Neutral citation [2003] CAT 27

IN THE COMPETITION APPEAL TRIBUNAL

Case: 1023/4/1/03

New Court
Carey Street
London WC2A 3BZ

3 December 2003

Before:

Sir Christopher Bellamy QC (President)
Mr Peter Clayton FCA
Mr Adam Scott TD

BETWEEN:

IBA HEALTH LIMITED

Applicant

-v-

THE OFFICE OF FAIR TRADING

Respondent

supported by

iSOFT PLC

and

TOREX PLC

Interveners

Mr Nicholas Green QC and Mr Aidan Robertson (instructed by Macfarlanes) appeared on behalf of the applicant.

Mr Jonathan Crow and Mr Daniel Beard (instructed by the Director of Legal Services, Office of Fair Trading) appeared for the respondent.

Mr David Anderson QC and Ms Kelyn Bacon (instructed by Ashurst Morris Crisp) appeared for iSOFT Goup PLC.

Torex PLC was represented by Mr Theo Savvides of Osborne Clark

Heard at the Royal Courts of Justice on 28 November 2003.

JUDGMENT

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I INTRODUCTION

1. By a notice of application dated 21 November 2003 the applicant, IBA Health Limited ("IBA"), applies pursuant to section 120 of the Enterprise Act 2002 ("the Act") for a review of the decision of the respondent, the Office of Fair Trading ("the OFT") under section 33(1) of the Act not to make a reference to the Competition Commission ("the Commission") of an anticipated acquisition by iSOFT Group plc ("iSOFT") of Torex plc ("Torex").

2. The Act came fully into force on 20 June 2003. This is the first case to arise under the new merger control provisions contained in Part 3 of the Act, and the first case to come before the Tribunal under section 120.

The case in a nutshell

3. Section 33(1) of the Act provides:

> "The OFT shall, subject to subsections (2) and (3), make a reference to the Commission if the OFT believes that it is or may be the case that –
>
> (a) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and
>
> (b) the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services."

4. The proposed merger between iSOFT and Torex was notified to the OFT on 1 August 2003. The OFT's decision, which runs to 34 unnumbered paragraphs, was taken on 6 November 2003, over 3 months later, and notified to IBA on 14 November 2003. In this judgment we use the paragraph numbers which IBA has, for convenience, added to the decision (Annex 1 to the notice of application).

5. Paragraphs 33 and 34 of the decision state:

> "33. For these reasons, the OFT does not believe that it is or may be the case that, if carried into effect, the creation of this relevant merger situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods and services.

DECISION

34. This merger will therefore **not be referred** to the Competition Commission under section 33(1) of the Act."

6. IBA submits, essentially, that iSOFT and Torex are direct competitors in the supply of software applications to hospitals, in particular Electronic Patient Record ("EPR") systems and Laboratory Information Management Systems ("LIMS"). iSOFT and Torex are currently the two largest companies active in those sectors. In the EPR sector, a merger between iSOFT (17.7%) and Torex (28.1%) would give rise to a combined market share of 46%. The next largest competitor would have 14%. In the LIMS sector, the combined market share of the parties would rise to 56%. In Scotland the parties would have 100% of the LIMS installed base after the merger.

7. In those circumstances, submits IBA, it is self evident that "it is or may be the case" that the proposed iSOFT/Torex merger may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services, within the meaning of section 33(1)(b). The OFT's contrary conclusion in the decision is erroneous, illogical and unlawful. In failing to refer the proposed merger to the Commission, the OFT is in breach of the statutory duty imposed by section 33(1).

8. The OFT's case, supported by iSOFT and Torex, is that the contested decision is plainly founded on the effects on the market for the procurement of systems software for NHS hospitals of a massive new programme currently being introduced called the National Programme for IT ("NPfIT"). According to the OFT, the whole thrust of the decision is that, as a result of the NPfIT, the proposed merger may not be expected to result in a substantial lessening of competition within the meaning of section 33(1)(b).

9. According to the OFT, that was a conclusion which it was entitled to reach, and there are no grounds for the Tribunal to interfere with that conclusion in a review under section 120.

The Tribunal's jurisdiction under section 120

10. The Tribunal's power of review is set out in section 120 of the Act as follows:

> "(1) Any person aggrieved by a decision of the OFT, the Secretary of State or the Commission under this Part in connection with a reference or possible reference in relation to a relevant merger situation or a special merger situation may apply to the Competition Appeal Tribunal for a review of that decision.
>
> (2) For this purpose "decision" -
>
> (a) does not include a decision to impose a penalty under section 110(1) or (3) but
>
> (b) includes a failure to take a decision permitted or required by this Part in connection with a reference or possible reference.
>
> (3) Except in so far as a direction to the contrary is given by the Competition Appeal Tribunal, the effect of the decision is not suspended by reason of the making of the application.
>
> (4) In determining such an application the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.
>
> (5) The Competition Appeal Tribunal may -
>
> (a) dismiss the application or quash the whole or part of the decision to which it relates; and
>
> (b) where it quashes the whole or part of that decision, refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal
>
> (6) An appeal lies on any point of law arising from a decision of the Competition Appeal Tribunal under this section to the appropriate court.
>
> (7) An appeal under subsection (6) requires the permission of the Tribunal or the appropriate court.
>
> (8) In this section -

> "the appropriate court" means the Court of Appeal or, in the case of Tribunal proceedings in Scotland, the Court of Session; and
>
> "Tribunal rules" has the meaning given by section 15 (1)".

11. It is common ground that IBA is a "person aggrieved" for the purposes of section 120(1).

12. The Tribunal itself is constituted under sections 12, 14 and 15 and Schedules 2 and 4 of the Act. The Tribunal's rules are set out in The Competition Appeal Tribunal Rules 2003, SI 2003 No. 1372. The Tribunal replaces an earlier Tribunal which was set up under section 48 of the Competition Act 1998. The Tribunal's jurisdiction covers the whole of the United Kingdom.

The application for interim relief

13. In its application IBA also requested interim measures under rule 61 of the Tribunal's Rules, in the event that the Tribunal was unable to hear and determine the application with sufficient expedition. In particular IBA requested the following interim relief:

> "(1) a direction under rule 61(2) to iSOFT not to seek approval for the merger offer from its shareholders either at its extraordinary general meeting convened for 9 December 2003 or otherwise; or
>
> (2) should a merger take place, a direction under rule 61(2) to iSOFT to keep separate businesses carried out by iSOFT and Torex prior to the merger; and in any event
>
> (3) an order under rule 61(1) suspending in whole or in part the effect of the Decision."

14. In the event it has not been necessary for the Tribunal to consider IBA's application for interim relief. By Order of 24 November 2003 the President gave directions granting iSOFT and Torex permission to intervene in the proceedings pursuant to rule 16 of the Tribunal's Rules and also for the filing and service of skeleton arguments and witness statements by 12 pm on 27 November 2003. The Tribunal heard oral submissions on the substance of the case at a hearing on 28 November 2003.

15. We are extremely grateful to all concerned for co-operating with the Tribunal in bringing this matter on so quickly, and for the high quality of the submissions that have been made to us.

II BACKGROUND

The parties

16. The applicant, IBA, is an Australian public company which describes itself in the notice of application as "a global supplier of IT solutions to the healthcare industry". In the United Kingdom IBA's products are supplied to a number of NHS Hospital Trusts. We are told that Torex has the exclusive right to sell IBA products in the United Kingdom under a distribution agreement dated 31 March 2003.

17. The intervener, iSOFT, is a United Kingdom public company which provides software and systems to hospitals and other healthcare providers. Between 1999 and 2002 iSOFT has acquired a number of businesses in the healthcare sector. In the year to 30 April 2003, iSOFT's worldwide turnover was £91.5 million, with sales of £74 million in the United Kingdom and other EU States.

18. Torex is also a United Kingdom public company which provides healthcare technology software and systems for healthcare providers to GPs, laboratories, hospitals and in community care. It also provides the hardware, installation and support that customers require. Torex is active in the supply of software systems in both the primary healthcare sector (i.e. GPs) and the secondary healthcare (i.e. hospital) sector. Torex too has made a number of acquisitions in recent years. In the year to 31 December 2002, Torex's worldwide turnover was £161.8 million, with healthcare technology sales of £65.5 million in the United Kingdom and Republic of Ireland. Torex also provides retail sector technology software and systems in the United Kingdom, Republic of Ireland and continental Europe with sales in the year to 31 December 2002 of £41.8 million.

The merger situation

19. On 22 July 2003 iSOFT announced a public offer to Torex shareholders to acquire the whole of the issued share capital of Torex in exchange for the issue of shares in iSOFT. According to the decision, iSOFT's offer values Torex at some £337 million. Under the proposals the Executive Chairman of Torex, Mr Christopher Moore, will become Chief Executive Officer of the merged iSOFT/Torex, which will be named iSOFT.

20. There is no doubt that, as a result of iSOFT's offer, "arrangements are in progress or contemplation which, if carried into effect, will result in the creation of a relevant merger situation" within the meaning of section 33(1)(a) and section 23 of the Act. The proposed merger was notified to the OFT on 1 August 2003.

The sector concerned

21. It is common ground that this case centres on the supply of certain software systems to hospitals. As the Tribunal understands it, hospitals and/or the relevant NHS Hospital Trusts have a wide range of software needs, ranging from payroll systems which are not particularly healthcare specific, to more or less specialised healthcare applications. For example, the pharmacy department of a hospital may have particular needs which are very different from those of the maternity department. As far as the present case is concerned, the particular applications principally concerned are (1) Electronic Patient Record (EPR) systems, and (2) Laboratory Information Management Systems (LIMS), as already mentioned.

22. According to paragraph 9 of the Decision:

> "*The sophistication of EPRs varies considerably, with the simplest systems recording demographic details of each patient on a Patient Administration System (PAS) and the more sophisticated systems incorporating clinical procedures and high-tech processes. LIMS are designed to prompt clinical processes in the face of specific diagnoses and ensure best practice by clinicians in the laboratory. EPRs can be developed on the back of the PAS, becoming more sophisticated by incorporating departmental modules (such as LIMS) as required, or they can be developed as integrated systems*

in which modules are "bundled" into the whole but can be replaced by alternative systems if these are thought to suit the hospital's needs better."

Market shares

23. In its submission to the OFT of 1 August 2003, iSOFT argued that the appropriate measure of the parties' market position in relation to EPRs was their recent success in winning EPR tenders as compared to their competitors. According to the figures provided in that submission, out of 31 contracts awarded over the past five years iSOFT had won in 8 cases (26%), Torex had won in 4 cases (13%) and IBA had won in 4 cases (13%). Those figures would give the merged iSOFT/Torex a market share of 39%, excluding the sales made by IBA. However, according to iSOFT, the infrequent award of reasonably sized contracts could give rise to volatility in market shares, depending on a company's success in winning particular contracts.

24. If, however, market share was to be based on the historic installed base of systems supplied by the two companies, then, according to iSOFT's submission to the OFT of 1 August, iSOFT would have a market share of 23%, Torex a market share of 21%, McKesson a market share of 15% and Siemens a market share of 7%. This would give a combined iSOFT/Torex market share of 44%. iSOFT, however, argued in its submission that the historic installed base of the parties was largely irrelevant as an indicator of market power, particularly in view of the forthcoming changes in the procurement policies of the NHS under the NPfIT.

25. As far as LIMS are concerned, iSOFT provided figures in its submission of 1 August 2003 showing that, of the 31 tenders awarded in recent years, iSOFT had won in 8 cases (26%) whereas Torex had won in 4 cases, again giving a combined market share of 39%. On the basis of the historic installed base, iSOFT had a market share of 45%, and Torex a market share of 11%, giving a combined market share of 56%.

26. In its application, IBA contends that together iSOFT and Torex supply healthcare information systems and associated services to over 45% of NHS hospitals in the UK, with iSOFT having a market share of 17.7% and Torex having a market share of 28.1%. The next three largest suppliers are, according to IBA, McKesson (14.5%), Siemens

(8.4%) and EDS (4%). These figures are apparently based on a report prepared in January 2003 by Silicon Bridge Research entitled "*NHS 21st Century Strategy for modernising NHS Information Systems. Research in Hospital Trusts and Current Status of NHS Strategy*", at pages 10 to 18. The figures in the Silicon Bridge report relate to "enterprise wide systems – such as electronic patient record, patient administration, admissions and opportunities".

27. The market shares of the parties, and the resulting market shares of the merged concern are not seriously in dispute. What is in dispute is the conclusion to be drawn from that increase in market shares. Paragraphs 14 and 15 of the contested decision state:

> "*The main suppliers of secondary healthcare software currently installed in UK hospitals are iSOFT, Torex/IBA, McKesson and Siemens. The parties' share of installed ("legacy") systems is significant, with the parties supplying 44 per cent of EPRs and 56 per cent of LIMS to the UK public sector. They are key suppliers in each country of the UK, particularly in the supply of LIMS (where in Scotland and Wales, their legacy systems will account for 100 per cent of the installed base). The pace of innovation in healthcare IT systems and changes to the procurement process suggest, however, that the installed base is not the best guide as to whether the parties will have market power in the future.*
>
> *Since most public sector contracts are awarded following a competitive tender, a better measure of potential market power may be the parties' success in winning competitive bids in the past few years. While the existence of an installed base may give incumbent bidders reputational or informational advantages in bidding for new contracts, if the system required is substantially different from existing systems these advantages are unlikely to be significant. The presence of other bidders should act as a competitive constraint on the parties as they bid for new contracts, requiring them to put forward innovative solutions at competitive prices.*"

The NPfIT

28. Historically, hospitals and/or their strategic health authorities have purchased information technology ("IT") systems on an individual and localised basis as and when required. As a result the NHS has many different installed "legacy" IT systems creating interface and interoperability issues.

29. Following a detailed review of its IT needs, the Department of Health has produced a national strategic programme entitled: *Delivering 21st century IT support for the NHS.* This National Programme for IT, the NPfIT, is one of the most ambitious and complex public procurement programmes in the world. It is due to be implemented progressively throughout most of the next decade, at a cost of several billions of pounds. It is impossible in this judgment to give more than the barest outline. The following, we hope relatively uncontroversial, description is taken from the witness statement of Mr Wallhouse, a consultant in the field of healthcare IT, filed on behalf of IBA.

30. The NPfIT applies to future IT procurement projects for the NHS in England. It does not apply in Wales, Scotland or Northern Ireland.

31. The NPfIT is comprised of five main projects to which at least £2.3 billion has been allocated over the next three years (i.e. 2003 - 2006). Recent press reports suggest further funding may be needed. These five projects are:

- the integrated care records service ("ICRS");
- an electronic appointment booking system ("e-booking");
- a system for the electronic transfer of prescriptions ("ETP");
- a national 'spine' (the "Spine") to provide a limited medical record database for the entire population; and
- a national NHS broadband network, to be known as N3.

32. All of the above, save for the ICRS element of Phase I, will be awarded on a national basis to so-called national applications service providers ("NASPs")

33. The NPfIT will consist of one central set of infrastructure services being the Spine, e-booking and ETP that, using the N3, will link five separate geographic areas in England:

- London;
- the North East, Yorkshire and the Humber;
- the South East and the South West;

- the East of England and the East Midlands; and
- the West Midlands and the North West.

34. There will be one national contract to cover the Spine that will involve the design, delivery and operation of a nationally accessible patient record system; one contract to cover each of e-booking and ETP, and five LSP contracts. The e-booking contract is so far the only one to be awarded, to SchlumbergerSema as announced on 8 October 2003.

35. As explained below LSPs are essentially project managers who will work with the NASPs and healthcare IT applications suppliers to implement the NPfIT.

