

2 Conclusions

Contents

	<i>Page</i>
The reference.....	5
The companies	6
IMS.....	6
PMSI.....	7
The background to the merger	8
Pharmaceutical business information	8
The legal uncertainty of prescription data services and its implications	12
The effects of the merger.....	12
The markets affected by the merger.....	13
The effect of the merger on competition to IMS	14
The strength of potential competition and the nature of barriers to entry	16
The countervailing power of the purchasers of pharmaceutical business information services	18
The effects on prices, quality of products and related services, innovation and customer choice	19
Effects on pharmacy software.....	20
Benefits of the merger.....	20
Effects on the public interest on the basis that the application for judicial review is successful	21
Effects on the public interest on the basis that the application for judicial review is dismissed	22
Conclusions on the public interest.....	22
Remedies.....	23
Recommendations.....	25

The reference

2.1. Under the reference (see Appendix 1.1), dated 14 October 1998, made under sections 64 and 69(2) of the Fair Trading Act 1973 (the Act), we are required to investigate and report on whether enterprises carried on by or under the control of IMS have, within the four months preceding the date of the reference, ceased to be distinct from enterprises carried on by or under the control of PMSI (of which one at least was carried on in the UK). If either the share of supply test or the assets test (referred to in section 64(1)(a) and (b) respectively of the Act) is satisfied, the reference requires us to exclude the other from our consideration. If we find that a merger situation qualifying for investigation has been created, we are required to investigate whether it operates or may be expected to operate against the public interest.

2.2. As noted in paragraph 3.100, on 3 August 1998 PMSI agreed to sell its UK subsidiaries (among many others) to IMS, ie within the four months preceding the date of the reference to us. The sale was completed on 5 August 1998.

2.3. In making the reference to us it appeared to the Secretary of State that, as a result of the merger, the share of supply test had been satisfied with respect to the supply of prescription data services in the UK. The share of supply test requires that, as a result of the merger, IMS supplied more than 25 per cent of the sales of services of any description in the UK, or, if that was the case before the merger, that IMS's share of supply of those services had been enhanced. We understand 'prescription data services' to mean pharmaceutical information services derived from prescriptions processed at pharmacies, and that is the meaning we give it in this report. Before the merger IMS accounted for some 11 per cent by value of prescription data services in the UK, and as a result of the merger that market share is increased to 38 per cent.

2.4. It is, however, open to the MMC to consider whether the share of supply test is satisfied with respect to any alternative definition of services. As apparent in Table 4.5, as a result of the merger IMS's share of all pharmaceutical business information services, that is information on sales of pharmaceutical products in the UK irrespective of the source of that information (hence, including in particular that derived from wholesaler and survey data as well as from prescriptions processed at pharmacies), was some 37 per cent before the merger, and as a result of the merger has been increased to 46 per cent. We therefore find that the share of supply test has been satisfied with respect to either the narrow description of services specified in the terms of reference, ie prescription data services, or the broader description of services described above, ie pharmaceutical business information services. The market share test having been satisfied, we are not required to consider whether the assets test is also met.

2.5. We conclude that a merger situation qualifying for investigation has been created. We have therefore to consider whether the creation of this merger situation operates or may be expected to operate against the public interest. Since the merger has only recently been completed, we have concentrated on investigating whether it may be expected to operate against the public interest in the future.

The companies

IMS

2.6. IMS¹ was floated as an independent company on 30 June 1998. It had formerly been a subsidiary of the Cognizant Corporation (Cognizant) which until November 1996 had in turn been a subsidiary of Dun & Bradstreet Corporation (D&B). It is the leading global provider of market information to pharmaceutical manufacturers and healthcare companies, operating in over 90 countries. It has a 50 per cent shareholding in Medicare Audit Ltd (Medicare), a company providing hospital audits in the UK, and owns Walsh International Inc (Walsh), a company acquired by Cognizant on 23 June 1998 that, *inter alia*, sells direct marketing services and electronic territory management software (ETMS) to pharmaceutical customers. IMS's worldwide sales in the year to 31 December 1997 were £640 million and its profit before taxation £195 million (excluding discontinued operations).

¹For convenience in this report, references to IMS, PMSI, Walsh and Source are to IMS Inc, PMSI Inc, Walsh Inc, and Source Informatics Inc respectively, including, if the context requires, their respective subsidiaries at the time.

2.7. As shown in Table 3.6, in the year to November 1998, the consolidated forecast turnover of IMS Holdings UK Limited (IMS UK), including two subsidiaries which were vehicles for IMS's Global Services operation, was some £40 million. Turnover of the UK operation on a stand-alone basis was £[redacted] million. The UK operation represented about 4 per cent of the global sales of IMS in 1997. We have noted that during the course of summer 1998 IMS acquired Walsh. The turnover of Walsh's UK subsidiary, Walsh UK Limited (Walsh UK), in the year to 30 June 1997 was £10.4 million.

2.8. As also shown in Table 3.6, IMS UK made a loss before taxation of £314,000 in 1997. This loss was forecast to increase to £4.4 million in 1998. Walsh UK, however, which is excluded from these figures, made a profit before taxation of £2.0 million in 1997. The profitability of IMS's UK business is affected by the policies adopted toward transfer prices and management charges. Data collected by the UK business on the UK market is incorporated without any payment to that business into IMS's international databases used by its Global Services operation; these databases are used by the headquarters of UK and other global pharmaceutical companies, with part of the revenue accounted for outside the UK. On the other hand, data from other countries contributes to the Global Services operation likewise without charge. Furthermore, IMS policy is not to charge operating subsidiaries for group overheads such as senior management, corporate finance, treasury, tax and other departments. IMS provided us with pro forma figures for its UK operation on a stand-alone basis excluding Global Services but including apportionment of corporate overheads. These are explained in paragraph 3.36 and show operating income peaking in 1996 at £[redacted] million declining to a forecast loss of £[redacted] million in 1998. The results of the UK Global Services operation are explained in paragraph 3.38 and show significant increases in sales and profits between 1993 and 1996 before reducing slightly in 1997 to £[redacted] million and £[redacted] million respectively.

PMSI

2.9. At the time of the merger which we are considering, PMSI was active primarily in the USA and Japan, but also operated in the UK and elsewhere in Europe. In the year to 30 June 1998 it had worldwide sales of £47.2 million and achieved pre-tax profits of £3.3 million.

2.10. As shown in Appendices 3.1 and 3.2, PMSI both in the USA and worldwide has been involved in a series of complex structural changes throughout the 1990s. In December 1997 it acquired the non-US businesses of another US corporation, Source, with which it had various licensing and organizational agreements (see Appendix 3.1 and paragraphs 3.50 to 3.52). (In referring to the UK and European businesses of PMSI below, we are including those of Source, although these had only recently been acquired.) However, at the same time it also disposed of an over-the-counter (OTC) information business in the USA and its existing interests in a joint venture with Source in the USA. After the disposals to IMS in August 1998 of businesses outside the USA (including those recently acquired from Source), the remaining subsidiary of PMSI was Scott-Levin, a provider of market research and managed care services to the pharmaceutical industry in the USA. In the year to 30 June 1998 that business generated a pre-tax profit of US\$6.6 million on sales of US\$26 million. During the course of our inquiry, it was announced that Quintiles Transnational Corporation (Quintiles) had agreed to acquire PMSI (with Scott-Levin).

2.11. In the year to 30 June 1998, PMSI UK Limited and its subsidiaries (PMSI UK) had a consolidated turnover of £8.2 million and loss before taxation of £0.5 million. Its subsidiary Mediphase Limited, which supplies pharmacy software, has generally been profitable; its other activities have recently been loss-making.

