EUROPEAN COMMISSION
DG Competition

Case M.10966 - COCHLEAR / OTICON MEDICAL

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REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 22
Date: 06/12/2022

EUROPEAN COMMISSION

Brussels, 6.12.2022
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PUBLIC VERSION

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus […]. Where possible the information omitted has been replaced by ranges of figures or a general description.

Autorité de la concurrence
11, Rue de l'Échelle
75001 Paris
France

Subject: **Case M. 10966 – COCHLEAR / OTICON MEDICAL**
Request for referral by the Autorité de la concurrence of France to the Commission pursuant to Article 22(1) of Council Regulation (EC) No. 139/2004[1] and Article 57 of the Agreement on the European Economic Area[2]

Ref.: Letter of the French Autorité de la concurrence of 15 November 2022

Dear Sir or Madam,

1. INTRODUCTION

(1) With the above-mentioned request of 15 November 2022 in application of Article 22(1) of the Merger Regulation, the Autorité de la concurrence (the "French Competition Authority") formally requested the Commission to examine the concentration whereby Cochlear Limited ("Cochlear" or "Notifying Party", Australia) acquires sole control of Oticon Medical ("Oticon"), a business division of Demant A/S ("Demant", Denmark) (the "Transaction"). Cochlear together with Oticon are referred to as the "Parties".

[1] OJ L 24, 29.1.2004, p. 1 (the "Merger Regulation").
[2] OJ L 1, 3.1.1994, p. 3 (the "EEA Agreement").

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(2) Pursuant to Article 22(1) of the Merger Regulation, one or more Member States may request the Commission to examine any concentration, as defined in Article 3 of the Merger Regulation, that does not have a Union dimension within the meaning of Article 1 of the Merger Regulation but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. Such a request must be made within 15 working days of the date of the notification of the concentration. Pursuant to Article 22(2) of the Merger Regulation, any other Member State may join the initial request within a period of 15 working days of being informed by the Commission of the initial request. Pursuant to Article 6(3) of Protocol 24 to the EEA Agreement, any EFTA State may join the request within a period of 15 working days from the day on which the Commission informed the EFTA Surveillance Authority of the initial request.

(3) In the present case, Cochlear notified the Transaction to the Comisión Nacional de los Mercados y la Competencia of Spain (the "CNMC") on 19 October 2022.[3]

(4) On 24 October 2022, the Parties made a submission to the Commission and the CNMC, arguing that a referral of the Transaction to the Commission is not necessary or appropriate.

(5) The Commission received the referral request made by Spain pursuant to Article 22(1) of the Merger Regulation on 27 October 2022.

(6) In accordance with Article 22(2) of the Merger Regulation, the Commission informed the competent authorities of Member States other than Spain and the EFTA Surveillance Authority of the CNMC's request on 28 October 2022.

(7) Within the time limit of 15 working days after being informed by the Commission, as foreseen by Article 22(2), second indent, of the Merger Regulation, the following Member States and EFTA States joined the CNMC's initial request: Bulgaria (on 11 November 2022), the Netherlands (on 15 November 2022), France (on 15 November 2022), Finland (on 16 November 2022), Portugal (on 16 November 2022), Lithuania (on 17 November 2022), Poland (on 18 November 2022), Norway (on 21 November 2022), Denmark (on 22 November 2022), Ireland (on 22 November 2022), Sweden (on 22 November 2022), and Italy (on 22 November 2022).

2. THE PARTIES AND THE CONCENTRATION

(8) Cochlear is a global manufacturer and supplier of implantable hearing solutions. Cochlear is an Australian publicly listed company and the parent company of the Cochlear Group. Cochlear's product portfolio includes a range of hearing implants and sound processor upgrades. Cochlear operates globally and has local affiliates in a number of Member States.

(9) Oticon is the hearing implants business division of Demant. Oticon supplies bone conduction solutions and cochlear implants. It is based in Denmark with production sites in France and Poland.