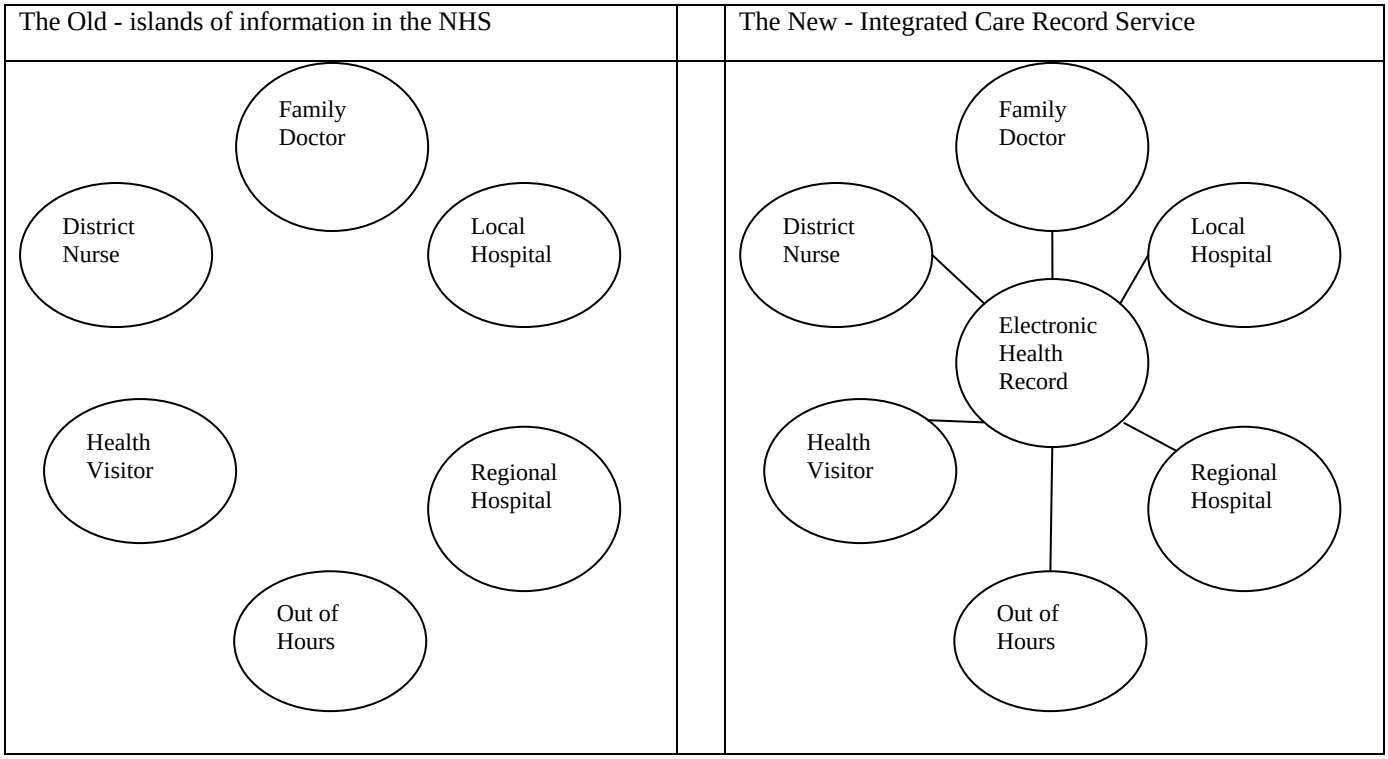
Integrated Care Records Service ("ICRS")

36. The ICRS is the core component of the NPfIT. According to IBA, the proposed merger between iSOFT and Torex impacts on the ICRS element of the NPfIT.

37. An overview of the ICRS element of the NPfIT (the "Overview") was published in July 2003. The Overview (page 2) summarises the ICRS as follows:

> *"The [ICRS] is the core component of the [NPfIT] and the key enabler for the appropriate capture, management, sharing and use of patient and clinical information. ICRS moves forward the concepts of both the organisation-specific electronic patient record and the cradle-to-grave electronic health records. It provides professionals with access to integrated services based around the patient.*
>
> *ICRS will be provided as an integral set of services, supported by robust standards; this may build on computer systems currently in place and will involve migration to new systems, over time."*

38. The ICRS concept aims to provide seamless communication in the provision of healthcare services, with each person's NHS health record and details of previous treatment available at any point in the provision of care. According to Mr Wallhouse, the ICRS concept is explained in the following diagram:



39. The development of the ICRS will take a number of years to become fully operational. According to IBA, it will not become fully operational until 2008 at the earliest (assuming that sufficient funding for the full implementation of NPfIT is forthcoming from HM Treasury and that there are no delays).

The phases of the ICRS element of the NPfIT

40. In July 2003 the NHS stated that the ICRS element of the NPfIT will comprise three phases as follows:-

Phase 1: 2003 to 2006;
Phase 2: 2006 to 2008;
Phase 3: 2008 onwards.

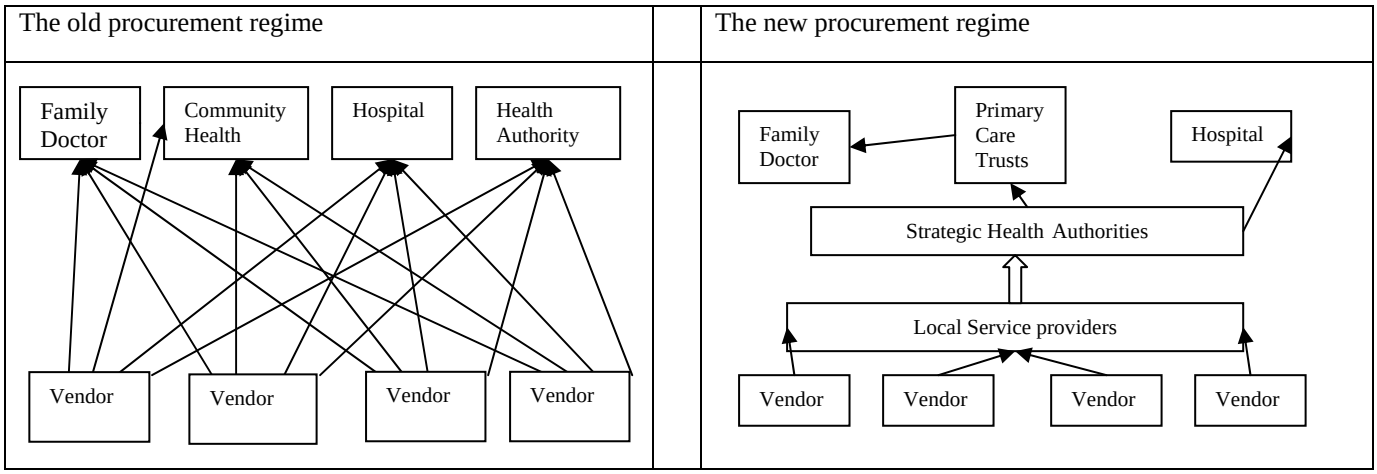
41. The stated business requirement for Phase 1 is to make a common subset of the information held in the local domain available to anyone with the correct permissions. The data available in the Spine will essentially be no more than the existing data held in various locations and in different formats.

42. No funding is yet in place for Phases 2 and 3, which will further develop the essential work done in Phase 1.

Local Service Providers ("LSPs")

43. The NHS has recognised that there is a large gap between the current and target environment needed to support the ICRS concepts outlined above. For example, today's systems are highly disparate and are largely organisation-based. In addition, today's systems generally fail to support the care delivery at the point of care and lack close integration with the business and clinical processes. For this reason the concept of LSPs has been created. It is intended that chosen LSPs will bridge the gap by working in partnership with Strategic Health Authorities ("SHAs").

44. According to Mr Wallhouse, the function of the LSPs is outlined in the diagram below:



45. As prime contractors, LSPs will design, manage, finance and implement the large scale deployments envisaged in the modernisation plans. This will include negotiations with SHAs, finance and risk management, training and consulting.

46. Each prospective LSP has been required to nominate a Preferred Application Provider(s) ("PAP") with which they will primarily work to achieve effective implementation of the NPfIT in their geographic area, although they will be able to work with others.

47. Having identified their PAPs, prospective LSPs were short-listed on 12 August 2003 with contracts due to be awarded by the end of 2003. The Tribunal understands that at least one such contract (for London) has been awarded. Torex was not on the shortlist for an appointment as an LSP, but had been on the long-list of organisations that were successful at the first stage of the NPfIT process which was announced on 16 April 2003. Since the shortlist was announced in August some potential LSPs have apparently withdrawn from the NPfIT.

48. Among the short listed LSPs, only three potential PAPs have been nominated, namely iSOFT, Cerner and IDX.

49. A letter from Torex dated 30 June 2003 indicates that Torex withdrew from contention as a potential LSP.

The Output Based Specification (OBS)

50. More detail about the ICRS part of the NPfIT is set out in a very lengthy document called the Output Based Specification ("OBS") which the OFT does not appear to have had before it when it made its decision. According to IBA, this document indicates that the implementation of the NPfIT is not based on a policy of "rip and replace", but will give prominence to the need to safeguard the enormous investment made by the NHS in the existing installed base, and to the gradual adaptation of the existing so called "legacy systems" to the needs of the national programme.

The tiered structure

51. According to the Silicon Bridge report, cited above, and oversimplifying what appears to the Tribunal to be an extremely complex situation, the implementation of the ICRS appears to involve a structure with three tiers. The first tier is that of the LSPs, who are the project managers for the five regions concerned. The second tier includes the Preferred Applications Providers ("PAPs") who will work with the LSPs as main contractors. The third tier consists of further sub-contractors who will work with the LSPs/PAPs on the detailed work necessary in the NHS Hospital Trusts in England: see the diagram at p. 21 of the Silicon Bridge Report.

52. According to IBA, it is as yet unclear where the contractual responsibility for procurement within the NPfIT will lie, i.e. with the NHS Hospital Trusts or other authorities, with the LSPs/PAPs, or with some other combination of persons. Nor, according to IBA, is it clear how the intellectual property rights of incumbent suppliers in particular of software programmes will be dealt with. Outside the NPfIT procurement will continue to be the responsibility of the relevant health authorities.

53. In any event, submits IBA, the existing installed base will be significant for many years to come, particularly as regards contracting activity in tiers below the LSPs/PAPs.

III THE STATUTORY FRAMEWORK UNDER THE ENTERPRISE ACT 2002

A. GENERAL

54. The Competition Act 1998, which came into force on 1 March 2000, modernised and strengthened the competition law of the United Kingdom by introducing prohibitions on restrictive agreements and abuse of a dominant position, based on Articles 81 and 82 of the EC Treaty. In July 2001 the Department of Trade and Industry published a White Paper entitled "A World Class Competition Regime" which proposed various further reforms aimed at further strengthening competition law with a view to producing "a world class competition law for the UK". Many of those reforms were subsequently adopted in the Enterprise Act 2002, including the creation of a criminal cartel offence, and a power to disqualify directors of companies engaged in anti-competitive activities. The Act also replaced the former Director General of Fair Trading ("the Director") with a new corporate body, the OFT.

55. The 2001 White Paper included proposals to modernise and strengthen the framework for merger control set out in the Fair Trading Act 1973 ("the FTA 1973") particularly with a view to "taking mergers out of the political arena". These proposals subsequently became Part 3 of the Enterprise Act 2002, with which this case is concerned. It is convenient first to summarise briefly the previous provisions of the

FTA 1973 before setting out the new statutory framework under the Enterprise Act 2002.

The Fair Trading Act 1973 (FTA 1973)

56. Part V of the FTA 1973, which itself replaced legislation dating from 1965, empowered the Secretary of State for Trade and Industry ("the Secretary of State") to refer to the Monopolies and Mergers Commission ("MMC") for investigation and report a merger situation, or a potential merger situation, qualifying for investigation under that Act: see sections 64 and 75 of the FTA 1973. Section 76 of the FTA 1973 imposed a duty on the Director to make recommendations to the Secretary of State in that regard.

57. If the Secretary of State made a merger reference, the MMC was required to investigate and report, normally within a period not exceeding 6 months, on the questions of whether a qualifying merger situation had been created and, if so, whether the creation of that situation operated, or may be expected to operate, against the public interest (sections 69 and 70 of the FTA 1973). The "public interest" was widely defined in section 84 to include not only maintaining and promoting effective competition in the United Kingdom, but also various other such matters. In recent years, however, most mergers under the FTA 1973 were examined on competition grounds.

58. The MMC was required to report to the Secretary of State on the questions comprised in the reference, and to give its reasons: section 72. The MMC's report was required to be laid before Parliament: see section 83. Where the MMC's report identified effects adverse to the public interest, the Secretary of State was empowered to remedy those effects by the exercise of the powers in Parts I and II of Schedule 8 to the Act by statutory instrument: see section 72(3). In so doing, the Secretary of State was required to take into account any recommendations by the MMC, and any advice given by the Director under section 88 of the 1973 Act.

59. The only avenue of challenging a decision made under the 1973 Act was by way of an application for judicial review. Apart from the old case of *R v Secretary of State for Trade and Industry ex parte Lonrho plc* [1989] BCC 284, we are unaware of any

attempt to challenge, by way of judicial review under the FTA 1973, a decision by the Secretary of State under his discretionary power to refer or not to refer a merger to the MMC for investigation and report. A number of challenges by way of judicial review were, however, made to the reports of the MMC in merger and other cases. Two recent challenges to reports of the Competition Commission by way of judicial review have been *R* (*Interbrew SA and Interbrew UK Holdings Ltd) v The Competition Commission and the Secretary of State for Trade and Industry* [2001] EWHC Admin 367 (23 May 2001) [2001] UKCLR 954 (a merger case) and *The Queen on the Application of (1) T-Mobile (UK) Ltd, (2) Vodafone Ltd, (3) Orange Personal Communication Services Ltd v (1) The Competition Commission, (2) The Director General of Telecommunications* [2003] EWHC 1555 (Admin) (a regulatory inquiry under other legislation).

60. Under the Competition Act 1998 the MMC was replaced by the Competition Commission, which continued to carry out the functions of the MMC under the FTA 1973.

The changes to merger control made by the Enterprise Act 2002

61. For present purposes, the main changes under the Act, as compared with the merger regime under the FTA 1973, are as follows:

(1) Under the FTA 1973, a merger reference could be made to the Commission only by the Secretary of State. The Commission made its report to the Secretary of State, and it was for the Secretary of State to decide what action, if any, to take on the basis of the report, including any remedies. Under the Act, however, the Secretary of State or other Ministers have no role to play, except in a very limited number of cases raising a specified public interest consideration, of which the interests of national security is the only example so far: see sections 42 to 66 of the Act. No question of an intervention by the Secretary of State arises in the present case.

(2) Under the FTA 1973, the role of the Director was to give advice to the Secretary of State about making merger references. There was no statutory obligation on the Secretary of State to follow the Director's advice, and the Secretary of State

was under no duty to make a reference. Under the Act, however, the OFT has a statutory duty to make references to the Commission in the circumstances set out in sections 22 and 33.

(3) Once a reference has been made by the OFT under the Act, the Commission must itself decide on the outcome of the reference, including any remedies, instead of reporting to the Secretary of State as under the FTA 1973.

(4) The criteria under the Act against which merger references are to be judged is no longer the public interest, but whether the merger may be expected "to result in a substantial lessening of competition in a market or markets in the United Kingdom for goods or services" (section 22 and 33 of the Act).

(6) Section 120 of the Act gives any person aggrieved by the decision of the OFT, the Commission or the Secretary of State, in connection with a reference or a possible reference in relation to a relevant merger situation, the right to apply to the Tribunal for a review.

B. THE ENTERPRISE ACT 2002

62. The Act retains two key concepts which owe their origin to the FTA 1973. The first concept is that of a "relevant merger situation" which is broadly unchanged from the concept of a "qualifying merger situation" under the FTA 1973. No issue as to the existence of a relevant merger situation arises in this case.

63. The second concept is that of a two stage procedure. At the first stage, the matter is considered by the OFT, and a reference is made or not to the Commission. If a reference is made, the Commission then conducts a second stage investigation, in greater depth. In our view, a key issue in this case is: what is the intended balance, as envisaged by the Act, between the first stage and the second stage?

(1) RELEVANT MERGER SITUATION

64. A relevant merger situation is defined in sections 23 to 26 of the Act and arises where enterprises cease to be distinct and satisfy either the turnover test or the "share of supply" test: see section 23(1) and (2). The turnover test is met where the value of the turnover in the United Kingdom of the enterprise being taken over exceeds £70 million: see section 23(1)(b). Many mergers are caught under the Act by the turnover test even if they involve no competition issues at all.

65. The share of supply test is met where, in relation to the supply of goods or services of any description, at least one-quarter of all the goods or services of that description which are supplied in the United Kingdom, or in a substantial part of it, are supplied by one and the same person, or are supplied to one and the same person, or are supplied by the persons by whom the enterprises concerned are carried on, or are supplied to those persons: see sections 23(3)(a) and (b) and 24(4)(a)(b).

66. In the present case, both the turnover test, and the share of supply test (in relation to EPRs and LIMS) are met by the proposed iSOFT/Torex merger.

