

Acquisition by Cochlear Limited of the hearing implants business of Demant A/S, known as Oticon Medical

INITIAL ENFORCEMENT ORDER FOR ANTICIPATED MERGERS MADE BY THE COMPETITION AND MARKETS AUTHORITY PURSUANT TO SECTION 72(2) OF THE ENTERPRISE ACT 2002 (THE ACT)

Whereas:

- (a) the Competition and Markets Authority (**CMA**) has reasonable grounds for suspecting that it is or may be the case that arrangements are in progress or in contemplation which, if carried into effect, will result in Cochlear Limited (**Cochlear**) and the hearing implants business of Demant A/S, known as Oticon Medical (**Oticon Medical**) ceasing to be distinct;
- (b) the CMA is considering whether to make a reference under section 22 or 33 of the Act;
- (c) the CMA wishes to ensure that no action is taken pending final determination of any reference under sections 22 or 33 of the Act which might prejudice that 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; and
- (d) the circumstances set out in section 72(6) of the Act do not apply and the reference has not been finally determined in accordance with section 79(1) of the Act.

Now for the purposes of preventing pre-emptive action in accordance with section 72(2) of the Act the CMA makes the following order addressed to Demant and Oticon Medical (**Order**).

Commencement, application and scope

1. This Order commences on the commencement date of **14th November 2022**.
2. This Order applies to Demant and Oticon Medical.

3. Notwithstanding any other provision of this Order, no act or omission shall constitute a breach of this Order, and nothing in this Order shall oblige Demant and Oticon Medical to reverse any act or omission, in each case to the extent that it occurred or was completed prior to the commencement date.
4. This Order does not prohibit the completion of the transaction provided that Demant and Oticon Medical observe the restrictions set out below.

Management of the Demant and Oticon Medical businesses until determination of proceedings

5. Except with the prior written consent of the CMA, Demant and Oticon Medical shall not, during the specified period, take any action which might prejudice a reference of the transaction under section 22 or 33 of the Act or impede the taking of any action under the Act by the CMA which may be justified by the CMA's decisions on such a reference, including any action which might:
 - (a) lead to the integration of the Demant business or Oticon Medical business with the Cochlear business;
 - (b) transfer the ownership or control of the Demant business or the Oticon Medical business or any of their subsidiaries; or
 - (c) otherwise impair the ability of the Oticon Medical business to compete independently of the Cochlear business in any of the markets affected by the transaction.
6. Further and without prejudice to the generality of paragraph 5 and subject to paragraph 3 and 4, Demant and Oticon Medical shall at all times during the specified period procure that, except with the prior written consent of the CMA:
 - (a) the Oticon Medical business is carried on separately from the Cochlear business and the Oticon Medical business's separate sales or brand identity is maintained;
 - (b) the Oticon Medical and Demant businesses are both maintained as a going concern and sufficient resources are made available for the development of the Oticon Medical business, on the basis of its pre-merger business plans;
 - (c) except in the ordinary course of business, no substantive changes are made to the organisational structure of, or the management responsibilities within, the Demant or Oticon Medical businesses;

- (d) the nature, description, range and quality of goods and/or services supplied in the UK by the Oticon Medical business is maintained and preserved;
- (e) except in the ordinary course of business for the separate operation of the two businesses:
 - (i) all of the assets of the Demant and Oticon Medical businesses are maintained and preserved, including facilities and goodwill;
 - (ii) none of the assets of the Demant and Oticon Medical businesses are disposed of; and
 - (iii) no interest in the assets of the Demant and Oticon Medical businesses are created or disposed of;
- (f) there is no integration of the information technology of the Oticon Medical and Cochlear business, and the software and hardware platforms of the Oticon Medical business shall remain essentially unchanged, except for routine changes and maintenance;
- (g) the customer and supplier lists of the Oticon Medical business shall be operated and updated separately from the Cochlear business and any negotiations with any existing or potential customers and suppliers in relation to the Oticon Medical business will be carried out by the Oticon Medical or the Demant businesses alone and for the avoidance of doubt the Cochlear business will not negotiate on behalf of the Oticon Medical or the Demant businesses (and vice versa) or enter into any joint agreements with the Oticon Medical or Demant businesses (and vice versa);
- (h) all existing contracts of the Oticon Medical business continue to be serviced by the Oticon Medical or Demant business;
- (i) no changes are made to key staff of the Oticon Medical business or Demant business;
- (j) no key staff are transferred from the Oticon Medical business to the Demant business;
- (k) all reasonable steps are taken to encourage all key staff to remain with the Oticon Medical and Demant businesses; and
- (l) no business secrets, know-how, commercially-sensitive information, intellectual property or any other information of a confidential or proprietary

