

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

Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups¹

Introduction

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 of Smartbox Assistive Technology Ltd and Sensory Software International Ltd (together, Smartbox) by Tobii AB (Tobii) (the Merger), for further investigation and report by a group of CMA panel members (the Inquiry Group).
2. On 28 September 2018, the CMA imposed an Initial Enforcement Order (IEO) on Tobii for the purpose of preventing pre-emptive action in accordance with section 72(2) of the Act. The IEO ceases to be in force under section 72(6) of the Act when the CMA makes an Interim Order under section 81 of the Act.
3. On 18 February 2019, the CMA imposed an Interim Order on Tobii and Smartbox for the purpose of preventing pre-emptive action in accordance with section 81 of the Act.
4. On 28 February 2019, the CMA imposed an Unwinding Order on Tobii and Smartbox for the purposes of restoring the position to what it would have been had pre-emptive action not been taken or otherwise for the purposes of mitigating its effects in accordance with section 81(2A) of the Act.
5. In its provisional findings on the reference notified to Tobii and Smartbox (together, the merger parties) on 30 May 2019, the CMA, among other things, provisionally concluded that the Merger has resulted in the creation of a relevant merger situation, and that the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition (SLC) due to the following:

¹ CMA Rules of Procedure for Merger, Market and Special Reference Groups (CMA17, 2014).

- (a) Horizontal competition concerns in the supply of dedicated AAC solutions in the UK.
 - (b) Vertical competition concerns with regard to input foreclosure by the merged entity of Smartbox's Grid software to the Parties' rivals in the downstream supply of dedicated AAC solutions in the UK.
 - (c) Vertical competition concerns with regard to customer foreclosure by the merged entity of Tobii's upstream competitors in the worldwide supply of eye gaze cameras to providers of dedicated AAC solutions including customers based in the UK.
6. The CMA's analysis provisionally indicates that this SLC has resulted, or may be expected to result, in adverse effects, for example in the form of higher prices, lower quality, reduced product range and/or reduced innovation compared to what would otherwise have been the case absent the Merger.
7. This Notice sets out the actions which the CMA considers it might take for the purpose of remedying the SLC and/or any resulting adverse effects identified in the Provisional Findings Report.²
8. The CMA invites comments on possible remedies by 13 June 2019.³

Criteria

9. In deciding on a remedy, the CMA shall in particular have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to remedy the SLC and any adverse effects resulting from it.⁴
10. To this end, the CMA will seek remedies that are effective in addressing the SLC and its resulting adverse effects and will select the least costly and intrusive remedy that it considers to be effective.⁵
11. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.⁶

² [Tobii/Smartbox merger inquiry case page](#).

³ Date: Responses to the Notice of Possible Remedies are typically requested within 14 days of publication of the Notice (and in any event, no less than seven days) so that they can be considered before response hearings. (CMA 2 Mergers: guidance on the CMA's jurisdiction and procedure, paragraph 13.1)

⁴ Sections 35(4) and 36(3) of the Act.

⁵ [Merger Remedies: CMA87](#) (December 2018), paragraph 3.4.

⁶ [Merger Remedies: CMA87](#) (December 2018), paragraph 3.4.

Possible remedies on which views are sought

12. The CMA prefers structural remedies, such as divestiture or prohibition, over behavioural remedies in merger inquiries, because:
 - (a) structural remedies are more likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry;
 - (b) behavioural remedies are less likely to have an effective impact on the SLC and its resulting adverse effects, and are more likely to create significant costly distortions in market outcomes; and
 - (c) structural remedies rarely require monitoring and enforcement once implemented.⁷
13. At this stage, the CMA's provisional view is that the full divestiture of Smartbox by Tobii (equivalent to a prohibition of the Merger) would be likely to be the only effective and proportionate remedy to the SLC and the resulting adverse effects that it has provisionally identified.
14. We have not at this stage, been able to identify a more proportionate divestiture package that could form the basis of an effective structural remedy. Moreover, the CMA's current view is that a behavioural remedy is very unlikely to be an effective remedy to the SLC or any resulting adverse effect that it has provisionally identified.⁸
15. Having said this, the CMA will consider any other practicable remedies – whether structural or behavioural in nature - that the merger parties, or any interested third parties, may propose that could be effective in addressing the SLC and/or any resulting adverse effects.
16. In determining an appropriate remedy, the CMA will consider the extent to which different remedy options would be effective in remedying, mitigating or preventing the SLC or any resulting adverse effects that have been provisionally identified.
17. The CMA will also consider whether a combination of measures is required to achieve a comprehensive solution – for example whether any behavioural remedies would be required in a supporting role to safeguard the effectiveness of any structural remedies. The CMA will evaluate the impact of any such combination of measures on the SLC or any resulting adverse effects.

⁷ [Merger Remedies: CMA87](#) (December 2018), paragraph 3.46..

⁸ See [Merger Remedies: CMA87](#) (December 2018), section 7 for further guidance on behavioural remedies.

Divestiture

18. In evaluating possible divestitures as a remedy to the provisional SLC it has found, the CMA will consider the likelihood of achieving a successful divestiture and the associated risks. In reaching its view, the CMA will have regard to the following critical elements of the design of divestiture remedies.