(2) THE OFT STAGE

Bringing the matter before the OFT

67. If a relevant merger situation has been created (section 22), or if arrangements are in progress or contemplation which, if carried into effect, will result in the creation of a relevant merger situation (section 33(1)(a)), the matter first comes before the OFT.

68. There is a statutory but voluntary pre-notification procedure, which provides that a public merger may be considered by the OFT within 20 working days, with a maximum extension of 10 working days. Subject to some exceptions, a merger is automatically cleared if no reference is made at the end of that period: sections 96 to 102 of the Act. However, companies and their advisers often prefer to advise the OFT of an anticipated or completed merger by means of an informal submission. The document *Mergers: procedural guidance* published by the OFT in May 2003 (OFT 526) states at paragraph

3.26 that, once full information has been provided in the context of an informal submission,

> "companies can generally expect a decision within 40 working days".

The statutory framework governing the OFT: section 33

69. The statutory framework in which the OFT is required to consider the merger is set out in section 22 of the Act, as regards completed mergers, and in section 33, as regards anticipated mergers. Since most mergers which come before the OFT are anticipated, rather than completed, mergers, as indeed is the present case, it is convenient to describe the OFT's duties by reference to anticipated mergers under section 33. The provisions relating to completed mergers under section 22 are virtually identical.

70. Section 33(1) and (2) provide:

> "(1) The OFT shall, subject to subsections (2) and (3), make a reference to the Commission if the OFT believes that it is or may be the case that-
>
> (a) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and
>
> (b) the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.
>
> (2) The OFT may decide not to make a reference under this section if it believes that-
>
> (a) the market concerned is not, or the markets concerned are not, of sufficient importance to justify the making of a reference to the Commission;
>
> (b) the arrangements concerned are not sufficiently far advanced, or are not sufficiently likely to proceed, to justify the making of a reference to the Commission; or
>
> (c) any relevant customer benefits in relation to the creation of the relevant merger situation concerned outweigh the substantial lessening of competition concerned and any adverse effects of the substantial lessening of competition concerned."

71. "Relevant customer benefits" are defined by section 30 (1) as follows:

"(1) For the purposes of this Part a benefit is a relevant customer benefit if-

(a) it is a benefit to relevant customers in the form of-

(i) lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom (whether or not the market or markets in which the substantial lessening of competition concerned has, or may have, occurred or (as the case may be) may occur; or

(ii) greater innovation in relation to such goods or services".

72. In the present case, no reliance is placed on any of the matters referred to in section 33(2). In particular, the decision does not address the question whether there are or may be any relevant customer benefits resulting from the merger (i.e. lower prices, higher quality, greater choice or greater innovation) which outweigh any substantial lessening of competition, or any adverse effects flowing therefrom, as envisaged by section 33(2)(c). Nor is it suggested that the market or markets concerned are not of sufficient importance to justify making a reference to the Commission under section 32(2)(a).

The OFT as a first screen

73. At paragraph 3.2 of its publication *Mergers: Substantive assessment guidance*, also published in May 2003 (OFT 516), the OFT describes its role as follows:

"The test for reference will be met if the OFT has a reasonably held belief that, on the basis of the evidence available to it, there is at least a significant prospect that a merger may be expected to lessen competition substantially. The OFT considers that this threshold is the same as that against which FTA reference advices were prepared. It differs from that used by the CC in its merger enquiries, reflecting the fact that the OFT is a first-phase screen while the CC is determinative: hence, the test for making a merger reference is lower than the CC's test for deciding that a merger may be expected to substantially lessen competition."

74. As we understand it, around 80 per cent of mergers referred to the OFT do not raise competition issues (paragraph 5.16 of OFT 526, cited above). At paragraph 2.5 of OFT 526, the OFT states:

> "While most mergers will raise no issues relating to a substantial lessening of competition, the merger control process is designed to allow the OFT to identify those where such issues **may** arise, so that they may be examined in greater detail through a reference to the CC."

The OFT's procedure in merger cases

75. Section 103 of the Act requires the OFT to have regard to the need to make a decision on whether to make a reference under section 22 or 33 as soon as reasonably practicable. The effect of section 104 is that, if it is proposing to make a reference under section 22 or 33, or accept undertakings under section 73 (see below), the OFT must consult the persons controlling the enterprises concerned, giving the OFT's reasons for the proposed decision, so far as practicable.

76. The OFT's procedure in merger cases is described in Part 5 of OFT 516. Once the OFT is seized of the matter, it may ask the parties for more information. Comments are solicited from interested third parties via the Regulatory News Service and the OFT's website (see also section 105 of the Act). The OFT may make specific enquiries of customers, competitors, interested Government Departments and others. Where adverse views raise significant competition issues, the parties preparing the merger are told of the nature of the concerns expressed (but not the identity of the persons concerned) and are given an opportunity to respond to them.

77. According to paragraphs 5.16 to 5.21 of OFT 526, headed "the Decision Making Process", the procedure thereafter is as follows:

> "In the majority of cases (roughly 80 per cent in any one year) that raise no serious competition issues, the decision to clear the merger will be made within the Branch. The Branch, acting on behalf of the OFT, will prepare a clearance decision paper or – where the request has been made under the confidential guidance procedure – an 'unlikely to be referred' decision paper and circulate it to an OFT review group which includes the Chairman, Executive Director, Director Competition Enforcement Division, a representative of

Competition Policy Co-ordination Branch, OFT Chief Economist or a deputy, a representative of OFT Legal Division, representatives of the Branch and the director of the relevant OFT sectoral branch if appropriate. Members of this review group that disagree with the decision or think that the case raises issues that require further discussion can request that a case review meeting be held. If there are no calls for a case review meeting, the decision will be finalised and announced (in public cases) and relayed to the parties or their advisers. In public cases, the text of the decision will subsequently be published on the OFT's website (see paragraph 5.22).

In cases that raise more complex or material competition issues, a different process will be followed. Once a case has been so identified, the parties will be advised and invited to attend an issues meeting with the Branch. To help the parties prepare for this meeting, the case officer will send an 'issues' letter to the parties. This will set out the core arguments and evidence in the case. It is intended that 'issues' letters will set out the arguments in favour of a reference so that parties have an opportunity to respond to the reasons why a reference, if it follows, has been made. That is not to say that a reference will follow in all cases in which an 'issues' letter is sent.

Parties to a merger may either comment on the 'issues' letter in writing, or orally at an issues meeting, or both. The OFT envisages an interval of around two to three days between receipt of the 'issues' letter and the date of the issues meeting to allow parties time to prepare. Issues meetings will generally be chaired by the Director of the Branch or a senior principal case officer.

Following the issues meeting, an outline decision that summarises the arguments for and against reference will be circulated, together with the Branch's internal economic analysis, issues letter and any written response to the issues letter from the parties, to the members of the review group in advance of a case review meeting. The outline decision may – though will not always – set out the case team's recommendations as to reference. This meeting will usually be chaired by the Director Competition Enforcement Division, and attended by the Branch case team, the Director of the Branch or a senior principal case officer, and the senior mergers economist. It may also be attended by OFT Board Members, a representative of Competition Policy Co-ordination Branch, the OFT Chief Economist or a deputy, colleagues from the relevant OFT sectoral branch if appropriate, and a representative from the OFT's Legal Division. Where a merger in a regulated industry is being considered, a representative of the relevant regulator may also be invited to attend.

To enhance the level of scrutiny to which the outline is subjected, someone in the review group will be charged specifically with acting as 'devil's advocate' for any case team recommendation.

> Following the case review meeting there will be a separate decision meeting, chaired by the decision maker, who may be the Chairman, another member of the Board, or a duly authorised officer acting on behalf of the OFT, and attended by the chair of the case review meeting, the attendees from the Branch, the 'devil's advocate' and others from the case review meeting as appropriate where this would enhance the level of debate and scrutiny at the decision meeting. At this meeting, the decision maker will hear a report on the debate, including any specific criticisms made of the outline decision, and will be able to determine whether he or she agrees with the outline decision. (Where time is pressing or the case particularly complex, the decision maker may also chair the case review meeting.)
>
> The case officer will then draft the decision in accordance with the decision maker's guidance. The final version will be submitted for signature and the decision announced (in public cases) and communicated to the parties or their advisers. In public cases the text of the decision will subsequently be published on the OFT's website, subject to excision of business secrets (see below)."

The duty to give reasons

78. Under section 107(1) of the Act the OFT shall publish any reference made by it under section 22 or 33, or any decision made by it not to make such a reference. By virtue of section 107(4), the OFT must publish the reasons for its decision.

The acceptance of undertakings

79. Section 73 of the Act applies where the OFT considers that it is under a duty to make a reference under section 22 or 33. Under section 73(1) the OFT may accept undertakings in lieu of making a reference. Section 73(2) to (4) provide:

> "(2) The OFT may, instead of making such a reference and for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has or may have resulted from it or may be expected to result from it, accept from such of the parties concerned as it considers appropriate undertakings to take such action as it considers appropriate.
>
> (3) In proceeding under subsection (2), the OFT shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it.

(4) In proceeding under subsection (2), the OFT may, in particular, have regard to the effect of any action on any relevant customer benefits in relation to the creation of the relevant merger situation concerned."

(3) THE COMPETITION COMMISSION

80. If a reference is made by the OFT under section 22 or section 33 the duty of the Commission is set out in section 35 (completed mergers) and section 36 (anticipated mergers).

Section 36 of the Act

81. Section 36 provides, as far as relevant:

"(1) Subject to subsections (5) and (6) and section 127(3), the Commission shall, on a reference under section 33, decide the following questions-

(a) whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and

(b) if so, whether the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.

(2) The Commission shall, if it has decided on a reference under section 33 that there is an anti-competitive outcome (within the meaning given by section 35(2)(b)), decide the following additional questions-

(a) whether action should be taken by it under section 41(2) for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which may be expected to result from the substantial lessening of competition;

(b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which may be expected to result from the substantial lessening of competition; and

(c) in either case, if action should be taken, what action should be

taken and what is to be remedied, mitigated or prevented.

(3) In deciding the questions mentioned in subsection (2) the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it.

(4) In deciding the questions mentioned in subsection (2) the Commission may, in particular, have regard to the effect of any action on any relevant customer benefits in relation to the creation of the relevant merger situation concerned."

The constitution of the Commission

82. The constitution of the Commission is to be found in Schedule 7 of the Competition Act 1998. The Commission is composed of a number of distinguished persons with expertise in economics, law, accounting, finance, business and other relevant disciplines. A merger reference inquiry is carried out by a group of members (normally three or five) appointed by the Chairman, and chaired either by the Chairman or one of the Commission's deputy chairmen. The group is supported by the Commission's staff who have experience in carrying out inquiries of this kind. The effect of paragraph 20 of Schedule 7 to the Competition Act 1998, as inserted by Schedule 11 of the Act, is that a decision on a merger reference that there is an anti-competitive outcome for the purposes of section 35 or section 36 must be reached by at least two thirds of the members of the group.

The Commission's procedure

83. Schedule 7A of the Competition Act 1998, as inserted by Schedule 12 of the Act, provides, among other things, for rules to be made as to the conduct of merger and other inquiries carried out by the Commission: see *Competition Commission: Rules of Procedure* published in June 2003. Those rules provide for the following stages of the Commission investigation, namely: (a) gathering information; (b) issuing questionnaires; (c) hearing of witnesses; (d) verifying information; (e) providing a statement of issues; (f) considering responses to a statement of issues; (g) notifying provisional findings; (h) notifying and considering possible remedies; (i) considering exclusions from disclosure; and (j) publishing reports. However, these stages need not

necessarily take place within the administrative timetable in the order in which they are mentioned above.

84. In practice, the Commission holds hearings with all the main parties, and interested third parties. The Commission may decide whether its hearings should be in public, and whether cross-examination should be permitted (paragraph 19 of Schedule 7 of the Competition Act 1998), although so far the latter has been rare. Provisional findings by the Commission are published, as are any proposals as to remedies.

The Commission's report

85. By virtue of section 38 of the Act:

> " (1) The Commission shall prepare and publish a report on a reference under section 22 or 33 within the period permitted by section 39.
>
> (2) The report shall, in particular, contain-
>
> > (a) the decisions of the Commission on the questions which it is required to answer by virtue of section 35 or (as the case may be) 36;
> >
> > (b) its reasons for its decisions; and
> >
> > (c) such information as the Commission considers appropriate for facilitating a proper understanding of those questions and of its reasons for its decisions.
>
> (3) The Commission shall carry out such investigations as it considers appropriate for the purposes of preparing a report under this section.
>
> (4) The Commission shall, at the same time as a report prepared under this section is published, give it to the OFT."

86. In practice, the Commission's report contains a full description of the factual background relevant to the merger, including notably the markets concerned, the evidence that has been given, the identity and views of all interested parties, and detailed reasons for the Commission's conclusions.

87. Pursuant to section 39 of the Act, the Commission's report must be completed and published within 24 weeks beginning with the date of the reference, subject to the

possibility of one extension of up to 8 weeks under section 39(3) where there are special reasons.

IV THE PROCEDURE FOLLOWED BY THE OFT IN THIS CASE

1 August to 30 September 2003

88. In this case the merger was notified to the OFT with a lengthy supporting memorandum prepared by Ashurst Morris Crisp on behalf of iSOFT on 1 August 2003. An invitation to third parties to comment was issued on 5 August 2003. IBA lodged a complaint on 15 August 2003. The OFT put various questions to iSOFT/Torex on 27 August 2003, and held a meeting with iSOFT/Torex on 28 August. The OFT held meetings with IBA on 29 August and 19 September.

The issues letter of 30 September

89. On 30 September the OFT sent an issues letter to iSOFT/Torex (but not to IBA or third parties) in the following terms:

> "**Main background assumptions:**
>
> Electronic patient records (EPRs) may be simple (level 1) patient administration systems (PAS) which are systems to which the departmental modules are connected, usually by means of an interface engine, or they may have been built as an integrated system, a level 6 EPR, which includes departmental modules and a Clinical Information System. The degree of complexity ranges from levels 1 to 6, with the NHS focused on implementing level 3 EPRs in the short term.
>
> Laboratory Information Management Systems (LIMS) consist of a patient related database that can cover all diagnostic laboratory disciplines. Its main function is the management of samples and analysis.
>
> The argument has been made that supply side substitutability is largely a question of programming skills. However, this is undermined by the fact that companies are highly specialised in a particular facet of programming and acquisition is used in the industry as a means of expansion.

Key Potential Competition Concerns

The following are hypothesis at this stage, which we are still evaluating in the light of the evidence put to us by the parties and third parties. They do not necessarily represent OFT's final view on these issues.

1. The merger will result in loss of direct bidding competition between iSOFT and Torex, in particular for EPR systems and LIMS, as well as other departmental systems.

   The pattern of OJEC bidding competition shows iSOFT and Torex have bid against each other on 21 of 39 EPR contracts and 16 of 31 LIMS contracts since 1998, suggesting they are regular and direct competitors.

2. The parties maintain that since Torex has not won an OJEC contract in the last 3 years it is no longer an effective competitor or constraint on iSOFT – however Torex has strengthened its portfolio of products by a number of acquisitions including for example Inhealth when it acquired the rights to IBA PAS/EPR systems. The up-dating and extension of its product range together with its strong position of the installed base suggests it is well placed to actively compete and mitigates against its lack of success in winning recent contracts.

   Competition takes place in bidding and being short-listed, not just in winning the contract.

3. iSOFT and Torex will hold a combined share of supply in excess of 50% of the installed base of both EPR/PAS systems, and LIMS systems, showing that on a historic basis they are the two leading suppliers in the UK. This will result in a significant structural change in the market where the presence/size of the next competitor is significantly smaller, and likely to result in a substantial lessening of competition.

   The merger will give the combined company significant market coverage and potential incumbency advantages.

4. There appear to be high barriers to entry – systems are UK specific with high conversion costs for systems developed overseas. The broad portfolio of products offered by the merged company may also raise costs and deter potential entry.

5. It is not clear whether either Cerner or IDX (or other providers) are capable of providing a significant competitive constraint to the merged business given their current low level of success in winning contracts.

6. Hospitals buying IT systems on an individual basis are unlikely to have buyer power. The LSP programme will (for England) increase the size of contracts although the requirement on the consortia to specify a preferred partner may make it difficult for the LSP to exercise any buyer power (particularly if competing suppliers exit the market or do not continue to invest in product development).

