

Completed acquisition by iSOFT Group Plc of Torex Plc

The OFT's Decision on reference under section 22 given on 24 March 2004

PARTIES

1. **iSOFT Group plc** (iSOFT) provides software and systems to healthcare provider organisations including the NHS. The company was founded within KPMG in 1994 as a specialist in innovative healthcare technology and bought out by its management team in 1998. In the year ended 30 April 2003, iSOFT's worldwide turnover was £91.5 million with sales of £74 million in the EU. iSOFT divested its retail business on 10 February 2004.
2. **Torex plc** (Torex) provides health care technology software and systems for healthcare providers to GPs, laboratories, hospitals and community care. It also provides the hardware, installation and support that customers require, and supplies computer systems and services to the retail sector. The retail business was divested on 10 February 2004. Torex entered the primary (GP) healthcare sector in 1997 and has since acquired a number of other companies active in this sector. It entered the secondary (or hospital) healthcare sector in 2000 by acquiring Shared Medical Systems, going on to acquire a number of other companies active in this sector. During 2003, Torex increased its portfolio of products by acquiring InHealth Group (see below), Protos (maternity department systems), Civica (operating theatre systems) and HASS (accident and emergency, and operating theatres). In the year ended 30 December 2002, Torex achieved worldwide turnover of £161.8 million, with UK sales of £107 million.
3. In February and March 2003, Torex acquired the primary and secondary healthcare business of InHealth Group; as part of this transaction it also acquired the exclusive distribution rights to sell certain IBA Health Ltd (IBA) software products in the UK. IBA is an Australian company supplying secondary healthcare IT solutions to, among others, a number of NHS hospitals. IBA had worldwide sales of Aus \$25.0 million (approximately £10.6 million) in the year to 30 June 2003 of which Aus \$0.6 million (approximately £0.25 million) were in the UK. Torex's acquisition of InHealth was a qualifying merger, considered by the OFT and cleared by the Secretary of State for Trade and Industry on 19 June 2003. That transaction led to only minor increments in Torex's UK share of various secondary healthcare systems and primary healthcare systems.

TRANSACTION

4. iSOFT's acquisition of Torex was initially considered by the OFT as a proposed merger: the OFT decided not to refer the merger to the Competition Commission (the CC) on 7 November 2003 (the November decision) [see note 1¹]. Following an appeal to the Competition Appeal Tribunal (CAT) by IBA, the CAT quashed the OFT's decision and remitted the case back to the OFT for re-examination on 3 December 2003. On 19 February 2004, the Court of Appeal dismissed the OFT's and iSOFT's appeals against the decision of the CAT, but clarified important points of law. The OFT is now considering the case afresh in light of the CAT's and the Court of Appeal's judgments.
5. iSOFT completed its acquisition of Torex on 23 December 2003 (the merger), valuing Torex at around £337.5 million [see note 1]. Subsequent to the completion of the transaction, iSOFT gave the OFT initial 'hold separate' undertakings pursuant to s71 of the Enterprise Act 2002 (the Act).

JURISDICTION

6. The OFT believes that these arrangements have resulted in the creation of a relevant merger situation pursuant to sections 22(1)(a) and 23 of the Act. The merger situation meets both the turnover test and share of supply test in section 23 of the Act. The share of supply test is met in respect of (a) the supply of Patient Administration Systems (PAS) to National Health Service (NHS) hospitals in the UK and (b) the supply of Laboratory Information Management Systems (LIMS) to NHS hospitals in the UK.

BACKGROUND

Proposed changes to the procurement of IT Systems in England

7. Until now, hospitals and/or their Strategic Health Authorities (SHAs) have purchased IT systems on an individual basis as and when required with the effect that the NHS has many different installed IT systems, creating interface and interoperability issues.
8. Following a detailed review of its IT needs, the Department of Health (DoH) proposed a new IT regime² 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. In broad terms, the objective of the NPfIT is to allow immediate electronic access to a patient's entire medical records from any part of the NHS, so clinicians can always see a patient's entire case file when treating them, thus facilitating better clinical care as well as efficiency savings for the NHS.
9. The NPfIT is intended to create: a 'national spine' of archived records known as the national NHS Care Records Service; an electronic (e-booking) system for

¹ iSOFT state that the transaction was structured as a merger as opposed to an acquisition by iSOFT of Torex.

² Outlined in the Department of Health's publication 'Delivering 21st Century IT Support for the NHS', June 2002.

hospital appointments³; an electronic transmission system for prescriptions; a national NHS broadband network; and a National Care Records Service (NCRS, formerly called the integrated care record service) covering both primary and secondary care which will be implemented at a regional level through the appointment of five Local Service Providers (LSPs). The cornerstone of the NCRS is the creation of an Electronic Patient Record (EPR) for each patient.

10. In order to implement the NCRS, five regions have been created in England, with an LSP appointed as project manager to oversee the implementation of the NPfIT in each. The regions are: London; North East, Yorkshire and Humberside; South East and South West; East of England and East Midlands; and West Midlands and North West. Within each region, the selected LSP and its preferred software supplier (known as a preferred application provider or PAP) will be responsible for developing and managing the process of migration from the installed legacy systems to NPfIT-compliant systems. However, the contract between the NPfIT and each LSP is to provide a working solution in terms of system functionality (set out in full in the NPfIT's Output-Based Specification (OBS)): the contract does not prescribe the specific software to be used to achieve this. The LSP is free to implement the OBS-defined solution in the way it deems best.
11. Each LSP has been required to specify its PAP and the main sub-contractors to be used so that the NPfIT can be confident that the proposed solution each LSP is seeking to implement complies with the requirements of the OBS. Accordingly, before appointing the LSP for each region, the DoH undertook a competitive tender process which included a comprehensive assessment ('proof of solution') carried out by the DoH's National Design Authority (NDA) to check that the combination of software suppliers and products each prospective LSP had assembled in its consortium provided all of the NCRS system functionality demanded by the OBS, including integration with the e-booking system and national spine of archived records. (Thus, while the totality of products in a consortium have been in some way 'approved' by the NPfIT, it would not be correct to think of an individual PAS or LIMS as having been individually accredited by the NPfIT.)
12. Since the OFT's November decision, the NPfIT assessment process has concluded with the award of the five LSP contracts.
 - On 8 December 2003, DoH announced that BT (whose PAP is IDX) had won the contract for the London area, worth £996 million over the next ten years; and that Accenture (whose PAP is iSOFT) had won the North East region contract worth £1,099 million over the next ten years.
 - On 23 December 2003, CSC was awarded the contract for the North West/West Midlands region, worth £973 million over the next ten years. Its PAP for this region is iSOFT. Accenture was awarded the contract for the Eastern Region, worth £934 million over the next ten years. Its PAP for this region is also iSOFT.

