business and the Commission has approved the purchaser and the terms of sale in accordance with paragraph 15].
2. [X] shall be deemed to have complied with this commitment if, by the end of the Trustee Divestiture Period, [X] has entered into a final binding sale and purchase agreement, if the Commission approves the Purchaser and the terms in accordance with the procedure described in paragraph 15 and if the closing of the sale of the Divestment Business takes place within a period not exceeding 3 months after the approval of the purchaser and the terms of sale by the Commission.
3. In order to maintain the structural effect of the Commitments, the Parties shall, for a period of 10 years after the Effective Date, not acquire direct or indirect influence over the whole or part of the Divestment Business, unless the Commission has previously found that the structure of the market has changed to such an extent that the absence of influence over the Divestment Business is no longer necessary to render the proposed concentration compatible with the common market.

Structure and definition of the Divestment Business

4. The Divestment Business consists of [*Provide a summary description of the Divestment Business*]. The present legal and functional structure of the Divestment Business as operated to date is described in the Schedule. The Divestment Business, described in more detail in the Schedule, includes
  - (a) all tangible and intangible assets (including intellectual property rights), which contribute to the current operation or are necessary to ensure the viability and competitiveness of the Divestment Business;
  - (b) all licences, permits and authorisations issued by any governmental organisation for the benefit of the Divestment Business;

- (c) all contracts, leases, commitments and customer orders of the Divestment Business; all customer, credit and other records of the Divestment Business (items referred to under (a)-(c) hereinafter collectively referred to as “*Assets*”);
- (d) the Personnel; and
- (e) *[To be included in cases in which the Divestment Business needs an on-going relationship with the Parties in order to be fully competitive and viable: the benefit, for a transitional period of up to [insert] years after Closing and on terms and conditions equivalent to those at present afforded to the Divestment Business, of all current arrangements under which [X] or Affiliated Undertakings supply products or services to the Divestment Business, as detailed in the Schedule, unless otherwise agreed with the Purchaser.]*

### **Section C. Related commitments**

#### Preservation of Viability, Marketability and Competitiveness

- 5. From the Effective Date until Closing, [X] shall preserve the economic viability, marketability and competitiveness of the Divestment Business, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Divestment Business. In particular [X] undertakes:
  - (a) not to carry out any act upon its own authority that might have a significant adverse impact on the value, management or competitiveness of the Divestment Business or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of the Divestment Business;
  - (b) to make available sufficient resources for the development of the Divestment Business, on the basis and continuation of the existing business plans
  - (c) to take all reasonable steps, including appropriate incentive schemes (based on industry practice), to encourage all Key Personnel to remain with the Divestment Business.

#### Hold-separate obligations of Parties

- 6. [X] commits, from the Effective Date until Closing, to keep the Divestment Business separate from the businesses it is retaining and to ensure that Key Personnel of the Divestment Business – including the Hold Separate Manager – have no involvement in any business retained and vice versa. [X] shall also ensure that the Personnel does not report to any individual outside the Divestment Business.
- 7. Until Closing, [X] shall assist the Monitoring Trustee in ensuring that the Divestment Business is managed as a distinct and saleable entity separate from the businesses retained

by the Parties. [X] shall appoint a Hold Separate Manager who shall be responsible for the management of the Divestment Business, under the supervision of the Monitoring Trustee. The Hold Separate Manager shall manage the Divestment Business independently and in the best interest of the business with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by the Parties.

8. *[The following is to be inserted in cases in which a company or a share in a company is to be divested and a strict separation of the corporate structure is necessary:* To ensure that the Divestment Business is held and managed as a separate entity the Monitoring Trustee shall exercise [X's] rights as shareholder in the Divestment Business (except for its rights for dividends that are due before Closing), with the aim of acting in the best interest of the business, determined on a stand-alone basis, as an independent financial investor, and with a view to fulfilling [X's] obligations under the Commitments. Furthermore, the Monitoring Trustee shall have the power to replace members of the supervisory board or non-executive directors of the board of directors, who have been appointed on behalf of [X]. Upon request of the Monitoring Trustee, [X] shall resign as member of the boards or shall cause such members of the boards to resign.]