2.12. We referred above to PMSI's acquisition of the non-US businesses of Source. Before the merger, Source had been establishing prescription data services throughout Europe, partly financed by a number of major multinational pharmaceutical companies in return for future discounts off charges and an initial period of exclusive use of the services. In the year to 30 June 1998 Source Informatics Ltd (Source UK), which operated in the UK, had turnover of £1.8 million and loss before taxation of £4.3 million (excluded from the figures in the previous paragraph). During this period, however, Source was incurring and expensing the costs of establishing prescription data services but without yet being in a position to generate revenue from them. Its losses are not therefore necessarily indicative of its future performance.

The background to the merger

2.13. In March 1998 Cognizant, the then parent company of IMS, and PMSI jointly announced that they had signed an agreement for Cognizant to acquire the entire stock of PMSI. The deal was subject to PMSI stockholder approval and regulatory clearance. That agreement was superseded by the agreement dated 3 August 1998 referred to in paragraph 2.2. The US assets were left out because of the uncertainty as to whether the Federal Trade Commission would give pre-completion clearance and the time that any inquiry by the Federal Trade Commission would take. Four Belgian subsidiaries of PMSI were also left out of the restructured deal given the concerns raised by the Belgian competition authorities that the merger would lead to the reinforcement of IMS's dominant position in the Belgian market for sales monitoring studies for products sold to pharmacies. IMS did, however, retain an option to acquire the Belgian subsidiaries within three months from the date of the agreement for no additional consideration. Subsequent developments are summarized in paragraphs 3.101 and 3.102; IMS did acquire PMSI Belgium SA, which operated PMSI's profiling services business, knowing that it would be required to divest it. The acquisition of the other PMSI businesses in Europe has proceeded country by country and the transaction in the UK was completed on 5 August. The amount paid by IMS for all the PMSI businesses acquired was US\$75 million in IMS common stock.

Pharmaceutical business information

2.14. As apparent in Chapter 5, concerns raised by third parties extended beyond the narrow area of prescription data services specified in the terms of reference to the much wider area of pharmaceutical business information. It was clear from our inquiry that the supply of such information is regarded as vital to pharmaceutical companies. It is used, *inter alia*, to monitor their competitive position on a product-by-product basis, to identify areas of product development, to focus and monitor their sales and marketing programmes, and to monitor and record the performance of their individual salesmen and so provide a basis on which remuneration is calculated. The potential importance of pharmaceutical business information to its users is illustrated by the scale of expenditure of pharmaceutical companies on sales and marketing—as much as a quarter of turnover according to one estimate we saw—hence the significant scope for more effective use of such expenditure if market information can be improved.

2.15. We did, however, during the course of the inquiry become aware of the difference of view between the pharmaceutical companies and the Department of Health (DH) over the wider effects of sales and marketing activities by the pharmaceutical companies, hence of the information that could make such activities more effective. The companies believed such activities were important in educating prescribers (ie GPs) as to the most effective treatments. The DH believed the industry's interest in the marketing of pharmaceuticals was

different from its own and did not equate to the public interest. The DH sought to promote its interest in encouraging effective prescribing by other activities such as publications by independent sources.

2.16. In Table 4.5 we have listed 13 categories of pharmaceutical business information and a number of related products supplied by IMS and PMSI, and which are described in more detail in paragraphs 4.29 to 4.110. We received varying views on how to disaggregate the market into particular sectors, and the extent to which they were complementary, competitive or potentially competitive.

2.17. IMS proposed a distinction between services used for market research, services used for marketing, services used for monitoring sales forces, and other services. Some of the services in these separate categories, however, are derived from the same data as those in other categories. In particular, IMS's *British Pharmaceutical Index (BPI)*, which shows national sales of individual products, and its *Regional Sales Analysis (RSA)*, which breaks down sales to separate postcodes, are both based primarily on information from wholesalers, to which IMS has had exclusive access for such purposes. Data services currently used for one purpose could also be developed for use for other purposes.

2.18. Other distinctions between different services put to us include:

- (a) prescription-based services, distribution-based services and ETMS. ETMS services, however, use pharmaceutical information rather than generate it and are excluded from the scope of pharmaceutical business information services in Table 4.5;
- (b) database services, audit services and ETMS. NDC Health Information Services (Arizona) Inc (NDC) put forward this categorization primarily because it saw prescription and distribution data services as potential alternatives—see paragraph 5.93;
- (c) continuous research, ad hoc surveys, and qualitative research, as proposed by Taylor Nelson Sofres (TNS) who also regarded prescription and distribution data services as potentially competitive—see paragraph 5.120; and
- (d) primary market research data and bespoke research.

2.19. In our view, there is no uniquely valid means of disaggregating the market, but we believe it reasonable to consider the separate categories we have set out in Table 4.5, distinguishing between the main source of the information used: namely wholesaler, prescription, and survey and other data. This information is summarized in Tables 4.5 and 2.1.

TABLE 2.1 Sales of pharmaceutical business information from a supply-side (data source) perspective

	1997 sales (£m)				1997 market share (%)		
	Market size	IMS	PMSI	Other	IMS	PMSI	Other
Wholesale data:							
Census of prescribed pharmaceuticals	16.0	15.2	0.8*	0	95	5	0
Sample/OTC/veterinary	20.1	3.6	0.1	16.4	18	1	82
Prescription data:							
Potential census	0.41*	0.14*	0.27*	0	34	66	0
Sample	1.7	0.1	0.3	1.3	6	18	76
Other:							
Various	26.7	5.2	4.5	17.0	19	17	64
Total	64.9	24.2	6.0	34.7	37	9	54

Source: MMC from information supplied by IMS.

*For the purpose of deriving figures for the total share of supply, we have used these figures for sales for the six or twelve months to June 1998, there being negligible sales of these services in 1997. Medicare sales of hospital audits are included with IMS.

2.20. As apparent from Table 2.1, the main source of information is that provided mainly by wholesalers on deliveries to pharmacies or pharmacy groups, accounting for about 55 per cent of total data sales in the UK and 78 per cent of IMS sales. Excluding OTC sales, IMS has a 95 per cent market share and PMSI the remaining 5 per cent. Information on OTC sales is provided by a number of other companies active in monitoring other retail markets, such as IRI Infoscan (IRI) and ACNielsen Inc (Nielsen).

2.21. Recently (and following developments in the USA) PMSI and IMS have developed prescription data services, based on prescriptions dispensed by pharmacies, from which they can identify prescriptions issued by a number of GPs in small local areas, or by individual GPs. Such services were described by some pharmaceutical companies which we saw as 'the ultimate marketing tool'. Pharmacies also benefited from payments, in some cases from both companies, for the data provided. We note in Appendix 4.2 the DH's guidance to GPs, now subject to an application for judicial review, that the provision of such information breaches patient confidentiality with no offsetting benefit to the public interest. We were told that the DH's guidance has significantly reduced the number of GPs consenting to the use of such information to below the level necessary for the successful development of these services.

2.22. Since these services were still under development by IMS and PMSI, they had negligible sales of such services in 1997. Before the merger IMS and PMSI were, however, the only suppliers of prescription data services potentially based on a sufficient sample of pharmacies to allow detailed analysis of prescriptions in local areas or by individual GPs. We therefore refer to this in Table 2.1 as potential census-level data, although it is unlikely to achieve the almost complete coverage that is currently provided by wholesale data; the previous exclusive contracts of IMS and PMSI with some data suppliers has also limited the ability of either company to provide census-level data. The present more limited coverage of IMS's and PMSI's prescription data services does provide a sufficient sample for some national analysis, as does the fairly limited sample of pharmacies covered by one service of TNS, who in 1997 accounted for most sales of prescription data services. TNS told us, however, that it was unlikely to extend its sample size to the scale proposed by IMS and PMSI.

