

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

Notice under paragraph 2(1) of Schedule 10 to the Enterprise Act 2002 (the Act) – consultation on proposed undertakings in lieu of reference pursuant to section 73 of the Act

ME/6870/19

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**). The text of the SLC Decision is available on the CMA webpages.¹
3. On 7 July 2020, Stryker offered undertakings in lieu of reference to the CMA for the purposes of section 73(2) of the Act.
4. On 14 July 2020, the CMA gave notice to the Parties, pursuant to section 73A(2)(b) of the Act, 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 Stryker's offer (the **UIL Provisional Acceptance Decision**).

¹ See <https://www.gov.uk/cma-cases/stryker-wright-medical-merger-inquiry>.

The undertakings offered

5. As set out in the SLC Decision, the CMA found a realistic prospect of an SLC in relation to the supply of total ankle replacement (**TAR**) prostheses products in the United Kingdom (**UK**).
6. As set out in the UIL Provisional Acceptance Decision, to address the SLC identified by the CMA, Stryker has offered undertakings to divest Stryker's Scandinavian Total Ankle Replacement (**STAR**) product and related assets (the **Divestment Business**). This comprises 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: (a) [X]; and (b) [X]. The other main assets included are:
 - (a) inventory of finished goods, work in process and raw materials;
 - (b) five members of staff dedicated to the STAR product (the **Key Staff**);
 - (c) intellectual property (**IP**) (including registered patents, registered trademarks, copyright registrations and domain names and know-how and other unregistered IP rights) specific to STAR;
 - (d) supplier, consulting and other contracts;
 - (e) customer and supplier lists, product and pricing information, account histories, design history files, clinical research and commercial data;
 - (f) materials related to sales/promotions and training; and
 - (g) government approvals (to the extent transferrable).
7. In addition, Stryker has offered to enter into arrangements with the purchaser in relation to:
 - (a) licensing certain IP related to the manufacture of products included in the Divestment Business and certain instruments used in the instrument set for the current STAR procedure;
 - (b) a transitional services agreement relating to services to be provided by Stryker to facilitate the transition of the Divestiture Business (including customer and account transition activities);
 - (c) a supply agreement for the transitional supply of the current STAR products pending transfer of legal manufacturer status for these products; and

- (d) a manufacturing agreement and related regulatory quality agreement for the transitional supply of certain products pending the transfer of the manufacture of such products.
8. In addition, Stryker has agreed to non-solicitation undertakings in respect of certain customers and the Key Staff.
 9. The text of the undertakings is available on the CMA webpages (the **Proposed Undertakings**).²
 10. As set out in the UIL Provisional Acceptance Decision, Stryker has also offered to enter into an agreement for the sale and purchase of the Divestment Business with an upfront buyer, before the CMA finally accepts the Proposed Undertakings (**the Upfront Buyer Condition**).
 11. Stryker has proposed Colfax Corporation (**Colfax**) as the upfront buyer, with the latter intending to incorporate the Divestment Business into its existing subsidiary DJO Global, Inc. (**DJO**). The agreement for the sale and purchase of the Divestment Business will be conditional on acceptance by the CMA of the Proposed Undertakings, including approval of Colfax as the buyer of the Divestment Business.

CMA assessment

12. The CMA currently considers that, subject to responses to the consultation required by Schedule 10 of the Act, the Proposed Undertakings will resolve the SLC identified in the SLC Decision in a clear-cut manner, ie the CMA currently does not have material doubts about the overall effectiveness of the Proposed Undertakings or concerns about their implementation.³
13. This is because the Proposed Undertakings will remove the entirety of the overlap between the Parties in the supply of TAR prostheses in the UK and will allow the buyer to compete effectively as a TAR prostheses product supplier in the UK. The Proposed Undertakings include (i) 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 two pipeline products); and (ii) 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. As such, The CMA currently believes that

² See <https://www.gov.uk/cma-cases/stryker-wright-medical-merger-inquiry>.

³ *Mergers Remedies (CMA87)*, December 2018, paragraph 3.38.

the sale of the Divestment business will enable the buyer to compete effectively in the supply of TAR prostheses in the UK and, as such, the Proposed Undertakings will result in replacing the competitive constraint provided by Stryker that would otherwise be lost following the Merger. The CMA believes that the Proposed Undertakings, or a modified version of them, are effective and capable of amounting to a sufficiently clear-cut remedy to resolve the CMA's competition concerns.

14. The CMA also considers that the Proposed Undertakings would be capable of ready implementation because:
- (a) the Divestment Business is a viable business that is capable of being transferred to an upfront buyer, comprising the Key Staff with knowledge of the STAR product, supplier contracts, customer and supplier lists, governmental approvals (to the extent transferable) and other associated assets as well as certain transitional arrangements.
 - (b) The Upfront Buyer Condition means that the CMA would accept the Proposed Undertakings only after Stryker has entered into an agreement with a proposed purchaser that the CMA considers to be suitable.⁴
 - (c) In light of ready purchaser interest, the CMA considers that the sale process can move forward quickly and that signing of an asset purchase agreement is achievable prior to the expiry of the CMA's deadline of 4 November 2020.⁵

Suitability of the proposed purchaser

15. In approving a purchaser, the CMA's starting position is that it must be confident without undertaking a detailed investigation that the proposed purchaser will restore pre-merger levels of competition. The CMA therefore seeks to ensure that:
- (a) The acquisition by the proposed purchaser must remedy, mitigate or prevent the SLC concerned or any adverse effect resulting from it, achieving as comprehensive a solution as is reasonable and practicable.
 - (b) The purchaser should be independent from and have no significant connection to the merger parties that may compromise the purchaser's

⁴ CMA87, paragraphs 5.28-5.32.