(10) The Transaction notified to the CNMC concerns the acquisition of sole control by Cochlear over Oticon by way of purchase of shares in relevant legal entities established in Sweden, Morocco, the United States, France and Denmark, and the purchase of certain other assets (e.g., IP), as well as by transfer of current employees of all of the above-referenced legal entities except for the entity

[3] Besides Spain, the Transaction has not been notified in any other EEA country.

established in Denmark. Therefore, the Transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

(11) The Transaction does not have a Union dimension within the meaning of Article 1 of the Merger Regulation, according to the information provided by the CNMC and the Parties, as the relevant turnover thresholds are not met.[4]

3. ASSESSMENT OF THE REFERRAL REQUEST

3.1. Legal requirements

(12) In order for a referral to be made by a Member State, one procedural and two substantive conditions must be fulfilled pursuant to Article 22(1) of the Merger Regulation.

(13) The procedural condition is that "*the initial referral shall be made within 15 working days of the date on which the concentration was notified*", or if no notification is required, otherwise made known to the Member State concerned, and "*any other Member States may join the initial request within a period of 15 working days of being informed by the Commission of the initial request*."

(14) As to the substantive conditions, the concentration must: (i) "*affect trade between Member States"*; and (ii) "*threaten to significantly affect competition*" within the territory of the Member State(s) making the request.[5]

(15) Once these conditions are fulfilled, the Commission has discretion whether to accept or reject the referral request. The Commission shall exercise its discretion based on the guidance of its relevant Notice on Case Referral in respect of concentrations (the "Referral Notice")[6].

3.2. Procedural condition

(16) Cochlear formally notified the Transaction in Spain on 19 October 2022. The Commission received the referral request made by Spain on 27 October 2022, i.e., within the time limit foreseen in Article 22(1), second indent, of the Merger Regulation.[7]

(17) The Commission informed the competent authorities of the Member States and the EFTA Surveillance Authority of the referral request on 28 October 2022. On 15 November 2022, the Commission received France's request to join the initial referral request made by Spain.

(18) Therefore, France joined the initial referral request within the time limit of 15 working days following the date on which the Commission informed it of the

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4 The Parties' turnover does not meet the thresholds of Article 1 of the Merger Regulation because Oticon's Union-wide turnover in 2021 was c. EUR […] million, i.e., below EUR 250 million (Article 1(2)) and EUR 100 million (Article 1(3) of the Merger Regulation).

5 See also Commission Notice on Case Referral in respect of Concentrations (the "Referral Notice"), paragraphs 42-44 (OJ C 56, 5.3.2005, p.2). The Referral Notice provides explanation on when the substantive conditions in Article 22(3) of the Merger Regulation are met.

6 OJ C 56, 5.3.2005, p. 2.

7 In this case, the Parties argue that the CNMC and the Commission had all relevant information to determine whether a referral is appropriate since at least June 2022 and that a referral request should therefore have come months earlier (see paragraph (34)(e) below). However, in cases where the Member State that requests the referral has jurisdiction over the transaction, as is the case here, the deadline for requesting a referral is 15 working days following notification, regardless of whether there has been contact between the Commission and the merging parties at an earlier stage.

referral request, as foreseen in Article 22(2), second indent, of the Merger Regulation.

3.3. Substantive conditions

(19) This section will first discuss the relevant markets affected by the Transaction. It will then assess whether for those markets, the substantive conditions for a referral as set out in paragraph (14) above are met with respect to France.

3.3.1. Relevant markets

(20) The Parties' activities appear to overlap horizontally in the supply of two types of hearing implants, namely cochlear implants and bone conduction solutions, in several EEA countries including France where both of the Parties are active.

(21) The Commission has not previously considered the market for cochlear implants and/or bone conduction solutions. According to the CNMC, cochlear implants and bone conduction solutions could constitute separate markets, e.g., because of the different nature of the hearing problems they address, which makes them non-substitutable from the patient's point of view. The Parties have provided information and data separately for cochlear implants and bone conduction solutions. Therefore, for the purposes of this decision and without prejudice to the outcome of a potential further investigation, the Commission considers cochlear implants and bone conduction solutions to form plausible separate product markets.