nature relating to any of the Oticon Medical, Demant or Cochlear businesses shall pass, directly or indirectly, from the Oticon Medical or Demant businesses (or any of their employees, directors, agents or affiliates) to the Cochlear business (or any of its employees, directors, agents or affiliates), or vice versa, except where strictly necessary in the ordinary course of business (including for example, where required for compliance with external regulatory and/or accounting obligations or for due diligence, integration planning or the completion of any merger control proceedings relating to the transaction) and on the basis that, should the transaction be prohibited, any records or copies (electronic or otherwise) of such information that have passed, wherever they may be held, will be returned to the business to which they relate and any copies destroyed.

Compliance

7. Demant and Oticon Medical shall procure that each of their subsidiaries complies with this Order as if the Order had been issued to each of them.
8. Demant and Oticon Medical shall provide to the CMA such information or statement of compliance as it may from time to time require for the purposes of monitoring compliance by Oticon Medical, Demant, and their subsidiaries with this Order. In particular, on 28th November 2022 and subsequently every two weeks (or, where this does not fall on a working day, the first working day thereafter) the Chief Executive Officer of Demant and the Chief Executive Officer of Oticon Medical or other persons of Demant and Oticon Medical as agreed with the CMA shall, on behalf of Demant, and Oticon Medical, provide a statement to the CMA in the form set out in the Annexes to this Order confirming compliance with this Order.
9. At all times, Demant and Oticon Medical shall each actively keep the CMA informed of any material developments relating to the Demant and Oticon Medical businesses, which includes but is not limited to:
 - (a) details of key staff who leave or join the Oticon Medical business or the Demant business;
 - (b) any interruption of the Oticon Medical business (including without limitation its procurement, production, logistics, sales and employee relations arrangements) that has prevented it from operating in the ordinary course of business for more than 24 hours;

- (c) all substantial customer volumes won or lost or substantial changes to the customer contracts for the Oticon Medical business including any substantial changes in customers' demand; and
 - (d) substantial changes in the Oticon Medical business's contractual arrangements or relationships with key suppliers.
10. If Demant or Oticon Medical has any reason to suspect that this Order might have been breached it shall immediately notify the CMA and any monitoring trustee that Demant may be directed to appoint under paragraph 11.
11. The CMA may give directions to a specified person or to a holder of a specified office in any body of persons (corporate or unincorporated) to take specified steps for the purpose of carrying out, or ensuring compliance with, this Order, or do or refrain from doing any specified action in order to ensure compliance with the Order. The CMA may vary or revoke any directions so given.
12. Demant and Oticon Medical shall comply in so far as they are able with such directions as the CMA may from time to time give to take such steps as may be specified or described in the directions for the purpose of carrying out or securing compliance with this Order.