⁵ On 21 August 2020, the CMA published a notice of extension of the period mentioned in section 73A(3) of the Act to extend the period in which its decision on whether to accept the Undertaking should be made in accordance with section 73(A)(4), for the reasons set out in that notice. See https://assets.publishing.service.gov.uk/media/5f3e9d368fa8f5370e7a2f5c/Stryker.Wright-Notice_of_extension_to_UIL_timetable_-_pdf.

incentives to compete with the merged entity (eg an equity interest, common significant shareholders, shared directors, reciprocal trading relationships or continuing financial assistance). It may also be appropriate to consider links between the purchaser and other market players.

- (c) The purchaser must have sufficient capability, including access to appropriate financial resources, expertise (including managerial, operational and technical capability) and assets, to enable the divested business to be an effective competitor in the market. This access should be sufficient to enable the divestiture package to continue to develop as an effective competitor. For example, a highly-leveraged acquisition of the divestiture package which left little scope for competitive levels of capital expenditure or product development is unlikely to satisfy this criterion. The proposed purchaser will be expected to obtain in advance all necessary approvals, licences and consents from any regulatory or other authority.
- (d) The CMA will wish to satisfy itself that the purchaser is committed to, and has an appropriate business plan and objectives for competing in, the relevant market(s), and that the purchaser has the incentive and intention to maintain and operate the relevant business as part of a viable and active business in competition with the merged party and other competitors in the relevant market.
- (e) Divestiture to the purchaser should not create a realistic prospect of further competition or regulatory concerns.⁶

16. Colfax is a publicly-traded, diversified technology company founded in 1995. In 2018, Colfax acquired DJO, a company which was founded in 1978 and develops, manufactures and sells a broad range of surgical and non-surgical orthopaedic products (including acute and functional bracing, reconstructive implants, and rehabilitation devices, among others) worldwide, including in the UK.

17. Subject to the responses to this consultation, and having regard in particular to the criteria set out in paragraph 15 above, the CMA currently considers Colfax to be a suitable purchaser of the Divestment Business for the following reasons:

- (a) The acquisition by Colfax of the Divestment Business would remedy, mitigate or prevent the SLC concerned and any adverse effect resulting

⁶ CMA87, paragraphs 5.20 to 5.27

from it, achieving as comprehensive a solution as is reasonable and practicable, as it would allow Colfax to compete effectively as a TAR prostheses product supplier in the UK.

- (b) The evidence available to the CMA indicates that Colfax and DJO are independent and do not appear to have any significant connection to Stryker or Wright that may compromise its incentives to compete with the merged entity if it were to acquire the Divestment Business.
- (c) The evidence available to the CMA indicates that Colfax and DJO are capable of, and have access to appropriate financial resources, to acquire and operate the Divestment Business as an effective competitor. Although DJO is not currently active in the TAR prostheses product market in the UK, it is a major global player in orthopaedics with existing surgical implant products in shoulders, elbows, knees, and hips. DJO has access to appropriate managerial, operational and technical expertise, as well as existing assets and infrastructure in the UK which are likely to be able to incorporate the sale and distribution of these products, and enable the Divestment Business to be an effective competitor in the market.
- (d) The evidence available to the CMA indicates that Colfax's acquisition of the Divestment Business, and continued commitment to the TAR market in the UK, is consistent with its overall strategy for DJO. Colfax and DJO have also discussed their business plans for the Divestment Business with the CMA, and provided associated financial projections. The evidence available to the CMA indicates that Colfax and DJO would be committed to continuing to compete effectively in the supply of TAR in the UK post-acquisition.
- (e) The evidence available to the CMA indicates that the acquisition of the Divestment Business by Colfax should not create a realistic prospect of further competition concerns, as Colfax has no existing TAR prostheses product in the UK or globally and therefore there is no existing overlap between Colfax and Stryker in this area. Moreover, the CMA considers that various regulatory requirements (eg CE marks / legal manufacturer requirements) which are required in this industry, and which any potential purchaser would likely encounter, are not likely to give rise to any regulatory concerns. The CMA considers that any residual risk to continuity of supply to TAR prostheses customers during the integration of the Divestment Business will be mitigated sufficiently by transitional services agreements to be entered into between Colfax and Stryker.

18. Therefore, subject to responses to this consultation, the CMA currently considers Colfax to be a suitable purchaser of the Divestment Business.

Proposed decision and next steps

19. For the reasons set out above, the CMA currently considers that the Proposed Undertakings and the purchase of the Divestment Business by Colfax are, in the circumstances of this case, appropriate to remedy, mitigate or prevent the competition concerns identified in the SLC Decision and form as comprehensive a solution to these concerns as is reasonable and practicable.
20. The CMA therefore gives notice that it proposes to accept the Proposed Undertakings in lieu of a reference of the Merger for a phase 2 investigation. The text of the proposed undertaking is available on the CMA web pages.⁷
21. Before reaching a decision as to whether to accept the Proposed Undertakings, the CMA invites interested parties to make their views known to it. The CMA will have regard to any representations made in response to this consultation and may make modifications to the Proposed Undertakings as a result. If the CMA considers that any representation necessitates any material change to the Proposed Undertakings, the CMA will give notice of the proposed modifications and publish a further consultation.⁸
22. Representations should be made by email only.

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Deadline for comments: 16 September 2020

⁷ See <https://www.gov.uk/cma-cases/stryker-wright-medical-merger-inquiry>.

⁸ Under paragraph 2(4) of Schedule 10 to the Act.