The scope of the divestiture package

19. To be effective in remedying the provisional SLC, any divestiture package would need to be appropriately configured to enable the purchaser to operate effectively as an independent competitor, as well as being sufficiently attractive to potential purchasers.
20. A successful divestiture will effectively address at source the SLCs that the CMA has provisionally identified by changing or restoring the structure of the market.⁹
21. The CMA invites views on:
- (a) whether a full divestiture of Smartbox (equivalent to a prohibition of the Merger) would represent an effective remedy;
 - (b) whether a differently configured divestiture package (eg a partial divestiture of some, but not all, of the business and operations of either Smartbox or Tobii) to a suitable purchaser could also be an effective remedy, and if so, what would constitute the appropriate scope of the package of assets to be divested;
 - (c) how the Distributor Agreement entered into by the merger parties in August 2018 should be treated and whether, for example, the new owners of Smartbox should be given the option to terminate, renegotiate the terms of, or continue to implement the Distributor Agreement.
 - (d) whether there are risks that the scope of the divestiture package (in the event of a partial divestiture) may be too constrained or not appropriately configured to enable a purchaser to operate as an effective competitor and / or attract a suitable purchaser; and
 - (e) any other elements (eg the inclusion of additional assets in the package, or supporting behavioural remedies) that may be required to support any

⁹ [Merger Remedies: CMA87](#) (December 2018), paragraph 3.38.

divestiture, whether full or partial, in order to manage any associated risks.

Identification of a suitable purchaser

22. The CMA will wish to be satisfied that a prospective purchaser:
- (a) is independent of Tobii;¹⁰
 - (b) has the necessary capability to compete;
 - (c) is committed to competing in the market; and
 - (d) will not create further competition concerns.¹¹
23. The CMA invites views on:
- (a) whether there are any specific factors to which the CMA should pay particular regard in assessing purchaser suitability, eg whether there are any types of potential purchasers that would not be suitable for the Smartbox business; and
 - (b) whether there are risks that a suitable purchaser is not available or that the merger parties will divest to a weak or otherwise inappropriate purchaser, and if so, how these risks should be mitigated.

Effective divestiture process

24. The CMA invites views on the appropriate timescale for achieving a divestiture.
25. The CMA will consider what, if any, procedural safeguards may be required to minimise the risks associated with this divestiture.
26. A monitoring trustee is already in place, and the CMA would expect this to continue throughout any divestiture process. The CMA invites views on whether any additional risks may arise during the divestiture period and whether the functions of the monitoring trustee should be amended to oversee the divestiture and to ensure that the business to be divested is maintained during the course of the process.

¹⁰ [Merger Remedies: CMA87](#) (December 2018), paragraph 5.21. The purchaser should have no significant connection to the merger parties that may compromise the purchaser's incentives to compete with the merged entity.

¹¹ [Merger Remedies: CMA87](#) (December 2018), paragraph 5.20 and 5.21.

27. As with any divestiture remedy, the CMA would have the power to mandate the appointment of an independent divestiture trustee to dispose of the divestiture package (and if necessary to achieve the divestiture at no minimum price) if:
- (a) Tobii failed to procure divestiture to a suitable purchaser within the initial divestiture period;¹² or
 - (b) the CMA had reason to expect that Tobii will not procure divestiture to a suitable purchaser within the initial divestiture period.
28. In unusual cases, the CMA may require that a divestiture trustee is appointed at the outset of the divestiture process. The CMA invites views on whether the circumstances of this Merger necessitate such an approach.

Cost of remedies and proportionality

29. In order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, that it considers will be effective. The CMA will also seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects. Between two remedies that the CMA considers equally effective, it will choose that which imposes the least cost or restriction. In relation to completed mergers, the CMA will not normally take account of costs or losses that will be incurred by the merger parties as a result of a divestiture remedy.¹³
30. The CMA invites views on what costs are likely to arise in implementing possible remedy options under consideration.

Relevant customer benefits

31. In deciding the question of remedies, the CMA may have regard to the effects of any remedial action on any relevant customer benefits in relation to the creation of the relevant merger situation.¹⁴
32. Relevant customer benefits are limited by the Act to benefits to customers in the form of:

¹² The CMA will state in its final report the period in which the merger parties should achieve effective disposal of a divestiture package to a suitable purchaser (ie the 'initial divestiture period'). The length of this period will depend on the circumstances of the merger but will normally have a maximum duration of six months. [Merger Remedies: CMA87](#) (December 2018), paragraph 5.40 and 5.41.

¹³ [Merger Remedies: CMA87](#) (December 2018), paragraph 3.8 and 3.9.

¹⁴ Section 36(4) of the Act, see also [Merger Remedies: CMA87](#) (December 2018), paragraph 3.15 and 3.16.

- (a) 'lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom ... or
 - (b) greater innovation in relation to such goods or services.'¹⁵
- 33. The Act provides that a benefit is only a relevant customer benefit if:
 - (a) it accrues or may be expected to accrue to relevant customers within the UK within a reasonable period as a result of the creation of that situation; and
 - (b) it was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition.¹⁶
- 34. The CMA welcomes views on the nature of any relevant customer benefits and on the scale and likelihood of such benefits and the extent (if any) to which these are affected by the different remedy options we are considering.

Next steps

- 35. Interested parties are requested to provide any views in writing, including any practical alternative remedies they wish the CMA to consider, by 13 June 2019 (see Note (i)).
- 36. A copy of this notice will be posted on the [CMA website](#).

KIP MEEK
Group Chairman
30 May, 2019

Note

- (i) This notice of possible actions to remedy, mitigate or prevent the SLC or any resulting adverse effects is made having regard to the Provisional Findings announced on 30 May 2019. Interested parties have until 20 June 2019 to respond to the Provisional Findings. The CMA's findings may alter in response to comments it receives on its Provisional Findings, in which case the CMA may consider other possible remedies, if appropriate.

¹⁵ Section 30(1)(a) of the Act, see also [Merger Remedies: CMA87](#) (December 2018), paragraph 3.17.

¹⁶ Section 30(3) of the Act, see also [Merger Remedies: CMA87](#) (December 2018), paragraph 3.19.