

# UK MERGER CONTROL

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**Jonathan Parker  
and Adrian Majumdar**

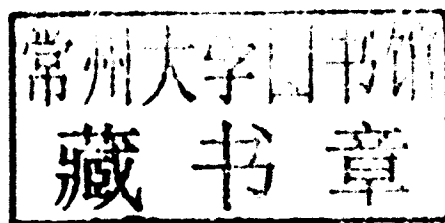
*Consultant Editor and Contributor*  
**Simon Pritchard**



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## UK MERGER CONTROL

This book is a fully up-to-date, comprehensive guide to the law, economics and practice of UK merger control law, including a review of the recently revised guidelines of the Office of Fair Trading and the Competition Commission. This guide presents an integrated legal and economic assessment of the substantive appraisal of mergers and examines in detail the following topics: the history of the Enterprise Act and its development from the Fair Trading Act; the various regulatory bodies that form the institutional structure of the UK merger control regime; enterprises subject to merger control regulation and the jurisdictional thresholds of the Enterprise Act; the relationship of the Enterprise Act with the European Merger Regulation; the procedural and substantive practice of the Office of Fair Trading; references to, and in-depth reviews by, the Competition Commission; appeals to the Competition Appeal Tribunal; public interest mergers and the role of the Secretary of State; and merger remedies. Uniquely, this book also provides insights into the substance and procedure of UK merger control from Simon Pritchard, formerly Senior Director of Mergers, OFT.

## AUTHORS' PREFACE

A sufficient amount of time has now passed since the coming into force of the Enterprise Act for some reflection on the changes that it introduced and for a body of case-law to have built up that is capable of analysis. This timing has also coincided with a significant overhaul of the Authorities' guidelines as well as, more recently, consideration being given to how the UK merger control regime might be revised. Consequently, in 2008, we decided to write a practitioners' guide to UK merger control that attempted not only to be up-to-date and comprehensive in terms of the UK's peculiar jurisdictional mechanics and merger control processes, but also to write an integrated, legal and economic guide to the substantive assessment of mergers. This is the result of our endeavours.

Much has happened since the merger provisions of the Enterprise Act came into force in June 2003 and most particularly in the last few years. Following the 'original' sets of guidance, published in 2003 – the OFT's Substantive Assessment Guidance and Procedural Guidance, and the CC's Merger Reference Guidelines – the Authorities have published several important sets of guidelines, including the OFT's Jurisdictional and Procedural Guidance, the OFT's guidance in relation to exceptions to the duty to refer and undertakings in lieu, and the Authorities have jointly published guidelines in relation to the substantive assessment of mergers (the Merger Assessment Guidelines). Very recently, the Authorities have also separately published a commentary on retail mergers.

Whilst we provide some historical context for the Enterprise Act by setting out, in Chapter 1, the process that gave rise to the evolution of the Enterprise Act from the Fair Trade Act 1973, which we consider relevant for providing students and practitioners with background on how the Enterprise Act came to exist in its current form, little time is spent discussing the Fair Trading Act itself. Instead, as almost all UK merger control practitioners also provide advice in relation to mergers assessed under the EU Merger Regulation, considerably more focus is given to a comparison between the approach under the Enterprise Act and the approach taken under the Merger Regulation and, to a lesser extent, the guidelines in the United States. In terms of the UK's now extensive guidelines themselves, we favoured allowing the guidelines speak largely for themselves in lieu of reproducing large extracts in the text, but have provided additional insights wherever possible. We have, however, focused on areas that we think are of importance for practitioners, including the concept of enterprises ceasing to be distinct, the counterfactual, the *de minimis* exception, undertakings in lieu and second-phase remedies.

We are extremely grateful to Simon for all his contributions to the book and most particularly his work on Chapters 11 and 12. He provided us with unrivalled access to the OFT's internal thinking and decision-making at the highest levels between late 2003 and 2008, which, not coincidentally, was also a significant period of evolution in the

OFT's assessment of mergers. We would also like to thank to Robert O'Donoghue (Brick Court Chambers) for his considerable efforts in relation to the chapter on judicial review.

We would also like to thank the following people for their helpful comments, insights, discussions and contributions: Alistair Lindsay (Monckton Chambers), Claudia Mercer (Allen & Overy), Carole Bowley, Bob Gaddes, Tim Geer, Nick Scola, Raul Nieto, Michael Tilley, Chris Walters (all OFT), Jenny Burrage, Katie Curry, Chris Doyle, Ethel Fonseca, Marie Goppelsroeder, Paul Hutchinson, Stephen Lewis, Daria Prigioni, Anna Thoreson, and Chris Whelan (all RBB). We would also like to thank Richard Hart and his team at Hart Publishing for their enduring patience and for their understanding when our 'final' versions were not quite final.

All views expressed in this book are personal and do not necessarily reflect the views of either Allen & Overy LLP, RBB Economics or their respective clients. All errors are our own.

The law is updated to 1 January 2011, although some references are made to important cases and guidelines that were published after this date and which we managed to smuggle in before Richard told us that enough was enough. References in this book to 'to date' refer to 1 January 2011.

This book is dedicated to Eleanor and Benjamin Parker, and to Isabelle, Felix, Xavier and Raphael Majumdar.

Jonathan Parker  
Adrian Majumdar  
London, May 2011

## EDITOR'S PREFACE

I moved to the UK to join the OFT Mergers Branch in October 2003 – a matter of days after the Case Review Meeting (CRM) in a case called *iSoft/Torex* – and had the privilege of spending over five rewarding years on the ninth floor of Fleetbank House. Looking back, one can only be struck by the pace of judicial, economic and policy developments during that formative era of modern UK merger control. But my abiding memory is not the post-*IBA Health* reference test or any particular case or policy issue but one of collegiate discussion in CRM cases in particular. It was intensely satisfying to sit around the table in 9C/7 surrounded by like-minded individuals with the dedication to debate and decide, as best we could, the ‘right answer’ to tangible merger casework and policy questions.

In the context of the current debate about reform of the competition regime, the one thing – perhaps the most important thing – that legislative change cannot address is the institutional culture and the intellectual curiosity, open-mindedness and humility of its internal advisers and decision-makers. In this respect, the best of the CC and OFT leadership and staff would make for a very fine merged authority indeed.

Likewise, it has been a pleasure to collaborate with Jonathan and Adrian on this treatise, despite its exhaustive demolition of our evenings and weekends. They have done a remarkable job and, equally remarkably, we seem to remain on good terms. While the end result is neither flawless nor entirely comprehensive – even given its length – it certainly fills an important gap since 2004 and, I hope, is a respectable successor to the long-standing must-have work of Messrs. Finbow & Parr. Needless to say, we have left some topics and issues for the second edition – in the best tradition of migrating users to version 2.0 – though regime reform will take care of that in any event.

I would also like to thank the following people for their direct or indirect influence both recently in terms of my own contribution to this work – in particular, Drs. Chris Walters, Amelia Fletcher and Alison Oldale – and/or more generally on much of the OFT merger policy and decisional practice reflected in it, including John Fingleton and Philip Collins, and too many fine current and alumni OFT staff to name. Most of all, I want to tip my hat to the Mergers management team during my last year – Adrian Payne, Bob Gaddes, Chris Walters, Nick Scola and Alastair Mordaunt – and the inaugural Mergers Intelligence Officer, Raúl Nieto. A toast to *plain vanilla* theories, *full-fat* competitors, the *slam-dunk* reference ... and that small-but-significant *graphic equalizer*.



Simon Pritchard  
London, May 2011

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