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## Guidance note revising 'Mergers - substantive assessment guidance'

OFT516a

October 2004

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### Introduction

This guidance note revises paragraph 3.2 of the OFT's 'Mergers – substantive assessment guidance' (the Guidance) in light of the judgment of 19 February 2004 handed down by the Court of Appeal in *IBA Health Ltd v Office of Fair Trading* [2004] EWCA Civ 142.

### Revisions

Paragraph 3.2 of the Guidance is revised as follows:

- 3.2 The test for reference will be met if the OFT has a reasonable belief, objectively justified by relevant facts, that there is a realistic prospect that the merger will lessen competition substantially.<sup>1</sup> By the term 'realistic prospect', the OFT means not only a prospect that has more than a 50 per cent chance of occurring, but also a prospect that is not fanciful but has less than a 50 per cent chance of occurring.
- This test differs from that used by the CC in its merger enquiries, reflecting the fact that the OFT is a first screen while the CC is determinative. Hence the threshold applied by the OFT for making a merger reference imports a lower degree of likelihood than the CC's threshold for *deciding* that a merger may be expected to lessen competition substantially.
  - The OFT's test will be met where the OFT believes that there is more than a 50 per cent chance of a merger resulting in a substantial lessening of competition, because the OFT's view of such a merger is

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<sup>1</sup> The test for reference has been reviewed by the Court of Appeal in *IBA Health Ltd v OFT*, [2004] EWCA Civ 142.

that it is 'more likely than not' to result in a substantial lessening of competition. In such cases, the degree of likelihood required for reference is necessarily met since the OFT believes that it is the case the merger may be expected to result in a substantial lessening of competition.

- The OFT's test may be met in other cases where the OFT believes that there is less than a 50 per cent chance of a merger resulting in a substantial lessening of competition. However, in such cases there is no exact mathematical formulation of the degree of likelihood which the OFT acting reasonably must require in order to make a merger reference. Between the fanciful and a degree of likelihood less than 50 per cent there is a wide margin in which the OFT must exercise its judgment as to whether it may be the case that the merger may be expected to result in a substantial lessening of competition.
- Merger review involves assessment of uncertain future prospects, often on the basis of imperfect information and in a limited time frame. The degree of uncertainty may vary from case to case depending on the subject-matter of the merger and the nature and scope of evidence available to the OFT. Whilst the OFT will seek information of its own initiative, the more comprehensive the information available to the OFT, the more confident it will be as to the possible effect of the merger. So, where the information available to the OFT is full and extensive, the degree of likelihood that the OFT must require to believe that it may be the case that a merger may be expected to result in a substantial lessening of competition may be higher up the scale of probability (albeit less than 50 per cent) than compared to when there is less information available, particularly as regards central points in the analysis. Merging parties and third parties are therefore encouraged to provide relevant information on a timely basis, whether or not it is expressly sought by the OFT.

## **Implementation**

This revision of the Guidance will take effect immediately.