Completed acquisition by Tobii AB of Smartbox Assistive Technology Limited and Sensory Software International Limited

Decision to refer

ME/6780/18

The CMA's decision to refer under section 22 of the Enterprise Act 2002 given on 8 February 2019. Full text of the decision published on 21 February 2019.

Please note that [✂] indicates figures or text which have been deleted or replaced in ranges at the request of the parties for reasons of commercial confidentiality.

Introduction

1. On 1 October 2018, Tobii AB (**Tobii**) acquired Smartbox Assistive Technology Limited (**SATL**) and Sensory Software International Limited (**SSIL**) (together, **Smartbox**) (the **Merger**).

2. On 25 January 2019, the Competition and Markets Authority (**CMA**) decided under section 22(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger constitutes a relevant merger situation that has resulted or may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom (the **SLC Decision**).[1]

3. On the date of the SLC Decision, the CMA gave notice pursuant to section 34ZA(1)(b) of the Act to Tobii of the SLC Decision. However, to allow Tobii the opportunity to offer undertakings to the CMA for the purposes of section 73(2) of the Act, the CMA did not refer the Merger for a phase 2 investigation pursuant to section 22(3)(b) on the date of the SLC Decision. On 25 January 2019, the CMA extended the statutory four-month period mentioned in section 24(1) of the Act by notice pursuant to section 25(4) of the Act.

[1] See https://www.gov.uk/cma-cases/tobii-ab-smartbox-assistive-technology-limited-and-sensory-software-international-ltd-merger-inquiry

4. Pursuant to section 73A(1) of the Act, if a party wishes to offer undertakings for the purposes of section 73(2) of the Act, it must do so before the end of the five working day period specified in section 73A(1)(a) of the Act. The SLC Decision stated that the CMA would refer the Merger for a phase 2 investigation pursuant to section 22(1), and in accordance with section 34ZA(2) of the Act, if no undertakings for the purposes of section 73(2) of the Act were offered to the CMA by the end of this period (ie by 1 February 2019); if Tobii indicated before this deadline that it did not wish to offer such undertakings; or if the undertakings offered were not accepted.

5. On 1 February 2019, Tobii offered a behavioural undertaking to the CMA for the purposes of section 73(2) of the Act (the **Proposed Undertaking**). Under the Proposed Undertaking, Tobii offered to:

   (a) lower the product pricing of all currently offered Tobii Dynavox devices or the equivalent successor of the same devices in the UK by at least [0-5]% per annum for at least three years;

   (b) increase its spending on global Tobii Dynavox research and development (**R&D**) by [0-5]% or more per annum for at least three years (calculated as a combination of the R&D efforts by both Tobii Dynavox and Smartbox prior to the acquisition);

   (c) provide any supplier of assistive technology solutions in the UK access to Tobii's eye tracking technology, either as peripherals at "wholesale pricing level" or as integration components on standard market terms for at least three years;

   (d) ensure any company developing assistive technology hardware in the UK will be able to purchase/license the Grid software on a "wholesale pricing level" (approximately [✂]% below market pricing);

   (e) ensure compatibility between the Grid software and any third-party eye tracking solution currently compatible with the solution for at least five years or more (Irisbond, EyeTech, Alea and LC Technologies); and to carry stock and make available relevant eye tracking peripherals from other manufacturers with the same margin as own comparable products to customers in the UK;

   (f) furnish any company that may want to offer the entire or part of the Tobii Dynavox portfolio to UK customers on standard commercial reseller terms for three years or more; and

   (g) engage and compensate a third party to monitor or audit Tobii's compliance with its proposed undertakings.

Assessment of the Proposed Undertaking

6. In the SLC Decision, the CMA concluded that it is or may be the case that the Merger has resulted or may be expected to result in an SLC[2],[3] as a result of:

   (a) horizontal unilateral effects in the (upstream) supply of dedicated AAC hardware worldwide;

   (b) horizontal unilateral effects in the (upstream) supply of AAC software worldwide;

   (c) horizontal unilateral effects in the (downstream) supply of dedicated AAC solutions to customers in the UK;

   (d) input foreclosure of Smartbox's AAC software to the Parties' rivals in the (downstream) supply of dedicated AAC solutions to customers in the UK;

   (e) input foreclosure of Tobii's eye gaze cameras to the Parties' rivals in the (downstream) supply of dedicated AAC solutions to customers in the UK; and

   (f) customer foreclosure by the merged entity (Smartbox in particular) of Tobii's eye gaze camera competitors worldwide.

