

TOBII AB (PUBL) AND SMARTBOX ENFORCEMENT ORDER 2019

Explanatory Note

This note is not a part of the Order

Introduction

1. On 1 October 2018, Tobii AB (publ) (“**Tobii**”) completed its acquisition of Smartbox Assistive Technology Limited and Sensory Software International Limited (the last two together “**Smartbox**”) (the “**Merger**”).
2. On 8 February 2019, the Competition and Markets Authority (the “**CMA**”) made a reference (the “**Reference**”) to its chair in accordance with [section 22\(1\)](#) of the Enterprise Act 2002 (the “**Act**”) for the constitution of a Group under Schedule 4 of the Enterprise and Regulatory Reform Act 2013 to investigate and report on the completed acquisition by Tobii of Smartbox.
3. On 18 February 2019, the CMA made an interim order pursuant to [section 81](#) of the Act (the “**Interim Order**”) to ensure that no action was taken pending final determination of the Reference which might prejudice the Reference or impede the taking of any action by the CMA under Part 3 of the Act which may be justified by the CMA’s decisions on the Reference.
4. On 28 February 2019, the CMA made an unwinding order addressed to Tobii and Smartbox (the “**Unwinding Order**”) in accordance with [section 81\(2A\)](#) of the Act for the purpose of reversing certain actions taken prior to the making of the Interim Order, which might prejudice the 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.
5. On 15 August 2019, the CMA published its final report under section 38 of the Act (the “**Final Report**”), concluding, in accordance with [section 35](#) of the Act, that:
 - (a) the completed acquisition by Tobii of Smartbox has resulted in the creation of a relevant merger situation;

- (b) the creation of that situation has resulted or may be expected to result in a substantial lessening of competition (“**SLC**”) in the following respects:
 - (i) Horizontal competition concerns in the supply of dedicated augmentative and assistive communication (“**AAC**”) solutions in the UK;
 - (ii) 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; and
 - (iii) 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 providers serving customers in the UK;
 - (c) the CMA should take action to remedy the SLC and the adverse effects likely to arise from it; and
 - (d) undertakings should be given to the CMA or where undertakings are not agreed, an order made to give effect to the remedies identified by the CMA in Chapter 10 of the Final Report.
6. The Final Report further concluded that Tobii must dispose of Smartbox.
 7. By an application made before the Competition Appeal Tribunal (the “**Tribunal**”) dated 13 September 2019 Tobii challenged the findings in the Final Report pursuant to [section 120](#) of the Act.
 8. On 2 October 2019, the CMA published a notice of its intention to make an order to remedy the adverse effects on competition that it had identified and invited written representations from any interested person or persons by 1 November 2019. The CMA received two responses to its notice. The CMA carefully considered these responses and concluded that no modifications were necessary to the order.
 9. The initial statutory period for the CMA either to accept final Undertakings or make a final Order was 7 November 2019. On 6 November 2019, the Group decided to extend by six weeks under [section 41A\(2\)](#) of the Act the period for the discharge of its duty under [section 41\(2\)](#) of the Act, as it considered that there were special reasons to do so. In taking this decision, the Group had regard to the fact that the statutory deadline under [section 41A\(1\)](#) of the Act was due to expire during the hearing of Tobii’s application to the Tribunal (between 6 November and 8 November 2019). As a result, the statutory period for the CMA either to accept final Undertakings or make a final Order was extended to 19 December 2019.

10. At the time of making this Order (the “**Order**”), the Tribunal’s judgment setting out its conclusion on each of the grounds of review (the “**Judgment**”) remains pending. The CMA has a statutory duty to accept final undertakings or make a final order by the extended deadline of 19 December 2019, with no scope for a further extension (pursuant to [section 41B\(2\)](#) of the Act). The CMA is making this Order to reflect the CMA’s findings in the Final Report, and will take such further action as appropriate to reflect the Judgment once it is handed down.

