

ANTICIPATED ACQUISITION BY COCHLEAR LIMITED OF THE HEARING IMPLANTS DIVISION OF DEMANT A/S

Final Undertakings given by Cochlear Limited and Demant A/S to the Competition and Markets Authority pursuant to section 82 of the Enterprise Act 2002

Background

- A. On 25 May 2022, Cochlear Limited (**Cochlear**) entered into an Asset Sale and Purchase Agreement to acquire the hearing implants division (**Oticon Medical**) of Demant A/S (**Demant**) (the **Merger**).
- B. On 14 November 2022, the Competition and Markets Authority (the **CMA**) made an initial enforcement order (**IEO**) pursuant to section 72(2) of the Enterprise Act 2002 (the **Act**) for the purpose of preventing pre-emptive action in accordance with that section.
- C. On 20 December 2022, the CMA in accordance with section 33(1) of the Act, referred the Merger to a group of CMA panel members (the **Reference**) to determine, pursuant to section 36 of the Act:
 - (i) whether arrangements are in progress or contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and
 - (ii) if so, whether the creation of that situation may be expected to result in a substantial lessening of competition (**SLC**) within any market or markets in the United Kingdom (**UK**) for goods or services.
- D. On 22 June 2023, the CMA published a phase 2 final report pursuant to section 38 of the Act (the **Report**) which concluded that:
 - (i) there are arrangements in progress or contemplation which, if carried into effect, will result in the creation of a relevant merger situation;
 - (ii) the creation of that situation may be expected to result in an SLC in relation to the supply of BCS in the UK; and
 - (iii) the CMA should take action to remedy the SLC and any adverse effects resulting from it.
- E. The CMA, having regard to its findings in the Report, has prohibited Cochlear from acquiring the BCS business, or any part thereof, and required that the Parties may only carry out a transfer of the CI business to Cochlear if the CMA

has approved the terms of, and transaction documentation in relation to, a transfer of the CI business to Cochlear (the **Remedy**).

- F. Any transfer of the CI business to Cochlear will be subject to the following safeguards:
- (a) The Parties will be subject to regular reporting requirements;
 - (b) The Parties will be required to appoint a Monitoring Trustee to monitor compliance with these Final Undertakings, including overseeing the proposed separation of the CI and BCS businesses; and
 - (b) The terms and final forms of the transaction documents in relation to the transfer of the CI business will require review and approval by the CMA prior to execution.
- G. The IEO ceases to be in force on the date of acceptance by the CMA, pursuant to section 82 of the Act, of these Final Undertakings. Any derogations already granted by the CMA pursuant to the IEO shall remain applicable.
- H. Now therefore each of Cochlear and Demant gives to the CMA on behalf of itself and, where relevant, its Subsidiaries and Affiliates, the following Final Undertakings pursuant to section 82 of the Act for the purpose of remedying, mitigating or preventing the SLC identified in the Report and any adverse effects resulting from it.

1. Interpretation

- 1.1 The purpose of these Final Undertakings is to give effect to the Remedy identified in the Report and they shall be construed in accordance with the Report.
- 1.1 Any word or expression used in these Final Undertakings or the recitals to these Final Undertakings shall, unless otherwise defined herein and/or the context otherwise requires, have the same meaning as in the Act or the Report (as appropriate).
- 1.2 The headings used in these Final Undertakings are for convenience and shall have no legal effect.
- 1.3 References to any statute or statutory provision shall be construed as references to that statute or statutory provision as amended, re-enacted or modified whether by statute or otherwise stated.
- 1.4 References to recitals, paragraphs, sub-paragraphs and annexes are references to the recitals, paragraphs and sub-paragraphs of, and annexes to, these Final Undertakings unless otherwise stated.
- 1.5 Unless the context requires otherwise, the singular shall include the plural and vice versa and references to persons includes bodies of persons whether corporate or incorporate. Any reference to person or position includes its or their successor in title.
- 1.6 The Annexes form part of these Final Undertakings.