(22) As regards the geographic scope of the plausible markets, the Parties submitted in the merger notification to the CNMC that the relevant markets for hearing implants are at least national in scope. The Parties further submitted that although they do not monitor competition at EEA-level (or at national level for every EEA country), there are generally no meaningful differences in industry dynamics across EU jurisdictions for either cochlear implants or bone conduction solutions because the degree of concentration is similar across all EU jurisdictions.[8]

(23) In a previous case that concerned a neighbouring market to cochlear implants and bone conduction solutions, i.e., that of hearing aids (M.8941 – *EQT / Widex / JV*), the Commission left open the possibility for the market of hearing aids to be national or EEA-wide in scope.[9] The factors considered in favour of a possible EEA-wide market included low regulatory barriers, low transportation costs and worldwide production and research & development,[10] which the Commission considers could also be relevant in the current case. Therefore, for the purposes of this decision and without prejudice to the outcome of a potential full investigation, the Commission considers the geographic scope of the plausible markets at least national and possibly EEA-wide.

3.3.2. Effect on trade between Member States

(24) According to paragraph 43 of the Referral Notice, the first substantive condition in Article 22(3) of the Merger Regulation (*i.e.* the Transaction must "*affect trade between Member States*") is fulfilled when a concentration is liable to have some discernible influence on the pattern of trade between Member States.

(25) The French Competition Authority submits that the Transaction could significantly influence on the pattern of trade between Member States and to affect trade

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8 Cochlear's notification of the Transaction in Spain, English working version of the filed version submitted on 19 November 2022, paragraph 267.

9 Commission decision of 13 February 2019 in Case M.8941 – *EQT/Widex/JV*, paragraph 71.

10 *Id.*, paragraph 70.

between Member States because the Parties are active in several EEA countries and, according to case law of the European Commission and the French Competition Authority, the geographic scope of the relevant markets may be wider than national, i.e., EEA-wide in scope.

(26) Furthermore, the merged entity will have very significant market shares in cochlear implants and in bone conduction solutions in various EEA countries. Indeed, according to information provided by the CNMC, the merged entity's combined market shares will be 50-75% in cochlear implants in at least 14 EEA countries (including France),[11] and 50-95% in bone conduction solutions in at least in 11 EEA countries (including France).[12]

(27) Based on the above, as well as on the fact that the relevant markets are possibly EEA-wide, the Commission considers that the Transaction is capable of having an impact on effect on trade between Member States.

(28) The Commission thus concludes that the first substantive legal requirement for an Article 22 referral request is met.

3.3.3. Concentration threatens to significantly affect competition

(29) Regarding the second substantive condition in Article 22(3) of the Merger Regulation (*i.e.* the Transaction must "*threaten to significantly affect competition*"), paragraph 44 of the Commission's Referral Notice provides that a referring Member State should demonstrate that, based on a preliminary analysis, there is a real risk that the transaction may have a significant adverse effect on competition and thus deserves close scrutiny, without prejudice to the outcome of a full investigation.

(30) The French Competition Authority submitted that, based on a preliminary analysis, the Transaction threatens to significantly affect competition within France because the merged entity's market share in France will be above 60% both in cochlear implants and in bone conduction solutions. The increment brought about by the Transaction will be more than 35% in bone conduction solutions. Further, the Transaction will eliminate a competitor in markets that already currently have only few suppliers.

(31) On the basis of the *prima facie* analysis submitted by the French Competition Authority, the Commission considers, without prejudice to the outcome of its potential investigation, that the concentration threatens to significantly affect competition within the territory of France.

(32) In their submission of 24 October 2022, the Parties argued that the requirements for an Article 22 referral are not met because: (i) absent the Transaction, Demant will close down Oticon, maintaining only limited activities to support its installed patient base; (ii) there is no alternative buyer, and (iii) the Transaction will thus not harm competition. The Commission considers that these arguments would not lead

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11 At least the Netherlands, Denmark, Sweden, Norway, Finland, France, Italy, Germany, Greece, Hungary, Lithuania, Portugal, Spain, and Slovakia.

