

TOBII/SMARTBOX MERGER INQUIRY

RESPONSE OF TOBII AB (PUBL) TO THE CMA'S NOTICE OF POSSIBLE REMEDIES

INTRODUCTION

1. This submission is made by Tobii AB (publ) ("**Tobii**") in response to the CMA's Notice of Possible Remedies dated 30 May 2019 ("**the Notice**") in relation to the completed acquisition by Tobii of Smartbox Assistive Technology Limited (Company registration number 05541084) ("**Smartbox**") ("**the Merger**"). It is made without prejudice to Tobii's views on the existence of any substantial lessening of competition ("**SLC**") that may raise from the Merger, which Tobii addresses in its response to the CMA's Provisional Findings dated 30 May 2019 ("**PFs**").
2. In its PFs, the CMA considers that the Merger will lead to an SLC as a result of:
 - a. horizontal unilateral effects in the supply of 'dedicated AAC solutions' in the UK;
 - b. vertical input foreclosure of Grid software to competing suppliers of 'dedicated AAC solutions' in the UK; and
 - c. vertical customer foreclosure of competing suppliers of eye gaze cameras for AAC applications.
3. As will be set out in Tobii's response to the PFs, Tobii considers that the CMA's provisional findings that the Merger will result in an SLC are unfounded and unsupported by reliable evidence.
4. The CMA has, based upon its provisional findings of an SLC, stated that its "provisional view is that 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"¹ and that it has not "at this stage, been able to identify a more proportionate divestiture package and that a behavioural remedy is unlikely to be an effective remedy to the SLC".²

¹ Notice, para. 13.

² Notice, para. 14.

5. For the reasons set out below, a full divestiture of Smartbox (i.e. of its worldwide business) would be wholly a disproportionate remedy to the SLC that has been provisionally found by the CMA in its PF, given Tobii Dynavox's limited presence in the UK market for the supply of 'dedicated AAC solutions'.
6. If the CMA were, in its final report, to maintain the SLC identified by it in the PFs, a more appropriate combination of remedies would be a combination of the following:
 - a. [REDACTED]
 - b. A commitment to continue licensing Smartbox's Grid software to competing suppliers of 'dedicated AAC solutions' on fair, reasonable and non-discriminatory terms;
 - c. [REDACTED]; and
 - d. A commitment for Smartbox to fulfil any existing R&D partnerships with other suppliers of eye gaze cameras for AAC applications.
7. Tobii considers that each of these commitments would constitute an effective and proportionate remedy for the overall SLC identified by the CMA in its PFs. They would also individually constitute effective and proportionate remedies to the three SLCs identified in paragraph 2 above.

FULL DIVESTITURE OF SMARTBOX WOULD BE DISPROPORTIONATE

8. As set out above, the CMA considers that the only effective remedy for the SLC identified in its PFs is the full divestiture of Smartbox. As the CMA recognises this is equivalent to the prohibition of the Merger.
9. The CMA accepts,³ reflecting the provisions of the Enterprise Act 2002 ("**the Act**") that, in devising (and, if necessary, imposing) an appropriate remedy, it must have regard to the following principles:
 - a. a remedy must achieve as comprehensive a solution as is reasonable and practicable to remedy the SLC and any adverse effects resulting from it;
 - b. a remedy must be effective in addressing the SLC and any adverse effects resulting from it;

³ Notice, paras. 9 to 11.

- c. it should select the least costly and intrusive remedy that it considers to be effective; and
 - d. a remedy must not be disproportionate in relation to the SLC and its adverse effects.
10. The CMA has provisionally identified an SLC in a market for the supply of ‘dedicated AAC solutions’ in the UK.⁴ That market comprises both purpose-built devices and wrapped tablets.⁵ However, the CMA considers that this market comprises products that are highly differentiated⁶ (with which Tobii agrees). It has therefore identified a number of distinct segments of this market, in particular ‘mid-range’ and ‘high-end’ devices,⁷ although the positioning of ‘wrapped tablets’ within these segments is unclear (we further note that, should these relate to a separate market segment, there would be no competitive overlap with respect to wrapped tablets, as Tobii Dynavox does not sell ‘wrapped tablets’).⁸
11. The CMA also considers that ‘dedicated AAC solutions’ (such as Tobii Dynavox’s ‘Indi’ product) face effective competition from ‘non-dedicated AAC solutions’ (i.e. those based on mainstream or consumer devices, such as the Apple iPad, such that no AAC will arise in respect of ‘mid-range’ devices, such as the Indi).⁹ It therefore follows that any SLC that the CMA may identify is limited to ‘high-end’ devices, i.e. purpose-built devices such as Tobii Dynavox’s and I-Series and Smartbox’s Grid Pad 12.
12. It is important to note that the geographic market for ‘dedicated AAC solutions’ on which the CMA considers an SLC to arise is limited to the UK. However, Tobii Dynavox and Smartbox are both internationally active business, as are their principal competitors in the UK, i.e. PRC (Liberator in the UK) and Jabbla (Techcess in the UK). Each has a global product range, for both hardware and software, as well as for accessories: the products that each sells in the UK are the same as those that are sold globally. Each has a single, integrated R&D and product development function,

⁴ PFs Summary, para. 23.