- 1.7 The Interpretation Act 1978 shall apply to these Final Undertakings as it does to Acts of Parliament.
- 1.8 Further, in these Final Undertakings:
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| the Act | means the Enterprise Act 2002; |
| Affiliate | means a person who is an affiliate of another person if they or their respective enterprises are to be regarded as being under common control for the purposes of section 26 of the Act; |
| Approved Agreement | means a binding agreement or agreements approved by the CMA; and Cochlear and Demant each recognises that in considering whether to approve any agreement the CMA shall consider whether the terms of the agreement (and any other agreement or arrangements ancillary or connected to the agreement) would give rise to a material risk that the effectiveness of the Remedy would be undermined, including having regard to the principles set out in Annex 2; |
| Associated Person | means a person who is an associated person within the meaning of section 127 of the Act; |
| BCS | means bone conduction solutions; |
| BCS Business | means all assets (including, inter alia, corporate entities, customers, contracts, staff, intellectual property, and real estate) used in activities relating to bone conduction solutions (including research, design, production, manufacturing, marketing and aftersales services) by Demant; |
| business | has the meaning given by section 129(1) and (3) of the Act; |
| CI | means cochlear implants; |
| CI Business | means all assets (including, inter alia, corporate entities, customers, contracts, staff, intellectual property, and real estate) used in activities relating to cochlear implants (including research, design, production, manufacturing, marketing and aftersales services) by Demant; |
| CMA | means the Competition and Markets Authority; |

Cochlear	means Cochlear Limited, an Australian company headquartered at 1 University Avenue, Macquarie University, NSW 2109, with ABN number 96 002 618 073;
Commencement Date	means the date on which these Final Undertakings are accepted by the CMA in accordance with section 82(2)(a) of the Act;
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, as defined in section 26 of the Act;
Demant	means Demant A/S, a company registered in Denmark at Kongebakken 9, 2765 Smørum, with CVR number 71186911
Directions	means written directions given by the CMA as set out in paragraph 5;
Final Undertakings	means these final undertakings given by each of the Parties and accepted by the CMA, including the Annexes hereto, and as may be varied in terms of paragraph 10;
IEO	means the initial enforcement order made by the CMA on 14 November 2022;
Interest	means any interest conferring control within the meaning of section 26 of the Act which includes the ability, directly or indirectly, de jure or de facto, to control or materially influence the policy of a body corporate, or the policy of any person in carrying on an Enterprise but without having a controlling interest in that body corporate or that Enterprise;
Merger	means the anticipated acquisition by Cochlear of Oticon Medical
Monitoring Trustee	means a person appointed or retained in accordance with paragraph 7.1 ;
Oticon Medical	means the hearing implants division of Demant;
Parties	means Cochlear and Demant;
Prohibition Period	means the period of ten years from the Commencement Date

Reference;	means the reference of the Merger on 20 December 2022 to a group of CMA panel members;
Related Person	means any Subsidiary, Affiliate or Associated Person;
Remedy	means the prohibition of Cochlear acquiring the BCS business, or any part thereof, and the requirement that the Parties may only carry out a transfer of the CI business to Cochlear if the CMA has approved the terms of, and transaction documentation in relation to, the transfer of the CI business to Cochlear;
Report	means the phase 2 final report entitled Anticipated acquisition by Cochlear Limited of the hearing implants division of Demant A/S published by the CMA on 22 June 2023;
SLC	means the substantial lessening of competition and adverse effects identified by the CMA in the Report;
Subsidiary	unless otherwise expressly stated has the meaning given by section 1159 of the Companies Act 2006;
UK	means the United Kingdom of Great Britain and Northern Ireland;
Working Day	means a day that is not a Saturday or Sunday or a bank holiday in England; and
written consent	means a consent given in writing, including by email.

2. Commencement

- 2.1 These Final Undertakings will come into force on the Commencement Date in accordance with section 82(2) of the Act.