7. Portfolio power – the merged company will be able to offer a broad portfolio of "leading" products/modules and may encourage more "one-stop" shopping by NHS hospitals. This may also have the effect of preventing smaller specialist providers of individual systems from competing and, in effect, freezing them out.

8. The likely effect of the NPfIT in terms of future changes and timing is uncertain. The proposed system of LSPs cover only England. This will not directly impact on procurement in Wales, Scotland and Northern Ireland, and in addition hospitals in England will continue to be able to purchase IT systems outside the NPfIT programme. It is not appropriate therefore to judge the effects of the merger solely in relation to the proposed NPfIT programme.

9. The parties are two key suppliers of PAS/EPR and LIMS system to the NHS. As such, they have a good understanding of existing IT systems and are well placed to deliver new and improved systems to meet increased standards. Absent the merger, the parties will continue to invest and innovate and develop new products to compete with each other. The merger reduces such incentives.

The parties are invited to put forward any evidence they wish to submit on the above issues and to consider appropriate undertakings to remedy the potential competition concerns outlined in the above in lieu of reference to the Competition Commission."

90. IBA had not seen the issues letter prior to these proceedings.

Early October 2003

91. The OFT held a meeting with iSOFT/Torex to discuss the issues letter on 2 October 2003.

92. A detailed submission was made by Ashurst Morris Crisp on behalf of iSOFT/Torex on 6 October arguing that there would be no substantial lessening of competition. Certain questions were also put by the OFT to IBA and answered by the latter on 7 October 2003.

93. An internal OFT case review meeting was held on 8 October, and later that day, according to Mr Gaddes' statement, filed on behalf of the OFT, a decision meeting was held at which the Chairman of the OFT gave guidance as to the drafting of the decision that the merger should not be referred to the Commission.

The last month

94. The drafting of the decision seems to have taken a further month, apparently following some difficulties with the availability of staff. The Chairman of the OFT approved the decision on 6 November 2003. It was notified to IBA over a week later, on 14 November 2003.

V THE DECISION

95. The contested decision is short enough to be set out in extenso from paragraph 5 onwards:

> "**BACKGROUND**
>
> **Proposed changes to the procurement of IT Systems in England**
>
> 5. Until now, hospitals and/or their Strategic Health Authorities have purchased IT systems on an individual basis as and when required with the effect that the NHS has many different installed legacy IT systems, creating interface and interoperability issues.

6. Following a detailed review of its IT needs, the Department of Health proposed a new IT regime (see note 1) to update IT systems in England. The National Programme for IT (NPfIT) will allow for cross-referencing of patients' records by creating a complete electronic medical record for each patient across all NHS providers in England. National projects will create a "national spine" of archived records and introduce an electronic (e-booking) system for appointments.

7. Five regions have been created in England, with a single Local Service Provider (LSP) to be appointed as project manager to oversee the implementation of the NPfIT in each region. Following a competitive tender, the DoH will shortly announce the appointment of the five LSPs and their preferred suppliers, who will be responsible for developing and managing the process of transition from legacy systems to the new systems. The appointment of LSPs will result in a fundamental change to the procurement process, significantly reducing the number of contracts available in England (but increasing their size) with the effect of increasing the buyer power of the LSPs (and thus the NHS).

RELEVANT MARKET

Product market

8. The parties overlap in the supply of IT software systems for use in hospitals. The IT requirements of each hospital will vary significantly but the parties are key suppliers to the secondary healthcare sector of Electronic Patient Records (EPRs) and Laboratory Information Management Systems (LIMS).

9. The sophistication of EPRs varies considerably, with the simplest systems recording demographic details of each patient on a Patient Administration System (PAS) and the more sophisticated systems incorporating clinical procedures and high-tech processes. LIMS are designed to prompt clinical processes in the face of specific diagnoses and ensure best practice by clinicians in the laboratory. EPRs can be developed on the back of the PAS, becoming more sophisticated by incorporating departmental modules (such as LIMS) as required, or they can be developed as integrated systems in which modules are "bundled" into the whole but can be replaced by alternative systems if these are thought to suit the hospital's needs better.

10. Interoperability is a key requirement of the NPfIT – the NHS has stated that it wants IT systems to be user-friendly with common databases and the same "look and feel" so that users do not need to be retrained when they move to different hospitals and/or departments. The functionality of each programme is specific to a particular department and this means that there is no demand side substitutability between different programmes.

11. The parties have argued that IT software is characterised by a high degree of supply side substitutability: while the parties acknowledge that different programming codes may be used in different applications, they consider that the same equipment, skills and know-how are used to develop and supply a wide range of IT products and services and that, where particular knowledge is required, it can be acquired by secondment or sub-contracting. This argument is undermined by the fact that companies are highly specialised in a particular facet of programming and, historically, acquisition appears to have been a favoured method of acquiring access to specialist modules.

Geographic market

12. IT software for the healthcare sector can be developed anywhere in the world – iSOFT employs programmers in India for example. UK public sector contracts in excess of £100,000 must be advertised in the Official Journal of the European Communities (OJEC) and this will attract bids from worldwide competitors, who will adapt their products to meet local specifications and requirements. While healthcare IT requirements vary nationally (and indeed regionally within the UK), such variations appear to be minor and the key requirement in implementing a new system appears to be a local presence. (Overseas bidders for LSP partnerships have recognised this and engaged in a process of recruitment in the UK.)

13. The Office takes the view that the appropriate frame of reference in this case appears to be the supply of software systems to the relevant hospital users within the UK.

COMPETITION ASSESSMENT

14. The main suppliers of secondary healthcare software currently installed in UK hospitals are iSOFT, Torex/IBA, McKesson and Siemens. The parties' share of installed (“legacy”) systems is significant, with the parties supplying 44 per cent of EPRs and 56 per cent of LIMS to the UK public sector. They are key suppliers in each country of the UK, particularly in the supply of LIMS (where in Scotland and Wales, their legacy systems will account for 100 per cent of the installed base). The pace of innovation in healthcare IT systems and changes to the procurement process suggest, however, that the installed base is not the best guide as to whether the parties will have market power in the future.

15. Since most public sector contracts are awarded following a competitive tender, a better measure of potential market power may be the parties' success in winning competitive bids in the past few years. While the existence of an installed base may give incumbent bidders reputational or informational advantages in bidding for new contracts, if the system required is substantially different from existing systems these advantages are unlikely to be significant. The presence of other bidders should act as a competitive constraint on the parties as they bid for new

contracts, requiring them to put forward innovative solutions at competitive prices.

The effect of the NPfIT

16. The NPfIT has attracted bids from two major US players, Cerner and IDX, who have adapted their US EPRs for use in the UK and who have been selected as preferred sub-contractors (by 3 and 2 respectively) of the 10 short-listed LSPs. The effect of this selection process, which has already taken place, will be to displace other suppliers of EPR systems who currently hold a share of the installed base, from the future NPfIT. Within England, it is uncertain whether NHS Trusts will have the funds or autonomy to be able to purchase IT software and systems independently of the NPfIT. Any such purchases are likely to be of limited value and may have to be funded directly by the NHS Trust so that there is unlikely to be sufficient incentive to behave autonomously outside of the NPfIT.

17. iSOFT's EPR system has been selected by 5 of the 10 short-listed LSPs, unlike Torex's which has not been selected by any of the LSPs. iSOFT considers that this is due to its superior product, reflecting its investment in product development to meet the needs of the NPfIT. The parties consider that Torex is no longer a viable competitor in the supply of PAS/EPR systems as it has neither developed nor innovated its existing software and, as a result, has not won any new contracts in the past three years nor been selected as a preferred supplier/sub-contractor for any of the LSPs for the supply of EPR systems. A review of information available on OJEC decisions for the past three years shows that Torex has, in fact, been short-listed on a number of occasions and was selected as the preferred supplier on three occasions but these projects were cancelled because they were incompatible with the NPfIT.

18. The parties consider that Torex's strength lies in its implementation and services capabilities while iSOFT's lie in product development, and the rationale for the merger is to bring together the parties' complementary strengths. As noted above, EPRs can be built up module by module or can be developed as an integrated system. The two US companies, Cerner and IDX, offer an integrated system so that any LSP that has chosen these companies as its preferred sub-contractor, may be less inclined to invite tenders for LIMS or other departmental systems. iSOFT has built up its system on a modular basis so that its LSP partners may invite bids for LIMS projects. The parties argue, once again, that Torex's LIMS module is unlikely to be selected because it has not been developed to meet the requirements of the NPfIT. They point to OJEC tender data for the past few years which reveal that Torex has not been successful in winning recent LIMS contracts.

Barriers to entry and expansion

19. The increasing sophistication of healthcare IT systems and the need to meet the particular requirements of the NHS would suggest that barriers to entry are likely to be high because of the cost of developing systems and bidding for contracts. However, the policy focus on NHS IT modernisation in England means that HM Treasury has made available significant funding to spend on updating IT systems and this has attracted bids from major US suppliers keen to win contracts with the LSPs. Smaller companies also have opportunities to enter as suppliers (either of systems or technical support) to the nominated sub-contractors.

20. The presence of international EPR suppliers in England is likely to have a knock-on effect on competition elsewhere in the UK. Annual IT expenditure in England is worth £850 million a year (with a further £2.3 billion allocated under the NPfIT in the next three years). In each of Northern Ireland and Wales, annual expenditure is worth some £25 million while in Scotland it is worth some £125 million. Smaller scale contracts elsewhere in the UK may allow more opportunity for smaller suppliers to enter the market with innovative solutions.

Buyer power

21. Under the NPfIT, five LSPs (rather then 177 NHS Trusts) will purchase IT requirements in England and this is likely to increase their buyer power, so long as there are alternative competing suppliers of EPRs and LIMS. EPR suppliers will have competed actively against each other to win preferred supplier status with the LSPs and this will have given the LSPs buyer power in deciding who to appoint.

22. The LSP contracts will be in place until 2010. The DoH, in appointing LSPs, has given them incentives to reduce costs and control risks while EPR and LIMS suppliers who do not meet their contractual obligations to the LSPs can be replaced. The effect of the NPfIT may be that some suppliers will exit the market – there is already evidence that this is occurring as companies lay off staff. However, this is not an unnatural consequence of competition for the market, and it seems likely that as contracts come up for renewal, this may provide entry opportunities for other providers of sufficient scale.

23. Elsewhere in the UK, contracts are largely awarded on a national basis, which raises the prospect that awarding bodies are likely to possess and exercise buyer power. Again, this requires that there are alternative suppliers of EPRs and LIMS.

Vertical issues

24. There appear to be no vertical concerns raised by this merger. One issue (mentioned in more detail in the third party views below) over the

distribution of competitor products is best addressed as part of the overall competition assessment.

THIRD PARTY VIEWS

25. A number of third parties were very concerned. They considered the merger would substantially lessen competition because the parties' incumbency (providing knowledge of existing systems) and increased portfolio would make it very difficult for competitors to compete with the merged firm and limit the choices available to purchasers. LIMS suppliers were particularly concerned that the EPR suppliers would be able to specify (or bundle) their departmental module in preference to independent suppliers.

26. One concerned competitor was IBA, who as noted at paragraph 1 above are also active in IT solutions to the healthcare industry. IBA believes that the proposed merger would be anti-competitive due to the combined group's high market share in the sector. IBA also allege that the close links between IBA and Torex resulting from the InHealth acquisition means that IBA would be unable to act as an effective constraint on the merged group and that the merged group would concentrate on sales of their own products to the detriment of IBA's.

27. Several hospitals responded to the Office's Invitation to Comment, expressing their concern that the merger would lead the parties to abandon some of their systems and this would increase hospitals' costs in migrating to new systems or decrease the usefulness of the system (if it was not well supported). This was a particular concern for hospitals which had recently purchased systems from IBA and Torex. This appears to be a contractual issue between hospitals and the parties rather than a competition concern. Several hospitals commented that the merger was consistent with the aims of the NPfIT and would be of benefit in terms of system development.

28. The relevant national health authorities outside England were generally unconcerned. While acknowledging that the parties would 'own' a significant proportion of the legacy contracts, they considered that there was sufficient competition (see note 2). This view was not necessarily shared by the Northern Ireland authority who felt that the merger could potentially lead to a loss of competition for contracts.

ASSESSMENT

29. In terms of their legacy contracts to the UK public sector, iSOFT and Torex are clearly the two leading suppliers of IT software to the healthcare sector in the UK. In a bidding market, competition is for the market rather than in the market so that the competitive advantage acquired from the legacy base is unlikely to be strong, especially where a new procurement strategy is being introduced.

30. The NPfIT has created five LSP regions, and bidders for the five regions have pre-selected their preferred sub-contractors. Torex's products have not been selected (although in line with its claim that its strengths lie in this area it has been selected as a service provider providing support and installation services) (see note 3). Absent the merger, this means that Torex is likely to face significantly reduced opportunities to sell its products (or those of IBA) to hospital users in England. Expenditure elsewhere in the UK is significantly lower and may not justify the costs involved in updating Torex's existing portfolio of products.

31. The NPfIT is a high profile strategy, supported by government, which gives effect to a commitment to increase spending on updating IT healthcare systems in England. The increase in funding has attracted international LSP bids from well known and established global companies and has allowed for partnerships between the LSPs and US IT healthcare providers, Cerner and IDX, as well as iSOFT. The presence of these international competitors makes it likely that competition for future contracts will remain active. There is a reasonable prospect that international competitors with a UK base will bid for contracts in the regions with the likely effect of increased competition for contracts in Northern Ireland, Scotland and Wales.

CONCLUSION

32. iSOFT and Torex have been the two leading suppliers of IT software to the healthcare sector in the UK. While a strong legacy base may give the parties a large presence it is unlikely, in itself, to confer significant market power in view of the changes being brought about by the NPfIT. Such a fundamental change has altered the future competitive landscape with the effect that competitive constraints must be viewed under a new scenario.

33. For these reasons, the OFT does not believe that it is or may be the case that, if carried into effect, the creation of this relevant merger situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods and services.

DECISION

34. This merger will therefore not be referred to the Competition Commission under section 33(1) of the Act.

NOTES

1. Outlined in the Department of Health's “Delivering 21st Century IT Support for the NHS”.
2. Text removed at third party request for reasons of commercial confidentiality.

3. Torex has requested that it is noted that in the primary care sector, Torex's IT software solutions for use by GPs in the primary sector have been accredited by LSPs under the NPfIT programme."

VI THE ARGUMENTS OF THE PARTIES

96. In addition to the material lodged and submissions made by the parties, by letter of 27 November the Tribunal invited the parties to address the question of the proper construction of section 33(1) of the Act, and the appropriate balance between the roles of the OFT and the Commission.

(1) IBA

97. In its notice of application IBA seeks to review the decision of the OFT on two principal grounds: first, that the OFT made material errors of law and fact in concluding that there was insufficient likelihood of a substantial lessening of competition and therefore that the OFT had no duty to refer the anticipated merger under section 33; and secondly that the OFT made material procedural errors by failing to conduct an appropriate or adequate investigation before adopting the Decision.

98. In support of its first ground of review, IBA submits that the OFT failed to apply its own guidance to the circumstances of this case and that had it done so the only reasonable conclusion that can be drawn is that the anticipated merger may be expected to lead to a substantial lessening of competition. Were the merger to be permitted there would be insufficient competitive constraints on the merged entity in the relevant market.

99. IBA points out that the market is nowhere clearly defined in the decision. In any event, a number of relevant factors arise in this case which make it likely that "non-coordinated anti-competitive effects" would be likely to arise if the merger were permitted.

100. First, the merger would lead to a substantial increase in concentration in the relevant market as measured by the Herfindahl-Hirschmann Index ("HHI"). In OFT 516 at

paragraph 4.3 the OFT states that it is likely to regard an HHI of 1,800 as "highly concentrated" and that an increase of 50 may give rise to potential competition concerns. In this case the HHI in the relevant market would increase as a result of the merger by 1,000 to 2,400.

101. Secondly, the merged firm would have a 45 per cent share of the relevant market and that only one other firm, McKesson with 14.5 per cent, has a market share greater than 10 per cent of the market. Although the concept of a substantial lessening of competition is not dependent on demonstrating the creation or enhancement of a dominant position, the EC Commission has nevertheless found an undertaking with a market share of 39.7 per cent to be dominant when 34 percentage points ahead of its nearest rival: see *BA/Virgin* OJ 2000 L 30/1. In this case the merged entity's market share would be 30 percentage points ahead of its nearest rival, McKesson.