2.23. Table 2.1 also shows pharmaceutical business information derived from other data sources, in which IMS had a significantly smaller market share—some 19 per cent—and PMSI some 17 per cent. Many of these categories involve sample surveys, which can

potentially be undertaken by a number of companies but PMSI is particularly strong in physician profiling (based on questionnaires issued to GPs on their prescribing behaviour, used for marketing) and IMS in medical and hospital audits.

2.24. Excluded from Table 2.1 are a number of other largely complementary products, supplied by IMS or PMSI. IMS, for example, following the acquisition of Walsh, supplies ETMS and direct marketing services (in both of which it estimates its market share at less than 25 per cent), and has recently expanded into healthcare management information in the UK. PMSI, through its subsidiary Mediphase, accounted for some 15 per cent of pharmacy software supplied in the UK, and also supplied medical data publishing services such as hospital directories.

2.25. Also excluded from Table 2.1 are the international data services, derived from the data collected by IMS in individual countries, and generally used by the headquarters of pharmaceutical companies, and the revenue from charges for access to such data by IMS Global Services, such as via MIDAS (see paragraph 4.108). To subscribe to the summary individual country data available through MIDAS it is necessary to subscribe to the full national data for that country.

2.26. It is apparent from Tables 2.1 and 4.5 that IMS is currently in a very strong position in the UK in supplying pharmaceutical business information, in particular that derived from wholesale and now prescription data. This is, however, only an aspect of its strong position internationally as a supplier of data on a global basis to pharmaceutical companies and which these companies regard as vital in the planning and management of their businesses. This information infrastructure, and the authority from being the major global and long-standing brand in supply of pharmaceutical business information, gives IMS considerable market power in the UK.

2.27. Despite the clear value of the data produced, it is apparent from Chapter 5 that those pharmaceutical companies that made representations to us were generally unhappy with IMS and its commercial policies, and its dominant position even before the merger. Main complaints related to increase in prices above the retail price index (RPI) (as shown in Appendix 4.1), lack of transparency in prices, and its 'bundling' of services requiring users to purchase one service in order to acquire another. We are aware of complaints made to the European Commission first by Source while it was still independent and subsequently by NDC about practices of IMS towards competitors, and by one customer to the Belgian competition authorities about other aspects of IMS's commercial practices.

2.28. IMS itself acknowledged that there had been weaknesses in its performance, and particularly in its customer relations, but believed that these were being addressed now that it was an independent company, and some users acknowledged that it had to some extent recently become more customer focused. Whereas, however, it claimed to have changed some of the policies about which users had been critical (for example, the 'bundling' of services), larger users were also critical of the changes it had made, for example the new pricing structure called Sunrise (see paragraph 4.30), although clients could elect to continue with their existing price structures. IMS told us that this had been introduced to meet customer requests, but it required very large increases in payments by some (usually large) users to receive the same total data set, or substantial reduction in the data received to maintain payments at or below previous levels. On the other hand, small pharmaceutical companies could obtain the data they wanted at lower cost. The scale of complaints from users is, in our view, itself indicative of the strong market position of IMS.

The legal uncertainty of prescription data services and its implications

2.29. We referred in paragraph 2.21 to the legal uncertainty as to the continuation of prescription data services. This matter is unlikely to be determined by the Court until after we have reported, and may not finally be resolved even within any possible period of extension of our inquiry.

2.30. Since we cannot know the outcome of the application for judicial review before we are required to report, we shall consider the effect of the merger on the public interest on the basis that the application succeeds, and on the basis that it is dismissed. As prescription data services are currently in operation, albeit on a smaller scale than is required both by the suppliers and users, we shall first consider the effects of the merger on the basis that the application succeeds. We then consider in paragraphs 2.75 to 2.78 the effects of the merger on the basis that the application is dismissed. We shall then come to a conclusion on whether the merger may be expected to operate against the public interest.

2.31. We have noted in paragraph 2.21 the guidance of the DH that prescription data services may breach patient confidentiality, and its view that there are no offsetting benefits to the public interest. The DH was particularly concerned about information which allowed the identification of individual GPs. It stated that it had no view as to the effects of the merger. The pharmaceutical companies clearly believe that the services, particularly those identifying individual GPs, would have significant benefits to themselves, including allowing them to focus their marketing efforts more effectively. They also argued that the services could benefit GPs, for example by reducing the flow of unnecessary marketing material and visits by sales representatives. It is clear that the services will continue to be required by the pharmaceutical companies until such time (if ever) that they are declared illegal or prevented by some action of the authorities. That would also have been the case had the merger not taken place. If the services are able to continue, they will represent a substantial expenditure by the pharmaceutical companies and a financial benefit to the pharmacies. The development of the services and the improvements in market information they allow would, moreover, allow scope for greater efficiency in the marketing expenditure of pharmaceutical companies (in the UK and elsewhere) and overall net savings in their UK marketing costs. We believe that this in turn is likely to benefit the UK public in that, for example, ultimately the costs of medicines to the National Health Service (NHS) and to consumers would be reduced and the choice of medicines improved (see paragraph 2.67). For that reason we consider that, so long as they are able to continue, making the prescription data services more efficient or less expensive would be of benefit to the public interest and that making the services less efficient or more expensive would be against the public interest.

The effects of the merger

2.32. IMS argued that the merger would help to protect its considerable investment in prescription data services and maintain the viability of those services in the face of any competition. They claimed that customers would benefit from the combination of two different business approaches. IMS's strengths were in the processing of large amounts of data whereas PMSI had been more creative and innovative in providing services to meet specific customer needs.

2.33. As evident in Chapter 5, we received a considerable amount of evidence from third parties. Fourteen of the 18 pharmaceutical companies from whom we received comments opposed the merger. A competitor and a potential competitor, three trade associations, including the British Association of Pharmaceutical Wholesalers (BAPW) representing all

full-line wholesalers in the UK, three retailers, one software supplier and one other company opposed the merger.

The markets affected by the merger

2.34. As is apparent from both Table 2.1 and Table 4.5, IMS and PMSI have tended to specialize in different sectors of pharmaceutical business information, in particular IMS in services based on wholesale data, and PMSI in research and survey material, but both have recently been active in the development of prescription data services. IMS argued that individual service categories, shown in Table 4.5, each represented separate markets since they served different demands. Moreover, IMS believed that, even in those cases in which there seemed to be some overlap within the service categories, the products were different, hence IMS and PMSI could still not be regarded as directly competing. In the case, for example, of Sales Territory Reports (STRs), IMS's *RSA* gave information on all products, whereas PMSI's *Source Dispenser* gave information only on a company's own products. Hence, in its view, overlap would be largely confined to prescription services and micromarketing.

2.35. We have, however, noted in paragraph 2.17 that a number of the different categories of pharmaceutical business information put forward by IMS are based on the same data. For example, the national sales audits (NSAs) and the STRs are both based primarily on wholesale data: prescription services for general market research and those for micro-marketing and marketing at GP level are both based on prescription data. Hence, a supplier of one service could readily supply another, as long as there were no restrictions on doing so. We have also noted the complaints by some companies that some products have been 'bundled' in terms of availability to users or pricing, in particular the STRs and the *BPI*, in part because they draw on the same data.

