

Terms of reference and conduct of inquiry

Terms of reference

1. On 30 December 2003 the OFT sent to the CC the following reference:

Whereas in exercise of its duty under section 33(1) of the Enterprise Act 2002 ("the Act") to make a reference to the Commission in relation to an anticipated merger the Office of Fair Trading ("the OFT") believes that it is or may be the case that-

- (a) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation in that:
 - (i) enterprises carried on by or under the control of Carl Zeiss Jena GmbH will cease to be distinct from enterprises carried on by or under the control of Bio-Rad Laboratories Inc; and
 - (ii) as a result, the condition specified in section 23(3) of the Act will prevail to a greater extent; and
- (b) the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services namely, the supply of advanced 3D Microscopes (which here includes single-photon and multi-photon microscopes) in the United Kingdom.

2. Now, therefore, the OFT, in exercise of its duty under section 33 of the Act and its power under section 36(5) of the Act, hereby refers to the Competition Commission ("the Commission"), for investigation and report within a period ending on 14 June 2004, the following questions in accordance with section 36 of the Act-

- (a) whether arrangements are in progress or in contemplation as described in paragraph 1 which, if carried into effect, will result in the creation of a relevant merger situation; and
- (b) if so, whether the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom.

3. In relation to the question whether a relevant merger situation will be created, the Commission shall exclude from consideration one of the subsections (1) and (2) of section 23 of the Act if they find that the other is satisfied.

30 December 2003
(signed) Vincent Smith
Director of
Competition Enforcement,
Office of Fair Trading

Conduct of inquiry

4. Notices inviting interested parties to submit evidence to the CC were placed in *Nature* and *New Scientist*. We also put a notice on the following web site: <http://listserv.buffalo.edu/archives/confocal.html> .
5. The administrative timetable for the inquiry was published on the CC web site together with details of the Group of members conducting the inquiry. The timetable was updated as the inquiry progressed.
6. In addition we sought evidence from competitors, including but not limited to Leica, Nikon and Olympus; and from customers, users and other parties.
7. Written evidence was received from many of these parties and we held hearings with four of them, including a joint hearing with a number of UK customers and users. We also received written submissions from a number of non-UK customers and users. Non-sensitive submissions that we received from third parties can be found on the CC's web site, together with a summary of third party views. A complete list of third parties that gave evidence can be found in Appendix F. In addition, we obtained information from Cornell University in respect of its patent.
8. Members of the Group accompanied by staff, visited Bio-Rad's manufacturing and R&D facilities at Hemel Hempstead. They also visited research organizations to observe confocal and multiphoton systems in operation.
9. We received written evidence from Zeiss and Bio-Rad, and non-sensitive versions of their main submissions can be found on the CC's web site. In addition, the companies each attended two hearings.
10. In the course of the inquiry, we sent to Zeiss and Bio-Rad, and published on the CC web site at the relevant time, a Statement of Issues, a Notice of Provisional Findings and the non-sensitive version of our Provisional Findings report.
11. We engaged the services of Bristows, solicitors, to advise on patent issues, and we also engaged Dr Alan Entwistle of the Ludwig Institute for Cancer Research as a technical adviser.
12. A number of parties responded to the CC's provisional findings. Non-sensitive submissions that we received from third parties can be found on the CC's web site. We had an additional hearing with Leica, at its request, and received from Leica additional information following that hearing.
13. We should like to thank all those who assisted in our inquiry.
14. A copy of this report has been placed on the CC's web site and on the Stationery Office's web site.