102. Thirdly the merger would eliminate the long-standing rivalry between iSoft and Torex which is a vital factor in maintaining competition in the relevant market.

103. Fourthly, IBA's ability to compete with the merged firm would be hampered because its products, which directly compete with those of iSOFT, are distributed in the UK by Torex. iSOFT has already indicated that the merged undertaking will choose to supply iSOFT products in preference to those of IBA.

104. Fifthly, IBA points out that Torex owns the UK rights to ibaPAS which is "the backbone of IBA's healthcare IT solutions." This, according to IBA, would allow the merged entity to prevent IBA from using ibaPAS to compete with it.

105. Sixthly, IBA draws attention to the fact that the OFT itself accepted in the decision that there are high entry barriers to the relevant market due to the cost of developing healthcare IT systems and bidding for contracts.

106. Seventhly, the OFT also accepted in its decision that the merging parties would have a combined UK share of installed systems of 44 per cent in relation to EPRs and 56 per cent in respect of LIMS and that in each country of the United Kingdom they are the

key suppliers particularly in relation to the supply of LIMS where in Scotland and Wales they account for 100 per cent of installed systems.

107. IBA submits that ordinarily this combination of factors would inevitably lead to the conclusion that there was, or was highly likely to be, a substantial lessening of competition which merited a full investigation by the Competition Commission. IBA does not understand the OFT to contend to the contrary.

108. However, the reason that the OFT did not reach the conclusion that the merger should be referred was because it considered that in a bidding market the merged entity's competitive advantage, based on its existing share of the market, was unlikely to be strong especially where a new procurement strategy is being introduced such as NPfIT. The presence of other bidders should act, according to the OFT, as a competitive constraint on the parties. However, according to IBA, this analysis cannot be applied to the circumstances of this case.

109. First, the two US suppliers, Cerner and IDX referred to in the decision have been attempting to enter the United Kingdom market for 10 years with relatively little success. Secondly, the smaller companies referred to in the decision are not identified. Thirdly, no explanation is given in the decision as to how these smaller companies would overcome iSOFT/Torex's reputational or informational advantages in bidding for new contracts, or how they would overcome the high barriers to entry and expansion identified in the decision. Similar objections arise in relation to the "smaller suppliers … with innovative solutions" referred to in the decision in relation to non-NPfIT contracts, which will still account for the majority of NHS IT expenditure during phase 1 of NPfIT, and where iSOFT/Torex's reputational or informational advantages will be particularly important in relation to competition to upgrade existing systems.

110. IBA submits that given the OFT's role as "a first-phase screen" the only reasonable conclusion that the OFT could have drawn was that it was under a duty to make a reference under section 33 of the Act.

111. IBA's second principal ground of review is that the OFT's conduct of the investigation was procedurally flawed.

112. According to IBA, the OFT: (i) did not examine the link between IBA and Torex; (ii) did not examine reasons why Torex did not win bids, but simply accepted iSOFT and Torex's submissions; (iii) did not examine the nature of the non-NPfIT funded market; (iv) did not examine the planned development of the NPfIT; (v) did not consider evidence as to the likely obstacles to the full development of NPfIT. The OFT's failure to carry out its duty to refer the proposed merger under section 33 of the Act has precluded the Commission from carrying out a full investigation into these matters.

113. In any event, IBA submits that the OFT's own investigation under section 33 of the Act was flawed by virtue of its failure to explore significant matters such as the relationship between IBA and Torex. Nor has the OFT investigated or directed its mind to the question whether iSOFT and Torex's bidding strategy was influenced by their plan to merge and/or that Torex's failure to secure PAP status was affected by the public announcement of the planned merger.

114. Furthermore the decision is vitiated by factual errors, in particular the OFT's acceptance that Torex was not an effective competitor to iSOFT because its products had not been selected by customers. In this regard IBA relies on the matters contained in the statements of Mr Wallhouse and Mr Cohen.

115. In its skeleton argument and oral submissions, IBA emphasised the findings in the decision about market shares (paragraph 14) the advantages of legacy contracts (paragraph 15) the lack of demand side substitutability (paragraph 10), limited supply side substitutability (paragraph 11) and high barriers to entry (paragraph 19). IBA additionally referred to paragraph 3.4 of the Competition Commission's *Guidelines on Merger references:*

> "In its analysis of the effect of the merger the Commission will have regard to the combined market shares of the merging parties. There is no particular market share threshold that will denote the likelihood of the Commission deciding that the merger has resulted in or is expected to result in an SLC. However, a combined market share of 25 per cent or above (not to be confused with the jurisdictional share of supply test) would normally be sufficient to raise potential concerns regarding the effect of the merger on competition. Mergers which result in a market share below 25 per cent are less likely to raise such concerns although the possibility, depending on how the market operates, cannot be ruled out."

116. IBA also alleged errors by the OFT as to (i) the installed base (legacy systems), (ii) buyer power under the NPfIT, (iii) impact outside the NPfIT, (iv) entry barriers, (v) the competitive position of Torex, (vi) the competitive position of Cerner and IDX, and (vii) the competitive position of IBA.

117. As to legacy systems, IBA argues that paragraphs 14 and 15 of the decision are contradictory, and that in any event paragraph 15 is mistaken in suggesting that new systems under the NPfIT will be "substantially different" as paragraph 15 states. The OFT has not investigated the position, and numerous extracts from the OBS and other material support the opposite view. It is not clear who the alternative suppliers will be in the future, other than the existing suppliers, among whom iSOFT/Torex will be dominant.

118. As to buyer power, that only exists as long as there are alternative suppliers (paragraphs 21 and 23 of the decision). The decision does not explain who the alternative suppliers, or potential new entrants, might be (paragraph 22). Paragraph 19 finds high barriers to entry. Neither Cerner nor IDX are yet effective players in the market. There is no evidence to support the OFT's speculative conclusions on future entry.

119. As regards the impact of the merger outside the sphere of the NPfIT, the NPfIT accounts for less than half of NHS spending in England, and no spending at all in Scotland, Wales or Northern Ireland. Even within the NPfIT, local funding and decision making is likely to be increasingly important, rather than the reverse. Paragraph 17 of Mr Gaddes' witness statement on behalf of the OFT as to why the non-NPfIT market was not considered in the decision, even if admissible, is contradictory and insufficient.

120. As to the scope of review by the Tribunal under section 120 of the Act, IBA relies on the summary contained in the Explanatory Notes to the Act, at paragraph 66, which essentially state that the grounds of review that would be applied by a court on an application for judicial view could include (i) that an error of law was made (ii) that there was a material procedural error (iii) that a material error as to the facts has been made and (iv) that there was some other material illegality (such as unreasonableness or

lack of proportionality). The Explanatory Note also states that judicial review evolves over time and that the approach in section 120(4) has been taken to ensure the grounds of review applied by the Tribunal mirror any such developments. IBA submits that grounds (i), (ii) and (iv) reflect the grounds of illegality, procedural impropriety and irrationality identified by Lord Diplock in *CCSU v Minister for the Civil Service* [1985] AC 374 at 410.

121. As to ground (iii), IBA submits that material error of fact is now accepted as a ground of judicial review in its own right. IBA relies on the observations of Lord Slynn in *R v Criminal Injuries Compensation Board ex parte A* [1999] 2 AC 330, at 344 to 345. According to IBA, review for error of fact is particularly appropriate for a tribunal such as the CAT which was described by the Court of Appeal as "expert and specialised" in *Napp v DGFT* [2002] EWCA Civ 796 [2002] UKCLR 726 at [34].

122. IBA submits that it is appropriate for the Tribunal to take into account the grounds of review applied by the European Court of Justice and Court of First Instance (CFI) and to apply a no less intense standard of scrutiny. The Tribunal is not bound to do so as a matter of law but to do otherwise would run the risk of divergence between EC and UK merger control, contrary to the duty of cooperation under Article 10 EC and the principle of undistorted competition in accordance with Article 3g EC: see Regulation 4064/89, recital 1. The intensity with which the CFI scrutinises questions of fact is demonstrated by Case T-5/02 *Tetra Laval v Commission* [2002] ECR II-4381 in which it held that the European Commission had failed to support its decision to block the relevant merger with "convincing evidence" and that the European Commission had failed to take into account or analyse evidence properly in its decision.

123. IBA also contends that the Tribunal should subject a decision not to review to more intensive standards of scrutiny on review than would apply to a decision to make a reference. A decision not to refer has "final and binding legal consequences" for both the parties and their competitors by virtue of the fact that the anticipated merger cannot be prohibited. A decision to refer, by contrast, does not have final legal consequences: it merely confers jurisdiction upon the Competition Commission to exercise its powers of investigation under the Act.

124. As to the construction of section 33(1) of the Act, IBA submits that the word "believes" in section 33(1) of the Act does not connote a definite decision. The double use of "may" in that section emphasises the "precautionary" nature of the test that the OFT must apply in deciding whether or not to refer a relevant merger situation to the Competition Commission. IBA submits that there will be cases where the issue of whether the OFT "believes" that a substantial lessening of competition may be expected from a particular merger situation is a relatively "black" or "white" one. However, where a case raised "grey" issues, then under section 33 the OFT was required to make a reference to the Commission. In order to succeed, all IBA has to do is to show that the case is "grey" rather than "white".

125. IBA contrasted the test that the OFT must apply under section 33(1) with that which the Competition Commission must apply under section 36 once a reference has been made. Under section 36 the Commission must "decide" on the balance of probabilities whether the relevant merger situation that has been referred to it may be expected to result in a substantial lessening of competition. For the OFT under section 33 a lesser standard of belief such as a "significant possibility" that the relevant merger situation may lead to a substantial lessening of competition is appropriate.

(2) THE OFT

126. The OFT argues that IBA's case is no more than an attempt to appeal against the OFT's assessment of the merger. That kind of appeal is not permissible within the limits of a judicial review under section 120. Similarly, IBA's argument based on "procedural error", is simply another way of saying that the OFT should have reached a different conclusion of fact, a matter which is outside the Tribunal's jurisdiction.

127. According to the OFT, IBA has to meet a high threshold. Whilst the OFT fully recognises that there may be room for differences of opinion as to whether there would be a substantial lessening of competition, IBA has to show that the decision was not one that the OFT *could* have reached.

128. The OFT emphasises that the principles that the Tribunal must apply on a review under section 120 "shall" be "the same" as those applied by a court on an application for

judicial review: section 120(4). The OFT contends that consequently the Tribunal must apply domestic law principles of judicial review and is not entitled to apply comparable or analogous, let alone different, principles. If European law applies a different standard of review to that which obtains under domestic law, it would be ultra vires for the Tribunal to apply the European standard.

129. The OFT submits that the principles applied by a domestic court on an application for judicial review are well known and reflected in the summary paragraph 66 of the Explanatory Notes to the Act. Particularly a court may overturn a decision where (i) it was taken on the basis of a misunderstanding of law; (ii) on the basis of a material procedural error; (iii) on the basis of a material error of fact which was "beyond the bounds of rationality" by reference to the observations of Lord Donaldson MR in *R v MMC, ex parte Argyll Group plc* [1986] 1 WLR 763 at 771; and (iv) where the decision was "unreasonable" in the sense that it was "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it". See also *R v Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696, at 764-5.

130. Despite the reference in paragraph 66 of the Explanatory Notes to the possibility that a decision could be overturned on the grounds of proportionality, the OFT submits that proportionality is not a ground of review absent issues raised by EC law or under the Human Rights Act 1998: see *R(Association of British Civilian Internees – Far Eastern Region) v Secretary of State for Defence* [2003] QB 1397, at [32] to [37].

131. The OFT emphasises that a review is not a process of appeal on the merits. Where Parliament has nominated a specialist decision-maker, the court should defer to his expert judgment: see Lightman J in *R v DG Telecommunications ex parte Cellcom* (unreported 26 November 1998), at paragraph 26 and the decision of Moses J in *R (on the application of London and Continental Stations and Property) v Rail Regulator* [2003] EWHC 2607 (Admin), 7 November 2003.

132. According to the OFT, the Tribunal should not apply a higher standard of review to a decision not to make a reference to the Competition Commission than a decision to make a reference. The standard of review should not depend on the outcome of the

decision. In any event "the final legal consequences" referred to by the applicants apply equally to a decision to refer a merger. A decision to make a reference involves an interference with the status quo and may be more intrusive than a decision not to refer. It is often the case that the making of a reference causes the parties to abandon the transaction.

133. The OFT also points out that a judicial review of a decision proceeds on the basis of its rationality in terms of the material that was before the decision maker when he took the decision. Consequently it is not open to the applicant to seek to introduce evidence which post-dates the decision, such as the evidence contained in the witness statement of Mr Wallhouse.

134. The OFT further submitted that the Tribunal should show due deference to its decision; although it is a specialist tribunal it should apply the same principles of judicial review as any other court. Reliance was placed, in particular, on paragraph 26 of the judgment of Lightman J in C*ellcom*, cited above; on paragraphs 27 to 34 of the judgment of Moses J in the *Rail Regulator* case; and on paragraph 41 of the judgment of the Court of Appeal in *Adan v Newham London Borough Council* [2002] 1 All ER 931. The test is whether the decision is so outrageous in its defiance of logic or accepted moral standards that no sensible person who applied his mind to the question could have arrived at it. The Tribunal should not ask itself whether the evidential basis of the decision was adequate, because that would amount to an appeal on the merits, and open the floodgates.

135. As to the construction of section 33(1), the OFT submitted that double use of the word "may" in that section did not lower the threshold of expectation that must be attained by the OFT before it must make a reference to the Competition Commission. According to the OFT the double use of the word "may" is simply a grammatical requirement flowing from the way in which the draftsman chose to structure the section by subdividing the requirements it contains into two subsections, 33(1)(a) and (b).

136. The OFT submits that on a purposive interpretation, section 33(1) should not be read as requiring the OFT to make references to the Competition Commission even where there is only a "fanciful" prospect that the relevant merger might result in a substantial

lessening of competition. This approach is reflected in the OFT's substantive assessment guidance which states at paragraph 3.2 that, "the test for reference will be met if the OFT has a reasonably held belief that, on the basis of the evidence available to it, there is at least a "significant prospect" that a merger may be expected to lessen competition substantially." The reference to the OFT acting as a "first-phase screen" reflects the fact that the OFT's role is to act as a filter to avoid the referral of cases which do not warrant a full investigation by the Competition Commission.

137. The OFT submits that it applied the correct test in its decision whether to make a reference, as can be seen by the reference in its decision to both section 33(1) and its guidance on the application of that section. Although the OFT accepts in paragraph 5.4 of its skeleton that there may be room for differences of opinion on the question of whether or not it should have referred the case to the Commission, that it is not a sufficient basis by itself on which to impugn its decision. Only if the conclusion not to make a reference was unreasonable (in a public law sense) or flawed on the basis of some other established principle of judicial review can it be impugned.

138. As to the alleged "merits" of the appeal, the OFT makes the general point that IBA's approach has shifted during the proceedings and is "scattergun" in its nature. In fact, all the matters raised by IBA were known to the OFT, as is shown by the issues letter of 30 September 2003 set out above.

139. As regards procurement outside the NPfIT, the OFT accepts that the NPfIT accounts for less than half NHS IT procurement, but considers this does not disclose the whole picture: see Mr Gaddes' statement at paragraph 17. The OFT rightly considered that it was more likely than not that the NPfIT would proceed.

140. As to the position of IBA, its possible exclusion from the market is due to Torex not being selected as a preferred applications provider, not to the merger. In any event, IBA has only 3% of the market and its removal would not affect competition.

141. The OFT submits that the indicators set out in its *Guidance*, such as market shares and the HHI, are no more than indicators of market structure. In this case, existing indicators of market share are of little use. Because of radical changes in the structure

of healthcare procurement, there was "no significant prospect" of a substantial lessening of competition. In other words, in so far as indicators of market power or the possibility of non-coordinated anti-competitive effects were present, there were "compelling reasons to the contrary", set out in the decision which led the OFT to its conclusion. The fact that the OFT did not consider that Torex was likely to be successful in the market, and that there was no significant prospect of a substantial lessening of competition was entirely reasonable, and well within the bounds of rationality. IBA can succeed only if it shows irrationality.