3. Final Undertakings

- 3.1 Cochlear undertakes that for the duration of the Prohibition Period and except with the prior written consent of the CMA, Cochlear will not, and shall procure that any Related Person of Cochlear will not,
- (a) acquire an Interest in the BCS Business or any of its Subsidiaries or any of its assets
 - (b) acquire an Interest in an enterprise holding an Interest in the BCS Business or any of its assets or carrying on the business of the BCS Business from time to time; or

- (c) hold an option to acquire an Interest referred to in subparagraphs (a) and (b) above.
- 3.2 Demant undertakes that for the duration of the Prohibition Period and except with the prior written consent of the CMA, Demant will not, and shall procure that any Related Person of Demant will not, sell or otherwise transfer to Cochlear:
 - (a) an Interest in the BCS Business or any of its Subsidiaries or any of its assets;
 - (b) an Interest in an enterprise holding an Interest in the BCS Business or any of its assets or carrying on the business of the BCS Business from time to time; or
 - (c) an option to acquire an Interest referred to in subparagraphs (a) and (b) above.
- 3.3 Cochlear undertakes that for the duration of the Prohibition Period and except (i) with the prior written content of the CMA or (ii) pursuant to an Approved Agreement, Cochlear will not, and shall procure that any Related Person of Cochlear will not,
 - (a) acquire an Interest in the CI Business or any of its Subsidiaries or any of its assets;
 - (b) acquire an Interest in an enterprise holding an Interest in the CI Business or any of its assets or carrying on the business of the CI Business from time to time; or
 - (c) hold an option to acquire an Interest referred to in subparagraphs (a) and (b) above.
- 3.4 Demant undertakes that for the duration of the Prohibition Period and except (i) with the prior written consent of the CMA or (ii) pursuant to an Approved Agreement, Demant will not, and shall procure that any Related Person of Demant will not, sell or otherwise transfer to Cochlear:
 - (a) an Interest in the CI Business or any of its Subsidiaries or any of its assets;
 - (b) an Interest in an enterprise holding an Interest in the CI Business or any of its assets or carrying on the business of the CI Business from time to time; or
 - (c) an option to acquire an Interest referred to in subparagraphs (a) and (b) above.
- 4. General obligations to cooperate in good faith and provide information to the CMA**
- 4.1 The Parties each undertake to cooperate with the CMA in good faith and to promptly provide to the CMA such information as the CMA may reasonably require for the purpose of performing any of its functions under these Final Undertakings or under sections 82, 83, 93(6) and 94 of the Act.

- 4.2 The Parties each undertake that should they at any time be in breach of any provision of these Final Undertakings, they will notify the CMA within three Working Days, starting with the date they become aware of the breach or relevant circumstances of that breach.
- 4.3 Where any person, including a Monitoring Trustee, must provide information to the CMA under or in connection with these Final Undertakings, whether in the form of any notice, application, report or otherwise, the Parties each undertake that they will take reasonable steps within their respective power to procure that that person shall hold all information provided to it as confidential and shall not disclose any business-sensitive information of the Parties to any person other than to the CMA, without the prior written consent of both the CMA and the relevant party.
- 4.4 The Parties each undertake to keep and produce those records specified in writing by the CMA that relate to the operation of any provisions of these Final Undertakings.

5. Directions

- 5.1 The Parties each undertake to comply with any Directions given by the CMA under these Final Undertakings and to procure that any holder of a specified office within the Parties including their Subsidiaries also comply, and to promptly take such steps as may be specified or described in the Directions for complying with these Final Undertakings, including by doing, or refraining from doing, anything so described which they have undertaken to do or refrain from doing under these Final Undertakings.
- 5.2 The Parties each acknowledge that:
- (a) the CMA may choose not to issue Directions immediately upon becoming entitled to do so, and recognise that any delay by the CMA in making a written Direction shall not affect its obligations at such time as the CMA makes any written Direction; and
 - (b) the CMA may vary or revoke any Direction so given.