2.36. IMS's strength in supply of wholesaler-based data has, moreover, been reinforced by the exclusive arrangements between the BAPW and IMS, by which the BAPW cannot provide data to any other company to compete with IMS. Although PMSI markets a service—*Source Dispenser*—based on BAPW data, that service can only provide users with data on sales of their own products. The BAPW, however, has given IMS a notice under the contract that could result in it being terminated on 31 December 1999, and told us that there would be no further exclusive arrangements which it believed contrary to EC competition legislation. IMS also told us that it would not seek any further exclusive arrangements. PMSI, in our view, being established in the market with expertise and historical data available to it, was one of the most likely competitors for any further BAPW contracts, and, by developing its existing *Source Dispenser* product, in supplying wholesaler data more generally. The possibility of PMSI or IMS extending their services to compete more actively with each other is therefore a further reason to consider that the merger has a wider effect than suggested by IMS.

2.37. Moreover a number of users of business information services said that there was potential competition between different product categories. In particular, a number of them said that prescription level data may ultimately challenge wholesale data, particularly the *RSA*. Although prescription level data are unlikely ever to have the complete coverage of wholesale data in the UK, some users believed this was more than offset by its advantages, such as the identification of the location of prescribing GPs, rather than of the dispensing pharmacies which could be elsewhere. IMS quoted experience in Canada, where the introduction of prescription data had had no apparent effect on the use of wholesale data. On the other hand, it acknowledged that in the USA regional sales analysis could be based on either prescription or wholesale data.

2.38. A number of third parties therefore believed that PMSI's presence in the UK acted as an incentive to IMS across the full range of its activities. Consequently, their concerns went beyond the narrow area of prescription data services.

2.39. We believe, therefore, that the potential effects of the merger go wider than prescription data services. There are, however, a number of categories of pharmaceutical information services where it is relatively easy for mainstream market research companies to introduce products. This is the case where the sources of data are readily accessible and the main skills required are expertise in standard techniques of market research. One example of this is OTC audits, which are based on data easily available from leading retailers and often collected in electronic form. Other cases are national primary research and prescriber profiling based on interviews or surveys of GPs and surveys of pharmaceutical advertising and its effectiveness. While it may be the case that companies like IMS and PMSI, through their familiarity with the pharmaceutical sector, derive more advantage in some of these sectors than in others, for example in prescriber profiling as compared with national primary research, we do not see such advantages as sufficient to justify allocating these services to a specialized pharmaceutical data market along with such services as NSAs and micro-marketing. Such specialized services require in our view both knowledge of the full range of pharmaceutical products, and the facilities necessary to support continuous analysis of extensive and highly detailed data. Arguably, hospital audits and medical audits could also be regarded as part of a specialized pharmaceutical data market—but it would make little difference to the size of the market or to the combined market share of IMS and PMSI if they were included.

2.40. The main market which is affected by the merger is therefore in our view that for specialized pharmaceutical data services. This comprises all those services listed in Table 2.1 with the exception of OTC and veterinary audits and those included in the 'other various' category. It therefore includes NSAs, STRs and the three categories of services based on prescription data—prescription audits, micromarketing services and GP-level prescription data services. The size of the market is £18.1 million, and the shares of IMS and PMSI are 85 per cent and 8 per cent respectively. However, the potential effects of the merger may go wider than this market because of the links with more general market research that IMS has created in its sales strategy and the links with related products, in particular computer software, that are involved in data supply.

The effect of the merger on competition to IMS

2.41. The view of virtually all third parties from whom we heard was that PMSI was an effective competitor to IMS. Actual competition was evident particularly in product development (through Source), both of prescription data services and of the *Source Dispenser* service. In both these developments Source had been preferred to IMS, and in the case of prescription data services Source had been prefunded by a number of pharmaceutical companies in part to establish a competitor to IMS. As noted above, many of the users, moreover, saw PMSI as a potential competitor in other services, for example by the development of prescription data services to compete with STRs. Given its expertise in other markets, it was regarded as uniquely well placed to challenge IMS. Users believed PMSI thereby acted as a constraint on the prices charged by IMS and as a stimulus on IMS to improve its own performance.

2.42. We have, however, noted in paragraph 3.78 that the relevant UK activities of PMSI (including Source) had losses in 1998 of £4.8 million which was almost one-half of turnover. These were primarily a result of the delay in obtaining approval for prescription data services, including the most recent delays resulting from the DH guidance. The total losses of Source's European operations amounted to some £29 million over the last four years. We

therefore considered whether PMSI could have been regarded as an effective actual or potential competitor given its financial performance.

2.43. Much of those losses reflect the costs of establishing prescription data services which currently generate little revenue. The services were expected to grow rapidly once established and PMSI would have expected to recover such costs as long as the services were successfully developed, although the scale of the delays encountered and of the resulting losses were clearly greater than expected. The PMSI group moreover had sufficient funds following the sale of other businesses to continue to support the further development of the services for a period. We also believe PMSI could, if needs be, have found another owner or partner: PMSI itself had acquired the European operations of Source for some US\$8 million and been acquired by IMS at a significant price.

2.44. PMSI's former management also suggested that PMSI was less likely than its users hoped to have competed in other services at least in the short term while it needed to concentrate on resolving the problems with prescription data. That may well have been the case in the short term, but in the long term we believe competition and the prospect of potential competition from PMSI would have been effective and of benefit to users of pharmaceutical business information. Such competition has been lost as a result of the merger.

2.45. In the specific context of prescription data services, IMS also drew attention to the arrangements by which a number of pharmaceutical companies partly financed the development of Source's prescription database services in return for discounts off future charges and an initial period in which they would have exclusive use of the services. It argued that during that period of exclusivity PMSI could not have competed for new customers. Competition therefore could not be effective, or adversely affected by the merger. In our view, however, despite those arrangements, Source's development of the services itself stimulated IMS to develop a competing product, to the benefit of other pharmaceutical companies. After an initial period, competition between IMS and PMSI would soon have been fully effective and to the benefit of users of the services. The prospect of such competition has again been lost as a result of the merger.

2.46. We have noted above that there are no other suppliers of prescription data services for micromarketing or at GP level. TNS's prescription data services are based on a smaller sample of data, which cannot be used to derive adequate regional or local sales analysis, and does not identify GPs. TNS told us that it currently had no intention to develop its services and compete with IMS/PMSI more widely. Hence, the merger eliminates competition in these services and also the potential competition between PMSI's prescription data services and IMS's wholesale data services.

2.47. As noted in Table 2.1, before the merger IMS accounted for about 95 per cent of the main services based on wholesale data in the UK, and PMSI for the remaining 5 per cent. The merger therefore removes the only alternative previous supplier of such services. Although IMS argued that PMSI in its *Source Dispenser* services was not a direct competitor to *RSA*, this reflects in our view the exclusivity of IMS's contract with the BAPW. Removal of that exclusivity would put PMSI in a position to negotiate with the BAPW to obtain a licence for the data necessary to develop *Source Dispenser* to compete in NSAs which, we have noted in paragraph 2.36, it was in a particularly strong position to do.

2.48. We have also noted the overlap between IMS and PMSI in supply of OTC information services and IMS's argument that PMSI's product did not compete directly with its own. This is, however, a sector with more suppliers, including companies supplying data on other retail sectors, and in which the merged company would have a relatively low combined market share.

2.49. There are a number of other pharmaceutical business information categories where either IMS or PMSI was inactive. However, PMSI's involvement in such other areas (for example, Mediphase Pharmacy software) and the expertise from overseas markets, in particular the USA, on which it was able to draw was regarded by some third parties as having enhanced its effectiveness as a potential competitor generally in the UK.

2.50. Conversely, prior to the merger, IMS because of its investment over time had achieved an over-arching information infrastructure, dominating key pharmaceutical information services. PMSI was the main challenger to that position not only in prescription data services but potentially in other pharmaceutical data services. As is evident in Table 4.5, the effect of the merger is to remove IMS's main actual competitor or potential competitor in many pharmaceutical business information services and to extend IMS's product range to cover the full scope of pharmaceutical business information services.