142. On barriers to entry, the OFT accepts that barriers are high, and may be higher as a result of changes to the NHS procurement strategy. However, competition and opportunities for small companies will still exist. The decision itself points out that higher available funding has attracted overseas companies to the market. Paragraph 22 of the decision is dealing with renewals of contracts after 2010. As to legacy systems, the OFT was entitled to reach the conclusion (paragraph 14 of the decision) that the parties' market share in legacy systems was not the best indicator for the future. According to the OFT, the extent to which suppliers have in the past succeeded in selling their systems is of far less significance than the question whether they have been selected as preferred sub-contractors to any of the 10 short listed LSPs. The OFT inferred that the business Torex would gain as a result of its legacy base would not be in a contestable market.

143. As to the suggestion that the OFT did not examine why Torex had not won any bids recently, IBA does not explain why the OFT should have made such an investigation, or what difference it would have made if it had. There is no evidence to support IBA's allegations, which are based on pejorative speculation. Even if Torex's failure to be selected as a PAP was influenced by the merger announcement, the fact that Torex had not been so selected had to be taken into account by the OFT.

144. As regards market definition, the OFT concluded at paragraph 13 of the decision that the "frame of reference" was the market for the sale of software systems to hospitals. However, where there are (a) potential advantages to incumbents and/or (b) dynamic changes in the field, market definition and attendant market share analysis will be of limited use in reaching conclusions about the effect on competition of a merger.

145. The OFT's position is supported by a witness statement by Mr Gaddes, Deputy Director of the Mergers Branch in the Competition Enforcement Division of the OFT. Mr Gaddes explains the OFT's procedures, and explains that it would be extremely onerous for the OFT to have to include in its decision all evidence and arguments received, together with its reasons for accepting or not accepting such arguments. The OFT's reasoning is therefore confined to the principal bases of its decision.

146. As regards the non-NPfIT market, Mr Gaddes states at paragraph 17 of his witness statement :

> " The OFT did not include in the Decision further analysis of the non-NPfIT market for a number of reasons. The OFT received information from the parties and third parties concerning the non-NPfIT market, which it critically reviewed. However, the OFT concluded that it was not necessary to include further analysis of the non-NPfIT market for, inter alia, the following reasons:
>
> (a) Much of non-NPfIT expenditure of hospitals and/or NHS Trusts is already allocated to legacy contracts, which may continue to run for a number of years. Such expenditure is therefore not contestible.
> (b) Equally, any non-NPfIT expenditure by hospitals and/or NHS trusts on, for example, extending or upgrading an existing EPR or PAS systems which might otherwise be obsolete is unlikely to be contestible since the hospital and/or NHS Trust are likely to use existing providers rather than seek competing bids.
> (c) Hospitals and/or NHS Trusts are in the future unlikely to purchase new systems which do not comply with NPfIT expectations or are incompatible with NPfIT. Indeed the parties identified at least three contracts which have not proceeded where Torex was identified as preferred bidder because of incompatibility with the NPfIT (including contracts relating to Calderdale & Huddersfield and Blackburn).
> (d) Further to the above, there is little incentive for hospitals to invest in, for example, EPR or PAS systems outside the NPfIT. Local funding is limited and largely committed to the on-going costs of existing systems. It is unlikely that hospitals or NHS Trusts will invest in new systems which are incompatible with the NPfIT.
> (e) Given their size, the award of an LSP contract is likely to result in both Cerner and IDX having a much more significant presence throughout the UK, both within and outside the NPfIT, and therefore these companies are likely to provide a stronger competitive pressure than they might have done in the past (see paragraph 31 of the Decision) and have every incentive to do so.
> (f) Those companies whose products have been selected by LSPs to supply, for example, EPR or PAS systems, and whose products are 'fit for purpose' and meet the technical requirements of NPfIT (unlike those of Torex) will, as a result of having a greater established presence in England, become more effective competitors outside of the NPfIT throughout the UK. If, in response, other

companies improve and develop their own products, this will only lead to greater bidding competition and enhance the competitive framework throughout the UK.
(g) As mentioned at paragraph 23 of the Decision, given that contracts for, for example, EPR or PAS systems, in other parts of the UK are largely awarded on a national basis, awarding buyers are likely to possess and exercise buyer power in those areas. The Merger will not lessen the effectiveness of that buyer power."

147. As to the position of Torex, Mr Gaddes points out that paragraph 30 of the decision refers only to the fact that Torex had not been selected as a PAP by short-listed LSPs. The OFT did not accept the parties' submissions that Torex had not won non-NPfIT contracts (see paragraphs 27 and 17 of the decision) although its success in this regard has been limited. According to Mr Gaddes, Torex's ability to win or complete contracts has been impaired by its products not being approved as 'fit for the purpose' for the purposes of the NPfIT. This is likely significantly to weaken Torex's ability to compete either within or outside the NPfIT. It is reasonable to infer that Cerner and IDX will play a larger role in the United Kingdom market, since they have been selected as preferred subcontractors by a number of short-listed LSPs. Mr Gaddes also refutes a number of other points made by Mr Wallhouse.

(3) iSOFT

148. iSOFT's arguments are supported by Torex, who did not make separate submissions.

149. iSOFT submits that the Tribunal's jurisdiction under section 120 of the Act is distinct from that of the CFI which does review European Commission decisions for "manifest errors of fact". In this case, IBA is essentially challenging the OFT's appraisal of facts.

150. iSOFT accepts that the Tribunal may review the contested decision on the basis of material errors of law or procedure. iSOFT rejects the submission by IBA that proportionality is a ground of review in domestic law. The only support for such a proposition are the obiter remarks of Lord Slynn in *R(Alconbury) v Secretary of State for the Environment* [2003] AC 295 at [53] to [54]. Proportionality has recently been rejected as a ground of review in domestic law by the Court of Appeal *R (Association of British Civilian Internees – Far Eastern Region) v Secretary of State for Defence* [2003] QB 1397, at [32] to [37].

151. However, iSOFT submits that there is no general power to review errors of fact. The only situations in which a judicial review court may consider a decision maker's assessment of the facts are: (i) where establishment of an objective fact is a condition precedent for the exercise of a jurisdictional fact; (ii) where there is submitted to be no evidence in support of a finding; (iii) where the decision maker's assessment is submitted to be *Wednesbury* unreasonable; (iv) where EC law or the Human Rights Act 1998 require it. The comments of Scarman LJ in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council,* and the obiter view of Lord Slynn in *R v Criminal Injuries Compensation Board ex parte A*, repeating his obiter views in *Alconbury*, do not establish a general ground of review of mistakes of fact.

152. Challenges based on questions of "fact and degree" and "evidence and fact" which are merely challenges to the merits of those conclusions are not reviewable: see *R v MMC, ex parte Argyll Group plc* [1986] 1 WLR 763, at 771 and *R(T-Mobile and others) v Competition Commission and DGT* [2003] EWHC 1555 Admin, at [141], [144], [145] and [154].

153. In the context of merger decisions expert bodies must reach their conclusions within a limited period and in cases, such as the present, where the issues raised turn on issues of prospective market analysis in respect of which alternative views will almost always be possible, it is essential that decision makers are permitted to exercise a degree of judgment.

154. As to the construction of section 33(1), iSOFT submitted that the number of references made to the Commission by the OFT, namely about three out of seventy, was an indication as to the respective functions of the OFT and the Commission and it would be wrong to interpret the test for reference in section 33(1) of the Act in a way which disturbed that balance. The administrative period of 40 days for the OFT to consider a case clearly indicated that a significant investigation by the OFT was envisaged despite the existence of the Commission. The Department of Trade and Industry's White Paper, *Productivity and Enterprise: A world class competition regime* makes clear in box 5.1 that "[t]he OFT will carry out first stage investigations which will be sufficient

to decide most cases. The Competition Commission will continue to carry out second stage in depth investigations where necessary."

155. According to iSOFT the word "believes" in section 33(1) is intended to indicate the level of the finality of the view that the OFT must have before making its decision on a reference while the word "may" refers to the content of the conclusion reached by the OFT. iSOFT accepts that the correct approach to the question of whether a relevant merger situation "may" be expected to lead to a significant lessening of competition is that set out in the OFT's guidance namely whether there is a "significant prospect".

156. iSOFT also drew attention in its oral submissions to the contrast between the meaning and use of the word "may" in section 33(1) and section 36 respectively. In the case of section 36 "may" has a different and more "substantial" meaning than it does in section 33(1). This is because under section 36 the Commission is required to "decide" the question of whether the relevant merger situation may be expected, on the balance of probabilities, to result in a substantial lessening of competition in any market or markets in the United Kingdom.

157. iSOFT added that the Tribunal should proceed cautiously, because of the short timescale in which these proceedings are being held, and because new matters have been raised which were not before the OFT.

158. iSOFT also invited us to look at this case in its specific context, in accordance with Lord Steyn's remarks in *Westminster City Council v NASS* [2002] I WLR 2956.

159. As to the various specific points made by IBA, iSOFT submits that the OFT fully took into account the progress and development of the NPfIT and the market outside the NPfIT. iSOFT accepts that IBA has won a number of contracts since 1998 and that Torex was the preferred bidder for Leeds Teaching Hospital in 2003. However, the point is that Torex's opportunities following the establishment of the NPfIT are very limited, its products being 'so unfit for the purpose' that it was not invited by LSPs to submit them for detailed testing.

160. On the position of IBA, and the entry of other suppliers, these matters were examined by the OFT; IBA has misdescribed the findings in the decision. Legacy market shares are irrelevant, for the reasons given in the decision.

161. As regards iSOFT and Torex's participation in the NPfIT bidding process, iSOFT relies on the witness statements of Mr Whiston, Finance Director of iSOFT, and Mr Sprigg, Commercial Director of Torex, served in response to IBA's evidence and arguments. Although according to Mr Whiston discussions with Torex about a merger started on 12 May 2003, it is denied by both witnesses that that had any impact on Torex's position as a prospective PAP.

162. According to Mr Sprigg, although Torex has recently won various contracts, these have been mainly extension contracts where Torex has been the incumbent supplier. The one exception is where Torex won the contract at a loss. In only two of the relevant contracts had Torex bid head to head with iSOFT. Mr Sprigg questions the suitability of IBA's products. Mr Sprigg considers that Torex does not have an EPR system capable of accreditation by LSPs, and that there is little overlap between iSOFT and Torex in EPRs. The only overlap is the LIMS product which, according to Mr Sprigg, has been unsuccessful for both parties.

163. Mr Whiston states that, historically, some 80 per cent of all new EPR IT systems for hospitals have been awarded to providers other than the incumbent. iSOFT relied on paragraph 34 of Mr Whiston's evidence to show that incumbency did not give rise to a material advantage.

(4) THE POST HEARING CORRESPONDENCE

164. On 28 November IBA filed a further witness statement by Mr Cohen highlighting, notably, Mr Whiston's view about the contestability of the market. iSOFT submitted observations in response to Mr Cohen's statement on 1 December, contending that Mr Whiston was referring to new system purchases, rather than upgrades or extensions, and dealing with other points made by Mr Cohen.

165. The OFT also lodged additional submissions on 1 December 2003. The OFT replied to certain points made by Mr Cohen and explained, in answer to the Tribunal's question, that the DoH had indicated that it did not see any adverse effect on competition in relation to EPRs and LIMS as a result of the merger. The OFT further submitted that IBA was well aware of the issues throughout the OFT procedure.

166. As to the construction of Section 33(1), the OFT accepts that it would be bound to refer if it believed there was "an alternative credible view", but it would only be under such a duty if it regarded "the alternative credible view" as sufficiently persuasive to lead it to believe that there was a significant prospect of a substantial lessening of competition. The matter therefore resolves itself into a single question, to be resolved by means of an overall evaluation of the evidence, according to the OFT. The question for the Tribunal is not whether it thinks there was no alternative credible view, but whether the OFT's decision was irrational.

167. IBA, in a letter also of 1 December, maintains that it had no idea of the OFT's reasons until it saw the decision. IBA objects to the OFT's reference to the views of the DoH, and considers that the matter should be referred to the Commission.

VII **THE TRIBUNAL'S ANALYSIS**

A. GENERAL

168. We start by asking ourselves the question: Was the OFT confronted with a real question as to whether it is or may be the fact that the iSOFT/Torex merger may be expected to lead to a substantial lessening of competition? We start with that question because, if the answer is in the affirmative, then three further questions become highly relevant, namely: What is the proper construction of section 33(1)? What is the overall scheme of the Act? How should the OFT have approached its task? We address these questions before coming to our review of the contested decision.

B. WAS THE OFT FACED WITH A REAL QUESTION AS TO SUBSTANTIAL LESSENING OF COMPETITION?

169. In our view, one does not need to be a specialist tribunal to see that the facts of this case raise material and complex issues as to whether or not it may be the case that the iSOFT/Torex merger may be expected to lead to a substantial lessening of competition.

170. As emerges from the market shares set out earlier in this judgment, the merged iSOFT/ Torex would have a market share of 44% in relation to EPRs, and a market share of 56% in relation to LIMS, on an installed basis, and would be substantially ahead of their nearest competitor. That is in contrast to the present position where, on iSOFT's figures, iSOFT has 23% and Torex 21% in EPRs, the figures for LIMS being 45% for iSOFT and 11% for Torex, respectively.

171. On the basis of the parties' success in winning competitive bids in recent years, which according to paragraph 15 of the decision is "a better measure of potential market power", according to iSOFT's figures in its submission of 1 August, iSOFT has 26%, Torex 13%, and IBA 13%. That gives the merged iSOFT/Torex a market share of 39%, leaving out of account any potential effect of the merger on IBA.

172. In its *Guidelines on Merger References*, June 2003, the Competition Commission states at paragraph 3.4:

> "In its analysis of the effect of the merger the Commission will have regard to the combined market shares of the merging parties. There is no particular market share threshold that will denote the likelihood of the Commission deciding that he merger has resulted in or is expected to result in an SLC. However, a combined market share of 25 per cent or above (not to be confused with the jurisdictional share of supply test) would normally be sufficient to raise potential concerns regarding the effect of the merger on competition."

173. Applying that guidance, it seems to us clear that, at the least, the combined market shares of the parties would normally be sufficient to raise potential real concerns regarding the effect of the merger on competition.

174. It seems to us that that provisional conclusion is reinforced by the reference to barriers to entry in the first sentence of paragraph 19 of the decision, and the lack of supply side

substitutability implied by the last sentence of paragraph 11, as well as by the gap in market share between iSOFT/Torex and its next largest competitor, McKesson.

175. It would, in our view, be difficult to put the matter more cogently than did the OFT itself in the issues letter sent to iSOFT/Torex on 30 September 2003, set out in section IV above. That letter sets out in detail, albeit provisionally, nine reasons why it could reasonably be believed that it is or may be the case that the merger may be expected to lead to a substantial lessening of competition.

176. Nonetheless the OFT decided, apparently at a decision meeting on 8 October 2003, just over a week after sending the issues letter, that it was under no duty to make a reference to the Commission under section 33 of the Act. That decision was taken following a meeting with the parties on 2 October and a submission made by the parties on 6 October. As appears from the decision, the basis of the OFT's conclusion was, in broad terms, that the potential competition concerns did not after all arise, as a result of the countervailing effects of the NPfIT interpreted by the OFT .

177. We are not required to decide, and should not decide under section 120, whether the OFT's decision was correct on its merits. We do, however, have to decide whether the decision was lawful. We therefore turn to consider the statutory framework, against the background of a case in which issues as to a substantial lessening of competition were plainly raised, at least potentially.

C THE CONSTRUCTION OF SECTION 33(1)

178. Section 33 is in Part 3 of the Act, which commences with the heading "Duty to make references".

179. "The OFT shall, subject to subsections (2) and (3), make a reference to the Commission if the OFT believes that it is or may be the case that —

> (a) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and

(b) the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services"

180. Section 33(1) may be compared with section 36(1), which provides:

"(1) Subject to subsections (5) and (6) and section 127(3), the Commission shall, on a reference under section 33, decide the following questions -

(a) whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and
(b) if so, whether the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services

181. If we "unpack" section 33(1), we find three elements, namely "the OFT believes", "that it is or may be the case"; and "may be expected to result".

182. If we take the last element first, the words "may be expected to result" occur in both section 33(1)(b) and section 36(1)(b). Those words, in our view, reflect the fact that in a merger case one is looking at the future effects of a merger, as to which there can never be absolute certainty. In order to prohibit a merger, what is required by the statute is something less than a certainty, namely an "expectation". An expectation is, however, more than a possibility, as the MMC acknowledged in *S & W Berisford Limited/ British Sugar Corporation* HCP 241, 1981. A "more than 50% chance" may be a crude way of expressing the idea of "an expectation".

