

# **ACQUISITION BY TOBII AB OF SMARTBOX ASSISTIVE TECHNOLOGY LIMITED AND SENSORY SOFTWARE INTERNATIONAL LIMITED**

## **Unwinding Order made by the Competition and Markets Authority pursuant to section 81(2A) of the Enterprise Act 2002**

Whereas:

- (a) on 1 October 2018, Tobii AB (**Tobii**) completed the acquisition of the entire issued share capital of Smartbox Assistive Technology Limited (**SATL**) and Sensory Software International Ltd (**SSIL**) (together, **Smartbox**) (the **Merger**);
- (b) on 15 August 2018, Tobii Dynavox AB and SATL entered into a reseller agreement whereby SATL agreed to act as a reseller of Tobii products in the UK and Ireland (the **Smartbox Reseller Agreement**);
- (c) in or around August 2018, certain Smartbox hardware products, including the Discontinued Products, were withdrawn from sale in the UK and Ireland and Smartbox discontinued several research and development projects, including the Development Projects;
- (d) on 28 September 2018, the CMA made an initial enforcement order under section 72(2) of the Act (the **IEO**), which came into force on 1 October 2018, to ensure that no action was taken pending final determination of any reference under section 22 of the Act which might prejudice that reference or impede the taking of any action by the CMA under Part 3 of the Act which might be justified by the CMA's decisions on the reference;
- (e) on 14 December 2018, the CMA issued directions under the IEO for the appointment of a Monitoring Trustee (**MT**) to monitor compliance with the IEO;
- (f) on 21 December 2018, the CMA granted consent pursuant to section 72(3C) of the Act to the continued operation of the Smartbox Reseller Agreement by way of a temporary derogation to the IEO, to remain in place until 25 January 2019 (subsequently extended to 18 February 2019);

- (g) on 8 February 2019, the Merger was referred by the CMA under section 22 of the Act for a phase 2 investigation (the **Reference**) to determine, pursuant to section 35 of the Act:
- (i) whether a relevant merger situation has been created; and
  - (ii) if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition in any market or markets in the United Kingdom (**UK**) for goods or services;
- (h) on 18 February 2019, the CMA made an Interim Order under section 81(2) of the Act for the purposes of preventing pre-emptive action prior to the Reference being finally determined (the **Interim Order**), and under that Interim Order issued directions for the continued appointment of the MT to monitor compliance with the Interim Order and varied the temporary derogation in respect of the Smartbox Reseller Agreement so that it remains in force until varied or revoked by the CMA;
- (i) the CMA has reasonable grounds for suspecting that action taken prior to the Interim Order might prejudice the reference concerned or impede the taking of any action by the CMA under Part 3 of the Act which might be justified by the CMA's decisions on the reference; and
- (j) the reference has not been finally determined in accordance with section 79(1) of the Act.

Now, for the purposes of restoring the position to what it would have been had the Pre-emptive Action not been taken or otherwise for the purposes of mitigating its effects in accordance with section 81(2A) of the Act, the CMA makes the following order addressed to Tobii and Smartbox (**Unwinding Order**).

#### **Commencement, application and scope**

1. This Unwinding Order commences on the commencement date, save for paragraphs 4 to 7 which shall come into force on 28 March 2018.
2. This Unwinding Order applies to Tobii and Smartbox.
3. This Unwinding Order shall continue in force until it is varied or revoked under the Act.

#### **Obligation to terminate the Smartbox Reseller Agreement**

4. Tobii and Smartbox shall not accept any new orders under the Smartbox Reseller Agreement. Tobii and Smartbox are permitted to fulfil Open Orders.
5. Tobii and Smartbox shall terminate the Smartbox Reseller Agreement once all Open Orders have been fulfilled.

### **Obligation to supply the Discontinued Products**

6. Smartbox shall be in a position to accept orders and otherwise supply the Discontinued Products to end-customers in the UK on an on-going basis, unless otherwise agreed in the Implementation Plan.

### **Obligation to reinstate Development Projects**

7. Smartbox shall reinstate the Development Projects, including investment and R&D staff allocations, to the position as existed at the end of July 2018, unless otherwise agreed in the Implementation Plan.

### **Implementation**

8. Smartbox shall work with the MT to prepare a detailed plan to implement the obligations under this Unwinding Order for the MT's review and the CMA's approval, which will contain at least:
  - (a) Smartbox's proposal to fulfil any Open Orders;
  - (b) Smartbox's proposed alternative supply arrangements with respect to Tobii Dynavox eye gaze camera devices. For the avoidance of doubt, Smartbox may discuss these arrangements with Tobii subject to certain safeguards to be agreed with the CMA prior to any discussions taking place;
  - (c) how Smartbox will reinstate and continue supply of the Discontinued Products, including, as relevant, reversing steps taken to stand down the necessary suppliers; setting and meeting sales targets and stock-levels; and drafting the necessary communications to its staff, suppliers and customers;
  - (d) how Smartbox will source products no longer available due to termination of the Smartbox Reseller Agreement, including eye-gaze camera devices; and
  - (e) how Smartbox will reinstate and progress the Development Projects, including, as relevant; setting and meeting project milestones; and the reallocation of R&D staff and continuation of investment.
9. Smartbox shall submit a draft of the Implementation Plan to the CMA (following consultation with the MT) no later than 5pm on 21 March 2019.
10. Smartbox and Tobii shall submit for the MT's review and CMA approval a proposal on the provision of customer service and after-sales support to customers who had purchased solutions provided under the Smartbox Reseller Agreement, where this requires Smartbox and Tobii to collaborate.
11. Tobii and Smartbox shall work with the MT to prepare and make the necessary external and internal communications announcing the unwinding of the Smartbox Reseller Agreement.