Interpretation

13. The Interpretation Act 1978 shall apply to this Order as it does to Acts of Parliament.
14. For the purposes of this Order:

'the Act' means the Enterprise Act 2002;

'an affiliate' of a person is another person who satisfies the following condition, namely that any enterprise (which, in this context, has the meaning given in section 129(1) of the Act) that the first person carries on from time to time and any enterprise that the second person carries on from time to time would be regarded as being under common control for the purposes of section 26 of the Act;

'business' has the meaning given by section 129(1) and (3) of the Act;

'the Cochlear business' means the business of Cochlear and its subsidiaries carried on as at the commencement date;

'Cochlear' means Cochlear Limited, an Australian company headquartered at 1 University Avenue, Macquarie University, NSW 2109, Australia, with ABN number 96 002 618 073;

‘commencement date’ means 14th November 2022;

‘control’ includes the ability directly or indirectly to control or materially to influence the policy of a body corporate or the policy of any person in carrying on an enterprise;

‘Demant’, means Demant A/S, a company registered in Denmark at Kongebakken 9, 2765 Smørum, with the CVR number 71186911;

‘the Demant business’ means the business of Demant and its subsidiaries, excluding the Oticon Medical business, carried on as at the commencement date;

‘the decisions’ means the decisions of the CMA on the questions which it is required to answer by virtue of sections 35 or 36 of the Act;

‘key staff’ means staff in positions of executive or managerial responsibility and/or whose performance affects the viability of the business;

‘the ordinary course of business’ means matters connected to the day-to-day supply of goods and/or services by Oticon Medical and Demant and does not include matters involving significant changes to the organisational structure or related to the post-merger integration of Oticon Medical and Cochlear;

‘Oticon Medical’ means the following subsidiaries of Demant: (1) Oticon Medical AB, a company registered in Sweden at Datavägen 37B, Se-436, 32 Askim; (2) Oticon Medical Maroc, a company registered in Morocco at 223 Ang Boulevard Abdelmoumen and place du docteur Charles Nicole, Casablanca; (3) Oticon Medical LLC, a company registered in the United States at 580 Howard Avenue, Somerset, New Jersey 00873; (4) Neurelec S.A.S, a company registered in France at 2720 Chemin Saint-Bernard 06220 Vallauris. (5) Oticon Medical A/S, a company registered in Denmark at Kongebakken 9, 2765 Smørum;

‘the Oticon Medical business’ means the business of Oticon Medical and its subsidiaries, including the shares and assets to be transferred as a result of the Asset and Share Purchase Agreement dated 25 May 2022 between Demant A/S and Cochlear Limited, carried on as at the commencement date;

‘specified period’ means the period beginning on the commencement date and terminating in accordance with section 72(6) of the Act;

‘subsidiary’, unless otherwise stated, has the meaning given by section 1159 of the Companies Act 2006;

‘the transaction’ means the transaction by which Cochlear and Oticon Medical will cease to be distinct within the meaning of section 23 of the Act;

Unless the context requires otherwise, the singular shall include the plural and vice versa.

Tim Geer

Director, Mergers

COMPLIANCE STATEMENT FOR DEMANT AND OTICON MEDICAL

I [insert name] confirm, on behalf of Demant and Oticon Medical, that:

Compliance in the Relevant Period

1. In the period from [insert date] to [insert date] (the Relevant Period):
 - (a) Demant and Oticon Medical have complied with the Order made by the CMA in relation to the transaction on [insert date of this Order] (the Order).
 - (b) Demant and Oticon Medical's subsidiaries have also complied with this Order.
2. Subject to paragraph 3 and 4 of the Order, and except with the prior written consent of the CMA:
 - (a) No action has been taken by Demant or Oticon Medical that might prejudice a reference of the transaction under section 22 or 33 of the Act or impede the taking of any action by the CMA which may be justified by its decision on such a reference, including any action which might:
 - (i) lead to the integration of the Demant business or Oticon Medical business with the Cochlear business;
 - (ii) transfer the ownership or control of the Demant business or the Oticon Medical business or any of their subsidiaries; or
 - (iii) otherwise impair the ability of the Oticon Medical business to compete independently of the Cochlear business in any of the markets affected by the transaction.
 - (b) The Oticon Medical business has been carried on separately from the Cochlear business and the Oticon Medical business's separate sales or brand identity has been maintained.
 - (c) The Oticon Medical and Demant businesses have both been maintained as a going concern and sufficient resources have been made available for the development of the Oticon Medical business, on the basis of its pre-merger business plans.