³ The e-booking contract has been awarded to SchlumbergerSema and is valued at £64.4 million. The NHS Care Records Service contract was awarded to BT and is worth £620 million over 10 years.

- On 26 January 2004, Fujitsu Alliance was awarded the Southern contract, worth £896 million over the next ten years. IDX is its PAP.
13. iSOFT is the PAP in three of the five areas: IDX is the PAP in the other two areas. It has been estimated that the PAP contracts are worth around 10 per cent of the overall LSP contract value over the next ten years [see note 4]⁴.
 14. The appointment of the LSPs has resulted in a fundamental change to the procurement process for healthcare IT products, significantly reducing the number of healthcare IT contracts available in England (but dramatically increasing their size). This shift in the competitive dynamic will inevitably lead to a degree of supplier rationalisation and is consistent with the aims of the NPfIT to reduce the number of different IT systems used across the NHS and achieve better value for money. LSPs have stated that the selection of the successful PAPs and sub-contractors was based not only on their current products, but also on their ability to develop and improve the functionality and interoperability of future products to meet the standards and aspirations of the NPfIT.
 15. It has been put to us that, in assessing the competitive effects of this merger, we should consider whether or not the NPfIT will proceed as planned. In particular, it has been argued that there are doubts whether the NPfIT will proceed as planned and whether sufficient funding is in place to support the roll-out of the NPfIT. Third parties have pointed to other government funded IT projects which are said to have been unsuccessful or significantly exceeded budget. It has been suggested that, if we were to conclude that the NPfIT would not proceed at all or only partially, we should also consider the competitive effects of the merger on the supply of secondary healthcare IT products in England in the absence of or in the presence of a partially implemented NPfIT.
 16. The available evidence suggests that the NPfIT is progressing as planned. Prior to the OFT's November decision, the initial stages of the NPfIT had all proceeded as planned (or with only minor delays). Since the November decision, this process has continued with the award of five ten-year contracts to implement the NCRS across the NHS in England. Funding has also been committed by the Treasury for the next three years comprising an additional £2.3 billion (£400 million in 2003/2004, £700 million in 2004/2005 and £1.2 billion in 2005/2006) on top of the existing NHS IT budget of around £850 million per year⁵. Further, DoH Ministers have publicly committed to future funding for the NPfIT⁶.
 17. The evidence available therefore leads us to believe that the appropriate counterfactual is one in which the NPfIT proceeds as planned. The competition assessment therefore focuses on the competitive effects of the merger within the NPfIT framework. In light of our assessment of the scope for possible future competition within the NPfIT framework, we also consider the competitive effects of the merger in England outside the NPfIT. This analysis would appear to be

⁴ iSOFT point out that the 10 per cent figure relates only to the initial contract value for core NCRS.

⁵ It is usual Treasury practice to set firm budgets only three years in advance. In our view, it is difficult to draw inferences from the fact that the Treasury has not yet guaranteed monies for the financial years 2006/2007 onwards.

⁶ In December 2003, John Reid, Secretary of State for Health said, ' There is funding agreed for the next two years. The idea that we will go ahead without funding, it is not realistic. The formalities have not yet been gone through, but the political will is there.'

essentially the same as the analysis one would conduct if it were assumed that the NPfIT was only partially implemented. We also consider separately the competitive effects of the transaction in Scotland, Wales and Northern Ireland (where the NPfIT does not apply).

RELEVANT MARKET

Product market

18. iSOFT and Torex each supply a range of healthcare IT software products, but overlap only in the supply of certain IT software systems to the secondary (or hospital) healthcare sector. More specifically, the parties are leading suppliers in the UK of PAS and LIMS⁷.
 - The sophistication of PAS varies considerably among NHS hospitals⁸: at its simplest the PAS used by hospitals records the demographic details of each patient. More sophisticated PAS, developed over recent years, are linked to clinical information systems (CIS) which in turn are linked to departmental modules thus giving PAS increased functionality⁹.
 - LIMS is a specific departmental system, designed to meet the requirements of a hospital's or trust's laboratory and to prompt clinical processes in the face of specific diagnoses and ensure best practice by clinicians in the laboratory.
19. 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 (e.g., maternity or A&E). There is therefore no demand-side substitution between the programmes used by different hospital departments. PAS systems are beginning to incorporate some clinical/departmental

⁷ This decision uses the terms 'PAS' and 'LIMS' to describe the overlap products. It uses the term Electronic Patient Record (EPR) to refer to the unified patient record held on and accessible over various hospital software systems, e.g., PAS, LIMS, maternity modules, other departmental modules. The DoH has set targets to improve standards and functionality for EPR systems, aiming to reach the most advanced level of functionality by 2010 – see 'Information for Health: An Information Strategy for the Modern NHS 1998-2005, A national strategy for local implementation' NHS Executive September 1998.

⁸ PAS and LIMS are also sold in private hospitals, although the systems sold in those hospitals are quite different from the systems sold in the NHS, particularly as they include billing functionality. There is no overlap between the parties' activities in respect of PAS sales to private hospitals: Torex is not active. On the other hand, Torex is the leading UK supplier of LIMS to private hospitals; iSOFT has only around 1 per cent of UK sales. Given the insignificant change to the competitive situation, the supply of PAS and LIMS to private hospitals is not considered further.

⁹ EPR systems can be developed on the back of the PAS, becoming more sophisticated by incorporating specific departmental modules 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.

functionality. The implementation of the NPfIT is itself driving change and improved functionality in, and interoperability among, healthcare IT systems.

20. The parties have argued that healthcare IT software is characterised by a high degree of supply side substitutability. They consider that the same equipment, skills and know-how are used to develop and supply a wide range of IT products and services. Where particular knowledge is required, the parties say that it can be acquired by secondment or sub-contracting. However, healthcare IT companies appear to be highly specialised by clinical need and, historically, in the UK, acquisition appears to have been a favoured method of acquiring access to specialist modules: Torex's expansion strategy was acquisition-led.
21. Finally, customers appear to buy PAS or LIMS as an IT package, which covers the upfront licence fee and implementation, as well as future maintenance and servicing costs. Accordingly, it seems appropriate to consider competition in

maintenance, servicing and upgrading of these software systems as part of the assessment of competition in selling the software systems themselves.
22. For starting purposes, the appropriate frame of reference for consideration of the competitive effects of the merger appears to be the supply of secondary healthcare software, in particular the supply of PAS and LIMS to NHS hospitals, where the parties' UK activities overlap.

