

# ANTICIPATED ACQUISITION BY COCHLEAR LIMITED OF THE HEARING IMPLANTS BUSINESS OF DEMANT A/S, KNOWN AS OTICON MEDICAL

## Notice of possible remedies under Rule 12 of the CMA's rules of procedure for merger, market and special reference groups<sup>1</sup>

### Introduction

1. On 20 December 2022, the Competition and Markets Authority (**CMA**), in exercise of its duty under section 33(1) of the Enterprise Act 2002 (the **Act**), referred the anticipated acquisition (the **Merger**) by Cochlear Limited (**Cochlear**) of the hearing implants business of Demant A/S (**Demant**), known as **Oticon Medical**, for further investigation and report by a group of CMA panel members.
2. Cochlear and Demant are together referred to as the **Parties**, and for statements referring to the post-Merger situation, Cochlear and Oticon Medical are referred to as the **Merged Entity**.
3. On 14 November 2022, the CMA imposed an initial enforcement order under section 72(2) of the Act on Demant and Oticon Medical to ensure that no action was 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.
4. In our provisional findings on the reference notified to the Parties on 20 April 2023 (the **Provisional Findings**), we provisionally concluded, among other things, that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and that the creation of that situation may be expected to result in a substantial lessening of competition (**SLC**) in the supply of bone conduction solutions (**BCS**) products in the UK.
5. The Provisional Findings analysis provisionally concludes that this SLC may be expected to result in adverse effects in the form of poorer patient outcomes, with patients potentially facing less choice, reduced quality or reduced product innovation, as well as the potential for higher prices for the NHS compared to what would otherwise have been the case absent the Merger.

---

<sup>1</sup> CMA, [Rules of Procedure for Merger, Market and Special Reference Groups \(CMA17\)](#), 28 March 2014.

6. This notice of possible remedies (**Remedies Notice**) sets out the possible actions which we consider we might take for the purpose of remedying this SLC and/or any resulting adverse effects identified in the Provisional Findings.<sup>2</sup> We invite comments on possible remedies by **17:00 hours (UK time) on Thursday 4 May 2023**.<sup>3</sup>

## Criteria

7. In deciding on a remedy, the CMA shall in particular have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it.<sup>4</sup>
8. To this end, the CMA will seek remedies that are effective in addressing the SLC and its resulting adverse effects and will select the least costly and intrusive remedy that it considers to be effective.<sup>5</sup>
9. The CMA will seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.<sup>6</sup>

## Possible remedies on which views are sought

10. In determining an appropriate remedy, the CMA will consider the extent to which different remedy options would be effective in remedying, mitigating or preventing the SLC or any resulting adverse effects that have been provisionally identified.
11. As set out in published remedies guidance, the CMA prefers structural remedies, such as divestiture or prohibition, over behavioural remedies because:
- (a) structural remedies are more likely to deal with an SLC and its resulting adverse effects directly and comprehensively at source by restoring rivalry;
  - (b) behavioural remedies are less likely to have an effective impact on the SLC and its resulting adverse effects, and are more likely to create significant costly distortions in market outcomes; and
  - (c) structural remedies rarely require monitoring and enforcement once implemented.<sup>7</sup>

---

<sup>2</sup> [Case page](#).

<sup>3</sup> Responses to the Notice of Possible Remedies are typically requested within 14 days of publication of the Notice (and in any event, no less than seven days) so that they can be considered before response hearings ([Mergers: Guidance on the CMA's jurisdiction and procedure \(CMA2revised\)](#)), paragraph 13.1).

<sup>4</sup> [Section 36\(3\)](#) of the Act. [Merger remedies guidance \(CMA87\)](#), 13 December 2018, paragraph 3.3.

<sup>5</sup> [CMA87](#), paragraph 3.4.

<sup>6</sup> [CMA87](#), paragraph 3.4.

<sup>7</sup> [CMA87](#), paragraph 3.46.

12. At this stage, we have identified prohibition as likely to be the only effective remedy to the SLC or any resulting adverse effects that have been provisionally identified, consisting of either:
- prohibition of the sale of Oticon Medical to Cochlear (**full prohibition**); or
  - prohibition of the sale of the BCS business of Oticon Medical to Cochlear (**partial prohibition**).
13. We have not at this stage been in a position to identify a more proportionate divestiture package that could form the basis of an effective structural remedy. Compared to prohibition, a divestiture remedy, such as allowing Cochlear to acquire all of Oticon Medical and sell on the BCS business to a third party, would appear to have a higher risk of not being effective and would not obviously reduce the costs of the remedy. However, we invite views on:
- whether a structural remedy other than a full or partial prohibition would be effective, and if so, what would need to be included in this package of assets to attract a suitable purchaser and allow them to operate as an effective competitor in the market; and
  - who might be a suitable purchaser<sup>8</sup> for such a package of assets.
14. Our current view is that a behavioural remedy is very unlikely to be an effective remedy to the provisional SLC or any resulting adverse effects that we have provisionally identified. However, we will consider any behavioural remedies put forward as part of this consultation.
15. Shortly before publication of this Remedies Notice, the Parties proposed a behavioural remedy based on one accepted by the Competition Commission in 2004 (Dräger Medical AG and Hillenbrand Industries, Inc), in which Cochlear would commit to continuing to provide, for a period of five years, Oticon Medical's existing passive BCS products to customers without any increased prices or reduced functionality. We would welcome views on this proposal or other similar behavioural remedies.
16. We will also consider whether a combination of measures is required to achieve a comprehensive solution – for example whether any behavioural remedies would be required in a supporting role to safeguard the effectiveness of any structural remedies. We will evaluate the impact of any such combination of measures on the provisional SLC or any resulting adverse effects.

