

COMPLETED ACQUISITION BY TOBII AB OF SMARTBOX ASSISTIVE TECHNOLOGY AND SENSORY SOFTWARE INTERNATIONAL LTD

Issues statement

26 February 2019

The reference

1. On 8 February 2019, the Competition and Markets Authority (CMA), in exercise of its duty under [section 22\(1\)](#) of the Enterprise Act 2002 (the Act), referred the completed acquisition by Tobii AB (Tobii) of Smartbox Assistive Technology and Sensory Software International Ltd (together Smartbox) for further investigation and report by a group of CMA panel members (the inquiry group).
2. The CMA must decide:
 - (a) whether a relevant merger situation has been created; and
 - (b) if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition (SLC) within any market or markets in the UK for goods or services.
3. In this statement, we set out the main issues we are likely to consider in reaching our decisions, having had regard to the evidence gathered to date including evidence set out in the phase 1 decision to refer the acquisition of Smartbox by Tobii for further investigation (the reference decision¹). This does not preclude the consideration of any other issues which may be identified during the course of our inquiry, which will include the gathering of further evidence.
4. Throughout this document, where appropriate, we refer to Tobii and Smartbox collectively as 'the Parties'.

¹ See the case page for the inquiry (<https://www.gov.uk/cma-cases/tobii-ab-smartbox-assistive-technology-limited-and-sensory-software-international-ltd-merger-inquiry>) to view published documents concerning the phase 1 investigation and the reference to phase 2. On 25 January 2019, the CMA announced that the merger would be referred for a phase 2 investigation unless the Parties offered acceptable undertakings to address the competition concerns identified. The full text of this decision was published on 26 February and is referred to in this document as the CMA phase 1 decision.

Background

5. On 1 October 2018, Tobii purchased the whole of the issued share capital of Smartbox (the merger).
6. The Parties supply hardware, software, accessories and related services to enable people with speech, language and communication needs to communicate, known as augmentative and assistive communication (AAC) solutions. Dedicated AAC solutions are high-tech solutions developed for the primary purpose of meeting the communication needs of those with complex AAC needs and comprise of four key components: (i) AAC software, (ii) dedicated AAC hardware; (iii) access methods; and (iv) customer support (and training).
7. Tobii is a leading supplier of, among other products, assistive technology solutions (ATS) and eye tracking solutions, with offices in Sweden, USA, China Japan, UK, Norway, Taiwan and South Korea. Tobii is listed on the Nasdaq Stockholm stock exchange and has three distinct business units: Tobii Dynavox, Tobii Pro and Tobii Tech. Tobii's global revenue in 2017 was approximately £90.3 million, of which approximately £2.8 million was generated in the UK.
8. Smartbox is a UK-based company which focuses on developing and reselling ATS, which help people with disabilities, including communication aids, environmental control devices, computer control technology and interactive learning solutions. Smartbox sells products mainly in the EEA and USA. Smartbox's global revenue in 2017 was approximately £9.3 million, of which approximately £4.8 million was generated in the UK.

Frame of reference

9. Market definition provides a framework for assessing the competitive effects of a merger and involves an element of judgement. The boundaries of the market do not determine the outcome of the CMA's analysis of the competitive effects of the merger in any mechanistic way. In assessing whether a merger may give rise to an SLC, the CMA may take into account factors such as constraints outside the relevant market, segmentation within the relevant market, and other ways in which some constraints are more important than others.² In general, we note that market definition and the analysis of competitive effects are both

² See [Merger Assessment Guidelines](#) (CC2/OFT 1254), September 2010, paragraph 5.2.2.

driven by considerations relating to the ‘closeness’ of substitution between the Parties’ offers and those of alternatives.

