



COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPLICATION UNDER SECTION 120 OF THE ENTERPRISE ACT 2002

CASE No. 1332/4/12/19

Pursuant to rules 14 and 26 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the “Rules”), the Registrar gives notice of the receipt on 13 September 2019 of an application for review under section 120 of the Enterprise Act 2002 (the “Act”) by Tobii AB (publ) (“Tobii”) against a decision dated 15 August 2019 (the “Phase 2 Decision”) made by the Competition and Markets Authority (the “CMA”). Tobii is represented by Preiskel & Co LLP of 4 King’s Bench Walk, Temple, London EC4Y 7DL (Reference: Tim Cowen).

Tobii is a company incorporated under the laws of Sweden (company number 556613-9654) and is the parent company of the Tobii group, which has subsidiaries in a number of countries including the United Kingdom. Tobii develops and sells assistive and augmentative communications (“AAC”) products worldwide. Tobii’s AAC products incorporate eye-tracking technology, which enables a computer, gaming console or other electronic device to be controlled by the user’s eyes.

Smartbox Assistive Technology Limited (“SATL”) and Sensory Software International Limited (“SSIL”), which together form the business known as “Smartbox”, are based in the United Kingdom. Smartbox develops and sells AAC hardware and software products worldwide.

According to the Application, there are numerous other developers and suppliers of AAC products. The purchasers of AAC products in the UK include NHS Trusts, schools, charities, local authorities and individual users.

On 1 October 2008, Tobii acquired the entire issued share capital of SATL and SSIL. The merger was not notified to the CMA, but was identified by the CMA’s mergers intelligence function. The CMA commenced a Phase 1 investigation on 27 November 2018 and, having decided that there was a relevant merger situation and a substantial lessening of competition (“SLC”), the CMA referred the merger for an in-depth Phase 2 merger inquiry on 8 February 2019 (the “Phase 1 Decision”). The CMA published its Issues Statement on 26 February 2019 and its Provisional Findings and a Notice of Possible Remedies on 30 May 2019. The CMA provisionally found the acquisition by Tobii of Smartbox was a relevant merger situation that resulted or may be expected to result in an SLC, and the CMA’s provisional view was that the full divestiture of Smartbox by Tobii (equivalent to a prohibition of the merger) would be likely to be the only effective and proportionate remedy to the SLC.

Tobii states that, during the CMA’s inquiry and between 1 March 2019 and 18 July 2019, it submitted to the CMA documents, economic papers, comments and responses on various CMA working papers, the CMA’s Phase 1 Decision, Issues Statement, Provisional Findings and Notice of Possible Remedies, and attended hearings with the CMA. Tobii’s submissions and responses to the CMA set out variously why the merger had not and would not result in an SLC on the relevant markets and would provide benefits for customers and end-users, identified a number of concerns with the CMA’s questionnaire sent to customers, identified serious errors in the CMA’s approach to obtaining evidence from third parties, submitted that the CMA’s findings as to market definition, substantive horizontal and vertical effects and countervailing factors were incorrect, and why a full divestiture of Smartbox would be disproportionate. Tobii also requested from the CMA copies of questionnaires it sent to customers and responses received, and proposed an alternative remedy package, including further submissions and clarifications why Tobii’s proposed alternative remedy would be a comprehensive and effective remedy to any SLC arising from the merger and maintain the same customer benefits as the CMA’s proposal for a full divestiture of Smartbox.

According to the Application, the CMA refused to disclose copies of the questionnaires sent and responses received and issued its Phase 2 Decision on 15 August 2019. The Phase 2 Decision found the merger was a relevant merger that has resulted or may be expected to result in an SLC in the market for the supply of dedicated AAC solutions in the UK as a result of horizontal unilateral effects or vertical input foreclosure effects and in the market for the supply of eye-gaze cameras for dedicated AAC solutions on a worldwide basis as a result of customer foreclosure of eye-gaze camera competitors (the “SLC Decision”). The CMA rejected Tobii’s proposed alternative remedy and found that the only effective remedy to the SLC and its adverse effects was a full divestiture of the whole of the Smartbox business to a suitable purchaser approved by the CMA (the “Remedy Decision”).

In summary, Tobii submits that the CMA’s SLC Decision and Remedy Decision are unlawful on six grounds:

1. The CMA breached its duty of procedural fairness by refusing to disclose to Tobii and/or its external advisers relevant evidence which formed the basis of the CMA’s findings under the SLC Decision and Remedy Decision.
2. The CMA’s finding of an SLC is not supported by relevant, reliable and sufficient evidence due to material errors in the CMA’s collection of evidence.
3. The CMA failed to properly define the relevant market for AAC solutions.
4. The CMA’s finding of an SLC as a result of horizontal unilateral effects is not supported by relevant, reliable and sufficient evidence due to material errors in the assessment of evidence.
5. The CMA’s finding of an SLC as a result of vertical foreclosure effects is not supported by relevant, reliable and sufficient evidence due to material errors in the assessment of evidence.
6. The full divestiture remedy required by the CMA is disproportionate and unreasonable.

Tobii seeks the following relief from the Tribunal:

1. A declaration that the SLC Decision and/or the Remedy Decision are unlawful.
2. An order quashing the SLC Decision and/or the Remedy Decision.
3. An order remitting the matter to the CMA to reconsider and to make a new decision under section 35 of the Act.
4. Costs.
5. Such other order or relief as the Tribunal may consider appropriate.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules. Pursuant to the Order of the President of the Tribunal abridging time for applying for permission to intervene (made on 16 September 2019), any request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London, WC1A 2EB, so that it is received **no later than 5pm on 25 September 2019**.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively, the Tribunal Registry can be contacted by post at the above address or by telephone (020 7979 7979) or email (registry@catribunal.org.uk). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE, QC (Hon)
Registrar

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