183. The concept of "expectation" does not normally give rise to particular difficulties at the stage of the Commission's investigation under section 36(1). However, at the stage of the OFT under section 33(1) the OFT is, in effect, assessing the prospect of the Commission finding the necessary "expectation", were a reference to be made.

184. Turning to "the OFT's belief" in section 33 (1), it is not suggested that that means merely the OFT's subjective belief. We assume for working purposes that the concept is that "the OFT believes on reasonable grounds". In our view the concept of a reasonable belief supposes that the OFT has sufficient material to support the grounds

in question, which in turn presupposes that a sufficient investigation has been carried out.

185. Furthermore, the phrase "if the OFT believes" in section 33(1) is in our view to be contrasted with the phrase "the Commission shall decide" in section 36(1). This in our view reflects the fact that, in cases meriting a fuller investigation, the decision maker is the Commission, not the OFT. The OFT merely has "to believe". In other words, the threshold to trigger the OFT's duty to refer under section 33 (1) is lower than "deciding".

186. In common with the parties, we are prepared to assume for working purposes that the difference between the position of the OFT and of the Commission is accurately captured in paragraph 3.2 of OFT 516:

> "The test for reference will be met if the OFT has a reasonably held belief that, on the basis of the evidence available to it, there is at least a significant prospect that a merger may be expected to lessen competition substantially. The OFT considers that this threshold is the same as that against which FTA reference advices were prepared. It differs from that used by the CC in its merger enquiries, reflecting the fact that the OFT is a first-phase screen while the CC is determinative: hence, the test for making a merger reference is lower than the CC's test for deciding that a merger may be expected to substantially lessen competition".

187. Similarly the idea is expressed in paragraph 2.5 of OFT 526:

> "While most mergers will raise no issues relating to a substantial lessening of competition, the merger control process is designed to allow the OFT to identify those where such issues **may** arise, so that they may be examined in greater detail through a reference to the CC."

188. It follows, putting the matter broadly at this stage, that the role of the OFT is primarily that of a first stage screen, to identify where competition issues *may* arise.

189. The third element, "it is or *may be* the case", is central to the present proceedings. This is what was referred to in the hearing as "the double may".

190. The use of the word "may" in the second line of section 33(1) seems to us to signify that, even if those responsible at the OFT are themselves of the view that a merger may not be expected to result in a substantial lessening of competition, it still "may be the case", within the meaning of section 33(1), that the merger may be expected to lead to a substantial lessening of competition, if there is, in fact, an alternative credible view that cannot be reasonably rejected by the OFT on the basis of a "first screen".

191. In other words, putting the matter less technically, if there is genuinely "room for two views" on the question whether there is at least a significant prospect that the merger may be expected to lead to a substantial lessening of competition, then in our opinion the requirement in section 33 (1) that "it may be the case" that … [the merger] may be expected to lead to a substantial lessening of competition, is satisfied.

192. In our opinion, in such circumstances, the statutory duty of the OFT under section 33(1) is not to decide, definitively, which of those two views, it, the OFT, prefers. Under the scheme of the Act, the definitive decision maker, in a case where there is room for two views, is not the OFT but the Commission. If there is room for two views, the statutory duty of the OFT is to refer the matter to the Commission, whose duty is to *decide* on the question whether the merger may be expected to lead to a substantial lessening of competition, as section 36(1) expressly provides.

193. When we refer to the possibility of there being "room for two views" in a given case, we do not envisage a case in which the alternative view is merely fanciful, or far fetched. We envisage a case in which the alternative view is credible. It must be a view which cannot be confidently dismissed on the basis of a "first screen" investigation.

194. There is also in our view a certain asymmetry under section 33(1) between the situation which arises when the OFT makes a reference, and the situation which arises when the OFT decides not to do so. Even in a case where a substantial lessening of competition seems a likely outcome, in *making* a reference the OFT does not *decide* whether, in fact, a substantial lessening of competition may be expected. The OFT simply "believes" that such "may be the case", without prejudging or pre-empting the Commission's investigation.

195. Where, however, the situation is the other way round, and the OFT decides *not* to make a reference it is deciding that the merger does not even reach the threshold of "it *may* be the case". In other words in such circumstances the OFT decides that the merger does not even reach "the grey area" where there may be room for more than one view. In its practical effect, a decision not to make a reference effectively decides the issue of substantial lessening of competition in the negative. It not only prejudges, but also excludes, any further investigation by the Commission.

196. In the vast majority of cases no practical consequences arise from this asymmetry. An initial search by the Tribunal showed 56 published merger cases considered by the OFT under the Act, of which 21 did not qualify and 31 were cleared in short, clear decisions. Similarly, in the decisions made to refer (such as *Unum/Swiss Life* and *P&O/Stena*) the OFT shows shortly and clearly why the OFT felt that it was under a duty to refer.

197. What is the correct approach in cases in the "grey area" in between? In a case where real issues as to the substantial lessening of competition potentially arise, it seems to us that the words "it may be the case" imply a two-part test. In our view, the decision maker(s) at the OFT must satisfy themselves (i) that as far as the OFT is concerned there is no significant prospect of a substantial lessening of competition and (ii) there is no significant prospect of an alternative view being taken in the context of a fuller investigation by the Commission. These two elements may resemble two sides of the same coin, but in our view they are analytically distinct.

198. It is, as we have said, implicit that the OFT in any event must have sufficient material to support its view. It also seems to us implicit in the second limb of the test that the OFT must be able reasonably to discount the possibility of the Competition Commission coming to a different view after a more in-depth investigation. It must be borne in mind throughout that the role of the OFT under the Act is "a first screen".

D THE SCHEME OF THE ACT

199. In our view it follows from our construction of section 33(1) that, where there is a real issue as to whether there is a substantial lessening of competition it is only in the

exceptional case that the OFT should, under the Act, seek to resolve the matter itself rather than making a reference to the Commission. That is particularly so in cases with a complex factual matrix. In our view that approach is supported by the general scheme of the Act, as follows.

200. First, under the Act, Parliament has expressed its intention to scrutinise closely mergers potentially leading to a substantial lessening of competition, either by way of undertakings under section 73, or by way of a reference under section 22 or 33. Whatever the position under the FTA 1973, in our view, there does not seem much room for any presumption under the Act to the effect that doubtful or borderline cases raising real competition issues should "get the benefit of the doubt".

201. Secondly, the OFT is a "first screen". It is not the statutory task of the "first screen" to carry out more than a preliminary investigation. Nor is it the OFT's task to prejudge, let alone pre-empt, under section 33, the fuller investigation by the Commission envisaged by section 36.

202. Thirdly, in any event, the timescales involved preclude the OFT from doing more than a preliminary investigation, if the scheme of the Act is to be workable. The OFT's administrative timetable of 40 working days (i.e. eight weeks) is already not ungenerous, given that the equivalent deadline for the European Commission under the EC merger regime is one month (Article 10 of Regulation (EC) 4064/89 OJ 1989 L 395/1, as amended).

203. If the OFT's investigation is too detailed or slow, the system as a whole will not function effectively.

204. Fourthly, in our view, in complex "grey area" cases it is inherently difficult for the OFT to explore the matter in sufficient depth to be able to decide *not* to make a reference with the necessary degree of certainty. Apart from the short timescales, the OFT is, as the present case shows, dependent to a significant degree on the submissions of the parties, with only limited means of verification at its disposal. Similarly some cases, of which the present case is one, have an extremely complex factual matrix. It may be extremely difficult to get to the bottom of complicated facts, let alone fully consider all

the possible expectations, in the time available, with the risk of an inadequate basis on which to take the decision not to refer.

205. Fifthly, in our view, the OFT should be slow to deprive itself of the possibility of obtaining undertakings under section 73. That section applies only where the OFT is under a duty to make the reference i.e. it believes "it may be the case" etc. The OFT should be slow to deprive itself of this useful power under section 73 by coming too readily to the belief that even the relatively low "may be the case" threshold is not met.

206. The sixth point is that if the matter goes to the Commission, there is a good deal more transparency and depth in the decision making process than is the case at the stage of the OFT. The Commission seeks comments from, and holds hearings with, all interested parties. Facts can be investigated in depth. The issues letter is published for all to see. The final report contains a summary of the evidence received, who gave that evidence, and the Commission's own detailed analysis. Everybody knows who said what. This greater transparency in the decision making process, it seems to us, is of general benefit to the public. We make in this regard no criticism of the OFT. It is simply that the "first screen" procedure does not lend itself to the same degree of transparency. Transparency, in our view, reinforces public confidence in the system.

207. The seventh point relates to the effectiveness of the Tribunal's review under section 120. The OFT believes that it is very difficult in the timescale, and within the framework of a first screen, for the OFT to set out in a decision such as the present the evidence on which its decision is based.

208. We fully recognise that the review under section 120 is not an appeal on the merits. However, in carrying out an orthodox judicial review, the court (or in this case the Tribunal) often needs to know what material was before the decision maker. Only then can the court confidently ascertain such matters as whether a particular finding was based on no evidence, whether there was material upon which the decision maker could reasonably reach a certain view, whether material considerations have been left out of account, and so on.

209. In many cases of judicial review the material on which the decision maker relied will be apparent from the decision itself, especially where there is a statutory obligation to give reasons, as there is in this case under section 107: *R v Westminster City Council ex parte Ermakov* [1996] 2 All ER 302. In any event, the public authority is normally under a duty to put before the court all that is necessary to enable justice to be done: *R v Lancashire County Council ex parte Huddleston,* [1986] 2 All 941, per Parker L J.

210. However, in practical terms, in a case such as the present, material that is not referred to in the OFT decision cannot easily be made available in the course of the proceedings, at least in any systematic and comprehensive way. The Tribunal is thus in a much more difficult position in reviewing a controversial decision not to refer under section 33(1) than it is when reviewing the Commission's evidence-based report on a reference under section 36.

211. If the Tribunal is called upon to review the legality of a decision such as the present, without access to the material which underpins it, in our view the effectiveness of any such review is weakened. The Tribunal becomes dependent, in effect, not on the material that was before the decision maker, but on the material that happens to be thrown up by the hazards of litigation. A great deal of what is in the decision has, in effect, to be taken on trust. That, in our view, is not a satisfactory situation, both from the point of view of public law and from the point of view of the proper functioning of the Act.

212. On the other hand, we see the force of the OFT's contention that it is for many reasons impracticable to include an account of the evidence or materials before it in a decision such as the present.

213. The answer to this apparent "Catch 22" situation is, in our view, that under the Act complex cases raising real issues as to substantial lessening of competition should not in general be dealt with under the first screen procedure, but should go to the Commission. Reports of the Commission will normally contain all the material upon which a proper judicial review can take place, as was the situation in such cases as *Cellcom, Interbrew* and *T-Mobile* that have been cited to us.

214. If the above analysis is corrrect, it also seems to us that where there is a real issue as to substantial lessening of competition, the onus is firmly on the OFT to satisfy the Tribunal that it had solid, logical and properly reasoned grounds for not complying with its duty to refer under section 33(1). That involves showing with a sufficient degree of certainty that it was entitled to come to the view that even the lower "may be the case" threshold was not met. In other words the OFT must show that it had good grounds for believing that the matter was not even "grey", but "white".

E THE SCOPE OF THE REVIEW

215. We have heard interesting and helpful submissions on the scope of the Tribunal's review under section 120. The applicant submits, essentially, that the position is set out in the Explanatory Notes to the Act, which state:

> "Section 120: Review of decisions under Part 3
> This section allows decisions taken by the OFT, CC or Secretary of State in connection with a merger reference or possible merger reference to be reviewed by the CAT. The grounds of review are those that would be applied by a court on an application for judicial review. Case law suggests such grounds could include: (i) that an error of law was made; (ii) that there was a material procedural error, such as a material failure of an inquiry panel to comply with the Chairman's procedural rules; (iii) that a material error as to the facts has been made; and (iv) that there was some other material illegality (such as unreasonableness or lack of proportionality). Judicial review evolves over time and the approach in *subsection* (6) has been taken to ensure the grounds of review continue to mirror any such developments".

216. The OFT and iSOFT submit, essentially, that the test is, in effect, a test of irrationality in the traditional *Wednesbury* sense, that is to say that the applicant must show that the decision is so unreasonable that no reasonable decision maker in the position of the OFT *could* have arrived at it.

217. We do not find it entirely easy to interpret the duty imposed on us by section 120(4) to apply "the principles as would be applied by the court on an application for judicial review".

218. First, an "application for judicial review" under CPR Part 54 may arise in an extraordinarily diverse range of circumstances. The application may involve underlying issues of policy, or discretion, where the court is rightly conscious of the risk of trespassing on areas which are primarily within the decision making powers of the executive or the legislature. In such cases, the separation of powers may properly require judicial restraint. Other cases may involve pure questions of law, or procedure, which pre-eminently fall within the judicial function. Some cases may involve no issues of fact at all, while other cases may, by their nature, involve the court in scrutinizing facts in order to determine whether the decision maker has acted lawfully in a particular context. The concept of "reasonableness" itself varies with circumstances.

219. The "principles as would be applied by the court on an application for judicial review" thus vary with the particular context. For example:

> "there is no universal rule as to the principles on which the exercise of a discretion may be reviewed: each statute or type of statute must be individually looked at" per Lord Wilberforce in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, at 1047G.
>
> "The actual application of the orthodox principles of judicial review will of course vary according to the subject matter of the case and in particular, according to the specific administrative function under review", per Buxton J in *R v Secretary of State for Health, ex parte London Borough of Hackney* 25 April 1994 unreported, transcript p.32.
>
> "In law context is everything" per Lord Steyn in *R v Secretary of State for the Home Department ex parte Daly* [2001] UKHL 26.

220. Secondly, a particular feature of the specific context of section 120 is that Parliament has created the Tribunal as a specialised tribunal. That is in contrast to the more normal situation where a non-specialised court is called upon to review the decision of a specialised decision maker. For that reason we are unpersuaded that there is necessarily a direct "readover" to section 120 from cases such as *Cellcom*, *Interbrew*, *T-Mobile*, and the *Rail Regulator* that have been cited to us.

221. We also observe that even within the Tribunal's jurisdiction under section 120 many different kinds of decision may arise. For example, a decision by the Secretary of State

that the interests of national security are involved under section 58 is a very different matter from a case in which it is alleged that turnover has been wrongly calculated for the purposes of the £70 million threshold under section 23, which may again be different from, say, a question of remedy arising in a market investigation case under Part 4. Many other examples could be given.

222. In *R (Westminster City Council) v NASS*, cited above, Lord Steyn observed at paragraph 5 that the Explanatory Notes form part of the context of a statute, and are thus an aid to ascertaining the intention of Parliament. We do not feel, therefore, we can properly ignore the Explanatory Notes, at least as a starting point. However, interesting issues such as the question of proportionality, whether error of material fact *in its own right* (as distinct from, say, failing to take account of a material consideration) applies in judicial review under section 120, and the relevance of the principles of European law, do not in our view need to be decided in the present case.

223. As far as the specific context of a decision by the OFT not to make a reference under section 33(1) is concerned, it seems to us that, unlike *Wednesbury* itself and many leading cases on judicial review, the issue before us does not involve controlling the exercise of a discretion. Hence a test geared to controlling a discretionary power does not seem to be appropriate. The issue before us is whether the OFT has complied with a duty, and in particular whether the OFT acted unlawfully in taking the view that the underlying circumstances giving rise to the duty were not present.

224. Moreover, in the present context, the Tribunal's task is not to take a decision itself, but primarily to decide which of two other specialised decision makers, the OFT or the Commission, should take the decision. As already emerges from the earlier part of this judgment, we see this case primarily in terms of statutory construction and the process to be followed, and not in terms of deciding factual disputes.

225. As a matter of general approach, the broad question we ask ourselves is whether we are satisfied that the OFT's decision was not erroneous in law, and was one which it was reasonably open to the OFT to take, giving the word "reasonably" its ordinary and natural meaning.

F. CONCLUSIONS

226. Applying the principles of judicial review appropriate to this case, in our judgment the contested decision was erroneous in point of law and/or was not a decision which it was reasonably open to the OFT to take on the true construction of the Act.

227. First, for the reasons already given, we consider that the OFT was faced with a real issue as to whether there was a substantial lessening of competition as a result of the iSOFT/Torex merger.

228. Secondly, on the proper construction of section 33(1), and in particular the words "it may be the case", the OFT had to satisfy itself not only (i) that in its own mind there was no significant prospect of a substantial lessening of competition, but also (ii) there was no significant prospect of the Competition Commission reaching an alternative view on the basis of a fuller investigation.

