

Anticipated acquisition by Stryker Corporation of Wright Medical Group N.V.

Decision that undertakings might be accepted

ME/6870/19

The CMA's decision under section 73A(2) of the Enterprise Act 2002 that undertakings might be accepted, given on 14 July 2020. Full text of the decision published on 24 July 2020.

Please note that [X] or [] indicates figures or text which have been deleted or replaced at the request of the parties for reasons of commercial confidentiality.

Introduction

1. On 4 November 2019, Stryker Corporation (**Stryker**) agreed to acquire, through its wholly owned subsidiary, Stryker B.V., all of the outstanding ordinary shares of Wright Medical Group N.V. (**Wright**) (the **Merger**). Stryker and Wright are together referred to as the **Parties**.
2. On 30 June 2020, the Competition and Markets Authority (**CMA**) decided under section 33(1) of the Enterprise Act 2002 (the **Act**) that it is or may be the case that the Merger consists of arrangements that are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and that this may be expected to result in a substantial lessening of competition (**SLC**) within a market or markets in the United Kingdom (the **SLC Decision**).
3. On the date of the SLC Decision, the CMA gave notice pursuant to section 34ZA(1)(b) of the Act to the Parties of the SLC Decision. However, the CMA did not refer the Merger for a phase 2 investigation pursuant to section 33(3)(b) on the date of the SLC Decision in order to allow the Parties the opportunity to offer undertakings to the CMA in lieu of such reference for the purposes of section 73(2) of the Act.

4. Pursuant to section 73A(1) of the Act, if a party wishes to offer undertakings for the purposes of section 73(2) of the Act, it must do so within the five working day period specified in section 73A(1)(a) of the Act.
5. Accordingly, on 7 July 2020, Stryker offered undertakings to the CMA for the purposes of section 73(2) of the Act.
6. The CMA now gives notice, pursuant to section 73A(2)(b) of the Act, to the Parties that it considers that there are reasonable grounds for believing that the undertakings offered, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act and that it is considering the offer.

The undertakings offered

7. Under section 73 of the Act, the CMA may, instead of making a reference, and for the purpose of remedying, mitigating or preventing the SLC concerned or any adverse effect which has or may have resulted from it or may be expected to result from it, accept from such of the merger parties concerned as it considers appropriate undertakings to take such action as it considers appropriate.
8. The SLC Decision found that the Merger gives rise to a realistic prospect of an SLC in relation to the supply of total ankle replacement (**TAR**) prostheses products in the UK. To address this SLC, Stryker has offered to give undertakings in lieu of a reference to divest Stryker's Scandinavian Total Ankle Replacement (**STAR**) product and related assets (the **Proposed Undertakings**). This would comprise the divestment of the STAR product, including certain instruments contained in the instrument set for the current STAR procedure, and include all current pipeline products: [X]. The other main assets included are inventory; [all] members of staff dedicated to the STAR product; intellectual property (**IP**) specific to STAR; supplier contracts; customer and supplier lists, product and pricing information, account histories, design history files, clinical research and commercial data; sales-related materials; and government approvals (to the extent transferrable). The Proposed Undertakings will be made by way of asset transfer.
9. Under the Proposed Undertakings, Stryker has also offered to enter into a purchase agreement with a purchaser approved by the CMA before the CMA finally accepts the Proposed Undertakings (**Upfront Buyer Condition**). Stryker will offer the purchaser transitional manufacturing, supply and services arrangements for a period of time, as well as grant a licence to use certain additional IP related to the manufacture of the [X] pipeline products and certain instruments that may be used for the current STAR procedures (on the

basis that the licensed IP is also used in connection with other Stryker products unrelated to TAR prostheses). All licensed IP will be made available on a royalty-free, worldwide, perpetual and irrevocable basis for use in TAR prostheses products.

The CMA's provisional views

10. The CMA considers that undertakings in lieu of a reference are appropriate when they are clear-cut and capable of ready implementation. The CMA's starting point when assessing undertakings is to seek an outcome that restores competition to the level that would have prevailed absent the merger.¹
11. The CMA believes that the Proposed Undertakings, or a modified version of them, might be acceptable as a suitable remedy to the SLC identified by the CMA, given that the Proposed Undertakings would likely allow the purchaser to compete effectively as a TAR prostheses product supplier in the UK. The Proposed Undertakings include:
 - (a) divestment of the entirety of the Parties' overlap in TAR prostheses products in the UK and globally (through the inclusion of Stryker's STAR product and its [§<] pipeline products); and
 - (b) divestment of supporting assets to the STAR product (a product with an established reputation and customer base), including experienced staff to enable the purchaser to develop and compete effectively with the STAR product in the UK.
12. As a result of the Parties competing in a regulated industry, the Proposed Undertakings reflect the specific requirements which arise (eg the necessity for certain transitional agreements while regulatory approvals are sought), as well as allowing for the orderly transfer and integration of the assets and related contracts / relationships. The CMA notes that such arrangements are consistent with previous acquisitions in the medical device industry.²

¹ *Mergers remedies (CMA87), December 2018 (Remedies Guidance)*, Chapter 3 (in particular paragraphs 3.27, 3.28 and 3.30).

