

Anticipated acquisition by Cochlear Limited of the hearing implants division of Demant A/S

SUMMARY

1. Cochlear Limited (**Cochlear**) has agreed to acquire the hearing implant division (**Oticon Medical**) of Demant A/S (**Demant**) (the **Merger**). Cochlear and Demant are together referred to as the **Parties**, and for statements relating to the future, Cochlear and Oticon Medical are referred to as the **Merged Entity**.
2. After examining a range of evidence, the Competition and Markets Authority (**CMA**) believes that the Merger, if carried into effect, will result in the creation of a relevant merger situation, and meets the threshold for reference to an in-depth phase 2 investigation, giving rise to a realistic prospect of a substantial lessening of competition (**SLC**).
3. The CMA is therefore considering whether to accept undertakings under section 73 of the Enterprise Act 2002 (the **Act**). The Parties have until 13 December 2022 to offer an undertaking to the CMA that might be accepted by the CMA. If no such undertaking is offered, then the CMA will refer the Merger pursuant to sections 33(1) and 34ZA(2) of the Act.

Competitive overlap

4. The Parties overlap in the supply of cochlear implants (**CI**) and bone conduction solutions (**BCS**) (together, **hearing implants**) in the UK, which are devices that are surgically implanted in patients with hearing loss to improve their ability to hear.
5. The CMA found that CI and BCS products serve distinct clinical patient needs. Therefore, these devices are not alternatives for each other. Further, the CMA found that other hearing solutions, such as hearing aids, are not good alternatives for hearing implants. Hearing implants are typically prescribed after hearing aids have been tried and failed, they typically seek to correct more serious hearing loss than hearing aids, cost significantly more than hearing aids, and, unlike hearing aids, require surgery. The CMA has

assessed the impact of the Merger on the basis of the supply of (i) BCS and, separately (ii) CI, in the UK.

Demant's strategic plans

6. Demant submitted that absent the Merger it would have exited its hearing implants business, maintaining only some limited activities to support existing implants. As such, Demant submitted that absent the Merger it would not be competing against Cochlear in the supply of BCS or CI and, as a result, the Merger cannot result in any loss of competition. Demant told the CMA that it agreed to the Merger in order to ensure that its patients would have the best lifelong technical and functional support.
7. Following the agreement of the Merger, Demant has publicly stated it is exiting the hearing implants business. Based on the evidence, the CMA believes strategic exit was one of a number of options considered by Demant, and that it decided to try to sell Oticon Medical in the first instance. The CMA does not consider that the evidence shows that Demant decided that Oticon Medical would have exited had it not agreed to sell the business to Cochlear. Moreover, the CMA also considers it would be commercially irrational for Demant to discontinue the entire hearing implant business given parts of the business were generating profits and worth almost £100 million without at least fully exploring other options.

Bone conduction solutions

8. BCS devices can be categorised as passive BCS or active BCS. Passive BCS use an external transducer (ie outside of the skin) whereas active BCS use an implanted transducer, to transmit the necessary vibrations to the inner ear. BCS have traditionally been passive, although the Parties submitted that active BCS is becoming more frequently used. Non-surgical BCS, which are typically attached to a headband or a patient's skin, are also available primarily for children who are not old enough for surgery or for adults with fluctuating degrees of hearing loss.
9. The CMA considered competition across the different types of BCS currently in the market – in particular active and passive BCS – and whether the fact that Oticon Medical does not currently have an active BCS means that Oticon Medical is a weaker competitive constraint than the shares of supply suggest. Oticon Medical is currently the leading supplier of passive BCS, with Cochlear the only other option for patients and clinics. The CMA found that while there is likely to be a shift from passive to active BCS in the future, the extent and speed of such a shift is unclear, and there will still be demand for passive BCS products in the foreseeable future. Further, the CMA also considers, based on

the available evidence, that Oticon Medical could become a strong competitor in the supply of active BCS in the future.

10. The CMA found the Merged Entity would have a combined share of 90-100% in the supply of BCS in the UK, and the Merger would result in the elimination of the strongest competitor. The CMA considered that the one remaining competitor, Med-El, would not impose a sufficient constraint on the Merged Entity, considering its low share of supply and because it only supplies an active BCS product. As such, the CMA believes that there is a realistic prospect that the Merger would result in significant competition concerns in the supply of BCS in the UK, which could result in reduced innovation, quality and service, and higher prices.

Cochlear implants

11. The CMA found that the supply of CIs in the UK is highly concentrated, with the Merged Entity having a combined share of approximately 70-80%, with an increment of 0-5%. The CMA examined the evidence carefully given Cochlear's substantial presence, however, the CMA found that Oticon Medical's low share of supply was consistent with its weak strength as a competitor both currently and going forward.
12. The CMA found that competition in the supply of CI is primarily based on product innovation, followed by other factors such as price. Oticon Medical was seen as a weaker constraint relative to other existing providers. There is limited evidence to suggest that it currently is or would in the future impose a material constraint on Cochlear. The CMA believes that there will remain two competitors to constrain the Merged Entity in CI in the UK post-Merger who would provide a much greater constraint on Cochlear in comparison to Oticon Medical.
13. The CMA believes that Oticon Medical's ability to compete with Cochlear going forward may be impacted by its recent CI product recall. This is because Oticon Medical was a newer entrant in the supply of CIs in the UK, and the CMA considers that the recall would be a setback in Oticon Medical's future growth prospects as a less established supplier.
14. As such, the CMA believes that the Merger does not result in a realistic prospect of an SLC in relation to the supply of CI in the UK.

Countervailing factors

15. The CMA believes that barriers to entry and expansion for the supply of BCS and CI in the UK are high, given the regulatory costs of entry and the

significant resources and time required to develop suitable products. As such, the CMA found that entry into BCS was unlikely in the foreseeable future.

16. The CMA also found that purchasers of CIs and BCSs, which are primarily the NHS and clinics, were unlikely to have buyer power, given the lack of alternative suppliers.
17. The CMA therefore believes that the Merger gives rise to a realistic prospect of a SLC in the supply of BCS in the UK, as a result of horizontal unilateral effects.