10. The Parties overlap in the supply of dedicated AAC hardware, AAC software and dedicated AAC solutions. Tobii also supplies eye gaze cameras. Certain of the products supplied by one or both of the Parties are inputs in the production of dedicated AAC solutions and therefore there are also vertical relationships between the Parties’ activities.
11. Our current intention is to assess the impact of the Merger in the following frames of reference:
 - a. the (upstream) supply of dedicated AAC hardware worldwide;
 - b. the (upstream) supply of AAC software worldwide;
 - c. the (upstream) supply of eye gaze cameras worldwide; and
 - d. the (downstream) supply of dedicated AAC solutions in the UK.
12. As part of the phase 1 process, Tobii submitted that the hardware product scope should be widened to also include the supply of consumer tablets suitable for fulfilling AAC needs. Based on the evidence received to date, our current view is that dedicated AAC hardware is sufficiently distinct from consumer tablets to constitute a separate product frame of reference.
13. Tobii also submitted that the software product scope should be widened to include the provision of all software to support ATS/AAC solutions (which can be used in conjunction with ATS/AAC hardware). This would include, for example, software available on consumer tablets such as Proloquo2Go, Avaz and the built-in accessibility and communication features of Microsoft Windows and Apple iOS.
14. Based on the evidence received to date, the CMA’s current view is that software which serves less complex communication needs, or broader ATS needs, is not a demand-side substitute for software which serves more complex communication needs, given the significant differences in their functionality and features. The CMA also currently considers that it would not be appropriate to expand the boundaries of the software product scope based on supply-side considerations, as there is likely to be limited supply-side substitutability and different firms generally compete to provide these different products.³ For these reasons, the CMA’s current intention is not to widen the product scope to

³ See [Merger Assessment Guidelines](#) (CC2/OFT 1254), September 2010, paragraph 5.2.17.

include all software which addresses communication needs, or even broader ATS needs. The statutory test for this inquiry is whether the merger has resulted in an SLC within any market(s) in the UK for goods or services. The CMA will, therefore, focus on competitive effects in the UK and on the effects on UK customers.

15. In doing so, the CMA will take account of global matters to the extent that they have competitive effects in the UK. The CMA will consider all relevant global competitors and their relative strength to service customers based in the UK.

Assessment of the competitive effects of the merger

Counterfactual

16. We will assess the possible effects of the merger on competition compared with the competitive conditions in the counterfactual situation (ie the competitive situation in the absence of the merger). We will therefore consider what would have been likely to have happened if the merger had not taken place and what would have been the likely conditions of competition in the foreseeable future.
17. For completed mergers the CMA generally adopts the pre-merger conditions of competition as the counterfactual against which to assess the impact of the merger. However, the CMA will assess the merger against an alternative counterfactual where, based on the evidence available to it, it believes that, in the absence of the merger, the prospect of these conditions continuing is not realistic, or there is a realistic prospect of a counterfactual that is more competitive than these conditions.
18. As set out in paragraphs 40 to 45 of the CMA phase 1 decision,⁴ the Parties have not submitted an alternative counterfactual.
19. In August 2018 the Parties entered into new mutual reseller agreements covering each other's hardware and software products. The CMA will consider carefully whether the Parties would have entered into these agreements absent the merger. Based on available evidence to date, we are not sufficiently certain that this would be the case to include the reseller agreements as part of the most likely counterfactual.
20. Therefore, the CMA currently considers the pre-merger conditions of competition to be the relevant counterfactual, taken to be the situation prior to

⁴ See CMA phase 1 decision, 25 January, 2019.

the August 2018 reseller agreements being in place. The CMA invites submissions on this matter from interested parties.

Theories of harm

21. Theories of harm describe the possible ways in which an SLC could arise as a result of the merger and provide the framework for our analysis of the competitive effects of the merger. We have set out below the theories of harm which we intend to investigate, and welcome views.
22. Our current intention is to assess three horizontal and three vertical theories of harm.

Horizontal theories of harm

23. We will assess whether the merger has resulted, or may be expected to result, in an SLC due to horizontal unilateral effects in each of the three product frames of reference in which the Parties overlap ((a), (b) and (d) in paragraph 12), namely:
 - a. the (upstream) supply of dedicated AAC hardware worldwide;
 - b. the (upstream) supply of AAC software worldwide; and
 - c. the (downstream) supply of dedicated AAC solutions in the UK.
24. Horizontal unilateral effects may arise when one firm merges with a competitor that previously provided a competitive constraint. The concern is that the removal of one party as a competitor could allow the Parties to increase prices, lower the quality of their products or customer service, reduce the range of their products/services, and/or reduce innovation. After the merger, it is less costly for the merged entity to raise prices or lower quality because it will recoup the profit on recaptured sales from those customers who would have switched to the offer of the other merging party.
25. We will examine the following factors:
 - a. **Shares of supply:** At phase 1, the CMA produced a range of estimates based on a number of sources, and consistently found that the Parties have a high combined share of supply in all three markets. To the extent that there is new evidence available, we will investigate whether our estimates should be revised.
 - b. **The closeness of competition between the Parties:** At phase 1, Tobii stated that, to date, it had primarily (but not exclusively) been

focussed on hardware, whereas Smartbox had been primarily (but not exclusively) focussed on software. However, a review of the Parties' internal documents indicated that pre-merger Tobii was in the process of improving its software offering while Smartbox was in the process of developing its hardware offering, and that these initiatives were taken at least partly in response to competition between the parties.

