



February 2004

BRIEFING

IBA Health: back to shades of grey

Executive summary

On 19 February 2004 the Court of Appeal restored a large measure of the UK Office of Fair Trading's (OFT) discretion to clear any merger that the OFT reasonably believes is unlikely to lead to a substantial lessening of competition. The Court disagreed with the Competition Appeal Tribunal's earlier interpretation of the OFT's role, which would have greatly increased the likelihood of UK mergers being referred to the Competition Commission for an in-depth probe. This is good news for business. However, the Court's judgment also confirms that the OFT needs to be more rigorous in its casework. Merging parties can therefore expect greater OFT scrutiny of UK reviewable mergers.

On 19 February 2004 the Court of Appeal handed down its much-anticipated judgment on the OFT's appeal against the Competition Appeal Tribunal's (CAT) decision in *IBA Health*. The question for the Court of Appeal was whether the CAT had been entitled to set aside the OFT's clearance decision on the (then) proposed merger between iSoft and Torex.

The Court of Appeal's judgment is good news for companies planning a merger. As a formal matter, the Court unanimously dismissed the OFT's appeal. However, the Court had no hesitation in preferring the OFT's arguments on the key legal issue at stake in the case – namely the definition of the circumstances in which the OFT is under a duty to refer a merger to the Competition Commission for an in-depth probe.

The CAT's 3 December 2003 judgment in IBA's favour had been met with widespread criticism. Commentators had accused the CAT of lowering the threshold for referring a merger to the Competition Commission so as to greatly restrict the discretion previously exercised by the OFT. This, commentators had suggested, was contrary to the wishes of parliament and would result in a significant increase in the number of references, potentially chilling UK M&A activity.

Such criticism has now largely been met. The Court of Appeal rejected the CAT's interpretation of the test for a reference. The Court made clear that the correct basis for reference is the OFT's own belief that the merger is or may be expected to result in a substantial lessening of competition. The OFT can formulate its belief without

reference to what the OFT thinks the Competition Commission might believe. In other words – and contrary to the CAT's formulation – the mere fact that there is 'room for two views' on the expected competitive effects of the merger is not enough to trigger the OFT's duty to refer. This is good news for those who had been concerned that, on the CAT's formulation, third parties seeking to put obstacles in the way of a merger could too easily force a reference by putting up a credible alternative view.

Have we returned entirely to the world as we – and the OFT – knew it before the CAT's December judgment?

Almost but not quite:

- the OFT's discretion has largely been restored: the CAT's view – that the OFT should refer any merger that is not 'pure white' in competition terms – has been dismissed and the OFT is once again entitled to engage in judgments around 'shades of grey';
- however, the Court noted that the OFT had previously been applying a reference test based on belief in a *significant* prospect of anti-competitive effect. The Court thought this was too far up the scale of probability;
- consequently, the likelihood of a reference in borderline cases is now one notch higher than it was before the CAT's December decision – but nothing like as high as would have been the case had the CAT's formulation been allowed to stand.

Yet the OFT has not emerged from the IBA saga unscathed. The Court of Appeal agreed with the CAT that the OFT's market analysis on the case in question (the

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proposed merger between iSoft and Torex) had been insufficient to justify the OFT's conclusions that the merger could be cleared without a reference to the Competition Commission.

Parties planning future mergers can therefore expect the OFT to demand more detailed information and subject merger proposals to more rigorous scrutiny. Most immediately, all eyes are on the OFT as it prepares to issue its second decision in the iSoft/Torex merger. However, so long as it provides a reasonable and objective justification for its belief, any decision should be secure against further challenge in the CAT.

We may not have returned entirely to a pre-*IBA Health* world, but businesses planning a UK reviewable merger should take considerable comfort from this ruling.

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