2.51. In our view, therefore, PMSI was an effective actual and potential competitor to IMS, and as a result of the merger actual competition and potential competition has been reduced in the supply of specialized pharmaceutical data services.

2.52. Pharmacists have also to date benefited from there being two companies wishing to acquire prescription data, with a substantial proportion of them selling such data both to IMS and PMSI. In future, wholesalers, through the BAPW, would also have benefited from competition between IMS and PMSI to acquire wholesale data bearing in mind that the current exclusive contract with IMS can be terminated by the BAPW on 31 December 1999 (see paragraph 2.36). The merger therefore also reduces competition to acquire such data, with adverse consequences for both pharmacists and wholesalers.

The strength of potential competition and the nature of barriers to entry

2.53. We have concluded that PMSI was in a position to extend its services to sectors in which its operations were previously limited (paragraph 2.51). We also have to consider whether other companies inside or outside the market as defined in Table 2.1 could compete in any of the areas affected by the merger. IMS argued that technological change, in particular the electronic capture of data with data now a mere 'commodity' and its own establishment as a separate company in June 1998 with greater transparency of its profitability, had largely removed barriers to entry to the industry. It also pointed to what it saw as significant recent developments increasing competition and potential competition in the industry: the acquisition by Quintiles of Scott-Levin in the USA; the acquisition of a third pharmacy software company in the UK by NDC; and the acquisition by the French company Cégédim of a UK company in other UK healthcare markets. These developments have yet, however, to give rise to any actual increase in competition in the UK market.

2.54. Virtually all the third parties from whom we have heard have said that barriers to entry are high, including:

- (a) Exclusivity of wholesale data. We have noted above that the BAPW's contract with IMS prevents it supplying wholesale data for any service that would directly compete with IMS. The BAPW has given notice such that it is in a position to terminate this contract on 31 December 1999 and told us that any future agreement with IMS would not be exclusive, given what it believes to be the requirements of EC competition law; IMS also told us that it would not seek any new exclusive contracts. It is, however, unclear to us, as it was also to some potential competitors, that IMS or the BAPW could be relied upon not to enter into such arrangements in future. This uncertainty is likely to deter entry to the industry.

- (b) Exclusivity of pharmacy data, of relevance to prescription data services. IMS told us that all such exclusivity will be, or has been, removed. This represents, however, a recent policy change and as late as August 1998 it was describing the data arrangements with some pharmacies as exclusive: hence it is not surprising that there is a widespread perception among many potential entrants of continuing exclusivity, and which is likely, in our view, to deter entry.
- (c) The cost, time and skills necessary to compete. IMS claimed these factors are no longer significant. Users and competitors, however, claimed the cost of entry could be up to £20 million for certain services, and that an entrant could require up to five years to become fully established. IMS argued that costs and timescales previously of such magnitude reflected the delays in gaining the necessary approvals that new entrants would not now face. Although it is clear to us that there are some areas of market research where a number of companies already operate and widely available market research skills can be used, development and application of extensive wholesaler- or pharmacy-based data can in our view be regarded as requiring significant investment, time and knowledge of the medical and pharmaceutical sectors. The specialized pharmaceutical data services require significant costs in establishing and maintaining databases, but with low variable costs in supplying additional customers. This itself increases the risk of entry and susceptibility to competitive responses by the incumbent.
- (d) The advantages for IMS of offering a range of services, in a range of countries (as brought together, for example, in MIDAS, which because of its worldwide coverage would be difficult and costly to duplicate), reinforced by the perceived 'bundling' of products and lack of transparency in pricing which would deter competitors from competing in particular niches. In our view, this is likely to act as a further inhibition on entry.
- (e) The advantage to IMS of being the incumbent. IMS acknowledged its 'first mover advantage' from having developed pharmaceutical business information services, and which were now embedded in the fabric of the pharmaceutical industry. As a number of users told us, a new entrant would now have to offer an innovative service, as did Source in developing prescription data services. The scope for a competitor to offer new services has been reduced by the merger, which has extended IMS's strong position into prescription data services and those other services in which PMSI was previously strong.
- (f) In the particular context of prescription data services, the uncertainty of the judicial review. IMS itself acknowledged that entry to prescription data services is implausible as long as this uncertainty continues.

2.55. Of possible entrants, wholesalers (through the BAPW) told us that they would not want to develop services themselves. A number of parties also said that the pharmaceutical companies were unlikely to develop the services individually or jointly: such data collection and analysis was outside their core competency, and collaboration was unlikely, given the extent of competition between the companies, and the probable restrictions of competition policy. IMS, in contrast, has a reputation for neutrality of information, enhancing its value to the pharmaceutical industry.

2.56. TNS and NDC, the two main companies with a presence in the market or in complementary activities, both argued that prospects of entry would be reduced by the merger. NDC, for example, which now has a significant presence in supply of pharmacy software in the UK, and has an ambition to establish data services, argued that users wished

to acquire a range of complementary services, which competitors to IMS would need to collaborate to supply; PMSI, given its existing activities, provided the main opportunity for such collaboration, hence as a result of the merger the prospects for such collaboration were much reduced.

2.57. IMS, and others to whom we spoke, suggested that the Prescription Pricing Authority (PPA), which has full information on prescriptions in England, was a main potential entrant should the judicial review find in favour of prescription data services. Given the opposition of the DH to prescription data services, the PPA is in our view likely to continue to be constrained from entering the market, even if the application for judicial review is successful. Even if it were not constrained from providing such services, it would need to invest in appropriate IT systems and to collaborate with an experienced operator of data services to make the most use of such information. Following the merger, IMS is the most likely partner for this purpose.

2.58. We believe that the strength of IMS's position as a global provider of pharmaceutical business information services and the barriers to entry outlined above are such that the prospects of effective entry into the UK market for specialized pharmaceutical data services are limited and insufficient to offset the loss of competition resulting from the merger. It is moreover difficult to reconcile IMS's view of a market easily entered with other aspects of its performance (for example, its price increases and pricing policy) about which customers have so vehemently complained.

The countervailing power of the purchasers of pharmaceutical business information services

2.59. As IMS pointed out, its customers are major, often global, companies, far larger than IMS, and it is considerably more dependent on them than they are on IMS. We were indeed initially surprised during this inquiry to find buyers of such commercial strength—ie the major pharmaceutical companies—who believed they had such limited countervailing power. There are, however, a number of characteristics of the market that suggest countervailing power is limited.

2.60. IMS has a relatively large number of customers, some 80, for example, for the *BPI*. The cost of services to those customers is small compared with the turnover of the companies, or the high value of the services to them. Some companies we spoke to, for example, had purchases from IMS in the UK of about £1 million but a UK turnover of over £500 million. The services are absolutely vital to their knowledge of their competitive positions in the pharmaceutical product market, which is characterized by limited price competition due to the NHS's almost total dominance of purchasing and its unwillingness to pay more given budget constraints and the role of the Pharmaceutical Price Regulation Scheme in price-setting mechanisms.

2.61. Although IMS quoted a number of overseas markets where manufacturers or wholesalers had developed their own information services, it was apparent from the companies we spoke to that it would not be cost-effective for the pharmaceutical companies to carry out such services in-house and they currently lacked the expertise necessary to do so. As we have noted above, there may be constraints on the users collaborating to do it themselves. The stimulus to innovation in such services, which the pharmaceutical companies regard as of major importance, is moreover likely to be more powerful if such services are provided by competing suppliers rather than by the pharmaceutical companies themselves. We have noted that some pharmaceutical companies partly financed the development of prescription data services in Europe by Source, thereby encouraging the development of competition, but in this they were largely frustrated now that Source, as part of PMSI, has

been acquired by IMS. Currently, they have little alternative to IMS. The extent of complaint about the policies of IMS also confirms the very limited countervailing power of its customers.