Moreover, the CMA found that, subsequent to the merger negotiations, the Parties decided to discontinue several hardware development projects from Smartbox, as well as certain software development projects from Tobii, insofar as these projects overlapped. We will consider further evidence from the Parties, customers and competitors on the closeness of competition between the parties, and their role in promoting innovation and product development in the industry.

- c. **Competitive constraints from alternative suppliers:** Based on the evidence received to date, the CMA's current view is that only Liberator/PRC and Techcess/Jabbla are credible competitors to the Parties in the three relevant markets where they overlap.

- 26. While the CMA already has a significant body of evidence on these different factors from the phase 1 investigation, we will also collect new evidence, to the extent relevant, as part of our phase 2 investigation. In particular, we would welcome any new evidence on the drivers of innovation and product development in the industry, and on any competitive constraint that has not been captured at phase 1.

Vertical theories of harm

- 27. Vertical effects may arise when a merger involves firms at different levels of the supply chain. Vertical mergers may be competitively benign or even efficiency-enhancing but, in certain circumstances, can weaken rivalry, for example when they result in foreclosure of the merged firm's competitors at either level of the supply chain. The CMA only regards such foreclosure to be anticompetitive where it results in an SLC in the foreclosed market(s), not merely where it disadvantages one or more competitors.⁵
- 28. In this particular case, the Parties are involved in four key levels of the value chain (dedicated AAC hardware, AAC software, dedicated AAC solutions, and eye-gaze cameras) and overlap in three of these levels. It is therefore particularly important to consider the interrelation between these different

⁵ In relation to this ToH 'foreclosure' means either exit of a rival or to substantially competitively weaken a rival.

markets, and the extent to which the Parties may be able to distort competition by withholding or deteriorating access to an important input or route to market.

29. More specifically, we are proposing to assess whether the merger has resulted, or may be expected to result, in an SLC due to the following vertical effects:

- a. Input foreclosure by the merged entity of Smartbox's AAC software ('Grid' software) to the Parties' rivals in the (downstream) supply of dedicated AAC solutions in the UK. This theory of harm will consider whether the Parties might potentially harm or weaken their competitors downstream by refusing to licence the Grid software to them (or by otherwise making access to the Grid more expensive or more difficult). At phase 1, the CMA found that the Parties' competitors frequently incorporate the Grid software in their dedicated AAC solutions, and that this was an important aspect of their offering. The concern is that such a foreclosure strategy might then dampen competition downstream;
- b. Input foreclosure by the merged entity of Tobii's eye gaze cameras to the Parties' rivals in the (downstream) supply of dedicated AAC solutions in the UK. This theory of harm will consider whether the Parties might potentially harm or weaken their competitors downstream by refusing to sell Tobii's eye-gaze camera to them (or by otherwise making access to Tobii's eye-gaze camera more expensive or more difficult). At phase 1, the CMA found that the Parties' competitors frequently resold Tobii's eye-gaze cameras as part of their dedicated AAC solutions, and that this was an important aspect of their offering. The concern is that such a foreclosure strategy might then dampen competition downstream; and
- c. Customer foreclosure by the merged entity of Tobii's eye gaze camera competitors worldwide. This theory of harm will consider whether, should Smartbox stop purchasing eye-gaze cameras from Tobii's competitors (or otherwise worsen the offer of dedicated AAC solutions using rivals' cameras, for example by degrading the interoperability between these cameras and the Grid software), these competitors would lose an important route to market, which would reduce their ability to compete in the foreseeable future. The concern is that such a foreclosure strategy would weaken competition in the supply of eye gaze cameras upstream.

30. The CMA's approach to assessing vertical theories of harm is to analyse:⁶

⁶ See section 5.6 of the CMA's Merger Assessment Guidelines.