⁵ PFs, para. 5.4.

⁶ PFs, para. 5.7.

⁷ PFs, para5.60.

⁸ For the avoidance of doubt, Tobii Dynavox’s ‘Eye Mobile’ is not a wrapped tablet, but simply a wrap for a mainstream consumer tablet. Indeed, Tobii Dynavox sometimes (but certainly not always) sells this device with a mainstream consumer tablet and/or AAC software. Moreover, this device is not sold with inclusive customer support. Therefore, based on the definition of ‘dedicated AAC devices’ set out by the CMA, we are unclear which market segment (if any) these devices would relate to.

⁹ PFs, para. 2.34.

Tobii Dynavox primarily in Pittsburgh (US) and Stockholm (Sweden) and Smartbox in Malvern and Bristol (UK). In each case, devices and accessories are manufactured by third party contract manufacturers.

13. The sale in the UK of what the CMA refers to as ‘high end’ devices [redacted], see **Table 1** below.

Table 1
Tobii Dynavox UK sales of I-110 and I-Series devices
as proportion of total global sales and revenues (2018)

	Unit sales in the UK as a proportion of all AAC devices sold globally ¹⁰	Revenues in the UK as a share of total global revenues ¹¹
I-series devices (I-12/I-15)	[redacted]	[redacted]
I-110 devices	[redacted]	[redacted]

Source: Economic Insight analysis of Tobii Dynavox’s transaction data and Tobii Dynavox’s global revenues detailed in table 2-1 of the CMA’s PFs.

14. Whilst Smartbox has (as would be expected, given it is a UK-based company) a greater proportion of its sales in the UK than does Tobii Dynavox, the UK still accounts for a relatively small part of Smartbox’s global business, which has sales in over 60 countries. Overall, [redacted] of Smartbox’s global revenues are generated in the UK. However, in 2018, the UK sales of the Grid Pad 12 represented [redacted] (by units) of all AAC devices sold globally and approximately [redacted] of its total global revenues; these proportions do not increase significantly if sales of wrapped tablets are taken into account, increasing to [redacted] and [redacted] respectively: see **Table 2** below.

¹⁰ This is calculated as a proportion of all AAC device sales (I-series, I-110, Indi-series, etc.) globally. Based on the methodology outlined in Tobii Dynavox’s response to the CMA’s RFI received on 9 May 2019, this equates to global AAC device sales of [redacted].

¹¹ This is calculated as a proportion of Tobii Dynavox’s total global revenues of [redacted] detailed in table 2-1 of the CMA’s PFs (which the CMA translated into GBP based on Tobii’s Annual Report 2018).

Table 2
Smartbox UK sales of Grid Pad 12 and wrapped tablets
as proportion of total global sales and revenues (2018)

	Unit sales in the UK as a proportion of all AAC devices sold globally ¹²	Revenues in the UK as a share of total global revenues ¹³
Grid Pad 12	[X]	[X]
'Wrapped' consumer tablets	[X]	[X]

Source: *Economic Insight analysis of Smartbox's sales data.*

15. As is demonstrated by **Table 1** above, the overlap between Tobii Dynavox and Smartbox that results in an SLC in the UK due to horizontal unilateral effects arises due to [X] units of I-Series devices, with a total UK sales value of [X]. As demonstrated by **Table 2** above, this overlap represents sales of [X] of Smartbox's Grid Pad 12, with total UK annual sales of [X], or [X] of Smartbox's global business.
16. The CMA does not quantify the extent of the consumer harm that would result from the SLC it has provisionally identified. However, it is clearly very modest.
17. The total consideration paid (or to be paid) by Tobii Dynavox for Smartbox is up to [X]. This is a factor that the CMA must take into account when assessing whether a remedy is proportionate and is also the least costly and least intrusive remedy that would effectively remedy the SLC identified by it.
18. In other cases where a merger that involves an international business and the SLC identified by the CMA (or, before it, the Competition Commission) relates to a distinct market in the UK and the UK market on which the merging parties are represents a small part of their global businesses, a total prohibition of the merger has been considered to be disproportionate. Thus, in *Imerys/Goonvean*, a price cap applicable to the specific products (which was by reference to pre-merger ex works prices) in respect of which an SLC had been identified (which represented less than 5% of the parties' total production) was imposed as an alternative to the prohibition, notwithstanding that the merging parties were the only producers and suppliers in the UK of the SLC products. Similarly, in *Reckitt-Benckiser/K-Y Brand*, an SLC was identified only in respect of sales through grocery retailers and pharmacies in the UK,

¹² This is calculated as a proportion of all AAC device sales globally (understood to be [X]).

¹³ This is calculated as a proportion of total global revenues (understood to be [X]).

which was a small part of the K-Y brand's global sales, the Competition Commission adopted a licensing remedy, applicable only in the UK, as an effective remedy.