2.62. In our view, therefore, the countervailing power of purchasers of specialized pharmaceutical data services as defined in paragraph 2.40 (together with the limited prospects of effective entry discussed in paragraph 2.58) is insufficient to offset the loss of competition resulting from the merger.

The effects on prices, quality of products and related services, innovation and customer choice

2.63. IMS argued that the opposition to the merger from users evident in Chapter 5 represented a misconception of the market by its customers and reflected complaints about past performance, which, it claimed, was now being improved, rather than about the merger in itself.

2.64. On the other hand we believe that the almost unanimous complaints about IMS's performance from the pharmaceutical companies that made representations to us reflect the limited degree of competition in the market even before the merger and the dominant position IMS has achieved in the main specialist pharmaceutical data services, globally as well as in the UK. In our view, the merger has removed an effective competitor and the main potential competitor to IMS in supply of specialized pharmaceutical data services. Although still a much smaller competitor than IMS, many of PMSI's services were still developing in the UK and elsewhere in Europe and it would have been expected to become an even more effective competitor in future. Competition and potential competition having been reduced by the merger, we believe there is more likely to be a deterioration rather than an improvement in IMS's performance. The prospect of adverse effects is reinforced by aspects of IMS's previous behaviour about which its customers have complained, in particular the lack of transparency in its pricing and customers' perception of IMS's 'bundling' of services.

2.65. We do not believe there is sufficient prospect of new entry to the market, nor that customers have sufficient countervailing power to offset the loss of competition in supply of specialized pharmaceutical data services. We believe therefore that the merger may be expected to result in higher prices to customers of the services affected, weaker incentives to improve quality of data and service, and less innovation than would otherwise be the case. There is also benefit in pharmaceutical companies being able to choose from a variety of data sources and methods of collecting data, from which they can judge the validity of data, a choice which has also been lost as a result of the merger.

2.66. We also noted in paragraph 2.52 that the merger could directly disadvantage suppliers of data, both pharmacies and wholesalers. Ultimately, such a reduction in income to wholesalers from such sources is itself likely to affect the level of discounts offered to pharmacies. A loss of income to data suppliers would also have wider adverse effects. It would reduce the incentives on both pharmacists and wholesalers to provide data and to maintain and develop it to the quality required, and could even be reflected in prices to the NHS and prices of OTC products.

2.67. The pharmaceutical companies would be directly affected by the merger in the way described in paragraph 2.65. The increase in costs or deterioration in the considerable benefits these companies currently obtain from pharmaceutical data services may in our view be expected to have wider adverse effects on the efficiency of pharmaceutical companies and the users of the products of those companies. Adverse effects on the efficiency and

effectiveness of the management of the pharmaceutical companies (in the UK and elsewhere) and of the marketing of their products in the UK, which is a main element of their costs, lowers the attractiveness of their investment and would be likely adversely to affect levels of research and development, and development and marketing of products. It may also be expected to raise the cost of marketing and market research, hence the cost of entry to new smaller and more innovative suppliers of pharmaceuticals. Ultimately the adverse effects on the efficiency and effectiveness and costs of the pharmaceutical industry would affect prices to the NHS as well as prices of OTC products in the UK which are likely to be indirectly affected by the merger, and the choice of pharmaceutical products available to users in the UK reduced.

Effects on pharmacy software

2.68. Considerable concern was also expressed to us about the effects of the merger on related services, in particular as a result of IMS's ability to 'bundle' (ie to pressurize users to buy as a package) its increased range of pharmaceutical business information services with its pharmacy software product acquired from PMSI and also with the ETMS product it had acquired with its takeover of Walsh.

2.69. We have noted that IMS's market shares both of pharmacy software and of ETMS are relatively low after the merger. The products are central to the day-to-day running of pharmacies and the sales forces of pharmaceutical companies respectively. Customers can currently choose from a number of competitors to supply the products, and the choice is likely to be made for reasons related to other business needs. IMS, moreover, claimed that it no longer bundled its services in the way about which concern was expressed. In the particular context of pharmacy software, it said there was no 'tie' with the acquisition of data, and that data was extracted from other software. This is confirmed by the overlap of pharmacies supplying IMS and PMSI. As regards ETMS, other ETMS systems were supplied with IMS data and IMS's Walsh products could be supplied with data from sources other than IMS.

2.70. Concerns about any effects on supply of ETMS systems also relate primarily to the acquisition of Walsh. We acknowledge the risk that IMS may attempt to use its position as supplier of pharmaceutical business information to promote sales of the Mediphase pharmacy software activities acquired from PMSI and the risk of adverse effects on supply of these products. Given, however, that IMS does not dominate the pharmacy software market (nor indeed that for ETMS), these risks are insufficient to establish an expectation that such adverse effects in supply of pharmacy software may result from the merger. Nonetheless, IMS's position as a supplier of pharmacy software, and in other software it installs to extract data from its prescription data services, is significant in the context of possible barriers to entry to the provision of prescription data services, to which we return in paragraph 2.90.

Benefits of the merger

2.71. IMS argued that the merger was necessary for the further development of prescriber-level data services. Among the benefits were the larger sample sizes from offering a combined service, although we noted that there was a substantial overlap between the IMS and PMSI sample of pharmacies for which data have been collected. PMSI also saw benefit in IMS being able to support the continuing costs of developing prescription data services and which it clearly has the financial resources to do; IMS would also be in a better position to support the remaining liabilities to those pharmaceutical companies who had supported Source's development of prescription data services.

2.72. As argued by most of the users from whom we heard, however, we believe that competition would more effectively promote development of these services, as was the case prior to the merger, particularly since it may not be in IMS's interests to develop prescription data services to the extent that they began to compete effectively with its wholesale data.

2.73. In our view, therefore, the benefits of the merger are not significant enough to offset the adverse effects.

Effects on the public interest on the basis that the application for judicial review is successful

2.74. We stated in paragraph 2.30 that we would first consider the effects of the merger on the basis that the application for judicial review is successful and we would then go on to consider the effects on the basis that the application is dismissed. In paragraphs 2.32 to 2.73 we have been considering the effects on the basis that it will be successful. By way of summary, on that basis our views are that:

- (a) PMSI was an effective actual and potential competitor to IMS, and as a result of the merger actual competition and potential competition has been reduced in supply of specialized pharmaceutical data services (paragraph 2.51).
- (b) The prospects of effective entry into the UK market for these services are limited, and insufficient to offset the loss of competition resulting from the merger (paragraph 2.58).
- (c) The countervailing power of purchasers of specialized pharmaceutical data services (together with the limited prospects of effective entry discussed in subparagraph (b) above) is insufficient to offset the loss of competition resulting from the merger (paragraph 2.62).
- (d) The merger may be expected to result in higher prices to pharmaceutical companies, weaker incentives to improve quality of data and service, and less innovation and customer choice in supply of specialized pharmaceutical data services than would otherwise be the case (paragraph 2.65). The merger may also be expected to result in lower rewards to data providers with adverse effects on the incentives on pharmacies and wholesalers to provide data and on the quality of the data provided (paragraph 2.66). The merger may thereby be expected to have adverse effects on the efficiency and effectiveness and costs of the management and marketing of pharmaceutical companies (paragraph 2.67).
- (e) The merger may also be expected to result in the NHS incurring higher costs, in higher prices for OTC medicines in the UK, and in less choice of pharmaceutical products in the UK (paragraph 2.67).