- a. The *ability* of the merged entity to foreclose competitors: We will examine the extent to which rivals can procure the inputs from (or sell their output to) alternative parties. For instance, we will examine the extent to which compatibility with Smartbox's software and/or Tobii's eye gaze cameras are a key driver of hardware sales.
 - b. Its *incentive* to do so: An input foreclosure strategy implies a loss of profits in the input market upstream (from the lost sales of the input to competitors), but a gain in the retail market downstream (from customers' switching to the Parties' integrated solution). At Phase 1, the CMA found that the Parties' average downstream margins were significantly higher than the average upstream margins, which could make the foreclosure strategies profitable.
 - c. The overall *effect* of the strategy on competition at the horizontal level. For instance, we will investigate the extent to which an input foreclosure strategy of Smartbox's software and/or Tobii's eye gaze cameras may reduce the ability of competitors to compete post-merger and increase further the merged entity's already very strong position in the supply of dedicated AAC solutions in the UK. Similarly, we will investigate the extent to which a customer foreclosure strategy of Tobii's eye gaze camera rivals may increase further Tobii's already strong global position in the supply of eye gaze cameras worldwide (and possibly consequently the merged entity's position in dedicated AAC solutions in the UK).
31. The CMA will build on the body of evidence on these different factors from the phase 1 investigation and will collect new evidence as part of its phase 2 investigation. In particular, we would welcome any new evidence on the suitability and competitiveness of any alternative options available to the parties' competitors in the supply of dedicated AAC solutions, should they lose access to Tobii's eye-gaze camera or Smartbox's Grid software.

Countervailing factors

32. We will consider whether there are countervailing factors which are likely to prevent or mitigate any SLC that we may find.

Entry and expansion

33. We plan to investigate the likelihood of entry and expansion, and whether new competitors to the Parties are likely to emerge.

34. In order for entry and/or expansion to offset an SLC, entry and/or expansion would need to be timely, likely and sufficient.
35. To investigate this issue, we intend to collect information on:
- the history of entry, expansion and exit into the UK and global markets;
 - the steps involved in new entry or expansion into the supply of new product lines or new geographies, and costs of doing so;
 - the likelihood of future entry/expansion in this market;
 - the barriers to entry and expansion, including:
 - Investment and likely time to develop AAC software, dedicated AAC hardware and/or access methods;
 - staff levels and expertise required;
 - the role played by supply relationships with providers of a) AAC software, b) dedicated AAC hardware and c) access method;
 - costs associated with marketing products to experts (eg NHS speech and language therapists) who recommend solutions to users;
 - breadth of product line required;
 - working capital/investment costs;
 - logistics and customer support network, including the provision of training and the availability of ongoing customer support;
 - customers' preferences to switch supplier (eg cost of switching, length of existing contracts, and importance of an established relationship).

Buyer power

36. In order for countervailing buyer power to offset an SLC, customers would have to have sufficient buyer power post-merger that could offset any attempt of the Parties to increase prices or reduce quality, range and/or innovation.
37. We will examine how negotiations are carried out between the Parties and their customers and how frequently these happen in order to determine if there are credible outside options for customers to switch to post-merger and therefore exercise countervailing buyer power of a scale to be sufficient to offset an SLC.

We will also assess the extent to which any countervailing buyer power held by some customers may be relied upon to protect other customers.

Efficiencies

38. We will examine any submissions and supporting evidence made in relation to efficiencies arising from the merger. In particular, we will examine whether any potential efficiencies are rivalry-enhancing and could be expected to offset any loss of competition.

Other

39. We are not currently aware of any other countervailing factors, and none have been suggested by the Parties.

Possible remedies and relevant customer benefits

40. If we conclude provisionally that the merger has resulted, or may be expected to result, in an SLC in any market(s), we will consider whether, and if so what, remedies might be appropriate, and will issue a further statement.
41. In any consideration of possible remedies, we may have regard to their effect on any relevant customer benefits in relation to the merger and, if so, what these benefits are likely to be and which customers would benefit.
42. To count as relevant customer benefits, customers need to be better off with the merger, despite the fact that the CMA may have found an SLC, and the CMA must believe that the claimed relevant customer benefits are:
- Merger specific (ie unlikely to accrue without the merger);
 - Timely (ie expected to accrue within a reasonable period from the merger)
 - Likely; and
 - Sufficient (ie large enough to outweigh any SLC that arises as a result of the merger)
43. The parties have submitted that the merger would enable the merged entity to have more resources available for the development of new products and have greater scale, enabling it to reach users currently not using dedicated AAC solutions. However, the CMA has seen no evidence to support these views, or to indicate why these benefits could only arise as a result of the merger, or to quantify these benefits.

44. The CMA welcomes submissions on this issue.

Responses to the issues statement

45. Any party wishing to respond to this issues statement should do so in writing, by no later than **5pm on 12 March 2019**. Please email Tobii.Smartbox@cma.gov.uk or write to:

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