7. The SLC Decision states that, if pursuant to section 73A(2) of the Act, the CMA decides that there are no reasonable grounds for believing that it might accept any undertaking offered by Tobii, or a modified version of it, then the CMA will refer the Merger pursuant to sections 22(1) and 34ZA(2) of the Act.

8. The CMA has an obligation under the Act in the phase 1 stage of its review to have regard, when accepting undertakings in lieu of a reference (**UILs**), to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it (section 73(3) of the Act). Accordingly, the remedies proposed must be clear-cut and capable of ready implementation.[4] This means, amongst other things, that the CMA must be confident that, if the UILs are accepted, there is no material doubt about their overall effectiveness; and that all potential competition

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[2] See paragraph 99 et seq. of the SLC Decision.
[3] See paragraph 167 et seq. of the SLC Decision.
[4] *Mergers – Exceptions to the duty to refer and undertakings in lieu of reference guidance* (OFT1122, December 2010) (**Exceptions Guidance**), adopted by the CMA as set out in *Mergers: Guidance on the CMA's jurisdiction and procedure* (CMA2), Annex D), paragraphs 5.6-7. OFT1122 applies as the Phase 1 merger investigation commenced before 13 December 2018. For Phase 1 merger investigations which commenced after 13 December 2018, the Mergers remedies guidance CMA87 applies.

concerns that have been identified in its investigation would be resolved by means of the UILs without the need for further investigation.

9. The CMA's starting point in deciding whether to accept a proposed UIL is to seek an outcome that restores competition to the level that would have prevailed absent the merger, thereby comprehensively remedying the SLC (rather than accepting a remedy that simply mitigates the competition concerns).[5]

10. At phase 1, the CMA is generally unlikely to consider that behavioural undertakings will be sufficiently clear-cut to address the identified competition concerns, as behavioural undertakings bring a number of risks which can reduce their effectiveness or create competition concerns elsewhere, and can be difficult to monitor and enforce.[6]

11. Nevertheless, despite its preference for structural remedies, the CMA does not inevitably refuse behavioural UIL offers. In particular, the CMA will consider behavioural undertakings where it considers that divestment would be clearly impractical or is otherwise unavailable.

12. Having carefully considered the Proposed Undertaking set out above, the CMA does not believe that the package of measures offered by Tobii is a comprehensive and clear-cut solution to all the competition concerns identified in the SLC Decision, for the reasons set out below.

13. For a remedy to be comprehensive and clear-cut, there must be no material doubts about the overall effectiveness of the remedy in relation to the substantive competition assessment. In the present case, the CMA has material doubts that the Proposed Undertaking would effectively remedy the competition concerns identified in the SLC decision. These doubts include:

    (a) The offers set out in paragraphs 5(a) and 5(b) appear to be aimed at remedying the horizontal concerns identified in the SLC Decision through a commitment to reduce prices and increase innovation. The CMA is not confident that the Proposed Undertaking would comprehensively address these horizontal concerns as, for example, a possible worsening of service quality or a reduction in product range would not be addressed. Moreover, the price decrease offered in paragraph 5(a) would be below the historic annual price decreases of Tobii's products between 2015 and

[5] Exceptions Guidance, paragraph 5.11.
[6] Exception Guidance, paragraphs 5.39 to 5.41.

2018,[7] suggesting that future prices under this measure might be higher than they would have been absent the merger. Similarly, the increase in R&D spend offered in paragraph 5(b) would be below Tobii's historic annual increase in R&D spend,[8] suggesting that future R&D under this measure might be lower than it would have been absent the merger. In addition, the CMA is concerned that simply increasing the amount spent on R&D might not be as effective in bringing about product innovation as competitive pressure.