Geographic market

23. IT software for the healthcare sector can be developed anywhere in the world. Although there are national variations in healthcare IT requirements (including some variations between England, Scotland, Wales and Northern Ireland), such variations appear to be minor. For example, hospitals in Scotland use a different system to validate morbidity records. Accordingly, software suppliers located outside the UK may bid for contracts to supply healthcare IT software to NHS hospitals in the UK. UK public sector contracts, such as contracts for the provision of services to NHS hospitals, in excess of £140,000 must be advertised in the Official Journal of the European Communities (OJEC): this facilitates bids from competitors not only across the EU but around the world, which seek to adapt their products to meet local specifications and requirements. Indeed, there is evidence of entry to the UK from abroad over the last 10 years or so (including by IBA itself).
24. From a demand-side perspective, the key requirement in marketing and selling a new system appears to be a local presence. Customers require a local presence particularly in order to ensure that the requisite installation expertise (and then maintenance and servicing) is readily available. Overseas bidders for LSP partnerships under the NPfIT have recognised this and engaged in a process of recruitment in the UK to strengthen their presence. In theory, such support services could be provided by a UK-based firm supporting products developed and sold by a non-UK based software supplier. However, we have not been able to gather evidence suggesting that this currently occurs or could happen quickly.

Conclusion

25. We take the view therefore that the most appropriate frame of reference for consideration of the competitive effects of the merger is the supply of secondary healthcare software in the UK to NHS hospitals, in particular the supply of PAS and LIMS to NHS hospitals.

COMPETITION ASSESSMENT

Horizontal competition assessment

26. As noted above, the parties' UK activities overlap in the supply of PAS and LIMS software to NHS hospitals. The following competition analysis therefore begins by focusing on whether the merger might give rise to competition concerns in the supply of those products alone. Our analysis focuses separately on competition inside and outside the NPfIT.

Shares of PAS and LIMS

27. The following chart shows historic share data (calculated by number of installations) for each of PAS and LIMS sold in NHS hospitals in the UK¹⁰.

	iSOFT	Torex	iSOFT/ Torex	IBA	McKesson	Siemens	Sysmed ¹¹	Inhouse supply
PAS	23 %	21 %	44 %	3 %	14 %	8 %	-	4 %
LIMS	45 %	11 %	56 %	-	-	-	11 %	11 %

Source: Silicon Bridge Report¹²; the parties¹³

28. These share data suggest that the parties have historically been important PAS and LIMS suppliers in each of the four home countries. However, in England, the procurement process has changed because of the NPfIT (see para. 33 below) so that shares of the legacy installed base might not be a good guide to future competitive conditions. Especially since these are bid markets where competition occurs for infrequent and large contracts. Legacy shares will not necessarily reflect recent developments in the sector (such as technology changes, new entry or new procurement methods) or whether a firm is currently regarded as competitive by customers (since shares of an installed base may reflect past success rather than more recent success).
29. In light of these points, examination of recent bidding histories may shed more light than legacy shares on the strength of recent competition between the

¹⁰On 29 February 2004, iSOFT signed a Settlement Agreement with IBA. **Information excised at the parties' and third party request.** In considering the situation with the merger, any changes to the structure of competition following the Settlement Agreement must be reflected. This is because in the situation with the merger the Settlement Agreement would take effect. In particular, iSOFT would not have an exclusive distribution agreement with IBA. In the following data, IBA appears as a separate entity.

¹¹ Sysmed Solutions Limited was formerly called William Woodard Associates Limited.

¹² NHS 21st Century Strategy for Modernising NHS Information Systems. January 2003.

¹³ No other supplier of PAS and LIMS has better than a 5 per cent share in either PAS or LIMS.

merging parties (and thus may be a better guide to the strength of possible future competition). Data provided by the parties from OJEC contracts put out to tender show the following numbers of contracts tendered in recent years, together with iSOFT's, Torex's and IBA's respective contract wins for PAS, and iSOFT's and Torex's wins of LIMS contracts. These data do not include situations where an existing contract was extended without being retendered¹⁴.

OJEC PAS contracts in England

Year contract tendered	Contracts tendered	Of which contracts awarded ¹⁵	iSOFT wins	Torex wins	IBA wins
1997	7	7	2	2	2
1998	2	2	1	0	0
1999	11	8	0	0	2
2000	7	4	1	0	0
2001	12	7	4	0	0
2002	6	3 (so far)	1	0	0
2003	3*	0	0	0	0
Total 1997-2003	48	31	9	2	4

* to July 2003

Source: the parties

OJEC LIMS contracts in England

Year contract tendered	Contracts tendered	Of which contracts awarded ¹⁶	iSOFT wins	Torex wins
1998	17	14	4	2
1999	4	4	2	0
2000	5	5	0	2
2001	9	5	0	0
2002	3	0	0	0
2003	4*	0	0	0
Total 1998-2003	42	28	6	4

* to April 2003

Source: the parties.

30. iSOFT and Torex won the following proportions of awarded PAS and LIMS NHS contracts in England between 1997 and 2003.

¹⁴ The proposed changes to the NHS IT software procurement under the NPfIT may have persuaded hospitals to extend existing contracts rather than re-tender. These contracts were not contestable (generally because installed software systems are protected by intellectual property rights that prevent third parties from working on them), but may have acted as a competitive constraint on these contracts. The planned introduction of the NPfIT may therefore have reduced the number of OJEC contracts advertised and awarded in the past two years.

¹⁵ Contracts for PAS are generally awarded one or two years later than the year in which the contract was tendered. The data shown here for contract awards relate to the contracts tendered for a given year, irrespective of the fact that they may have been awarded some time later.

¹⁶ Contracts for LIMS are generally awarded one or two years later than the year in which the contract was tendered. The data shown here for contract awards relate to the contracts tendered for a given year, irrespective of the fact that they may have been awarded some time later.

- iSOFT won nine of the 31 PAS contracts awarded (or 29 per cent) and Torex won two (or 6 per cent), giving a total share for the merged entity of 35 per cent. IBA won four contracts (or 13 per cent). Torex won no new PAS contracts from 1998 onwards, but was short-listed on 11 occasions and selected as the preferred supplier on three. On each of these three occasions, the projects were cancelled because the projects were deemed incompatible with the NPfIT. Principal competition to iSOFT for PAS contracts appears to have come from firms other than Torex.
- iSOFT won six of the 28 LIMS contracts awarded (or 21 per cent) and Torex won four (or 14 per cent), giving a total share for the merged entity of 36 per cent. No new LIMS contracts have been awarded since 2001. iSOFT and Torex appear to be close rivals: they have frequently been shortlisted against each other in

bid contests, and have often won contracts from – or lost contracts to – each other.

