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## Completed acquisition by Torex Retail plc of Retail-J Limited

The OFT's decision on reference under section 22(1) given on 4 December 2006. Full text of decision published 14 December 2006.

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**Please note that square brackets indicate text or figures which have been deleted or replaced with a range at the request of the parties for reasons of commercial confidentiality.**

### **PARTIES**

1. **Torex Retail plc** (Torex) is a provider of retail IT systems including electronic point of sale ('EPOS') software systems, workforce and performance management, merchandise planning and other back office functions.
2. **Retail-J Limited** (Retail-J) is a UK software development business which develops EPOS software systems for the retail sector. Retail-J had a turnover of less than £5 million in 2005.

### **TRANSACTION**

3. On 3 July 2006, Torex announced that it had entered into a sale and purchase agreement to acquire Retail-J. The transaction was completed on 11 July 2006. The parties notified the transaction on 1 September and the administrative timetable expires on 5 December 2006.

### **JURISDICTION**

4. As a result of this transaction Torex and Retail-J have ceased to be distinct. The parties overlap in the supply of EPOS software systems and the share of supply test in section 23 of the Enterprise Act 2002 (the Act) is met. The transaction gives rise to a combined share of supply of

above 25 per cent for Tier 2<sup>1</sup> customers. The OFT therefore believes that it is or may be the case that a relevant merger situation has been created.

## **RELEVANT MARKET**

5. The parties overlap in the supply of EPOS software systems designed for the retail sector in the UK. Retail-J is not active in any other sector.

### **Product market**

6. The parties submitted that the relevant product scope is that for all EPOS software regardless of the size (based on number of points of sale) or type of retail outlet or revenue.
7. The parties submitted that in the past EPOS service providers had tended to focus on particular sectors, and this was due in part to the limitations of the prevailing EPOS software available at that time. The parties argued that as the latest software is based on either Javascript or Microsoft.NET, it is much easier to develop applications which can be modified for the different requirements of each sector and therefore expansion into other tiers was relatively easy.
8. On the demand side, one third party submitted that it was appropriate to segment the market into Tiers (as shown below) according to number of tills, as they considered that customers in the different Tiers had different technical and business requirements and software designed for one Tier would not be suitable for another.
  - Tier 1 - more than 2,500 tills
  - Tier 2 - 250 to 2,500 tills
  - Tier 3 - 25 to 250 tills
  - Tier 4 - less than 25 tills

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<sup>1</sup> It is possible to segment EPOS software systems (consisting of hardware, software and professional services) into Tiers reflecting the size of the retail outlet they are being designed for use in. The 'Tier 2' retail sector segment is usually defined as retailers in the area of department, fashion and speciality stores that have between 250 and 2,500 points of sale. It excludes convenience, food, hospitality and petroleum forecourt stores. In the UK, there are approximately 200 retailers in this sector segment.

9. However, the majority of customers stated that they would be willing and able to switch between suppliers of different Tiers following a price increase of 5 to 10 percent. Customers also considered that the software of one Tier could be easily adapted to the needs of the customers of other Tiers, and this was particularly the case for the first three Tiers.
10. An additional factor affecting choice of supplier cited by customers was the suppliers' ability to provide after sale support, such as maintenance. Customers told us that these services were not always provided by the lower tier suppliers, however, they believed that they would still be able to purchase the EPOS software and then procure the service and maintenance from independent providers separately. One customer indicated that switching from one Tier to another might cost as much as £500,000, although it considered that its needs were considerably more complex than that of other customers.
11. On the supply side, most suppliers confirmed that they would switch to supplying alternative Tiers following a 5 to 10 percent increase in the price of the software in that Tier. One competitor considered that there are no substantial differences between software used in each Tier and felt this software could be easily adapted to suit customers from other Tiers. Another competitor confirmed that the choice of Tier which they target is not dependent on the software but on other reasons such as profitability. One competitor considered that it may be difficult to migrate software to a lower Tier, but indicated that there were past examples of people moving up a Tier.
12. Overall, on the basis of the evidence provided to the OFT, the relevant product frame of reference is considered to be at least as wide as that of all EPOS software, as there appears to be significant demand and supply substitution within the sector.

### **Geographic market**

13. The majority of customers indicated that they would be willing to procure EPOS software from suppliers outside the UK, in the event that UK suppliers increased price by 5 to 10 percent. Customers considered

that it was generally not necessary for an EPOS systems provider to have a local or regional presence to be considered a suitable supplier, as remote software support is available. They also noted that if hardware support and account management was not available locally this could be supplied by independent providers. Similarly, independent providers of service and maintenance would also be able to provide support for any products purchased from an overseas supplier.

14. On the basis of the evidence available to the OFT it is considered that the relevant geographic frame of reference is at least as wide as the UK. However, it is not necessary to reach a definitive conclusion on this issue as the transaction does not raise any competition concerns regardless of the geographic frame adopted.

## **HORIZONTAL ISSUES**

15. Post merger, the parties submit they have a combined share of supply of EPOS software of approximately 13 per cent (increment one per cent) in the UK<sup>2</sup>. The merged entity continues to face significant competition in the sector from a large number of competitors, in particular Microsoft which accounts for over 45 per cent of EPOS software sold in the UK.
16. Furthermore, bidding data provided by the parties showed that in the majority of instances the parties did not directly compete against one another for the same customer contracts, indicating that the competitive interaction between them was limited. The parties submitted that [ ], and will assist Torex in its aim of rationalising its EPOS product portfolio.
17. Based on the available evidence, the OFT considers that the merged entity continues to face sufficient competitive constraints from the remaining competitors in the sector. Therefore, the merger is not considered to give rise to a substantial lessening of competition in the supply of EPOS software in the UK at the horizontal level.

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<sup>2</sup> Share of supply by revenue.

## **VERTICAL ISSUES**

18. Currently Retail-J uses a number of companies to distribute its product to customers. One distributor raised concerns that post-merger Torex could provide the Retail-J software to its internal sales team at a lower price to than the price it provides the software to distributors or indeed stop using them altogether. They argued that it would be difficult for distributors to find another product to compete successfully in the event that Torex no longer wished to use them and wanted to go 'in house'. However, the parties submitted that since the merger completed Torex has agreed several distribution contracts with several distributors, substantially on the same terms as their existing agreements. Furthermore, based on the evidence available to the OFT, the parties do not possess any significant market power which would enable foreclosure of independent distributors as suggested. As noted above, there are a number of other suppliers of EPOS software present in the sector who would be capable of supplying alternative EPOS software to distributors.

## **ASSESSMENT**

19. The parties overlap in the relation to the supply of electronic point of sale 'EPOS' software systems designed for the retail sector in the UK. Post-merger the parties' combined share of supply is approximately 13 per cent (increment 1 per cent). The parties provided bidding data which suggested that competition between them prior to the merger was limited. Furthermore, there are a number of other suppliers present in the sector who pose a strong competitive constraint on the merged entity.
20. One third party distributor raised concerns that the merged entity may seek to provide software to its in house distributor at a lower price. However, based on the evidence before the OFT, Torex is not considered to possess the necessary market power to enable it to foreclose independent distribution. Furthermore, there are a number of alternative supplier present.
21. Consequently, the OFT does not believe that it is or may be the case that the merger has resulted or may be expected to result in a

substantial lessening of competition within a market or markets in the United Kingdom.

## **DECISION**

22. This merger will therefore not be referred to the Competition Commission under section 22(1) of the Act.