#### Ring-fencing

9. [X] shall implement all necessary measures to ensure that it does not after the Effective Date obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to the Divestment Business. In particular, the participation of the Divestment Business in a central information technology network shall be severed to the extent possible, without compromising the viability of the Divestment Business. [X] may obtain information relating to the Divestment Business which is reasonably necessary for the divestiture of the Divestment Business or whose disclosure to [X] is required by law.

#### Non-solicitation clause

10. The Parties undertake, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit, the Key Personnel transferred with the Divestment Business for a period of [•] after Closing.

#### Due Diligence

11. In order to enable potential purchasers to carry out a reasonable due diligence of the Divestment Business, [X] shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process:
  - (a) provide to potential purchasers sufficient information as regards the Divestment Business;

(b) provide to potential purchasers sufficient information relating to the Personnel and allow them reasonable access to the Personnel.

#### Reporting

12. [X] shall submit written reports in [*Indicate the language of the procedure or another language agreed with the Commission*] on potential purchasers of the Divestment Business and developments in the negotiations with such potential purchasers to the Commission and the Monitoring Trustee no later than 10 days after the end of every month following the Effective Date (or otherwise at the Commission's request).
13. The Parties shall inform the Commission and the Monitoring Trustee on the preparation of the data room documentation and the due diligence procedure and shall submit a copy of an information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers.

#### **Section D. The Purchaser**

14. In order to ensure the immediate restoration of effective competition, the Purchaser, in order to be approved by the Commission, must:
  - (a) be independent of and unconnected to the Parties;
  - (b) have the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors;
  - (c) neither be likely to create, in the light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed, and must, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business (the before-mentioned criteria for the purchaser hereafter the "**Purchaser Requirements**").
15. The final binding sale and purchase agreement shall be conditional on the Commission's approval. When [X] has reached an agreement with a purchaser, it shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), to the Commission and the Monitoring Trustee. [X] must be able to demonstrate to the Commission that the purchaser meets the Purchaser Requirements and that the Divestment Business is being sold in a manner consistent with the Commitments. For the approval, the Commission shall verify that the purchaser fulfils the Purchaser Requirements and that the Divestment Business is being sold in a manner consistent with the Commitments. The Commission may approve the sale of the Divestment Business without one or more Assets or parts of the Personnel, if this does not affect the viability and competitiveness of the Divestment Business after the sale, taking account of the proposed purchaser.

## **Section E. Trustee**

### **I. Appointment Procedure**

16. [X] shall appoint a Monitoring Trustee to carry out the functions specified in the Commitments for a Monitoring Trustee. If [X] has not entered into a binding sales and purchase agreement one month before the end of the First Divestiture Period or if the Commission has rejected a purchaser proposed by [X] at that time or thereafter, [X] shall appoint a Divestiture Trustee to carry out the functions specified in the Commitments for a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Extended Divestment Period.
17. The Trustee shall be independent of the Parties, possess the necessary qualifications to carry out its mandate, for example as an investment bank or consultant or auditor, and shall neither have nor become exposed to a conflict of interest. The Trustee shall be remunerated by the Parties in a way that does not impede the independent and effective fulfilment of its mandate. In particular, where the remuneration package of a Divestiture Trustee includes a success premium linked to the final sale value of the Divestment Business, the fee shall also be linked to a divestiture within the Trustee Divestiture Period.

#### *Proposal by the Parties*

18. No later than one week after the Effective Date, [X] shall submit a list of one or more persons whom [X] proposes to appoint as the Monitoring Trustee to the Commission for approval. No later than one month before the end of the First Divestiture Period, [X] shall submit a list of one or more persons whom [X] proposes to appoint as Divestiture Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the proposed Trustee fulfils the requirements set out in paragraph 17 and shall include:
  - (a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;
  - (b) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks;
  - (c) an indication whether the proposed Trustee is to act as both Monitoring Trustee and Divestiture Trustee or whether different trustees are proposed for the two functions.