12 At least Denmark, Finland, France, Germany, Italy, Ireland, the Netherlands, Norway, Portugal, Spain and Sweden. According to the CNMC, the Parties have submitted that their combined market share in bone conduction solutions in all EU Member States is similar to that in Spain where the Parties' market share is above 90%, leading to a situation close to a monopoly at Union-level, or at the very least exceeds 50% in 12 EEA countries (i.e., Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Netherlands, Norway, Portugal, Spain and Sweden). Based on materials provided by the CNMC, it has not been possible to verify Oticon's turnover, and thus the existence of a horizontal overlap, in one of those twelve countries, i.e., Belgium.

to the conclusion that the Transaction *prima facie* does not affect trade between Member States or threaten to significantly affect competition in France, or in other EEA countries. This is because the Parties have high combined market shares in a number of EEA countries and it appears that a more careful assessment of the Parties' failing firm defence is warranted, in particular as the Target's business pertaining to bone conduction solutions appears profitable[13] and it is questionable whether the assets would have exited the market and whether no less anticompetitive solutions may be found.

(33) The Commission thus concludes that the second substantive legal requirement for an Article 22 referral request is met.

3.4. On the appropriateness of a referral of the present case to the Commission

3.4.1. The Parties' submissions

(34) In their submission of 24 October 2022, the Parties submit the following arguments in addition to the claim that the legal criteria of Article 22 of the Merger Regulation would not be met:

(a) The CNMC is fully equipped to assess the case.

(b) A referral to the Commission after more than six months of prenotification discussions with the CNMC will risk delay of the final decision and further erode the economic position of Oticon, risking that the Transaction will not take place.

(c) Any delay would cause trauma for existing patients with Oticon's cochlear implants.

(d) The Transaction is not a "killer acquisition" and does not harm innovation.

(e) A referral should have been made months earlier, as both the Commission and the CNMC had the relevant information to decide on a referral since at least June 2022.[14]

3.4.2. The Commission's assessment

(35) Pursuant to paragraph 45 of the Referral Notice, referrals of concentrations already notified should be limited to those cases which appear to present a real risk of negative effects on competition and trade between Member States and where it appears that these would be best addressed at the Union level.

(36) The Notice identifies two types of cases that are most appropriate for referral under Article 22:

a) cases which give rise to serious competition concerns in one or more markets which are wider than national in geographic scope, or where some of the potentially affected markets are wider than national, and where the main economic impact of the concentration is connected to such markets, and

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13 Cochlear's notification of the Transaction in Spain, English working version of the filed version submitted on 19 November 2022, e.g., paragraph 81. However, the Parties submit that this profitability is overstated and that the division is cross-subsidised by other parts of the business.

14 See footnote 7 above.

b) cases which give rise to serious competition concerns in a series of national or narrower than national markets located in a number of Member States, in circumstances where coherent treatment of the case (regarding possible remedies, but also, in appropriate cases, the investigative efforts as such) is considered desirable and where the main economic impact of the concentration is connected to such markets.

(37) As discussed in paragraphs (22)-(23) above, for the purposes of the present decision, the markets for cochlear implants and bone conduction solutions are considered to be at least national and possibly EEA-wide in scope.

(38) Assuming that one or both of the product markets are geographically wider than national, i.e., EEA-wide in scope, it appears that the Transaction could give rise to serious competition concerns with respect to bone conduction solutions and possibly also in cochlear implants, due to the Parties' high market shares and market concentration.