We regard the effects of the merger specified in sub-paragraphs (a), (d) and (e) to be against the public interest. The benefits of the merger are not significant enough to offset those adverse effects (paragraph 2.73).

Effects on the public interest on the basis that the application for judicial review is dismissed

2.75. We now consider the effects of the merger on the basis that the application for judicial review is dismissed. Such an outcome would clearly result in some prescription data services ceasing to continue. The loss of such services could be limited to those identifying individual GPs. It may be, however, that the national and micromarketing services also supplied by PMSI could not be sustained. It is difficult to form a view on which result would be the most likely. We shall proceed on the basis of the latter occurring, as that would make the greater difference to our previous analysis.

2.76. In paragraph 2.74(a) we formed the view that, on the basis that the application for judicial review will succeed, the merger would adversely affect competition in supply of specialized pharmaceutical data services, which includes prescription and wholesaler-based data. The effect on competition in prescription data services would clearly not arise if the services were discontinued: PMSI would also be unable to extend the scope of prescription data services, were they to be discontinued, to compete with wholesaler services. Nonetheless, we regard PMSI as a former effective competitor in supply of wholesaler-based information subject to the constraints imposed by the exclusivity of the information supplied by the BAPW to IMS. It would have remained the main potential entrant to wider wholesaler-based information services, from its current *Source Dispenser* services, and the main source of independent competitive expertise able to seize market opportunities in the UK, and act as a constraint and stimulus on IMS's performance. As in our analysis in paragraph 2.43, although the financial performance of PMSI Ltd (which includes most of the activities of PMSI excluding prescription data services) was poor, we would have expected it to remain in business, probably with a new owner. Accordingly, even on the basis of the application for judicial review being dismissed, we are of the view that actual competition and potential competition between IMS and PMSI have been lost as a result of the merger.

2.77. The limited prospects of entry discussed in paragraphs 2.54(a), (c), (d) and (e), 2.55, 2.56 and 2.74(b) apply both to specialized pharmaceutical data services considered as a whole and if prescription data services are excluded, given in particular the widespread perception of the previous and current exclusivity of wholesale data supplied through the BAPW. The limited countervailing power of purchasers of specialized pharmaceutical data services discussed in paragraphs 2.59 to 2.62 and paragraph 2.74(c) applies to wholesale data alone.

2.78. As regards the adverse effects specified in paragraph 2.74(d) and (e), the merger would not of course directly reduce rewards to pharmacies for supply of data, or incentives to pharmacies, if the application for judicial review were to be dismissed. We would, however, for the reasons given in paragraphs 2.75 to 2.77, expect the remainder of the adverse effects to arise, albeit to a lesser extent than if the application succeeded. The benefits of the merger would be even less, and insufficient in our view to offset the adverse effects that we would expect to arise.

Conclusions on the public interest

2.79. For the reasons given in paragraph 2.74, we are of the view that the merger may be expected to operate against the public interest if the application for judicial review succeeds. For the reasons given in paragraph 2.78, we are of the view that the merger may be expected

to operate against the public interest if the application for judicial review is dismissed. Accordingly, it is not necessary for us to form a view on whether we do or do not expect it to succeed. In our view the merger may be expected to operate against the public interest whether or not the application for judicial review succeeds.

2.80. Having found that the merger may be expected to operate against the public interest, we are required to specify the particular effects, adverse to the public interest, which in our opinion we expect the merger to have. Although our findings as to the particular adverse effects of the merger are limited to those that we would expect to arise were the application to be dismissed, we would expect the identity of the adverse effects to be the same whether the application for judicial review succeeded or not and the extent of those effects to be greater if the application were to succeed.

2.81. We find that the merger may be expected to operate against the public interest with the effects adverse to the public interest of:

- (a) reducing competition in supply of specialized pharmaceutical data services (paragraphs 2.74(a) and 2.76);
- (b) higher prices to pharmaceutical companies, weaker incentives to improve quality of data and service, and less innovation and customer choice in supply of specialized pharmaceutical data services than would otherwise be the case, and lower rewards to data providers, adversely affecting the incentives to provide data and the quality of the data provided. The merger may thereby be expected to have adverse effects on the efficiency and effectiveness and costs of the management and marketing of pharmaceutical companies, as stated in paragraphs 2.74(d) and 2.78; and
- (c) greater costs to the NHS for the supply of medicines, higher prices for OTC medicines in the UK, and less choice of pharmaceutical products in the UK (paragraphs 2.74(e) and 2.78).

We are therefore required to consider what action, if any, should be taken for the purpose of remedying or preventing the adverse effects identified.

Remedies

2.82. We considered a wide range of remedies including those suggested to us by third parties and summarized in Chapter 5. Broadly, the approaches sought to remedy the adverse effects of the merger in one of three ways:

- (a) by attempting to restore the situation prior to the merger through divestment of assets acquired. As well as divestment of PMSI UK in its entirety or in part, divestment could be of the former Source business in the UK or in part; but an alternative suggestion put to us was that divestment could extend to other former IMS service categories in the UK, for example of IMS's as well as PMSI's prescription data services;
- (b) by seeking behavioural undertakings from IMS or imposing regulatory controls in an attempt to ensure that it could not take advantage of its position following the merger. Among the options were price controls; a requirement to price according to transparent price lists and discounts; prohibition on bundling information services, or pharmacy hardware or software, or discounting to the same effect; and a requirement to promote the rapid availability of prescription data services in the market place and continue their development; or

- (c) by seeking to encourage entry to the industry, thereby providing an alternative source of actual or potential competition to that provided by PMSI before the merger. Among the options put forward were to prevent IMS from requiring or maintaining exclusive contracts with data sources, and to supply data under licence and on reasonable terms to competitors or other users.

2.83. IMS argued that divestment would be ineffective in promoting competition since, as well as the uncertainty as to the outcome of the judicial review, the PMSI businesses divested had lost key personnel and had no management or financial structure, nor treasury or billing capacity. PMSI would also be required for two years after the introduction of prescription data services in Europe to supply only those companies which had partly financed their development. Technology and skills were already available to at least one major potential competitor (NDC), as was access to pharmacy data. IMS believed, however, that divestment would have major disadvantages to its own UK business; for example, it wanted to retain some of the personnel acquired from PMSI.

2.84. Whilst not accepting that the merger would adversely affect the public interest, or have any effect beyond prescription data services, IMS proposed a number of undertakings which in its view would address the best interests of UK customers and data suppliers and promote the competitive process within the UK:

- (a) to maintain the current prices in current *Xtrend* and *Micromarketer* contracts and not to set the price of its combined *Xponent* service (see paragraph 4.75) before consultation with an appropriate government agency;
- (b) to sell all IMS's UK information services and products at prices set out in published transparent price lists and discounts;
- (c) not to enforce the exclusivity provisions of current data supply agreements (as with the BAPW) or enter into any new exclusive contracts with suppliers of data for any of IMS's information services and products in the UK (including therefore the other data used in compiling the *BPI* and *RSA*);
- (d) not to sell different IMS information services or products in the UK as a package or discount to the same effect (including, therefore, its wholesale or prescription data);
- (e) to make no exclusivity provisions relating to pharmacy software and hardware or install into pharmacies any hardware or software for the purpose of extracting prescription data that would inhibit the extraction of that data by other parties; and
- (f) to license its prescription input database, either as integrated from multiple data sources or as raw prescription data.