31. Does being the incumbent PAS or LIMS supplier to a given hospital confer any advantages (by way of informational or reputational advantage) when a contract is being retendered? If so, the installed base might give the parties a competitive advantage when bidding for new business. OJEC bidding data show that where the incumbent is known, in 81 per cent of cases for PAS and 85 per cent of LIMS, the incumbent has been displaced, suggesting that the market is highly competitive. A hospital may be satisfied with the performance of its supplier and choose to extend its existing contract as opposed to putting the contract out to re-tender. However, a hospital may have many different reasons for changing supplier, not least possible dissatisfaction with the performance of the incumbent in which case it may prefer to re-tender its requirements. These percentages might also be based on a small and not necessarily representative sample of PAS and LIMS contracts, since the restructuring of IT arrangements resulting from the impending NPfIT may, in recent years, have encouraged some hospitals to extend existing contracts rather than re-tender for entire systems.
32. The evidence shows that iSOFT and Torex were historically important rivals in the supply of both PAS and LIMS to NHS hospitals as demonstrated by their respective legacy shares of PAS and LIMS. Review of bidding data suggests that the more recent competition between them for PAS contracts has been more limited, but in relation to LIMS they may have been close pre-merger rivals. Assessment of the importance of continued future competition between iSOFT and Torex must reflect the effect of the NPfIT on competition to supply PAS and LIMS to hospitals.

The effect of the NPfIT in England

33. The NPfIT will change the structure of competition in secondary healthcare software supplied to NHS hospitals in England (including the supply of PAS and LIMS). A key question is whether, following the competition for appointment as an LSP or a nominated PAP, there remains any scope for future competition to supply PAS or LIMS to hospitals in England. If there is no scope for future competition within the NPfIT, then the merger could not have an adverse effect on competition within the NPfIT since Torex has not been selected to supply PAS or LIMS products to any LSP. If however award of PAS or LIMS contracts under

the NPfIT continues to be open and contestable (i.e., if companies can still enter the NPfIT or compete for IT purchases by hospitals outside the NPfIT) then Torex might in the future have been able independently to develop its products in order to compete for future NPfIT custom.

34. More specifically, the OFT has considered whether the NPfIT has changed the nature of competition for NHS IT contracts from competition *in* the market to competition *for* the market. Whereas historically NHS hospitals purchased PAS and LIMS individually and rival suppliers competed at the hospital level to supply these products, under the NPfIT rival software suppliers have competed to supply PAS and/or LIMS functionality to an LSP for a particular region. So competition to supply PAS and LIMS over the next 10 years in a particular region of England may be said to have taken place in the shape of the contest to be part of a LSP/PAP consortium winning a NPfIT contract.
35. In assessing the effect of the NPfIT, the following considerations are relevant.
- First, the appointment of an LSP, a PAS supplier and a LIMS supplier for each region means that other existing suppliers of PAS and LIMS will be displaced over time. Over the course of the 10-year LSP contracts, all systems are likely to be replaced or significantly upgraded. There will be a process of migration or upgrade to the NPfIT-compliant systems. Existing PAS or LIMS may remain in place until contract expiry and may be upgraded to enhance short-term functionality, or even to achieve NPfIT compliance where this would be possible¹⁷.
 - Second, iSOFT contends that there will be in future only limited scope for the appointed PAS or LIMS supplier to have its contract terminated, and that is confined to situations of non-performance of its contract obligations¹⁸. iSOFT argues that this means that the award of PAP contracts under the NPfIT is de facto exclusive.
 - Third, some third parties have argued that the 'route to market' through the NPfIT is not necessarily closed to other competitors should they develop new products with enhanced functionality, which are NPfIT compliant, or develop a product offering better value for money. Also, it has been suggested that LSPs may wish to offer other suppliers' PAS or LIMS products in addition to their existing PAP's products should a better PAS or LIMS product be developed over the coming years. Third parties point to NPfIT statements suggesting that it might approve rival PAS products in addition to those already approved. One of the aims of the NPfIT is to improve the overall value for money that the NHS achieves in IT purchasing, so it would be odd for a better product to be excluded from the NPfIT. Indeed, all of the empirical evidence suggests that such a product would be included. This may therefore represent a further way in which the NPfIT will continue to allow, and indeed facilitate, competition in the product market.

¹⁷ This is consistent with the OBS statements that the objective of the NPfIT is not immediately to 'rip and replace' existing systems.

¹⁸ Non performance may include where the supplier does not have sufficient capacity to meet the requirements of the NPfIT.

- Fourth, even if there is scope for in-market competition under the NPfIT, LSPs may have limited incentives to allow hospitals to buy PAS or LIMS other than those offered by the LSP. This is because under the terms of the contract between an LSP and its PAP, the LSP pays [see note 19]¹⁹ fixed fee to the PAP for the supply of PAS. The level of the fee is the same irrespective of the number of hospitals in which the PAS is installed. Further, such competition may not materialise as NPfIT funding appears to be predicated on hospitals taking the PAS or LIMS offered by the PAP: hospitals may not have the financial resources to buy outside the NPfIT. iSOFT has argued that a hospital's ability to fund such purchases itself might well decline as the NPfIT progresses and more of the NHS's overall IT expenditure becomes committed to NPfIT-related projects.

36. Overall, while the evidence suggests that most NHS hospitals will take the PAS or LIMS offered by the relevant PAP, there is a real possibility that the NPfIT has not

entirely eliminated future competition for PAS and LIMS. It appears that hospitals may indeed choose their own PAS or LIMS if they so wish, although there is debate as to how such purchases might be financed and whether they would fall inside or outside the NPfIT. Although each LSP has appointed suppliers of PAS and LIMS that have been subject to the NDA's 'proof of solution' testing, an LSP may change to an alternative PAS or LIMS, or indeed offer customers a choice of PAS or LIMS. Scope for future competition appears to be greater in relation to LIMS than to PAS: PAS is a core part of the NCRS which needs to be implemented in advance of other departmental systems, In addition, LSP's have stated that no current LIMS meet the requirements of the NCRS in terms of functionality so that implementation of the LIMS-related functionality in the NCRS may take longer.

37. In light of these considerations, we need to consider the competitive effects of the merger on: (a) future competition within the NPfIT, including an assessment of Torex's future importance as an independent, competitive force; and (b) possible competition in England outside the NPfIT. The next two sections of this decision address these points.

Importance of Torex

38. Insofar as there is continued competition to supply PAS and LIMS under the NPfIT, would that competition be substantially lessened by the merger? That depends in part on whether Torex, absent the merger, would have been a strong future competitor. It also depends in part on whether there are other actual or potential suppliers of PAS and/or LIMS to which customers could turn. These points, along with NHS buying power, are discussed below.