² Eg in M.7265 *Zimmer/Biomet* (2015) (*Zimmer/Biomet*), the divestiture transaction included in the commitments accepted by the European Commission included, among other things, a transitional period of up to 24 months for Zimmer to supply the purchaser with the divestment businesses' product lines; in 2014, Stryker Corporation's purchase of substantially all the assets of Small Bone Innovations, including of its TAR system, entailed [§<]. In 2015, in relation to Wright Medical Group, Inc.'s purchase of Tornier N.V. (*Wright/Tornier*), the divestiture transaction included in the commitments accepted by the US Federal Trade Commission included, among other things, a three-year transitional supply agreement and support during that same time for the completion of any pending regulatory submissions/approvals and all registration transfer activities.

13. As regards the licensed IP, the CMA notes that Stryker's proposal to license (rather than transfer) certain IP is based on the fact that this IP also pertains to certain non-TAR-related activities that Stryker will retain post-Merger, and that the IP in question largely relates to the manufacturing of the [X] pipeline products and instrumentation that is ancillary to the STAR product.
14. The CMA further notes that such licences are being provided in conjunction with a divestiture of STAR-related assets, as outlined above (including the transfer of IP rights specific to the STAR product) on a perpetual, royalty-free basis. The CMA considers that these factors will, in line with the CMA's Remedies Guidance, ensure there will be no material links between a potential purchaser and Stryker post-Merger (eg, in the form of reliance for updates of technology, or access to know-how) and will enable the potential purchaser to have the resources to compete effectively with the Parties.³ The CMA further notes that the licensing of additional IP (including, of IP that does not pertain exclusively to the products forming the subject of the divestment) is consistent with previous acquisitions (including in particular remedies) in the medical device industry.⁴
15. As such, the Proposed Undertakings are clear-cut, capable of ready implementation, and may result in replacing the competitive constraint provided by Stryker that would otherwise be lost following the Merger.
16. It is anticipated that the Proposed Undertakings would be implemented as a sale of a single package of assets to a single purchaser. To implement this package, Stryker submitted that the sales process could move forward quickly and that it had a preferred purchaser that it considered met the CMA's purchaser suitability criteria and with whom it envisaged the signing of an asset purchase agreement expeditiously after CMA approval.
17. The Upfront Buyer Condition means that the CMA will only accept the Proposed Undertakings after Stryker has entered into an agreement with a nominated buyer that the CMA considers to be suitable. It also means that, before acceptance, the CMA will consult publicly on the suitability of the nominated buyer, as well as other aspects of the Proposed Undertakings. In

³ Remedies Guidance, Chapter 6 (in particular paragraphs 6.1 – 6.4). See also paragraph 5.11 in which the CMA cites examples of where it has previously required amendments to IP licences to grant a divestment purchaser a perpetual and royalty-free licence.

⁴ For example, in *Wright/Tornier*, the US Federal Trade Commission accepted a divestment that also included the grant of a royalty-free, perpetual, irrevocable, non-exclusive licence for certain IP to the divestment business purchaser. In *Zimmer/Biomet*, the commitments submitted by the merging parties included the licensing on a royalty-free, perpetual, non-exclusive basis for certain rights that were necessary for the manufacturing, marketing or sale of certain divested products (as well as the transfer of IP rights used exclusively for the products forming the subject of the divestment business).

order to consider the proposed buyer as being suitable, the CMA will need to be satisfied that the purchaser suitability criteria in the Remedies Guidance are met.⁵ These criteria include the requirement that the proposed purchaser has the financial resources, expertise, incentive and intention to maintain and operate the divestment business as part of a viable and active business in competition with the merged entity in the relevant market.

18. For these reasons, the CMA currently thinks that there are reasonable grounds for believing that the Proposed Undertakings, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act.
19. The CMA's decision on whether ultimately to accept the Proposed Undertakings or refer the Merger for a phase 2 investigation will be informed by, among other things, third party views on whether the Proposed Undertakings are suitable to address the competition concerns identified by the CMA. In particular, before ultimately accepting the Proposed Undertakings, the CMA must be confident that the nominated buyer is effective and credible such that the competitive constraint provided by Stryker absent the Merger is replaced to a sufficient extent.

Consultation process

20. Full details of the undertakings offered will be published in due course when the CMA consults on the undertakings offered as required by Schedule 10 of the Act.⁶

Decision

21. The CMA therefore considers that there are reasonable grounds for believing that the Proposed Undertakings offered by Stryker, or a modified version of them, might be accepted by the CMA under section 73(2) of the Act. The CMA now has until 9 September 2020 pursuant to section 73A(3) of the Act to decide whether to accept the undertakings, with the possibility to extend this timeframe pursuant to section 73A(4) of the Act to 4 November 2020 if it considers that there are special reasons for doing so. If no undertakings are accepted, the CMA will refer the Merger for a phase 2 investigation pursuant to sections 33(1) and 34ZA(2) of the Act.

⁵ Remedies Guidance, Chapter 4 (in particular paragraphs 4.30 – 4.34), and Chapter 5 (in particular paragraphs 5.20 – 5.32).

⁶ Mergers: Guidance on the CMA's jurisdiction and procedure (CMA2), January 2014, paragraph 8.29.

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