2.85. IMS believed licensing of IMS's prescription database as in paragraph 2.84(f) would most quickly and effectively facilitate entry into the UK market, and thus remedy any adverse effects of the merger. IMS would provide adequate documentation to allow a competitor to make effective use of this information, and would commit itself to provide all available historic prescription data on an equivalent basis. Such licences could be on terms which would enable IMS only to recover recurrent costs of licensing the database, including payments to data suppliers, which would be documented and subject to arbitration in the event of dispute. It said, however, that it was not possible to assign the agreement of individual GPs for their identification, but this could be sought by the licensee of the data, a process in which it would assist (see paragraph 6.70). IMS believed the merger would have no effect on wholesale data: it said that licensing of wholesale data, given IMS's current poor financial performance in the UK and other developments in the market, would be seriously detrimental to its UK business and put other services at risk.

Recommendations

2.86. Having found that the acquisition of PMSI/Source UK by IMS may be expected to operate against the public interest as detailed above, we first considered, given the weight of evidence, whether we should recommend that IMS be made to divest the whole of PMSI UK or of Source UK which it has acquired, together with all associated contracts and intellectual property rights etc, either by refloating or by sale to a third party buyer.

2.87. However, as can be seen from the financial analysis sections of this report, PMSI UK in general and Source UK in particular have already accumulated considerable and potentially continuing losses. Given also the events since the merger took place, set out in (c) below, there must be a significant question as to their forward financial viability as stand-alone companies (see also paragraphs 3.71 to 3.75). The most important factors relate to the two main products that are still to be fully developed and exploited (*Prescriber* and *Micromarketer*). We have to bear in mind that they:

- (a) are subject to an application for judicial review consequent upon the DH advice to GPs and pharmacists concerning patient confidentiality. The application is unlikely to be determined before this report is published and could possibly be the subject of an appeal;
- (b) have been developed with substantial financial support from several major pharmaceutical companies under contracts which give them exclusive rights to use the products for two years after their introduction; the companies also get significant discounts on products so that either the financial support is repaid by the discounts or they would be compensated in full; they would in addition get lesser but continuing discounts indefinitely thereafter; and
- (c) would have to rely for their success and development on PMSI/Source's main assets of people and their skills and knowledge. During the period that has elapsed since the IMS takeover of PMSI/Source several of the PMSI/Source management have moved to positions in IMS and other personnel have left. In addition intellectual knowledge has been exchanged and mingled with that of IMS as part of the declared intention to meld IMS's own *Xtrend* product with PMSI/Source's product.

2.88. We are therefore not confident that a remedy of divestment or flotation of the whole of PMSI or Source in the UK, or of either prescription data business, is likely to be as reliable or effective in this case in remedying the adverse effects identified as other measures to restore the competition that has been lost as a result of the merger.

2.89. We believe it appropriate therefore to propose a number of remedies which must be seen as a package aimed at encouraging one or more new or expanded competitors into the pharmaceutical sales information field. In this way, a counterweight would be provided to the further strengthening of IMS's dominant position in providing such services as a consequence of the merger. Removal of barriers to entry would provide the potential for other companies, as noted in paragraph 2.53, to enter the UK market.

2.90. We believe a combination of undertakings by IMS as regards its future behaviour, the licensing of prescription data and a limited divestment of PMSI's former activities based on wholesale data would be more reliable and effective than divestment of the whole of PMSI or Source UK in remedying the adverse effects of the merger. We recommend that IMS give the following undertakings as to its future behaviour, which are necessary in our view for any new entrant or business divested from IMS to compete in the UK market:

- (a) that IMS price all UK specialized pharmaceutical data services according to transparent published price lists and discounts. This approach would address the risk that IMS could use its discretion in pricing to deter new entry;
- (b) that IMS should not sell UK specialized pharmaceutical data service products only as a package or discount to the same effect; nor should it make sale of any UK specialized pharmaceutical data service products or terms on which they are sold dependent on the sale of any other UK data service or product. The prospect of such bundling or discounts is in our view a main deterrent to entry and the means by which IMS can abuse its position to the detriment of its users; and
- (c) that IMS should not enter into contracts with its sources of UK specialized pharmaceutical data that contain a provision that restricts the source's right to supply any data to a third party. It should waive any such provisions in its favour in existing contracts. This waiver should apply to historical and future data. It should also waive claims arising out of the breach of such a provision occurring on or after the date the undertakings are given. Such exclusivity has in the past been a main barrier to entry and the continuing perception of exclusivity remains in our view a barrier to entry which would be addressed by such a requirement. Nor should IMS introduce any hardware or software in pharmacies that could inhibit extraction of data by other purchasers.

2.91. Of the various other suggestions for behavioural undertakings put to us we do not believe regulation of prices would be appropriate, although directly meeting the concern of some users, given the difficulty in providing adequately for variation in the quality and quantity of information provided and of the product characteristics; nor do we believe any purpose would be served by requiring consultation with, for example, the Office of Fair Trading on prices to be charged. We also believe IMS is fully committed, as it has assured us is the case, to continue to develop prescription data services, and this we expect it to do, if the application for judicial review succeeds. Its commitment is confirmed by its intention to negotiate an end to the initial period of exclusivity of those companies who financed the initial development of prescription data services by Source in Europe in using the services, in order to develop a wider market. Some of IMS's own proposals, moreover, go beyond the adverse effects identified.

2.92. The measures listed in paragraph 2.90 would not, however, on their own be sufficient to remedy the adverse effects of the merger. We have noted that the merger has eliminated competition in potential census-level prescription data, and the potential for PMSI's prescription data services to compete with IMS's wholesale data. In our view the availability of historic data as well as the costs of establishing and maintaining current data are main barriers to entry to this market. Licensing of prescription data is therefore the remedy most likely to provide the prospect of competition to wholesale data that existed prior to the merger if the application for judicial review is successful.

2.93. We therefore recommend that IMS should undertake to supply under licence and on reasonable terms prescription data (including back data), either integrated from multiple data sources with adequate documentation to support its use or in raw form with full documentation if requested by competitors or other users, and/or software. IMS should use its best endeavours to secure or assist licensees in securing any necessary consents from GPs to the extent permitted by the requirements of the Data Protection Acts 1984 and 1998, including IMS's own proposals referred to in paragraph 6.70. The fees for such licences should cover only the recurrent costs of licensing the data including payments to data providers; in the event of dispute, there should be a procedure for the appointment of an independent expert to settle the terms with provision for the costs of such an independent expert to be shared between IMS and the licensees. It would also in our view be open to

prospective licensees to complain to the Director General of Fair Trading (DGFT) who could refer the matter to this Commission. This undertaking should be subject to review after five years.

2.94. We have also noted that the merger has eliminated the only competition to IMS in supply of wholesale data, and the most likely potential competitor in supply of such services. We accept that such licensing of wholesale data would have damaging effects on IMS's business that would go beyond remedying the adverse effects of the merger.

2.95. In our view, IMS should be required to divest PMSI's *Source Dispenser* business, which comprises essentially the licence to use the BAPW data, the know-how to do so, historic data and customer lists. This would allow a new owner of that business an initial opportunity to compete by offering a slightly different product to that available from IMS, and to build on the historical data available to it, the expertise, and the established position in the market to compete more extensively with IMS's wholesaler-based data services. Successful divestment of this part of PMSI's business would itself need to be in combination with the behavioural undertakings listed in paragraph 2.90 to allow it to compete effectively in the market, and the licensing of prescription data outlined in paragraph 2.93 to provide the opportunity for potential competition from such services.

2.96. Undertakings satisfactory to the DGFT (and following consultation between the DGFT and other interested parties) should be agreed within three months of publication of this report. If satisfactory undertakings cannot be obtained, IMS should be required to divest PMSI's business in the UK and to comply with the requirements listed in paragraph 2.90 to such an extent as is necessary to enable an independent PMSI business to become established and compete effectively.