Possible consequences of not complying with the Order

11. [Section 94](#) of the Act places a duty on any person to whom the Order applies to comply with it. Any person who suffers loss or damage due to a breach of this duty may bring an action.
12. [Section 94](#) of the Act also provides that the CMA can seek to enforce the Order by civil proceedings for an injunction or for any other appropriate relief or remedy.
13. The CMA has power under the Order to give directions, including directions to a person in their capacity as an office holder, for the purpose of carrying out, or ensuring compliance with, the Order.
14. [Section 87](#) of the Act provides that, if there is a failure to comply with a direction under the Order, the CMA can seek to enforce the direction in court and may recover the costs or expenses of such enforcement.

Review of this Order

15. The CMA has a duty under [section 92](#) of the Act to monitor the operation of the Order. This includes a duty to consider, from time to time, whether the Order should be varied or revoked in the light of a change of circumstances.

Status of this explanatory note

16. Nothing in this explanatory note is legally binding. In the event of a conflict between this explanatory note and any provision of the Order, the Order shall prevail.

Structure of the Order

17. The Order contains 17 Articles and 6 Schedules as follows:
 - (a) General provisions (Articles 1, 2, 16 and 17), which include specifying when the Order comes into force, the scope of the Order and

definitions that are used throughout the Order (and which are also used in this explanatory note), the governing law and termination provisions.

- (b) The divestiture (Article 3), whereby Tobii is required to divest the Divestment Business within the Initial Divestiture Period.
- (c) The prohibition against re-acquisition of the Divestment Business (in whole or in part) or any assets relating to the Smartbox Business, or the acquisition of any material influence over them for a period of 10 years from Effective Divestiture (Article 10).
- (d) Interim measures, including the maintenance of the Smartbox Business and the role of the Monitoring Trustee (Articles 4 and 6).
- (e) Compliance provisions including reporting obligations, extension of time limits, appointment of a Divestiture Trustee and Hold Separate Manager, procedure for consent, severability, provision of information to the CMA, service, and the CMA's power to issue directions (Articles 5, 7, 8, 9, 11, 12, 13, 14 and 15).
- (f) Schedule 1 contains the Suitable Purchaser Criteria and relates to Article 3.
- (g) Schedule 2 contains provisions for the appointment and functions of the Divestiture Trustee, if applicable, and relates to Article 8.
- (h) Schedule 3 contains provisions for the appointment and functions of the Hold Separate Manager, if applicable, and relates to Article 9.
- (i) Schedule 4 contains the template for a Compliance Statement for Tobii as provided for in Article 5.1.
- (j) Schedule 5 contains the template for a Compliance Statement for Smartbox as provided for in Article 5.2.
- (k) Schedule 6 contains a variation to the 14 November 2018 derogation.

Scope of this explanatory note

18. This explanatory note deals with each of the Articles in the Order.

Article 1 – Title, commencement, application and scope

19. This provides that the Order applies to Tobii and its subsidiaries, Smartbox, any person who is an Affiliate with respect to Tobii, and to a Divestiture Trustee or Hold Separate Manager appointed under the Order.

20. The Commencement Date for the Order is the date on which it is made.
21. The obligations of Tobii under Article 3 (Divestiture) and the obligations of the Monitoring Trustee under Article 6.2 apply from the Commencement Date).

Article 2 – Interpretation

22. This sets out the defined terms used in the Order.

Article 3 - Divestiture

23. Article 3.1 provides that Tobii shall divest the Divestment Business to an Approved Purchaser within the Initial Divestiture Period. Tobii is required to provide a timetable to the CMA for approval as soon as reasonably practicable which sets out the timeframe and steps towards Effective Divestiture.
24. Article 3.3 requires Tobii to submit a list of Potential Purchasers of the Divestiture Business for approval by the CMA, in line with the approved timetable.
25. Article 3.5 provides that Tobii shall submit any agreement with an Approved Purchaser for the purchase of the Divestiture Business to the CMA for approval prior to entering into it. Article 3.6 describes the CMA's process for approval of the same.

Article 4 - Measures to maintain the Smartbox Business

26. Article 4 provides for interim measures to maintain the Smartbox business. This is required to prevent pre-emptive action by Tobii prior to Effective Divestiture, as the Interim Order dated 18 February 2019 and the Unwinding Order dated 28 February 2019 fall away on the Commencement Date.
27. The interim measures under Article 4 apply from the Commencement Date until Effective Divestiture takes place.
28. Article 4.3 provides that the directions and derogations issued previously under the Initial Enforcement Order, Interim Order of the Unwinding Order shall remain in place even once the Interim Order and Unwinding Order cease to have effect on the Commencement Date.