- (d) No substantive changes have been made to the organisational structure of, or the management responsibilities within, the Demant or Oticon Medical businesses, except in the ordinary course of business.
- (e) The nature, description, range and quality of goods and/or services supplied in the UK by the Oticon Medical business have been maintained and preserved.
- (f) Except in the ordinary course of business for the separate operation of the two businesses:
 - (i) all of the assets of the Demant and Oticon Medical businesses, including facilities and goodwill, have been maintained and preserved as at the start of the Relevant Period;
 - (ii) none of the assets of the Demant and Oticon Medical businesses have been disposed of; and
 - (iii) no interest in the assets of the Demant and Oticon Medical businesses has been created or disposed of.
- (g) There has been no integration of the information technology of the Oticon Medical and Cochlear businesses, and the software and hardware platforms of the Oticon Medical business have remained essentially unchanged, except for routine changes and maintenance.
- (h) Subject to integration which had occurred prior to the commencement date, the customer and supplier lists of the Oticon Medical business have been operated and updated separately from the Cochlear business and any negotiations with any existing or potential customers and suppliers in relation to the Oticon Medical business have been carried out by the Oticon Medical or the Demant businesses alone and, for the avoidance of doubt, the Cochlear business has not negotiated on behalf of the Oticon Medical or the Demant businesses (and vice versa) or entered into any joint agreements with the Oticon Medical or Demant businesses (and vice versa).
- (i) All existing contracts of the Oticon Medical business have been serviced by the Oticon Medical or Demant business, except to the extent novated, assigned or subcontracted prior to the commencement date.
- (j) No changes have been made to key staff of the Oticon Medical or Demant business.

- (k) No key staff have been transferred from the Oticon Medical to the Demant business.
- (l) All reasonable steps have been taken to encourage all key staff to remain with the Oticon Medical and Demant businesses.
- (m) Except as permitted by the Order, no business secrets, know-how, commercially-sensitive information, intellectual property or any other information of a confidential or proprietary nature relating to either of the any of the Oticon Medical, Demant or Cochlear businesses, has passed, directly or indirectly, from the Oticon Medical or Demant business (or any of its employees, directors, agents or affiliates) to the Cochlear business (or any of its employees, directors, agents or affiliates), or vice versa.
- (n) Except as listed in paragraph (o) below, there have been no:
 - (i) key staff that have left or joined the Oticon Medical or Demant business;
 - (ii) interruptions of the Oticon Medical business (including without limitation procurement, production, logistics, sales and employee relations arrangements) that have prevented it from operating in the ordinary course of business for more than 24 hours;
 - (iii) substantial customer volumes won or lost or substantial changes to the customer contracts for the Oticon Medical business; or
 - (iv) substantial changes in the Oticon Medical business's contractual arrangements or relationships with key suppliers.
- (o) [list of material developments]

3. Demant, Oticon Medical and their subsidiaries remain in full compliance with the Order and will continue actively to keep the CMA informed of any material developments relating to the Oticon Medical or the Demant business in accordance with paragraph 9 of the Order.

Interpretation

4. Terms defined in the Order have the same meaning in this compliance statement.

I understand that:

it is a criminal offence under section 117 of the Enterprise Act 2002 for a person recklessly or knowingly to supply to the CMA information which is false or misleading in any material

respect. Breach of this provision can result in **finances, imprisonment for a term not exceeding two years, or both.** (Section 117 of the Enterprise Act 2002.)

Failure to comply with this order without reasonable excuse may result in the CMA imposing a **penalty of up to 5% of the total value of the turnover** (both in and outside the United Kingdom) of the enterprises owned or controlled by the person on whom the penalty is imposed. (Section 94A of the Enterprise Act 2002.)

FOR AND ON BEHALF OF DEMANT AND OTICON MEDICAL

Signature

Name

Title

Date