12. Tobii shall not receive or request any details of the Implementation Plan and Smartbox's Development Projects, except with the prior written consent of the CMA.

### **Compliance**

13. Tobii and Smartbox shall procure that each of their subsidiaries comply with this Unwinding Order as if the Unwinding Order had been issued to each of them.
14. Each of Tobii and Smartbox shall facilitate whatever action is required by each of the other parties to this Unwinding Order to give effect to this Unwinding Order subject to requests that each may reasonably make, and subject to continuing to comply with the Interim Order.
15. Tobii and Smartbox shall provide to the CMA such information or statement of compliance as it may from time to time require for the purposes of monitoring compliance by Tobii and Smartbox and their subsidiaries with this Unwinding Order. In particular, on 1 April 2019 and subsequently every two weeks (or, where this does not fall on a working day, the first working day thereafter) the CEO and Managing Director of each of Tobii and Smartbox respectively or other persons of Tobii and Smartbox as agreed with the CMA shall, on behalf of Tobii and Smartbox, provide a statement to the CMA in the form set out in the Annex to this Unwinding Order confirming compliance with this Unwinding Order.
16. If Tobii and/or Smartbox has any reason to suspect that this Unwinding Order might have been breached it shall immediately notify the CMA and the MT.
17. The CMA may give directions to a specified person or to a holder of a specified office in any body of persons (corporate or unincorporated) to take specified steps for the purpose of carrying out, or ensuring compliance with, this Unwinding Order, or do or refrain from doing any specified action in order to ensure compliance with the Unwinding Order. The CMA may vary or revoke any directions so given.
18. Tobii and Smartbox shall comply in so far as they are able with such directions as the CMA may from time to time give to take such steps as may be specified or described in the directions for the purpose of carrying out or securing compliance with this Unwinding Order.
19. In the case of potential conflict between the provisions of this Unwinding Order and the Interim Order, Tobii and Smartbox shall consult the CMA.

### **Interpretation**

20. The Interpretation Act 1978 shall apply to this Unwinding Order as it does to Acts of Parliament.
21. For the purposes of this Unwinding Order:  
  
**'the Act'** means the Enterprise Act 2002;

**'commencement date'** means 28 February 2019;

**'Development Projects'** means the Smartbox discontinued development projects related to [X] unless otherwise agreed with the CMA;

**'Discontinued Products'** means the [X], unless otherwise agreed with the CMA;

**'Implementation Plan'** means the plan as agreed between Smartbox and the CMA under paragraph 8;

**'Open Orders'** means those orders for products or services due to be supplied by Smartbox to end-customers pursuant to the Smartbox Reseller Agreement that (i) were placed by an end-customer on or before the 28 March 2018; (ii) Tobii and/or Smartbox had provided an end-customer, who has completed a customer assessment, with a quotation for on or before the 28 March 2019; or (iii) are approved by the CMA;

**'Pre-emptive Action'** means the entering into the Smartbox Reseller Agreement, the discontinuation of the Development Projects and the withdrawal of the Discontinued Products;

**'Smartbox'** means Smartbox Assistive Technology Limited of 26 Abbey Road Abbey Road, Malvern, England, WR14 3HD, company number 05541084, and Sensory Software International Ltd of 26 Abbey Rd Abbey Road, Malvern, England, WR14 3HD, company number 03662043;

**'subsidiary'**, unless otherwise stated, has the meaning given by section 1159 of the Companies Act 2006;

**'Tobii'** means Tobii AB of Karlsrovägen 2D, Danderyd, 182 53, Sweden, listed on Nasdaq Stockholm, corporate identity number 556613-9654;

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

**Signature:**

**Kip Meek**

**Inquiry Chair**

**Compliance statement for [Tobii] [Smartbox]**

I [*insert name and position*] confirm on behalf of [Tobii] [Smartbox] that:

**Compliance in the Relevant Period**

1. In the period from [X] 2019 to [X] 2019 (the **Relevant Period**):
  - (a) [Tobii] [Smartbox] has complied with the order made by the CMA in relation to the Merger on [*commencement date*] 2019 (the **Unwinding Order**); and
  - (b) [Tobii] [Smartbox]'s subsidiaries have also complied with this Unwinding Order.
2. [Tobii] [Smartbox] and its subsidiaries remain in full compliance with the Unwinding Order.

**Interpretation**

3. Terms defined in the Unwinding Order have the same meaning in this compliance statement.

**I understand that:**

4. It is a criminal offence under section 117 of the Enterprise Act 2002 for a person recklessly or knowingly to supply to the CMA information which is false or misleading in any material respect. Breach of this provision can result in fines, imprisonment for a term not exceeding two years, or both.
5. Failure to comply with the Order without reasonable excuse may result in the CMA imposing a penalty of up to 5% of the total value of the turnover (both in and outside the UK) of the enterprises owned or controlled by the person on whom the penalty is imposed (section 94A of the Enterprise Act 2002).

FOR AND ON BEHALF OF [TOBII] [SMARTBOX]

Signature .....

Name .....

Title .....

Date .....