(39) The Commission notes that at EEA level, only three players are active in **bone conduction solutions**, namely the Parties and Med-El, implying that the Transaction would lead to a reduction of players from 3-to-2, with the remaining competitor playing a negligible role in the EEA. Indeed, according to the CNMC, the Parties have submitted that their combined market share in bone conduction solutions in all EU Member States is similar to that in Spain where the Parties' market share is above 90%, leading to a situation close to a monopoly at Union-level. At the very least, according to the information submitted by the Parties, their combined market share exceeds 50% in 12 EEA countries.[15]

(40) As regards **cochlear implants**, the Commission notes that, at EEA level, there are currently four players, namely the Parties, Med-El and Sonova (through Advanced Bionics), implying that the Transaction would lead to a reduction of players from 4-to-3. The Parties have a strong combined market position also in cochlear implants where, according to information provided by the CNMC, the merged entity's market share would be 50-75% in at least 14 EEA countries.[16]

(41) The above is unaffected by the fact that the Parties' activities do not overlap in every single EEA country and by the Parties' argument that cochlear implants and bone conduction solutions represent only a small proportion of the overall hearing solutions space.

(42) Assuming that the plausible markets are national in scope, it appears that the Transaction threatens to significantly affect competition in a series of Member States in the EEA and that the Transaction would be best addressed at the Commission level. This is for the following reasons.

(43) *First*, the Parties have a strong combined market position in cochlear implants and bone conduction solutions across the EEA and the plausible markets are concentrated. According to information provided by the CNMC, the merged

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15 According to the CNMC, the Parties have submitted that their combined market share in bone conduction solutions in all EU Member States is similar to that in Spain where the Parties' market share is above 90%, leading to a situation close to a monopoly at Union-level, or at the very least exceeds 50% in 12 EEA countries (i.e., Belgium, Denmark, Finland, France, Germany, Ireland, Italy, Netherlands, Norway, Portugal, Spain and Sweden). Based on materials provided by the CNMC, it has not been possible to verify Oticon's turnover, and thus the existence of a horizontal overlap, in one of those twelve countries, i.e., Belgium.

16 See footnote 11 above.

entity's market share would be 50-75% in cochlear implants in at least 14 EEA countries[17] and 50-95% in bone conduction solutions in at least 11 EEA countries.[18] This is unaffected by the fact that the Parties' activities do not overlap in every single EEA country and by the Parties' argument that cochlear implants and bone conduction solutions represent only a small proportion of the overall hearing solutions space.

(44) The Parties have argued that a referral would not be appropriate because Oticon would exit the market absent the Transaction and because the Transaction is not a "killer acquisition". As has been explained above at paragraph (32), the Commission does not consider that the Parties' arguments submitting a failing firm defence would lead to the conclusion that the Transaction *prima facie* does not affect competition in France, or in other EEA countries. While the Parties' arguments will require thorough analysis if the Commission were to obtain jurisdiction, at this stage, the Commission considers that the Parties have not demonstrated that all requirements in respect of the failing firm defence would be met, in particular as Oticon's business pertaining to bone conduction solutions appears profitable and it is questionable whether the assets would have exited the market and whether less anticompetitive solutions may be found. Further, it is not a requirement that the Transaction is a "killer acquisition" for the Commission to accept a referral request.

(45) *Second*, within the EEA, the Transaction has only been notified in Spain. Therefore, there is no risk of parallel reviews between the Commission and Member States that have jurisdiction but choose not to join the referral request. In addition, if the Commission were to obtain jurisdiction, its review would encompass not only Spain but all those jurisdictions where the Transaction threatens to significantly affect competition that joined the referral.

(46) *Third*, the Commission has experience in the hearing solutions sector. It has previously reviewed a transaction in the hearing solutions sector, namely M.8941 – *EQT / Widex / JV* in 2019. The Commission is therefore well-placed to assess the markets concerned in the Transaction.

(47) On balance, it appears that the Transaction presents a real risk of negative effects on competition and trade between Member States and it would be best addressed at the level of the Commission.

(48) Therefore, the Commission considers the Transaction to fall under at least one of the categories of cases referred to in paragraph 45 of the Referral Notice and that it is appropriate for referral to the Commission pursuant to Article 22 of the Merger Regulation.

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17 See footnote 11 above.

18 See footnote 12 above.

4. CONCLUSION

(49) For the above-mentioned reasons, the Commission has decided to examine the concentration by which Cochlear proposes to acquire sole control of Oticon, the hearing implants business division of Demant. This decision is based on Article 22(3) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(Signed)
Margrethe VESTAGER
Executive Vice-President