#### *Approval or rejection by the Commission*

19. The Commission shall have the discretion to approve or reject the proposed Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for

the Trustee to fulfil its obligations. If only one name is approved, [X] shall appoint or cause to be appointed, the individual or institution concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, [X] shall be free to choose the Trustee to be appointed from among the names approved. The Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

*New proposal by the Parties*

20. If all the proposed Trustees are rejected, [X] shall submit the names of at least two more individuals or institutions within one week of being informed of the rejection, in accordance with the requirements and the procedure set out in paragraphs 16 and 19.

*Trustee nominated by the Commission*

21. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom [X] shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

II. Functions of the Trustee

22. The Trustee shall assume its specified duties in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Trustee or [X], give any orders or instructions to the Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

*Duties and obligations of the Monitoring Trustee*

23. The Monitoring Trustee shall:

- (i) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision.
- (ii) oversee the on-going management of the Divestment Business with a view to ensuring its continued economic viability, marketability and competitiveness and monitor compliance by [X] with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall:
  - (a) monitor the preservation of the economic viability, marketability and competitiveness of the Divestment Business, and the keeping separate of the Divestment Business from the business retained by the Parties, in accordance with paragraphs 5 and 6 of the Commitments;

- (b) supervise the management of the Divestment Business as a distinct and saleable entity, in accordance with paragraph 7 of the Commitments;
  - (c) (i) in consultation with [X], determine all necessary measures to ensure that [X] does not after the effective date obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to the Divestment Business, in particular strive for the severing of the Divestment Business' participation in a central information technology network to the extent possible, without compromising the viability of the Divestment Business, and (ii) decide whether such information may be disclosed to [X] as the disclosure is reasonably necessary to allow [X] to carry out the divestiture or as the disclosure is required by law;
  - (d) monitor the splitting of assets and the allocation of Personnel between the Divestment Business and [X] or Affiliated Undertakings;
- (iii) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision;
- (iv) propose to [X] such measures as the Monitoring Trustee considers necessary to ensure [X]'s compliance with the conditions and obligations attached to the Decision, in particular the maintenance of the full economic viability, marketability or competitiveness of the Divestment Business, the holding separate of the Divestment Business and the non-disclosure of competitively sensitive information;
- (v) review and assess potential purchasers as well as the progress of the divestiture process and verify that, dependent on the stage of the divestiture process, (a) potential purchasers receive sufficient information relating to the Divestment Business and the Personnel in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process, and (b) potential purchasers are granted reasonable access to the Personnel;
- (vi) provide to the Commission, sending [X] a non-confidential copy at the same time, a written report within 15 days after the end of every month. The report shall cover the operation and management of the Divestment Business so that the Commission can assess whether the business is held in a manner consistent with the Commitments and the progress of the divestiture process as well as potential purchasers. In addition to these reports, the Monitoring Trustee shall promptly report in writing to the Commission, sending [X] a non-confidential copy at the same time, if it concludes on reasonable grounds that [X] is failing to comply with these Commitments;

- (vii) within one week after receipt of the documented proposal referred to in paragraph 15, submit to the Commission a reasoned opinion as to the suitability and independence of the proposed purchaser and the viability of the Divestment Business after the Sale and as to whether the Divestment Business is sold in a manner consistent with the conditions and obligations attached to the Decision, in particular, if relevant, whether the Sale of the Divestment Business without one or more Assets or not all of the Personnel affects the viability of the Divestment Business after the sale, taking account of the proposed purchaser.

*Duties and obligations of the Divestiture Trustee*

- 24. Within the Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price the Divestment Business to a purchaser, provided that the Commission has approved both the purchaser and the final binding sale and purchase agreement in accordance with the procedure laid down in paragraph 15. The Divestiture Trustee shall include in the sale and purchase agreement such terms and conditions as it considers appropriate for an expedient sale in the Trustee Divestiture Period. In particular, the Divestiture Trustee may include in the sale and purchase agreement such customary representations and warranties and indemnities as are reasonably required to effect the sale. The Divestiture Trustee shall protect the legitimate financial interests of [X], subject to the Parties' unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.
- 25. In the Trustee Divestiture Period (or otherwise at the Commission's request), the Divestiture Trustee shall provide the Commission with a comprehensive monthly report written in [*Please indicate the language of the procedure or a different language agreed with the Commission*] on the progress of the divestiture process. Such reports shall be submitted within 15 days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to the Parties.