19. It is submitted that the CMA should take a similar approach in the present case, to ensure that any divestment remedy is both proportionate and effective and is the least onerous necessary to ensure that the SLC identified by it is remedied effectively.

AN ALTERNATIVE REMEDY WOULD BE MORE EFFECTIVE THAN A FULL DIVESTITURE OF SMARTBOX IN ENSURING CONTINUITY FOR VULNERABLE PEOPLE

20. A full divestiture of Smartbox would, self-evidently, remove the entire horizontal overlap between Tobii Dynavox and Smartbox and also resolve any vertical foreclosure concerns that the CMA may have. However, this would be disproportionate. [REDACTED].

21. The behavioural commitments outlined below include a commitment to licence the Grid 3 and Grid for iPad software to competing suppliers of dedicated AAC solutions. It would do so on fair, reasonable and non-discriminatory terms that reflect the terms on which Smartbox presently licences its products and would be subject to a level of price control that is consistent with Tobii's commitment to sell products at low prices and increased volumes.

[REDACTED]

22. The CMA's horizontal unilateral effects concerns are based upon Smartbox's supply of a single 'high end' device, the Grid Pad 12, as this is the only Smartbox hardware that has a competitive overlap with the devices sold by Tobii Dynavox: Smartbox does not have an equivalent device to Tobii Dynavox's Indi device and Tobii Dynavox does not sell wrapped tablets.

23. [REDACTED]

24. [REDACTED]

25. [REDACTED]

- a. [REDACTED]

- b. [REDACTED]

- c. [X]
 - d. [X]
 - e. [X]
 - f. [X]
 - g. [X]
 - h. [X]
26. [X]
27. [X]

Behavioural remedies to resolve any vertical foreclosure concerns would provide greater assurance for vulnerable people than a full divestiture.

Input foreclosure of Grid software

28. In order to remedy the CMA's input foreclosure concerns, Tobii proposes licensing the Grid 3 and Grid for iPad software to competing suppliers of dedicated AAC solutions. It would do so on fair, reasonable and non-discriminatory terms that reflect the terms on which Smartbox presently licences Grid 3 and Grid for iPad to third parties such as PRC and Jabbla.
29. The licence would be available on a worldwide basis, subject to compliance with any applicable legislation prohibiting the sale of software in or to certain territories or companies. The licence fee would be calculated (as at present) as a discount from the applicable retail price for the relevant software in the relevant country or territory subject to the licence fee (subject to indexation for inflation) being no higher than the licence fee presently charged by Smartbox to existing licensees.
30. In the case of an existing licensee of Grid 3 and/or Grid for iPad, Tobii Dynavox will continue (at the licensee's option) to apply the existing licence agreement and will not terminate the same without cause.
31. This commitment [X] would ensure that competing suppliers of dedicated AAC solutions will continue to be able to install Grid 3 (or Grid for iPad) on their devices, as at present, and on terms that reflect the pre-merger situation. It would be both, comprehensive and, to a significant extent, 'self-monitoring', given the very limited number of potential licensees. This would allow licenses to readily identify any

compliance failures and bring them to the attention of a monitoring trustee and/or the CMA.

Customer foreclosure of competing eye gaze camera suppliers

32. The CMA has expressed concerns that competing suppliers of eye gaze cameras could be foreclosed by limiting the compatibility of Grid with eye gaze cameras supplied by third parties.
33. To remedy this concern ([§<]), Tobii will commit to the following:
 - a. Smartbox (as a software developer, i.e, of Grid 3 and Grid for iPad continuing any existing collaboration agreements with eye gaze camera manufacturers in accordance with their existing terms (with confidentiality provisions in place to prevent Tobii Dynavox having access to any confidential information of a competing eye gaze manufacturer received by Smartbox's software business);
 - b. [§<]; and
 - c. making Grid 3 and Grid for iPad software (including upgrades and new versions) available to competing suppliers of eye gaze cameras on fair, reasonable and non-discriminatory terms which reflect pre-merger conditions, to enable them to design their products to work with this software.
34. This commitment [§<] would ensure that competing suppliers of eye gaze cameras will continue to be able to ensure that their hardware is compatible with Grid 3 (or Grid for iPad), as at present, and also to pursue collaboration projects with other AAC software developers. It would be both, comprehensive and, to a significant extent, 'self-monitoring', given the very limited number of competing eye gaze camera beneficiaries (the CMA has identified four in the PFs). This would allow the licensees to readily identify any compliance failures and bring them to the attention of a monitoring trustee and/or the CMA.

CONCLUSION

35. Tobii remains strongly of the view that the Merger will not result in an SLC in any relevant market. However, without prejudice to this view, it has identified comprehensive remedies that will restore effective competition in all relevant markets and thereby resolve the SLC that the CMA has provisionally identified in its PFs. The remedies identified by Tobii in this submission are proportionate and effective, unlike

the sole remedy identified by the CMA (prohibition and full divestiture of Smartbox), which would be manifestly disproportionate.

36. Tobii confirms its willingness to work with the CMA to identify appropriate and proportionate remedies, should they be required.

13 June 2019