Anticipated Acquisition by Cochlear Limited of the hearing implant division of Demant A/S

Response to CMA Provisional Findings

11 May 2023

1. This submission is made by Cochlear Limited ("**Cochlear**" or the "**Acquirer**") in response to the CMA's provisional findings dated 20 April 2023 (the "**Provisional Findings**") in relation to the anticipated acquisition by Cochlear of Oticon Medical, the hearing implant division of Demant A/S ("**Demant**" or the "**Seller**").

2. Since the issuance of the Provisional Findings, Demant has reaffirmed its intention to exit the hearing implants segment. In the event that the CMA does not accept Partial Prohibition as an effective remedy, Cochlear doubts the existence of suitable alternative purchasers for the Oticon Medical business. Time will quickly tell whether those expressing an interest in potentially acquiring all or part of Oticon Medical will, upon the completion of more due diligence, have the resources, the willingness, and the incentives to purchase and sustain the business in the long term.

3. In the event that the CMA does not accept Partial Prohibition as an effective remedy and Demant is unsuccessful in concluding a sale with an alternative purchaser, the CMA's counterfactual will have been proven wrong. In that eventuality, Cochlear stands by its commitment to patients that would otherwise be left stranded. It is in this context that Cochlear makes the following submissions.

A. The Provisional Findings do not take sufficient account of the fundamental dynamics of competition in the hearing implants segment

4. The provisional conclusion that Cochlear's acquisition of Oticon Medical and Demant's exit from the supply of bone conduction solutions ("**BCS**") could lead to poorer patient outcomes in terms of the potential for less choice/reduced innovation for patients and higher prices for the NHS is speculative and unsubstantiated.

5. By focusing only on the loss of competition between the Parties for the relatively few patients who are referred to a specialist for consideration of a BCS device, it ignores the massive unmet need and the fact that only 2% of the addressable market is currently served as the result of market failures (notably, the lack of specialist education, lack of a patient referral pathway, lack of patient awareness, and the absence of any agreed standard of care for adults with hearing loss).

6. The CMA did not address this unmet need in the questions asked of clinics and, in particular, did not explore the options presented to the 98% of candidates who are not referred to BCS clinics (e.g., whether all patients with relevant indications were referred to BCS clinics or what solutions those that were not referred to BCS clinics ultimately received). Anecdotal responses that BCS clinics consider other hearing solutions as "relatively weaker" substitutes for the 2% of the addressable market currently served are therefore far from conclusive and not representative of the experience of 98% of candidates. The feedback from clinics summarised at paragraphs 2.51-55 of the Provisional Findings is indicative of the lack of consistency in approach which the CMA accepts at face value with no justification other than the circular statement that "*their awareness and views of other hearing solutions are reflective of how the market functions and the options they would be aware of and willing to recommend to patients*" (paragraph 5.57).

7. The CMA ignores that competition and innovation in the hearing implants market are driven by the size of the opportunity in penetrating [✂].

8. The CMA ignores that numerous hearing solutions overlap across the range of hearing loss, especially for mild to moderate and moderately severe hearing loss that characterises those patients referred to BCS specialists. It ignores [✂] that BCS products offer many more patients a better solution than middle-ear surgery and hearing aids.

9. The CMA ignores the dynamic pace of innovation in the hearing aids sector that implant manufacturers must keep up with in order to persuade patients to consider implant solutions.

10. The CMA ignores that any attempt to diminish patient outcomes would be commercially irrational, damaging Cochlear's reputation and actively discouraging patients from implant surgery, which is the antithesis to the very core of Cochlear's strategy.

B. The CMA has failed to correctly assess the buying power of the NHS

11. The CMA has consistently failed to conduct a proper assessment of buyer power with the stock refrain that the strength of buyer power depends on the availability of good alternatives that buyers can switch to. By limiting the range of "good alternatives" to the Parties' existing passive BCS implants, the CMA errs in (1) excluding the range of suitable hearing solutions available for adults with mild to moderately severe hearing loss, and (2) ignoring the unique position of the NHS that is able to (and does) simply say "NO" when faced with even a monopolist seeking to impose a price that is deemed unjustifiably high. The NHS periodically refuses to fund life-saving new medicines that have cost £1 billion or more to develop, which demonstrates that it can readily refuse any theoretical attempt to increase the price of a non-life-saving hearing implant.

12. With the NHS, pricing pressure is one-sided and often downward sloping. Passive BCS implants are a niche market in decline from a baseline of approximately 2,000 patients per annum in the UK. The CMA has failed to articulate how, post-Transaction, Cochlear could conceivably raise prices or otherwise harm competition in this niche.

13. For existing products, price increases are out of the question ([✂]).

14. For new products, if a treatment is too expensive compared to the clinical benefit it brings, the NHS has a long track record of simply refusing to pay. The UK has one of the world's most rigorous healthcare cost control systems in place.

15. In ignoring these factors, the CMA has manifestly failed to conduct a proper analysis of the specific attributes of the NHS, instead retreating behind the vague assertion that "*any commercial or contractual factors are likely to be imperfect and insufficient to mitigate the impact of any likely deterioration of competition arising from the Merger*" (paragraph 5.32).

C. Should the CMA not accept Partial Prohibition as an effective remedy, Cochlear doubts the existence of suitable alternative purchasers for the Oticon Medical business

16. Demant and other large market players, including medtech giant Medtronic, have tried and failed to overcome the significant barriers to sustainable growth in the hearing implants segment.

17. The CMA posits that the Target business has a leading market position in the passive BCS segment in the UK and a prominent market presence in the passive BCS segment globally, but these glowing statements ignore the fact that the UK market size amounts to approximately 2,000 patients per year.

18. In the event that the CMA does not accept Partial Prohibition as an effective remedy, any credible purchaser will need to make a long-term commitment to begin to gain the trust of surgeons and it is clear that scale is critical to survival. Any potential purchaser that needs to build trust and attain scale from scratch is likely to encounter significant challenges.

19. There remain serious question marks as to the feasibility of Sentio. Demant has yet to conclude [✂]. Even assuming the product is developed and eventually authorised, challenges remain in relation to reimbursement and the lead time and resources required to educate and train surgeons. The prospect of Sentio at scale is therefore [✂] and highly uncertain, [✂].

20. In the event that the CMA does not accept Partial Prohibition as an effective remedy and Demant is unsuccessful in concluding a sale with an alternative purchaser, the CMA's counterfactual will have been proven wrong. In that eventuality, Cochlear stands by its commitment to patients that would otherwise be left stranded. That includes its commitment to investing in the complex engineering of developing future sound processors compatible with Oticon Medical's installed cochlear implants, its commitment to continue developing future generations of sound processors and accessories to support Oticon Medical's (and its own) installed passive BCS patient base and, if it is ultimately successful in acquiring Oticon Medical's BCS business, its willingness to support choice in the passive BCS segment in line with the behavioural remedy submitted by the Parties.