



# Tribunal quashes OFT merger clearance decision

## Executive summary

For the first time the Competition Appeal Tribunal (CAT) has quashed an OFT decision clearing a merger without referring it to the Competition Commission. The CAT has decided, in essence, that the OFT will have to refer mergers to the Commission for detailed examination, except where these mergers can be shown to raise no issues. Unless the CAT's decision is over-ruled, it will be difficult to obtain OFT clearance for complex cases and companies will need to be prepared to undergo lengthy and expensive proceedings to win merger clearance from the Commission.

On 21 November 2003, the Competition Appeal Tribunal (CAT) received its first application for a review of an Office of Fair Trading (OFT) decision not to make a reference of a proposed merger to the Competition Commission. On 3 December 2003, the CAT published its judgment granting the application, quashing the OFT's clearance decision and referring the matter back to the OFT with a direction to reconsider the matter.

## Facts of the case

The case concerns a proposed merger between iSoft and Torex, both suppliers of software systems to healthcare providers. The proposed merger was notified to the OFT on 1 August 2003. Following public consultation, an 'issues letter' to the parties setting out the core arguments and evidence in the case as well as meetings with the parties and at least one complainant, the OFT published its decision not to refer the merger to the Commission.

The parties' activities of supplying IT software to hospitals overlap, particularly in the provision of electronic patient records (EPRs) and laboratory information management systems (LIMS). The OFT decision quotes the parties' shares of installed systems as 44 per cent of EPRs and 56 per cent of LIMS and, in terms of success in recent tenders, 39 per cent of EPRs and 39 per cent of LIMS.

The OFT decided that this strong 'legacy' base is unlikely to confer significant market power in view of a new regime where the Department of Health will conduct

competitive tenders for the appointment of service providers and suppliers. These suppliers will develop new systems to create a complete electronic medical record for each patient across all NHS providers in England.

## Application for review

IBA Health Limited, an Australian company supplying IT solutions to a number of NHS hospital trusts, sought review of the OFT's decision on two principal grounds:

- that the OFT made material errors of law and fact in concluding (i) that there was insufficient likelihood of a substantial lessening of competition; and (ii) therefore that the OFT had no duty to refer the merger to the Commission; and
- that the OFT made material procedural errors by failing to conduct an appropriate or adequate investigation before adopting the decision.

## Legal background

The Enterprise Act 2002, which came into force on 20 June 2003, introduced a number of important changes to the UK merger control process: it removed the role of the secretary of state in making merger reference decisions in most cases; it introduced a duty for the OFT to make references to the Commission where it 'believes that it is or may be the case that' a merger 'may be expected to result in a substantial lessening of competition' in any UK market; and it introduced a statutory right of appeal of reference decisions to the CAT.

## The CAT's assessment

The CAT concluded that the OFT is under a strict duty to refer mergers raising competition issues and that its role as a first phase investigator is limited. Specifically:

- the OFT merely has to 'believe' on reasonable grounds that the threshold triggering its duty to refer is met – clearly distinguishing the Commission's duty to 'decide' on a substantial lessening of competition; and
- as the duty is triggered when 'it may be the case' that a substantial lessening of competition 'may be expected', not only must the OFT satisfy itself that the test is not met but there must be no significant prospect of an alternative view being taken by the Commission. In other words, if the OFT's 'preliminary investigation' establishes that there is room for two credible views, the OFT has no choice but to comply with its duty to refer.

The CAT sees the OFT as a 'first screen' investigating body, carrying out no more than a preliminary investigation in the time allowed. It finds that where there is a real issue as to whether there is a substantial lessening of competition it is only in exceptional cases that the OFT should seek to resolve the matter itself rather than making a reference to the Commission. In such cases, the OFT must be able to satisfy the CAT that it had solid, sufficiently certain and properly reasoned grounds for deciding that the duty to refer was not triggered.

The CAT refers to the Commission's guidelines on merger references, which state that a combined market share of 25 per cent or more would normally be enough to raise potential concerns. It goes on to find that, based on combined shares of between 45 and 55 per cent, the presence of barriers to entry and the lack of supply side substitutability, a decision that on no reasonable view could a merger be expected to lead to a substantial reduction of competition needs 'a proper factual basis and exceptional clarity of analysis'. These were not found in this case.

## Effect of the case

The OFT may, with permission, appeal the CAT's decision to the Court of Appeal: on 5 December it indicated that it is currently 'giving careful consideration to the CAT

judgment and is considering next steps'. Pending any appeal, the judgment has a number of immediate implications.

- Mergers between companies competing horizontally with combined market shares in excess of 25 per cent and raising material and complex issues are likely to be referred unless the OFT can resolve each issue based on strong and clear evidence.
- More generally, borderline cases should not 'get the benefit of the doubt'. Parliament intended such cases to be closely scrutinised by the Commission.
- The statutory exceptions to the OFT's duty to refer (including whether any customer benefits outweigh the adverse effects) are not addressed. Will the OFT be able to make such decisions in complex cases without the risk of successful challenge?
- The effect on undertakings in lieu of a reference is unclear. The CAT tells the OFT not to deprive itself of the possibility of obtaining undertakings. But will the OFT be inclined to accept undertakings if it must pass any complex cases to the Commission to avoid a challenge?
- Will the decision undermine the value of the confidential guidance process? How can the OFT satisfy itself that no credible alternative views exist without consulting the market?

Many mergers, which before the CAT's decision would have passed muster at the OFT stage, will now receive clearance only after a protracted (usually around four months) Commission review that involves significant financial resources and management time. By indicating that the OFT has no ability to decide on mergers other than those that clearly and unarguably raise no serious competition issues, the CAT's decision sits uncomfortably with the deregulatory spirit of the Enterprise Act 2002.

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