39. In relation to PAS, the following considerations are relevant.

- First, the quality of Torex's PAS may be judged from the fact that, in contrast to iSOFT (whose PAS was selected by five of the 10 short-listed LSPs and which has been selected as the PAP to supply three of the regions), Torex was not even selected to participate as a partner to a prospective LSP in bidding for a regional contract. Torex approached all

¹⁹ Information excised at the parties' request.

prospective LSPs with its PAS at the beginning of the selection process, prior to the merger discussions, but was not selected to supply its PAS by a single prospective LSP.

- Second, although Torex has a significant share of legacy PAS contracts, it has not won any new PAS contracts in the past six years. It has also been submitted that reliance on Torex's share of legacy contracts is an inaccurate guide to its future competitive strength since certain customers have asked for Torex products to be replaced as a matter of urgency by the NPfIT.
- Third, Torex argues that it has neither developed nor innovated its existing PAS software²⁰. Its commercial strategy has been to acquire firms with differing software products rather than to develop new products itself. It

has been argued that Torex could develop/innovate in the future in order to enter the NPfIT as an alternative PAS supplier, but this may be questioned. Evidence suggests that Torex failed to develop its products sufficiently for the most important part of the NPfIT: the initial award of PAP contracts. This may be in part explained by the fact that it only owned the PAS business for a short time before this merger arose. But it is doubtful whether the lower future NPfIT contract rewards, even when coupled with the potential value of sales (outside England and non-NPfIT sales in England), would create sufficient incentive for Torex to invest in new products meeting NPfIT OBS functionality. Torex's own pre-merger actions suggest that there would not be such an incentive; following its exclusion from the NPfIT, it began laying off staff that would otherwise have supported PAS. (It appears that other companies failing to secure NPfIT participation have behaved similarly.)

40. In relation to LIMS, the following considerations are relevant.

- First, the quality of Torex's LIMS may be judged from the fact that, in contrast to iSOFT, whose LIMS was selected by a number of the 10 short-listed LSPs, Torex was not even selected to participate as a LIMS supplier to a prospective LSP in bidding for a contract. Torex approached all prospective LSPs with its LIMS at the beginning of the selection process, prior to the merger discussions, but was not selected to supply its LIMS by a single LSP.
- Second, Torex has won two new LIMS contracts recently and had historic success as demonstrated by its share of the legacy base²¹. (Further data on legacy shares and contract wins are set out above.)
- Third, Torex has neither developed nor innovated its existing LIMS software. Indeed, Torex has indicated that its LIMS product was not developed with the NPfIT in mind and that it has no record of innovation in this field. However, this may be in part explained by the fact that it only owned the LIMS business for a short time before this transaction arose, and so would

²⁰ 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.

²¹ To be precise, Torex acquired the company, Berkeley, that won these contracts.

have had limited time to look at it. In this connection, many of the same points made above concerning incentives to invest in PAS development apply here. However, many other third parties suggested that Torex's LIMS product was a very strong product that had been continually developed: there is evidence that competition between iSOFT and Torex specifically was a key driver of product development.

41. Aside from Torex, it is arguable that sufficient competitors will remain to act as a competitive constraint both in PAS and LIMS, whether as existing suppliers or potential suppliers (through product development). Generally, the increasing

sophistication of healthcare IT systems and the need to meet the particular requirements of the NHS in the UK would suggest that costs for new entrants are likely to be significant. However, any such costs must be viewed relative to the value of contracts under the NPfIT. While recognising the additional conversion

costs to 'anglicise' products, this has not prevented overseas entry (such as IDX or IBA) and the incentives to enter appear unlikely to change post-merger.

- In the supply of PAS, alternative suppliers include IDX, Cerner, IBA, Siemens, TrakHealth Ltd (an Australian firm which supplies its PAS, CIS and LIMS products via McKesson), Misys [see note 22]²², Filetek (a US firm supplying EPR systems via Meditech), Capula (which acquired Elan Technologies' products). Of these firms, IDX – which has been selected as the PAP to supply two regions – will clearly have a stronger position in the UK than hitherto. Cerner, although not successful in winning a PAP contract, has been selected as a potential PAP: its integrated EPR/PAS met the NDA's 'proof of solution' tests. As a result, it appears likely that both will have a stronger competitive position in the UK than previously when bidding for any future contracts. As a result of the Settlement Agreement between iSOFT and IBA (see footnote 10 above) IBA is free to compete against the merging parties in the future.
- As regards LIMS, there are numerous examples of actual entry by overseas companies over the past 10 years or so, including TrakHealth Ltd (again via McKesson), Misys, Capula (which acquired Elan Technologies' products) [see note 23]²³, and Triple G Systems (a Canadian LIMS supplier now owned by GE Medical Systems). The three main competitors that have won the majority of OJEC LIMS tenders have been Triple G, Sysmed and Misys. Aside from iSOFT, only Triple G has current NPfIT involvement: it is the default supplier of LIMS to IDX. (Sysmed is IDX's reserve provider.) Customers have expressed mixed views about the ability of these firms to compete with the merged entity. In particular, as noted above, there is evidence that competition between iSOFT and Torex specifically was a key driver of product development.

42. There is also good reason to believe that one of the effects of the NPfIT has been to increase buyer power substantially in the NHS and that, post-merger, this will continue to discipline the merged entity's commercial behaviour. Already, PAS

²² iSOFT submits that Misys does not supply PAS.

²³ iSOFT submits that Capula does not supply LIMS.

and LIMS suppliers have competed actively against each other to win preferred supplier status with the LSPs. iSOFT has said that, in order to win PAP contracts, it was forced to reduce its software licence fees by [see note 19]. Some of the scope for these price reductions is said to result from the merger with Torex. iSOFT has argued that efficiency and customer benefits in the form of lower prices will thus result from the merger.

43. In sum, notwithstanding that there appears to be some scope for future competition within the NPfIT for PAS and LIMS supply, there appear to be good arguments to suggest that the loss of Torex as an independent future competitor would not be a substantial loss of rivalry to iSOFT within the NPfIT. In particular, this is due to the fact that no LSP took up Torex's PAS or LIMS as part of their overall 'solution' offered to the NPfIT and Torex's limited development of PAS and LIMS. However, the available evidence does suggest (a) that Torex achieved relatively more success in relation to its LIMS than its PAS products; and (b) that the scope for competitors to develop new/better LIMS products and then win future NPfIT business seems greater in relation to LIMS than to PAS.
44. As noted above, consideration of whether Torex would have sufficient incentive to engage in this sort of product development depends not just on the potential rewards for innovation within the NPfIT framework, but also on the potential rewards outside the NPfIT in England and also in Northern Ireland, Scotland and Wales.