229. Thirdly, under the statutory scheme in part 3 of the Act where, as here, the OFT is confronted with a real question as to whether there is a substantial lessening of competition, it is only exceptionally that the OFT should attempt to resolve the matter itself at the "first screen" stage, rather than refer to the Commission. That is particularly so in cases involving a complex factual matrix.

230. Fourthly, in a case such as the present, where there is a real issue as to substantial lessening of competition, the onus is on the OFT to satisfy the Tribunal that it applied the right test, and that it had solid, sufficiently certain, and properly reasoned grounds for deciding that the relatively low threshold of "may be the case" under section 33(1), was not met.

Did the OFT apply the right test?

231. We remind ourselves that in *Secretary of State for Education v Tameside*, cited above, Lord Diplock said at paragraph 1065:

> "… the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information so as to enable him to answer it correctly?"

232. In this case, the Tribunal is unable to be satisfied, on the material before it, that the OFT asked itself the right question, namely whether the OFT was satisfied *not only* that there was no significant prospect of a substantial lessening of competition, *but also* that there was no significant prospect of the Competition Commission reaching an alternative view after a fuller investigation. There is no indication in the decision that the OFT considered the second limb of that test.

233. In the Tribunal's view, the tenor of the decision read as a whole is that the OFT decided that the effect of the NPfIT was to rebut the inference of a substantial lessening of competition resulting from the increase in market share of the parties following the merger. In other words, the OFT's approach was to seek to decide which of two plausible views the OFT preferred, rather than adopting the correct approach, namely to ask whether there were, reasonably, two views which could be taken. By failing to ask itself that latter question, the OFT failed correctly to ask itself whether "it may be the case" that the merger may be expected to result in a substantial lessening of competition within the meaning of section 33(1).

Could the OFT have reasonably excluded the alternative view?

234. Secondly, if, which is not established before the Tribunal, the OFT believed not only that there was no significant prospect of the merger resulting in a substantial lessening of competition, but also that there was no significant prospect of the Commission coming to an alternative view after a fuller investigation, the Tribunal is not satisfied that was a view that the OFT could reasonably have reached.

235. First, it seems to the Tribunal that there is little doubt that there *was* an alternative view to which the OFT, as a decision maker, could reasonably have come. That view is set out cogently in the issues letter of 30 September 2003 which the OFT took two months to prepare.

236. To decide in the period of slightly over a week between 30 September 2003 and 8 October 2003 that all the matters set out in the issues letter were successfully dealt with or rebutted, so that the matters in that letter did not even give rise to a reasonable alternative view, seems to the Tribunal to be somewhat surprising.

237. If such was indeed the case, we would expect to find, in the decision, a detailed point by point rebuttal of the matters set out in the issues letter demonstrating that the alternative view could not reasonably be held, and the material relied on. Full reasoning of that kind would normally be found in a report by the Commission on a reference but we do not find reasoning in that form in the decision. For example the following matters in the issues letter do not seem to be clearly rebutted in the decision: the existence of regular bidding between iSOFT and Torex (point 1); the strengthening of Torex's portfolio (point 2); competition in bidding, not simply in winning (point 2); significant market coverage and potential incumbency advantages (point 3); high barriers to entry (point 4); lack of clarity as to whether Cerner, IDX or other providers are capable of providing significant competitive constraints (point 5); lack of buyer power (point 6); portfolio power (point 7); uncertainty as to the NPfIT (point 8) and reduced incentive to innovate (point 9).

238. In its skeleton argument before the Tribunal at paragraph 5.4 it is stated "the OFT fully recognises that there may be room for differences of opinion as to whether there would be a substantial lessening of competition". That seems to the Tribunal to come close to acknowledging expressly that, in this case, there was, all along, a credible alternative view. The existence of such an alternative view is sufficient to trigger the duty to refer under section 33(1).

239. It is also relevant in this case that the underlying factual matrix is extremely complicated. The NPfIT is a complex and ambitious programme. The sums of money involved are very great. Outside the NPfIT the matter is also complex, and again large sums of money are involved. In these circumstances, in our view, the OFT needed to be particularly confident that it had got to the bottom of all the relevant facts on the basis of its 'first screen', so as to be able to exclude the possibility of the Commission taking a different view.

Are the facts sufficiently found in the decision?

240. The Tribunal does not find, in the decision, a clear exposition of the workings of the markets with which it deals. For example, as far as the existing situation is concerned it is not clear from the decision what kind of contracts it is dealing with, for example, how long such contracts last, how frequently they come up for bidding, what is the size and complexity of such contracts, how many bidders there are, what is the difference between new contracts, renewals, extended or upgraded contracts, the rôle of sub-contracts and what is the relative economic significance of contracts in each of those different categories.

241. As far as the future is concerned, the Tribunal does not find in the decision any satisfactory description of exactly what it is that the NPfIT is likely to involve "on the ground", and over what timescale. For example, apart from describing in general terms the role of the LSPs/PAPs, there is no analysis, or even mention, of what is apparently the third tier below these levels where most of the contracting seems likely to be done. There is no explanation of how the installed base of the NHS is going to be replaced or adapted, how long that is likely to take, what is going to happen in the meantime, and what the chain of contractual relationships is going to be and how, in a counterfactual, Torex itself might have sought to adapt.

242. It seems to the Tribunal that a basic analysis of that kind is necessary, first to make clear on what factual basis the OFT has grappled with such issues as the significance of the installed 'legacy' base, buyer power and new market entry; secondly to demonstrate that the OFT as decision maker has indeed fully understood the factual context of its decision; and thirdly to lay a proper foundation for the analysis of the question whether any lessening of competition may or may not be substantial.

243. In this case, the description of the market is so scanty, and expressed at such a level of generality, that it is extremely difficult for the Tribunal to be satisfied that all material considerations have been taken into account and all material facts ascertained.

244. To give only one obvious example. It may well be that, as the decision says at paragraph 32, the situation needs to be judged against "a new scenario". But to

determine whether the reduction in competition resulting from the merger is "substantial" one needs to know for how long, and to what extent, the "old scenario" is likely to subsist alongside the "new scenario", both inside and outside the NPfIT. For example, the absence of a substantial lessening of competition in the sphere affected by the "new scenario" does not necessarily preclude a substantial lessening of competition in spheres that will for a long time to come form part of the "old scenario". It is a matter of fact and degree, but unless one starts with a clear exposition of the relevant facts it is difficult for the analysis to get satisfactorily off the ground.

245. It may be objected that this approach impresses an impossible burden on the OFT in the context of a "first screen". However, the extent to which such an analysis is necessary will vary according to the circumstances of the case. In the vast majority of cases the matter is "open and shut" and only short reasoning is necessary.

246. The present matter is a case of a direct merger between two companies who compete horizontally and who are identified in the decision as numbers 1 and 2 in the market, with combined market shares in the 45%/55% range. A decision by the OFT to the effect that on no reasonable view could such a merger be expected to lead to a substantial reduction of competition in our view needs a proper factual basis and exceptional clarity of analysis. We do not find such a basis in the decision.

247. If an analysis of the kind we consider necessary cannot be concluded or drafted within the administrative timetable of 40 days, then in most cases of horizontal mergers the inevitable conclusion will be that the matter is one that ought to be referred to the Commission under section 33(1).

Was there material on which the OFT could base its decision?

248. In the present case a number of factual matters and the associated reasoning in the decision have been put in issue, including:

(i) the length of the process of transition from legacy systems to the new systems (paragraph 7 of the decision)

(ii) whether national variations in healthcare IT solutions can as regards the United Kingdom be easily overcome by overseas suppliers (paragraph 12)

(iii) whether the systems required under the NPfIT will be "substantially different" from existing systems (paragraph 12)

(iv) whether incumbent bidders' reputational or information advantages in bidding for new contracts "are likely to be significant" (paragraph 15)

(v) whether the presence of other bidders should act as a competitive constraint on the parties (paragraph 15)

(vi) whether Torex is no longer a viable competitor (paragraph 17)

(vii) whether Cerner and IDX are likely to be successful as suppliers of EPRs/LIMS in the United Kingdom market, and if so over what timescale (paragraphs 16 and 20)

(viii) whether there is any significant likelihood of unidentified smaller suppliers entering the market, and if so over what timescale (paragraphs 19 and 20)

(ix) whether there is any likelihood of new entry or increased competition in the large sector not affected by the NPfIT, either in England, or in Scotland, Wales or Northern Ireland (paragraphs 20 and 31)

(x) whether increased buyer power will act as a significant restraint (paragraphs 21 and 23)

249. In a normal case of judicial review, where factual findings or assessment are put in issue, the role of the court as classically understood is not to decide whether the assessment is right or wrong, but to decide whether the assessment is one which the decision maker could reasonably have reached on the material before him.

250. In the present case, as already pointed out, it is extremely difficult for the Tribunal to carry out the classic judicial review function of deciding whether the OFT could have reached the decision it did on the material before it in circumstances where the material upon which the OFT acted is not apparent from, or referred to in, the decision.

251. Short of some wholesale disclosure exercise, which we do not think practicable within the timescale of most merger cases, the Tribunal thus is unable to satisfy itself as to (i) what material it was that the OFT took into account in expressing the views it did; and as to (ii) whether that material was reasonably capable of supporting the OFT's view.

252. In our view, it is not sufficient, in modern public law, for the Tribunal simply to accept the decision maker's assurance that there was material on which he based his view, even though such material is not referred to in the decision or available to the Tribunal. Nor is it satisfactory for the Tribunal to be invited to uphold the decision simply on the basis of the material placed before the OFT by the merging parties, particularly without knowing how far or to what extent that material has been verified or subjected to critical analysis by the OFT.

253. In those circumstances the Tribunal is simply not in a position to find that the OFT has discharged the burden of satisfying the Tribunal that there was material on the basis of which it could reasonably have come to the conclusion that it did in the decision.

An example: the legacy base

254. That, in our view, is particularly so in relation to one matter that has been put in issue, namely the significance of the legacy base.

255. Paragraph 32 of the decision states that the existing legacy base is "unlikely to confer significant market power". In answer to the applicant's contention that the OFT has failed to understand or has underestimated the significance of the legacy base, the OFT contends, among other things, that renewal contracts for the legacy base (which after all currently comprises the entire existing infrastructure of the NHS in England) would not be put out to tender and do not therefore form part of the "contestable" market.

256. This contention is not, however, found in the decision but in paragraphs 17 (a) and (b) of Mr Gaddes' witness statement which state:

> "17 (a) Much of non-NPfIT expenditure of hospitals and/or NHS Trusts is already allocated to legacy contracts, which may continue to run for a number of years. Such expenditure is therefore not contestible.
>
> 17 (b) Equally, any non-NPfIT expenditure by hospitals and/or NHS trusts on, for example, extending or upgrading an existing EPR or PAS systems which might otherwise be obsolete is unlikely to be contestable since the hospital and/or NHS Trust are highly likely to use existing providers rather than seek competing bids".

257. Neither that reasoning, nor the facts upon which it is based, are set out in the decision. That is, at first sight, contrary to the OFT's duty to give its reasons under section 107 of the Act. It is a well known principle that:

> "the court should, at the very least, be circumspect about allowing material gaps to be filled by affidavit evidence or otherwise": see *R v Westminster City Council ex parte Ermakov* [1996] 2 All ER 302, at 312e, per Hutchinson LJ."

258. If a material element is not set out in the decision, it is very difficult for the reviewing court or tribunal to be satisfied that the matter was properly investigated or that the supplementary reasons did in fact form part of the decision making process.

259. The need to approach this matter with caution is highlighted in this case by some of the uncertainties which have emerged. In their initial memorandum to the OFT of 1 August 2003 at paragraph 1.16, Torex and iSOFT point out that in the five years since 1998, in relation to contracts where the incumbent is known to them, the incumbent has been replaced in 81 per cent of cases in relation to EPR systems and 85 per cent of cases in relation to LIMS.

260. Mr Whiston, the Chief Finance Officer of iSOFT in his witness statement signed on 27 November 2003 states at paragraph 34 that ownership by iSOFT of legacy systems prior to the proposed introduction of the NPfIT did not confer material competitive advantages as, historically, some 80 per cent of all new EPR IT systems for hospitals have been awarded to providers other than the incumbent. He also stated that Torex's failure in recent years to implement its systems in the market evidences this lack of advantage conferred by incumbent systems. These statements were highlighted in the second witness statement of Mr Cohen signed on 28 November 2003 on behalf of IBA to demonstrate that the legacy market was contestable, contrary to Mr Gaddes' view.

261. On 1 December the Tribunal received a letter from Ashurst Morris Crisp on behalf of iSOFT indicating that Mr Cohen's statement in paragraph 5.5 of his witness statement was erroneous and that the comments of Mr Whiston in his witness statement had been taken out of context. In their letter Ashurst Morris Crisp stated, as follows:

> "In the limited cases where existing installed systems are capable of upgrade or extension, this work will not be contestable as it can only

practically be performed by the owner of that intellectual property. The reference to systems awards to providers other than the incumbent relates to new systems purchases, not upgrade or extension."

262. Yet on the Tribunal's reading of Mr Sprigg's evidence on behalf of Torex, the Leeds contract won by Torex in May 2003, for the NHS's largest Trust, was an extension contract for which iSOFT, Torex and McKesson competed. Other examples are given by Mr Sprigg of bidding taking place for incumbency contracts (Pennine Acute NHS Trust and Blackburn and Burnley NHS Trusts) or changes in the incumbent supplier for one reason or another (North and East Herts and East Kent). On the other hand, there appears to have been some incumbency advantage at the latter sites, and in relation to Royal Liverpool University Hospital. Calderdale/Huddersfield NHS Trust is given by Mr Sprigg as a recent example of a contract won by Torex directly against iSOFT, albeit, so it is said, at a substantial loss.

263. Self evidently, issues like these cannot be resolved, or even gone into, on an application for judicial review. But the resulting picture the Tribunal has is one of considerable confusion, in which the exact nature of the competitive process in relation to new, extended or upgraded contracts, and the significance of incumbency, is far from clear. Particularly in a sector of national importance, where large amounts of public money are at stake, a decision such as the present should in our view clearly set out the OFT's reasoning on issues such as these, together with sufficient material to show that the conclusion can be supported and that the matter has been properly investigated. The Tribunal has been unable to satisfy itself that such is the case here.

Other matters

264. A number of other matters give cause for concern. These include what assessment was in fact made of the viability of Torex's products or its ability to develop new ones; the inference, if any, to be drawn, particularly as regards "third tier work", from Torex's withdrawal from the LSP process and its apparent non selection as a PAP; the new material regarding the situation outside the NPfIT referred to by Mr Gaddes; the situation in Scotland and Wales, where the merged company would have 100% of the installed LIMS base; and the potential effect of the merger, if any, on actual or potential

market entrants such as IBA who, on a bidding basis, was said in the memorandum of 1 August to have 13% of the EPR market.

265. We also note that the OFT apparently considered a single "new scenario", without apparently assessing whether there were a range of conceivable future outcomes. In our view, considering the effects of a prospective merger on the basis of a number of different possible scenarios is an important part of the "may be the case" test.

General conclusions

266. As we have already indicated, we are not satisfied that the OFT applied the right test, or that the OFT reached a conclusion that was reasonably open to them. We are not satisfied that the facts are sufficiently found in the decision or that all material considerations have been taken into account. We are unable to verify whether there was material on which the OFT could reasonably base important findings in the decision.

267. In a merger case where it is clear that there are material and complex issues relating to what is potentially a substantial lessening of competition between horizontal competitors in a sector of national importance, we do not think it likely that Parliament intended that those issues were to be resolved at the stage of the OFT.

268. In these circumstances we feel we have no alternative but to grant the application. In so doing, we would stress that, as we have said, our view largely turns on our view of the *process* that should be followed under the Act in cases such as this. We recognise the work done and effort made by the OFT in the face of a complex situation, and we imply no criticism of the OFT, who had no guidance to go on as to the proper limits of its role under the Act, as compared with that of the Commission. It is inevitable that, with a new regime, such issues of process need to be sorted out at an early stage.

269. For these reasons we are unanimously of the opinion that we should quash the contested decision under section 120(5)(a) of the Act and refer the matter back to the OFT under section 120(5)(b) with a direction to reconsider the matter. We do not consider it appropriate to make any further direction.

Christopher Bellamy Peter Clayton Adam Scott

Charles Dhanowa
Registrar 3 December 2003