(b) The offers set out in paragraphs 5(c) to 5(f) appear to be aimed at addressing the vertical concerns identified in the SLC Decision. The CMA is not confident that the Proposed Undertaking would comprehensively address these vertical concerns as there is material doubt about their scope and effectiveness. For example, the offer in paragraph 5(e) to ensure compatibility between the Grid software and any third-party eye tracking solution refers only to currently compatible solutions and not to future solutions. Moreover, the offer appears to be limited to carrying the stock of third party peripherals without creating an incentive for Tobii to sell this stock.

(c) The offer to ensure third party access to Tobii's eye tracking technology (paragraph 5(c)) and the Grid software (paragraph 5(d)), and to enable other companies to sell the full Tobii Dynavox portfolio (paragraph 5(f)), also raises potential concerns, including:

(i) high circumvention risks as Tobii would have control over the wholesale price which could undermine the Proposed Undertaking – Tobii has not specified the "standard market terms" under which the proposed access would be granted;

(ii) the offer does not preclude Tobii from imposing onerous or prohibitive terms ultimately denying access through other means; and

(iii) the offer in paragraph 5(c) does not include a commitment to ensure on an on-going basis the compatibility of Tobii's eye tracking software with other suppliers' products.

(d) The CMA notes that any effective remedy would need to apply as long as an SLC persists to provide a clear-cut solution. This period is difficult to predict but the CMA has seen no reason to believe with confidence that it

[7] Tobii submitted that the average unit price decrease between 2015 – 2018 was [✂] for all eye tracking peripheral products, [✂] for all touch AAC devices and [✂] for all eye tracking AAC devices.
[8] Tobii submitted that, between 2014 and 2018, it increased its annual spend on research and development by over [✂].

would be limited to the next three to five years (noting the initial periods mentioned in the offers of the Proposed Undertaking described in paragraphs 5(a) to 5(c) and 5(e) to 5(f)). While the offers may have effects which extend beyond these initial periods, the CMA considers that these effects are uncertain. Moreover, the offer to decrease prices (described in paragraph 5(a)) could become less effective over time as it might cover fewer relevant products.

14. To be acceptable to the CMA, the implementation of the UIL also needs to be clear-cut. In the present case, the CMA has material doubts in relation to the duration and timing of the Proposed Undertaking (see, for example, paragraph 13(d)) and sees extensive risk with regard to circumvention, monitoring and enforcement. The Proposed Undertaking is a technical and complex package of measures and the CMA has material doubts about whether it would be possible to preclude circumvention and effectively monitor and enforce the measures set out. As such, the CMA considers that the Proposed Undertaking would be difficult to implement. For example, the definition of certain elements of the offer such as “equivalent successor” (for the purpose of the offer in paragraph 5(a)) or “R&D spend” (for the purpose of the offer in paragraph 5(b)) is unclear, and the CMA has material doubts about being able to define such terms in a way which would remove circumvention risk. Moreover, there would be circumvention risks associated with the offers in paragraphs 5(c), 5(d) and 5(f), as identified at paragraph 13(c) above.

15. The CMA notes the offer to engage and compensate a third party to monitor compliance with the Proposed Undertaking (paragraph 5(g)) but has material doubts that such a monitoring trustee would be able to identify all possible activities which could represent a breach of the Proposed Undertaking over the long term. Even in the presence of a monitoring trustee, the CMA has material concerns about the effective monitoring and enforcement of the complex package of measures set out in the Proposed Undertaking. In any event, this offer would not relieve the CMA of its statutory duties under section 92 of the Act to monitor compliance with the Proposed Undertaking, with the resultant burden that this imposes.

Decision

16. For the reasons set out above, the CMA does not believe that the Proposed Undertaking would achieve as comprehensive a solution as is reasonable and practicable to the SLC identified in the SLC Decision and the adverse effects resulting from that SLC.

17. Accordingly, the CMA has decided not to exercise its discretion under section 73(2) of the Act to accept undertakings in lieu of reference.

18. Therefore, pursuant to sections 22(1) and 34ZA(2) of the Act, the CMA has decided to refer the Merger to its chair for the constitution of a group under Schedule 4 to the Enterprise and Regulatory Reform Act 2013 to conduct a phase 2 investigation.

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