Non-NPfIT expenditure in England

45. In addition to considering how non-NPfIT contracts might affect competition within the NPfIT, we also need to consider how this merger might itself affect competition for PAS and LIMS contracts in England outside the NPfIT.
46. It has been difficult to obtain clear evidence as to the potential future value of PAS and LIMS contracts outside the NPfIT in England: in part, this is because the actual impact of the NPfIT on non-NPfIT healthcare software purchasing is uncertain, but also there are no publicly-available data on the value of PAS and LIMS contracts awarded annually by the NHS in England. Our best estimate is that historically total PAS contracts awarded annually were worth around £7-10 million and total LIMS contracts awarded annually were worth around £2-4 million.²⁴ While these totals may be some guide to initial spending on PAS and LIMS spending in the NHS in England, non-NPfIT PAS and LIMS spending is likely to decline from these totals as upcoming contracts are awarded and paid for under the NPfIT. However, since the NPfIT is planning to migrate legacy PAS

²⁴ These estimates are based on the following: current IT expenditure across the NHS (including both primary and secondary care) is estimated at £850 million annually. This figure includes significant sums that are committed under multi-year contracts and thus the annual £850 million figure is substantially higher than the value of IT contracts actually awarded annually by the NHS. Indications put to OFT suggest that between 10 per cent and 20 per cent (or £85-£170 million) of all IT contracts NHS-wide may be contestable each year. All third parties estimate that, at present, annual expenditure on PAS and LIMS systems represents only a small proportion of the contestable contracts awarded annually. Since the average PAS contract is worth around £1 million and the average LIMS contract around £400,000, and around 7-10 PAS and 5-10 LIMS contracts were being awarded annually pre-NPfIT, we believe that the above estimates are a sound guide.

more quickly than LIMS, LIMS contracts may continue to be awarded outside the NPfIT for a longer period of time.

47. As to the effects of the merger on competition for PAS and LIMS contracts outside the NPfIT in England, many of the points made above (paras. 39-42) are relevant here, including in particular Torex's recent bidding record, views of Torex's future product development, and the scope for alternative suppliers to bid against the merged iSOFT/Torex for PAS and LIMS contracts. Importantly, the NPfIT itself is likely to impact on conditions of competition outside the NPfIT: products that have not been selected by LSPs may well find it harder to compete for future contracts since they may be seen as 'NPfIT non-compliant'; and software suppliers may also find their non-NPfIT prices being benchmarked against NPfIT pricing.
48. As to whether, and to what extent, non-NPfIT PAS and LIMS business may affect incentives to compete within the NPfIT, the evidence available is mixed. While both iSOFT and Torex expect to receive future revenues from their legacy PAS and LIMS contracts, the projected revenue for non-NPfIT contracts fall far short of the expected NPfIT-derived revenues over the next ten years. More specifically, Torex's future PAS and LIMS revenues, which of course include no NPfIT element, were projected to be around [see note 19] of iSOFT's future revenues. These data though raise a number of questions, including the expected rates of migration from legacy to NPfIT systems, the level of profitability that these projected revenues will deliver, and whether these profits would have been sufficient for Torex alone to fund the necessary PAS and LIMS product development to compete for NPfIT business. The fact that migration to NPfIT LIMS is likely to take longer than for PAS may increase the time over which Torex could have invested in delivering its LIMS product.
49. In sum, as regards competition for PAS and LIMS contracts outside the NPfIT, we have reached the following views.
 - Considering the evidence in respect of PAS systems, we do not believe that the merger would give rise to a substantial lessening of competition given the intended implementation of the NPfIT PAS. We believe that Torex's initial exclusion from the NPfIT would have had a significant effect on its ability to compete, reducing its incentives to invest in product development (both inside and outside the NPfIT). Non-NPfIT customers would likely have been influenced by its exclusion from the NPfIT to deter them from purchasing Torex's PAS, especially as implementation of this part of the NPfIT will take place first. Nor do we consider there to be sufficient evidence to believe that non-NPfIT business would sustain the R&D necessary to develop Torex's PAS in order to compete effectively for future NPfIT business.
 - In respect of LIMS, the situation is more complex. Torex was a stronger competitor in LIMS than in PAS. Its initial exclusion from the NPfIT might not have had such a significant effect on its prospects for success in LIMS given the longer time frame to migrate from legacy systems to NPfIT-compliant systems. It might therefore have been able to compete strongly with iSOFT for LIMS contracts for the foreseeable future; additional contract wins and an expectation of being able to win some NPfIT business may have given Torex sufficient incentive to develop its LIMS. While there

are alternative suppliers of LIMS – some of which have secured NPfIT work – the weight of the evidence suggests that they may not exert sufficient competitive constraint on the merged iSOFT/Torex in the future.

Supply in Northern Ireland, Scotland and Wales

50. As noted above, the NPfIT does not extend to Northern Ireland, Scotland and Wales. Consideration of the effects of this transaction in Northern Ireland, Scotland and Wales requires review of the same considerations as were raised above in relation to competition in England outside the NPfIT: i.e., how this merger might itself affect competition for PAS and LIMS contracts in each of these three countries, together with how non-NPfIT contracts might affect competition within the NPfIT by giving Torex sufficient incentive to develop its

PAS and LIMS products to NPfIT standard. In regard to the latter, it should be noted that the value of total secondary healthcare IT expenditure in each of Northern Ireland, Scotland and Wales is significantly smaller than in England, with

estimates of £15 million in each of Wales and Northern Ireland, and £75 million in Scotland, of which PAS and LIMS would be but part.

51. In Northern Ireland, Scotland and Wales, the merger gives rise to little overlap between the parties in PAS. iSOFT is the main supplier of PAS systems in Scotland with a 47 per cent share (supplying 17 systems), NHS in-house accounts for 25 per cent (nine systems), Compass 6 per cent (two systems) and Torex 3 per cent (one system). The increment in Scotland is thus small: the only PAS contract awarded since 1997 was won by iSOFT. Torex is a major supplier of PAS in Northern Ireland: available evidence suggests that iSOFT is not. iSOFT has strong presence in Wales, supplying the majority of hospitals with the remainder supplied largely in-house. Torex won the only Welsh PAS contract to be awarded since 1997. As to competitive conditions more generally the following points may be made.

- It is likely that the NPfIT would have a 'ripple effect' and thus influence substantially future competition for Northern Irish, Scottish and Welsh PAS contracts. Each of the three national authorities indicated that it is considering implementing national procurement for patients records systems²⁵. Third parties also thought that if a supplier is not part of the NPfIT, given the relatively low sales compared to the NPfIT, it is less likely to succeed in supplying IT products outside England.
- PAS suppliers that have entered or expanded because of the NPfIT, such as IDX, have strong incentives to compete for custom in Northern Ireland, Scotland and Wales. Although IT systems in Northern Ireland, Scotland and Wales have different patient numbers, codes and definitions of episodes of care, the changes required to convert English IT systems to accommodate such differences appear to be minimal. Accordingly, the loss of Torex as an independent PAS supplier is not expected to be significant as regards

²⁵ Scotland 'Partnership in Care' White paper February 2003; Wales Informing Healthcare (Single Integrated Electronic Health Record) announced July 2003; Northern Ireland in January 2003 IBM was awarded a 10 year infrastructure contract to consolidate systems to move towards electronic care records.

prospective competition, particularly taking into account Torex's already weak position in PAS supply.