---

<sup>8</sup> We will wish to be satisfied that a prospective purchaser is (a) independent of the merger parties; (b) has the necessary capability to compete; (c) is committed to competing in the market; and (d) will not create further competition concerns ([CMA87](#), paragraph 4.39).

## **Prohibition**

17. Full prohibition would result in Oticon Medical and Cochlear continuing to operate under separate ownership as independent competitors. It would therefore prevent the provisional SLC from arising. Our initial view is, therefore, that full prohibition would be an effective remedy as it would represent a comprehensive solution to all aspects of the provisional SLC that we have provisionally found (and consequently any resulting adverse effects) and the risks in terms of its effectiveness are very low.
18. The Parties have told us that the Cochlear Implant (**CI**) and BCS businesses of Oticon Medical are interdependent and that divesting the CI business only would affect the profitability of the BCS business.<sup>9</sup> Third parties have also told us that the BCS business 'on its own' may lose certain 'call point' market benefits resulting from, for example, clinicians and Key Opinion Leaders (**KOLs**) being shared across CI and BCS products.
19. Nevertheless, the SLC we have provisionally found only relates to the BCS business in the UK. Consequently, the SLC may, in principle, be remedied effectively and comprehensively by a partial prohibition if we can be satisfied that the BCS business would act as an effective competitor if separated from the CI business. This would involve only the CI business being sold to Cochlear, with the sale of the BCS business to Cochlear being prohibited.
20. We would welcome views on the effectiveness of this partial prohibition and also whether there are safeguards we should put in place to ensure its effectiveness.

## **Consultation on the cost of remedies and proportionality**

21. In order to be reasonable and proportionate, the CMA will seek to select the least costly remedy, or package of remedies, that it considers will be effective.<sup>10</sup> The CMA will also seek to ensure that no remedy is disproportionate in relation to the SLC and its adverse effects.<sup>11</sup> Between two remedies that the CMA considers equally effective, it will choose that which imposes the least cost or restriction.<sup>12</sup>
22. When considering relevant costs, the CMA's considerations may include (but are not limited to):<sup>13</sup>
  - (a) distortions in market outcomes;

---

<sup>9</sup> Parties' Response to Annotated Issues Statement and Working Papers – paragraph 2.12.

<sup>10</sup> [CMA87](#), paragraph 3.6.

<sup>11</sup> [CMA87](#), paragraph 3.4.

<sup>12</sup> [CMA87](#), paragraph 3.6.

<sup>13</sup> [Merger Remedies: CMA87](#) (December 2018), paragraph 3.10.

- (b) compliance and monitoring costs incurred by the Parties, third parties, or the CMA; and
  - (c) the loss of any relevant customer benefits (**RCBs**) that may arise from the Merger which are foregone as a result of the remedy.
23. We invite views on what costs are likely to arise in implementing each remedy option.

### ***Relevant customer benefits***

24. In deciding the question of remedies, we may have regard to the effect of any remedial action on any RCBs in relation to the creation of the relevant merger situation.<sup>14</sup>
25. RCBs are limited by the Act to benefits to customers in the form of:
- (a) 'lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom (whether or not in the market(s) in which the SLC has occurred or may occur); or
  - (b) greater innovation in relation to such goods or services.'<sup>15</sup>
26. For the purposes of an anticipated merger, the Act provides that a benefit is only an RCB if:
- it may be expected to accrue within a reasonable period as a result of the creation of the relevant merger situation; and
  - it is unlikely to accrue without the creation of that situation or a similar lessening of competition.<sup>16</sup>
27. We welcome views on the nature of any RCBs and on the scale and likelihood of such RCBs and the extent (if any) to which these are affected by the different remedy options we are considering.

### **Next steps**

28. Interested parties are requested to provide any views in writing, including any practical alternative remedies they wish us to consider, by **17:00 hours (UK time) on Thursday 4 May 2023** (see Note).

---

<sup>14</sup> [Section 36\(4\)](#) of the Act, see also [CMA87](#), paragraphs 3.15 and 3.16.

<sup>15</sup> [Section 30\(1\)\(a\)](#) of the Act, see also [CMA87](#), paragraph 3.17.

<sup>16</sup> [Section 30\(3\)](#) of the Act.

29. A copy of this Remedies Notice will be posted on the CMA [case page](#).<sup>17</sup>

Kip Meek  
Chair of the Inquiry Group  
20 April 2023

### *Note*

This notice of possible actions to remedy, mitigate or prevent the provisional SLC or any resulting adverse effects is made having regard to the Provisional Findings announced on 20 April 2023. Interested parties have until **17:00 hours (UK time) on Thursday 11 May 2023** to respond to the Provisional Findings. Our findings may alter in response to comments we receive on the Provisional Findings, in which case we may consider other possible remedies, if appropriate.

Comments should be made by email to: [Cochlear.Oticon@cma.gov.uk](mailto:Cochlear.Oticon@cma.gov.uk)

---

<sup>17</sup> A copy of this Remedies Notice and the Provisional Findings can be found on the CMA [case page](#).