6. Procedure for consent and notification

- 6.1 Where the consent or approval of the CMA is required (including in respect of seeking the CMA's approval for an agreement in relation to a transfer of the CI Business to Cochlear), the Parties each undertake to seek the consent or approval in writing. In particular, in order to seek approval for any proposed transfer of the CI Business to Cochlear, the Parties undertake to provide to the CMA and to the Monitoring Trustee the agreed terms of the transfer, all agreed draft agreements relating to the transfer of the CI Business, and all other information the CMA may require.
- 6.2 The Parties each undertake that any application by it for the CMA's consent or approval shall make full disclosure of every material fact and matter within its knowledge that it believes is relevant to the CMA's decision. Where the CMA considers that full disclosure has not been provided, it shall inform the relevant

party and the relevant party must promptly provide such additional information as the CMA requires.

6.3 The Parties each recognise that where the CMA grants consent or approval on the basis of misleading or incomplete information and such information materially affects its consent or approval, the consent or approval is voidable at the election of the CMA.

6.4 In the event that Cochlear or Demant discovers that an application for consent or approval has been made in accordance with paragraph 6.1 without full disclosure to the CMA, the relevant party undertakes to:

(a) inform the CMA in writing, identifying the information that it omitted to include in the application for consent within two Working Days of becoming aware that the relevant information is misleading or incomplete; and

(b) at the same time or not later than two Working Days starting with the date on which it has informed the CMA of the omission in accordance with paragraph 6.4(a) above, provide to the CMA an application for consent that includes the missing information.

6.5 Cochlear and Demant shall use all reasonable endeavours to make each application or to procure that each application for consent or approval is made so that it is received by the CMA at least fifteen Working Days, or such lesser period as the CMA may allow, before the day on which the CMA's consent or approval is necessary to avoid a breach of these Final Undertakings.

7. Monitoring Trustee

7.1 The Parties undertake that, if they pursue a sale of the CI Business to Cochlear, they will secure the appointment of an independent Monitoring Trustee to perform the functions set out in Annex 1 on behalf of the CMA.

8. Variations to these Final Undertakings

8.1 The terms of these Final Undertakings may be varied with the prior written consent of the CMA in accordance with sections 82(2) and 82(5) of the Act.

8.2 Where a request for consent to vary these Final Undertakings is made to the CMA, the CMA will consider any such request in light of the Report and will respond in writing as soon as is reasonably practicable having regard to the nature of the request and to its statutory duties.

8.3 The consent of the CMA shall not be unreasonably withheld or delayed.

9. Extension of time limits

9.1 The Parties recognise and acknowledge that the CMA may, where it considers it appropriate, in response to a written request from either of the Parties showing good cause, or otherwise at its own discretion, grant an extension of any period specified in these Final Undertakings within which the Parties and the Monitoring Trustee (as the case may be) must take action. The grant of any such extension shall not be unreasonably withheld or delayed.

10. Acceptance of service

- 10.1 Cochlear hereby authorises its legal representatives, Baker McKenzie LLP c/o [X] (whose address for service is Baker McKenzie cvba/scri, Bolwerklaan 21, 1210 Brussels, Belgium) and [X] (whose address for service is 100 New Bridge Street, London, EC4V 6JA) to accept service of all documents, orders, requests, notifications or other communications connected with these Final Undertakings (including any such document which falls to be served on or sent to Cochlear or its Subsidiaries or Affiliates in connection with proceedings in court in the UK).
- 10.2 Demant hereby authorises its legal representatives, Latham & Watkins LLP c/o [X] and [X] (whose address for service is 99 Bishopsgate, London, EC2M 3XF) to accept service of all documents, orders, requests, notifications or other communications connected with these Final Undertakings (including any such document which falls to be served on or sent to Demant or its Subsidiaries or Affiliates in connection with proceedings in court in the UK).
- 10.3 Unless Cochlear or Demant informs the CMA that their legal representatives have ceased to have authority and have informed the CMA of an alternative to accept and acknowledge service on their behalf, any document, written directions, order, request, notification or other communication connected with these Final Undertakings shall be deemed to have been validly served, as applicable, on Cochlear or Demant, if it is served on their applicable respective legal representatives, and service or receipt shall be deemed to be acknowledged by email from Cochlear's and Demant's legal representatives to the CMA.
- 10.4 Paragraph 10.3 has effect irrespective of whether, as between Cochlear and its legal representatives, or Demant and its legal representatives, their respective legal representatives have or continue to have any authority to accept and acknowledge service on their behalf (unless they inform the CMA that Cochlear's or Demant's legal representatives have ceased to have authority to accept and acknowledge service on their behalf), and no failure or mistake by Cochlear's or Demant's legal representatives (including a failure to notify, as applicable, Cochlear or Demant, of the service of any document, order, request, notification or other communication) shall invalidate any action taken in respect of these Final Undertakings, including any proceeding or judgment pursuant to these Final Undertakings.