- There are insufficient grounds to believe that winning PAS contracts in Northern Ireland, Scotland and Wales – or the expected future revenues from legacy contracts – would generate an incentive for Torex to develop its products to compete in England in the NPfIT going forward.

52. As regards LIMS systems, there appears to have been significantly more head-to-head competition between iSOFT and Torex. In Scotland and Wales, the parties account for 100 per cent of the installed base for LIMS – in Scotland, iSOFT supplies 18 systems (64 per cent) and Torex 10 systems (36 per cent): they account for all three of the LIMS contracts awarded in Scotland since 1998. In Northern Ireland, many LIMS systems have been developed in-house. Torex has won a contract at the Royal Victoria Hospital in Belfast which will act as a reference site, and supplies two hospitals out of 17. iSOFT has no presence in Northern Ireland in LIMS. Welsh customers have provided evidence of material competitive interaction between the parties: iSOFT and Torex account for both of the LIMS contracts awarded in Wales since 2000.

- As noted above, the NPfIT is likely to have a significant impact on conditions of competition in Northern Ireland, Scotland and Wales. For the reasons set out above in relation to non-NPfIT expenditure in England, the impact of the NPfIT is expected to take effect earlier in relation to PAS than to LIMS.
- There are alternative suppliers of LIMS products, for example Triple G, Misys and Sysmed. The fact that Triple G has been successful in winning business under the NPfIT suggests that it may also now be capable of winning LIMS contracts in Northern Ireland, Scotland or Wales. Moreover, Misys and Sysmed may have strong incentives to win additional business outside England. However, in Scotland and Wales particularly, competition between iSOFT and Torex appears to have been strong.
- There are insufficient grounds to believe that winning LIMS contracts in Northern Ireland, Scotland and Wales – or the expected future revenues from legacy contracts – would generate an incentive for Torex to develop its products to compete in England in the NPfIT going forward.

Vertical issues

53. Certain of the concerns that were raised by IBA may be characterised as vertical: these related to an exclusive distribution agreement between IBA and Torex's subsidiary In-Health. Under this agreement, Torex acted as IBA's exclusive UK distributor for its PAS: Torex also owned the UK rights to the intellectual property underpinning the IBA PAS. Thus, IBA argued that the merger would effectively foreclose it from competing to supply PAS products in the UK since, post-merger, iSOFT would likely focus on its own PAS, and that it would be able via the exclusive distribution agreement to prevent IBA from competing. Provided that the merger is cleared or undertakings accepted in lieu of reference, this concern will be effectively addressed by the Settlement Agreement (see footnote 10 above.)

Conglomerate issues

54. It has been argued that the combined iSOFT/Torex would be able to exercise 'portfolio power' to leverage its strength in secondary healthcare IT products into other parts of the NHS system as they are exposed to the NPfIT. These include primary healthcare, social care, emergency ambulance services, prison healthcare, and aspects of the existing NPfIT contracts where a number of LSPs have chosen the following Torex departmental products: maternity, theatre, A&E, and ambulance, as well as primary care.
55. We do not believe that this transaction raises any conglomerate competition issues. First, we have not been provided with any evidence to support the assertion that it would. The fact that a firm's products may be inter-operable or form part of a broader portfolio of products is not of itself evidence of anti-competitive effects: on the contrary, this may well be a sound customer benefit of the transaction. Second, many of the contracts for these products may well be purchased separately. In these circumstances, the parties would appear to have no material ability or incentive to engage in anti-competitive leveraging conduct. Third, the fact that both Torex and iSOFT in the NPfIT have been successful with some individual products but not with others suggests that LSPs want to buy the best product in a class, rather than looking for a one-stop shop²⁶. The NPfIT's emphasis on interoperability will reinforce this purchasing pattern.

THIRD PARTY VIEWS

56. The OFT consulted a wide range of third parties with an interest in the NPfIT and the healthcare sector. Following our November decision and the CAT judgment, important additional information was obtained from a number of other third parties.
57. In general, a number of third parties raised concerns. They considered that the merger would substantially lessen competition because the parties' incumbency (providing knowledge of existing systems) and that their 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 PAS suppliers would be able to specify (or bundle) their departmental module in preference to independent suppliers.
58. IBA, which produces PAS systems, was very concerned. IBA believed that the proposed merger would be anti-competitive due to the combined group's high market share in the sector and unassailable first mover advantages resulting from the merger which could (i) eliminate rivalry between the two largest players in the secondary care market, and (ii) reinforce the parties leading position in the secondary market as well as adding Torex's primary care product which is one of the leading systems in this sector. IBA also alleged that the close link between IBA and Torex resulting from the InHealth acquisition meant that IBA would be unable to act as an effective constraint on the merged group which would concentrate on sales of its own products to the detriment of IBA's.
59. Several hospitals expressed concerns that the merger would lead the parties to abandon certain systems and this would increase hospitals' costs in migrating to

²⁶ Torex has been successful in relation to Protos, Civica and HASS. See paragraph 2 above.

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 Torex (and IBA). Some hospitals considered that post-merger there would be a loss of innovation, particularly in LIMS. However, several hospitals commented that the merger was consistent with the aims of the NPfIT and would benefit systems development.

60. The NPfIT was consulted. Information was provided about the operation of the NPfIT programme, its funding and the competition which was taking place in the award of contracts. [See note 27]²⁷
61. 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 for new contracts and the legacy base did not yield any particular benefits. This view was not shared by the Northern Ireland authority which considered that the merger could potentially lead to a loss of potential competition for contracts.