Article 5 – Compliance

29. Article 5.1 imposes an obligation on Tobii to provide the CMA with compliance statements in the form set out in Schedule 4 to enable the CMA to monitor compliance with the interim measures set out in Article 4.
30. Article 5.2 imposes an obligation on Smartbox to provide the CMA with compliance statements in the form set out in Schedule 5 to enable the CMA to monitor compliance with the interim measures set out in Article 4.
31. Article 5.3 requires that Tobii shall and shall procure that Smartbox shall inform the CMA of any material developments relating to the Smartbox Business.

Article 6 – Monitoring Trustee

32. Article 6.1 provides for the Monitoring Trustee to continue in post.
33. Article 6.2 provides that the Monitoring Trustee's obligations shall extend, following the Commencement Date, to reporting to the CMA on the progress made towards Effective Divestiture, compliance with the Order of any data room and clean teams, assisting the CMA to ensure Effective Divestiture, any issues which could prejudice the effective outcome of the divestiture process and any other matter that the CMA might direct.
34. Article 6.3 requires Tobii to amend the Monitoring Trustee Mandate under which Tobii appointed the Monitoring Trustee in order to give effect to Articles 6.1 and 6.2.
35. Article 6.4 provides that the additional reporting obligation in Article 6.2 ceases to apply on the appointment of a Divestiture Trustee, to avoid an overlap in functions.

Article 7 – Extension of Time Limits

36. Article 7 enables the CMA to extend the Initial Divestiture Period.

Article 8 – Divestiture Trustee

37. Article 8 provides that the CMA may require Tobii to appoint a Divestiture Trustee, in accordance with Schedule 2, where Effective Divestiture does not occur within the Initial Divestiture Period or where the CMA does not consider it likely that it will do so.

Article 9 – Hold Separate Manager

38. Article 9.1 requires Tobii to appoint a Hold Separate Manager in circumstances where the CMA, upon reasonable grounds, considers that there has been a material change in relation to the existing Smartbox senior management team. The appointment and functions of the Hold Separate Manager are provided for in Schedule 3.

Article 10 – Re-acquisition prohibition

39. Article 10 prohibits the reacquisition by Tobii of the Divestment Business (in whole or in part) or any assets relating to the Smartbox Business, or the acquisition of any material influence over them, for a period of 10 years from Effective Divestiture.

Article 11 – Procedure for consent and approval

40. Article 11 provides for the procedure, content, timing and correction of any application by Tobii for consent or approval from the CMA.

Article 12 – Severability

41. Article 12.1 provides that the remaining provisions of the Order shall survive if some become invalid or contrary to law.
42. Article 12.2 prohibits Tobii from relying on any default or want of authority by Tobii, Smartbox or their officers or employees in the execution of the Order unless directed so to do by the CMA.

Article 13 – Provision of Information to the CMA

43. Article 13.1 requires any person to whom the Order applies to provide information so the CMA can monitor compliance with and the effectiveness of the Order and fulfil its functions.
44. Articles 13.2 and 13.3 require the production of records and provision of information in person to assist in the discharge of the CMA's functions in relation to the Order.
45. Article 13.4 highlights that the CMA may publish information received in connection with the Order in compliance with Part 9 of the Act.
46. Article 13.5 requires Tobii to inform the CMA immediately if it suspects that the Order has been or is likely to be breached.

Article 14 – Service

47. This Article sets out the address to be used by Tobii for any communications or applications to the CMA in writing under the Order.

Article 15 – Powers of direction

48. Article 15 provides that the CMA may give written directions as to compliance with the Order.

Article 16 – Governing Law

49. Article 16 stipulates that the Order and contractual obligations connected with the Order are governed by English law and that any dispute connected with the Order is to be heard in the courts of England and Wales.

Article 17 - Termination

50. Article 17 provides for the Order to remain in force until varied or revoked under the Act. Any obligations or rights survive termination of the Order.