11. Effect of invalidity

- 11.1 The Parties undertake that should any provision of these Final Undertakings be contrary to law or invalid for any reason, they shall continue to observe the remaining provisions.

12. Undertakings given jointly and severally

- 12.1 Where undertakings in these Final Undertakings are given by each of Cochlear and Demant, they are given jointly and severally, as appropriate.

13. Compliance

- 13.1 The Parties each undertake to do, and to procure that their Subsidiaries do, all things necessary to ensure the Parties are able to comply with these Final Undertakings.

14. Governing law

- 14.1 These Final Undertakings shall be governed by and construed in all respects in accordance with English law.
- 14.2 Disputes arising concerning these Final Undertakings shall be subject to the jurisdiction of the courts of England and Wales.

FOR AND ON BEHALF OF Cochlear.

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Signed

.....
Name

.....
Title

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Date

FOR AND ON BEHALF OF Demant

.....
Signed

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Name

.....
Title

.....
Date

Annex 1

Appointment and Functions of Monitoring Trustee

1. The Monitoring Trustee must possess appropriate qualifications and experience to carry out its functions. The Monitoring Trustee must be under an obligation to carry out its functions to the best of its abilities.
2. The Monitoring Trustee must neither have nor become exposed to a conflict of interest that impairs the Monitoring Trustee's objectivity and independence in discharging its duties under these Final Undertakings, unless it can be resolved in a manner and within a time frame acceptable to the CMA.
3. The Parties shall remunerate and reimburse the Monitoring Trustee for all reasonable costs and professional fees properly incurred in accordance with the terms and conditions of the appointment and in such a way so as not to impede the Monitoring Trustee's independence or ability to effectively and properly carry out its functions.
4. The following shall apply:
 - a. the appointment of the Monitoring Trustee and its terms and conditions must be approved by the CMA. The Parties shall inform the CMA as soon as is reasonably practicable and in any event by no later than two Working Days after the Commencement Date of the identity of the Monitoring Trustee that it proposes to appoint and provide the CMA with draft terms and conditions of appointment. Once the Monitoring Trustee has been approved by the CMA and appointed by the Parties, the Parties shall provide the CMA with a copy of the agreed terms and conditions of appointment.
 - b. If the proposed Monitoring Trustee is rejected by the CMA, the Parties shall submit the names of at least two further persons within five Working Days starting with the date on which it was informed of the rejection, in accordance with the requirements and the procedures set out in clauses 1 to 3 above.
5. The provisions of clause 6 below shall apply if:
 - a. the Parties fail to nominate persons in accordance with clauses 1 or 4;
or
 - b. those further persons nominated by the Parties in accordance with clauses 1 or 4 above are rejected by the CMA; or
 - c. the Parties are unable for any reason to conclude the appointment of the Monitoring Trustee within the time limit specified by the CMA.
6. The CMA shall nominate one or more persons to act as Monitoring Trustee, and the Parties shall appoint or cause to be appointed such Monitoring Trustee within two Working Days starting with the date of such nomination under the term of a Monitoring Trustee mandate approved by the CMA.
7. The Monitoring Trustee's mandate shall specify that the Monitoring Trustee will carry out the functions set out in clauses 10 and 11 below and that the

Monitoring Trustee will monitor the compliance of the Parties with their obligations under these Final Undertakings. The mandate shall provide that the Monitoring Trustee shall take such steps as it reasonably considers necessary to carry out its functions effectively and that the Monitoring Trustee must comply with any reasonable requests made by the CMA for the purpose of carrying out its functions under these Final Undertakings.