CONCLUSION

62. This merger takes place against the background of major changes introduced by the NPfIT in way in which NHS IT systems are procured. The parties' activities overlap in the supply of PAS and LIMS to hospitals. When measured on installed base, iSOFT and Torex have been the leading suppliers of PAS and LIMS to hospitals in the UK. In the supply of PAS, recent competition between the parties appears to have been limited. There has however been more competition between them in relation to the supply of LIMS.
63. The NPfIT has transformed the way in which competition to supply PAS and LIMS to NHS hospitals takes place. The NPfIT involves competition by LSPs and PAPs for the market. While the evidence overall suggests that most hospitals will take the products offered by the relevant PAP for their area(s), future competition for PAS and LIMS supply has not been entirely eliminated within the NPfIT. Hospitals may choose a different PAS or LIMS product if they wish. The LSP may switch to an alternative PAS or LIMS, or indeed offer customers a choice of PAS or LIMS. The scope for future competition within the NPfIT appears to be greater in relation to LIMS than PAS.
64. Although Torex's PAS and LIMS have not at this stage been selected by any LSP, we have considered whether Torex might in the future have had both the ability and incentive to develop its products to take advantage of any scope for future competition in the NPfIT. If so, assessment of the prospects of a substantial lessening of competition also requires review of (a) other possible sources of actual and potential competition to iSOFT and (b) buyer power.
 - Torex's ability and incentive to develop its PAS to meet NPfIT standards is doubtful given its initial failure to be selected by any LSP. It does not appear to have developed its PAS in the past, preferring to reap existing revenue streams. Moreover, the possibility that it would have had sufficient incentive to develop its PAS in the future seems remote given (a) the limited

²⁷ Information excised at third party request.

non-NPfit business (whether in England, Northern Ireland, Scotland or Wales) available to it; (b) the speed with which such development would have needed to take place; and (c) the existing standard of its products. In any event, absent Torex, iSOFT will continue to face competition from NPfit-compliant suppliers such as IDX, while there remain a number of other possible PAS suppliers in at least as good a position to develop their PAS as Torex.

- Torex's ability to develop its LIMS to meet NPfit standards may also be questioned given its initial failure to be selected by any LSP. However, the available evidence does suggest that Torex achieved relatively more success in relation to its LIMS than its PAS products and that Torex had developed its LIMS to win business. It is also the case that the scope for competitors to develop new/better LIMS products and then win future NPfit business seems greater in relation to LIMS than to PAS. While there are alternative

suppliers of LIMS, overall the available evidence suggests that they may not exert sufficient competitive constraint on the merged iSOFT/Torex in the future.

65. Hospitals do appear to have some choice as to whether they purchase a PAS or LIMS provided by the LSP for their area. It is possible that these purchases may be made outside the NPfit using funds accrued from internal savings. In this connection, our assessment of the competitive effects of the merger in England outside the NPfit is as follows.

- There appear to be a range of potential PAS suppliers. We consider that the NPfit will affect conditions of competition outside as well as within the NPfit. Further, we believe that Torex's initial exclusion from the NPfit would have had a significant effect on its ability to compete, reducing its incentives to invest in PAS development (both inside and outside the NPfit); non-NPfit customers would have been influenced by its exclusion from the NPfit, deterring them from purchasing Torex's PAS.
- Torex appears to have been a stronger competitor in LIMS than in PAS, and its initial exclusion from the NPfit might not have had such a significant effect on its prospects for LIMS (rather than PAS) success outside the NPfit given the longer timeframe to migrate from legacy LIMS systems to NPfit-compliant systems. It might therefore have been able to compete with iSOFT for LIMS contracts for the foreseeable future. Additional contract wins and an expectation of being able to win some NPfit business may have given Torex sufficient incentive to develop its LIMS product. While there are alternative suppliers of LIMS products, third parties overall did not view them as sufficiently strong to constrain iSOFT in the future.

66. The NPfit does not currently extend to Northern Ireland, Scotland and Wales. The competitive effects of this transaction therefore need to be examined separately in relation to these three countries.

- In relation to PAS, the merger gives rise to little overlap between the parties. We believe that the NPfit would influence substantially the future competition for Northern Irish, Scottish and Welsh PAS contracts. PAS suppliers that have been strengthened because of the NPfit, such as IDX, have strong incentives to seek to win custom in Northern Ireland, Scotland

and Wales. Accordingly, we do not believe that the loss of Torex as an independent PAS supplier will or may be significant, particularly taking into account Torex's already weak position in PAS supply.

- In LIMS, there appears to have been more head-to-head competition between iSOFT and Torex. It is likely that the NPfIT would influence substantially the future competition for Northern Irish, Scottish and Welsh LIMS contracts. But the longer period of time for development of NPfIT-compliant LIMS may mean that the effect of the NPfIT is less in relation to LIMS than in relation to PAS. Although there are a number of alternative LIMS suppliers, it does appear that, in Scotland and Wales particularly, competition for LIMS contracts between iSOFT and Torex has been important.

67. Finally, possible arguments that there would be vertical and conglomerate anti-competitive effects lack substantive empirical support and appear unsustainable in view of the Settlement Agreement and the nature of competition for PAS and LIMS contracts.
68. The OFT does not believe that it is or may be the case that this merger may be expected to result in a substantial lessening of competition in the supply of PAS to NHS hospitals.
69. The OFT believes that there is a realistic prospect that, absent the merger, Torex would have represented a substantial competitive constraint on iSOFT in respect of the supply of LIMS to NHS hospitals, and that other suppliers might not exert sufficient competitive pressure post merger to offset the loss of that constraint. The OFT therefore believes that – in line with the reference test set out by the Court of Appeal in IBA – it may be the case that this merger may be expected to result in a substantial lessening of competition in the supply of LIMS to NHS hospitals.

UNDERTAKINGS IN LIEU

70. iSOFT has made the following offer of undertakings in lieu, notwithstanding its firm view that a substantial lessening of competition has not or will not result from the merger. To remove any outstanding competition concerns the OFT may have iSOFT would be prepared to offer the following undertakings to address possible competition concerns:
 - (a) to divest the Torex LIMS businesses, including employees, IPRs, and legacy contracts;
 - (b) to either amend the IBA distribution agreement so it is no longer exclusive or terminate it; and/or
 - (c) [see note 19].
71. The OFT's published guidance 'Substantive Assessment Guidance (OFT 516)' indicates that undertakings in lieu will only be accepted if they represent a clear cut remedy to a clearly identified competition concern.

72. As noted above, the OFT believes that it may be the case that the merger may be expected to result in a substantial lessening of competition only in relation to the supply of LIMS to NHS hospitals. iSOFT's offer to divest the Torex LIMS business is a clear cut remedy to this concern. More specifically, iSOFT's proposed remedy involves the divestment of the entire Torex LIMS business, including all legacy contracts and staff. It therefore restores entirely the status quo ante in respect of competition in LIMS.
73. The OFT notes that the second undertaking offered, namely the termination of the IBA distribution agreement, will be given effect through the implementation of the Settlement Agreement.

DECISION

74. For these reasons, this merger will therefore **be referred** to the Competition Commission under section 22(1) of the Act unless iSOFT gives suitable **undertakings** pursuant to section 73 of the Act to address the potential competition concern outlined above.

John Vickers
Chairman
24 March 2004