III. Duties and obligations of the Parties

- 26. [X] shall provide and shall cause its advisors to provide the Trustee with all such co-operation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of [X's] or the Divestment Business' books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and [X] and the Divestment Business shall provide the Trustee upon request with copies of any document. [X] and the Divestment Business shall make available to the Trustee one or more offices on their premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.
- 27. [X] shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Divestment Business. This shall include all administrative support functions relating to the Divestment Business

which are currently carried out at headquarters level. [X] shall provide and shall cause its advisors to provide the Monitoring Trustee, on request, with the information submitted to potential purchasers, in particular give the Monitoring Trustee access to the data room documentation and all other information granted to potential purchasers in the due diligence procedure. [X] shall inform the Monitoring Trustee on possible purchasers, submit a list of potential purchasers, and keep the Monitoring Trustee informed of all developments in the divestiture process.

28. [X] shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale, the Closing and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to achieve the sale and the Closing, including the appointment of advisors to assist with the sale process. Upon request of the Divestiture Trustee, [X] shall cause the documents required for effecting the sale and the Closing to be duly executed.
29. [X] shall indemnify the Trustee and its employees and agents (each an “*Indemnified Party*”) and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to [X] for any liabilities arising out of the performance of the Trustee’s duties under the Commitments, except to the extent that such liabilities result from the wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.
30. At the expense of [X], the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to [X’s] approval (this approval not to be unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should [X] refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard [X]. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 29 shall apply mutatis mutandis. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served [X] during the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.

#### IV. Replacement, discharge and reappointment of the Trustee

31. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a conflict of interest:
  - (a) the Commission may, after hearing the Trustee, require [X] to replace the Trustee; or
  - (b) [X], with the prior approval of the Commission, may replace the Trustee.

32. If the Trustee is removed according to paragraph 31, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 16-21.
33. Beside the removal according to paragraph 31, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

**Section F. The Review Clause**

34. The Commission may, where appropriate, in response to a request from [X] showing good cause and accompanied by a report from the Monitoring Trustee:
  - (i) Grant an extension of the time periods foreseen in the Commitments, or
  - (ii) Waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments.

Where [X] seeks an extension of a time period, it shall submit a request to the Commission no later than one month before the expiry of that period, showing good cause. Only in exceptional circumstances shall [X] be entitled to request an extension within the last month of any period.

.....  
 duly authorised for and on behalf of  
*[Indicate the name of each of the Parties]*

## SCHEDULE

1. The Divestment Business as operated to date has the following legal and functional structure: *[Describe the legal and functional structure of the Divestment Business, including the organisational chart].*

2. Following paragraph [4] of these Commitments, the Divestment Business includes, but is not limited to:

- (a) the following main tangible assets: *[Indicate the essential tangible assets, e.g. xyz factory/warehouse/pipelines located at abc and the real estate/property on which the factory/warehouse is located; the R&D facilities];*
- (b) the following main intangible assets: *[Indicate the main intangible assets. This should in particular include (i) the brand names and (ii) all other Intellectual Property Rights used in conducting the Divestment Business.];*
- (c) the following main licences, permits and authorisations: *[Indicate the main licences, permits and authorisations];*
- (d) the following main contracts, agreements, leases, commitments and understandings *[Indicate the main contracts, etc.];*
- (e) the following customer, credit and other records: *[Indicate the main customer, credit and other records, according to further sector specific indications, where appropriate];*
- (f) the following Personnel: *[Indicate the personnel to be transferred in general, including personnel providing essential functions for the Divestment Business, such as central R&D staff];*
- (g) the following Key Personnel: *[Indicate the names and functions of the Key Personnel, including the Hold Separate Manager, where appropriate];* and
- (h) the arrangements for the supply with the following products or services by [X] or Affiliated Undertakings for a transitional period of up to [●] after Closing: *[Indicate the products or services to be provided for a transitional period in order to maintain the economic viability and competitiveness of the Divestment Business].*

3. The Divestment Business shall not include:

- (i) ...;
- (ii) *[It is the responsibility of the Parties to indicate clearly what the Divestment Business will not encompass].*