Monitoring Trustee – replacement, discharge and reappointment

8. The Parties each acknowledge that if the Monitoring Trustee ceases to perform its duties, or for any other good cause, including the exposure of the Monitoring Trustee to a conflict of interest, the CMA may, after consulting the Monitoring Trustee, require the Parties to replace the Monitoring Trustee.
9. If the Monitoring Trustee is removed under clause 8 above, the Monitoring Trustee may be required to continue in its post until a new Monitoring Trustee is in place to whom the Monitoring Trustee has effected a full handover of all relevant information. The new Monitoring Trustee shall be appointed in accordance with the procedure contained in clauses 1 to 6 above.

Monitoring Trustee Functions

10. The Monitoring Trustee's functions as set out in this clause 10 are to monitor and review compliance with these Final Undertakings, and shall in particular include assisting the CMA in:
 - a. Considering whether the terms of any agreement in relation to a sale of the CI Business to Cochlear would give rise to a material risk that the effectiveness of the Remedy would be undermined, in particular having regard to;
 - i. whether any assets that would be transferred as part of a sale of the CI Business are also part of or used by the BCS business;
 - ii. whether staff transfers from Oticon Medical to Cochlear, as part of a sale of the CI Business, may affect the viability and competitive capability of the BCS business;
 - iii. whether the transfer or licensing of intellectual property rights may affect the viability and competitive capability of the BCS business;
 - b. Where the Monitoring Trustee reasonably deems necessary, requesting and reviewing copies of communications (save where those communications are subject to legal privilege) between Cochlear and Demant and their financial or other advisers to ensure an effective separation of the CI and BCS business and to monitor and prohibit the exchange of competitively sensitive information;
 - c. Monitoring and reporting on any issues arising which the Monitoring Trustee considers might prejudice the intended and effective outcome of the Remedy; and
 - d. Any other matter that the CMA may direct.

11. The Monitoring Trustee will promptly inform the CMA of any material developments in connection with these Final Undertakings and will provide a written report to the CMA every four weeks, the first report to be submitted as directed by the CMA.

Annex 2

Principles related to any transfer of the CI business to Cochlear

1. In line with the Report, each of Cochlear and Demant recognises that in considering whether to approve any agreement relating to a transfer of the CI Business, the CMA shall consider whether the terms of the agreement may give rise to a material risk to the effectiveness of the Remedy in the UK. In particular, without limitation to other relevant factors, the CMA will have regard to the following principles:
 - a. the implementation of the separation process does not harm or otherwise negatively affect the competitive position of the BCS Business;
 - b. any licence of intellectual property rights will contain a restriction permitting use only in relation to the CI Business, including for integration purposes;
 - c. there will be no transfer of any intellectual property rights relating to the BCS Business, including where these are shared with the CI Business being transferred;
 - d. there will be no exchange of competitively sensitive information in relation to the BCS Business, and there will be appropriate safeguards implemented to protect any such information which it is strictly necessary to transfer for the sale of the CI Business;
 - e. there will no provision of technology or know-how in relation to licensed intellectual property rights other than as is strictly necessary for the transfer and operation of the CI Business, including for integration purposes;
 - f. no customer contracts or other contracts relating to the BCS Business would be transferred to Cochlear; and
 - g. there will not be any restrictions imposed on the BCS Business or the Demant business beyond any lawful ancillary restraints in the Approved Agreements, subject to the approval of the CMA.