

## European Competition Law Review

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### Publication Review

#### UK Merger Control: Law and Practice

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Reviewed by David Reader

#### **Subject:** Competition law

Few would argue with the proposition that timing is crucial in the procedural realms of merger control. Indeed, the same might be said for merger control publications. A case in point is the first edition of Frank L. Fine's seminal text on *Mergers and Joint Ventures in Europe*, which was rendered largely outdated just a few short weeks after publication when the European Community adopted major reforms introduced under EC Merger Regulation 4064/89.<sup>1</sup> So it was perhaps with some trepidation that the authors of another acclaimed text, *UK Merger Control: Law in Practice* (3rd edition, Sweet & Maxwell), have chosen to release this latest edition in the midst of notable uncertainties surrounding Brexit and the changes it may usher in for domestic merger procedure. But it has proved an inspired decision which has rewarded readers with the most accessible and comprehensive edition to date, and one that is largely 'Brexit-proof'.

Since the first edition was published in 1995, the text has become something of a mainstay on the bookshelves of legal and economic practitioners specialising in the UK procedures. Reviews published in this very journal have heaped praise on the first and second editions for providing highly practical and unique insights from the practitioner perspective.<sup>2</sup> This reputation will only be enhanced by the third edition, which sees the core authors enlist the services of a further ten specialist contributors from Ashurst LLP and AlixPartners, culminating in detailed collection of chapters that masterfully present the law and analyse the (often subtle) procedural nuances that practitioners are likely to encounter in a range of cases. Perhaps most commendable, in this respect, is that the language, tone and depth of analysis remains consistent throughout the text. This book does not read as a collection of standalone practitioner insights on merger control but, rather, as a single voice which will become very familiar to any reader who adopts the book as their primary tool of reference.

After a major update which incorporates the changes brought about by the Enterprise and Regulatory Reform Act 2013 and over a decade's worth of new case law, the third edition now extends to 1,011 pages including appendices. The 12 substantive chapters logically address the core topics at the heart of UK merger control, including *inter alia*: jurisdictional issues; the procedure, outcomes and remedies arising in Phase I and II assessments; the intuition behind and application of the SLC test; and reviews by the Competition Appeal Tribunal. Welcome new additions include chapters on (i) analysing the risk

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<sup>1</sup> The second edition of Fine's book is a valued part of the reviewer's collection. Reviews of the first and second editions can be found in previous issues of this journal: Valentine Korah, 'Publication Review – Mergers and joint ventures in Europe: the law and policy of the EEC' (1990) 11(3) ECLR 128; and Julian Maitland-Walker, 'Publication Review – Mergers and joint ventures in Europe: the law and policy of the EEC (2nd edition)' (1995) 16(3) ECLR 207.

<sup>2</sup> Julian Maitland-Walker, 'Publication Review – UK Merger Control: Law and Practice' (1996) 17(8) ECLR 481; and Neil Baylis, 'Publication Review – UK Merger Control: Law and Practice' (2005) 26(11) ECLR 650.

of a merger being referred to a Phase II investigation, (ii) the relationship between EU and UK merger control, and (iii) the public interest merger regime.

It is the latter two of these new chapters which provide contingency in the event of Brexit (or the UK Government's new industrial strategy) inducing significant procedural change within the merger regime. Indeed, while discussion around the EU-UK relationship and public interest mergers was previously woven into numerous chapters across the first and second editions, the decision to present these topics as standalone chapters in the third edition acts to minimise any potential disruption that Brexit can have on the book's overall accuracy. Of course, there remains a great deal of speculation as to how Brexit and the Government's proposals to review the public interest provisions under the Enterprise Act 2002 will affect the procedure for public interest mergers (if at all).<sup>3</sup> The authors are right not to engage in this speculation; although, readers may be interested in a journal article that two of the authors have since written on the future direction of UK merger control, which is intended as a companion piece for the book's concluding chapter.<sup>4</sup>

The presentation of the book lends itself to ease of access and, in particular, the authors' effective use of cross-referencing makes it simple for the reader to take a bottom-up approach when seeking to familiarise themselves with a specific topic. When referring to a particular sub-section, the text often invites the reader to explore the topic's broader context or its related themes by providing directions to other parts of the book. Given the encyclopaedic proportions of the third edition, it comes as a relief that the book also refers to specific paragraph numbers in its contents, tables of cases/statutes and its list of official documents released by past and present UK competition authorities and government departments. Of course, the reader's navigation is also aided by a detailed index which, in this edition, has been prepared using Sweet & Maxwell's Legal Taxonomy.

Due to the improved online accessibility of official documents and statistical data relating to mergers in the UK, the book's appendices are far more concise than previous editions. However, these still feature a consolidated table of statistics for Phase I and II merger outcomes since April 2004 and, of particular note, a comprehensive overview of all Phase II merger reference investigations between 1986 and 2015.<sup>5</sup> Building on an observation made about the previous edition of the text,<sup>6</sup> the authors may have missed an opportunity to further enhance the accessibility of the book by including procedural flow charts and diagrams within the appendices, which other merger control texts have used to good effect.<sup>7</sup> For example, the inclusion of separate flow diagrams that illustrate the step-by-step procedure involved in 'typical', public interest and EU-level merger inquiries would have offered a useful point of reference.

Remember I mentioned that the first and second editions of this text have been reviewed in this journal before? Something that both reviewers expressed surprise towards was that the book was the

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<sup>3</sup> At the time of writing, there appears to be an emerging preference amongst academics and practitioners to maintain the status quo with regard to the public interest regime; see Bruce Lyons, David Reader and Andreas Stephan, 'UK competition policy post-Brexit: taking back control while resisting siren calls' (2017) 3 *Journal of Antitrust Enforcement* (forthcoming); Brexit Competition Law Working Group, *BCLWG Conclusions and Recommendations* (Final Report, 26 July 2017) <<http://www.bclwg.org/wp-content/uploads/2017/07/BCLWG-Conclusions-and-Recommendations-Final.pdf>> accessed 26 July 2017.

<sup>4</sup> Nigel Parr and Catherine Hammon, 'UK merger control at a crossroads' (2017) 16(1) *Competition Law Journal* 13.

<sup>5</sup> This overview details: dates, names of parties, market activity, relevant geographic market, market shares, SLC/public interest finding, recommendations of the authority and the final outcomes.

<sup>6</sup> Baylis (n 2).

<sup>7</sup> See eg Andrew Scott, Morten Hviid and Bruce Lyons, *Merger Control in the United Kingdom* (OUP 2006) 549-557.

only one on the market to be dedicated solely to UK merger control.<sup>8</sup> While mindful of resisting the urge to make the obvious competition-based pun, it is remarkable to conceive of how this book remained completely unopposed between 1995 and 2006. There now exist at least 3 other books that have a specific focus on UK merger control;<sup>9</sup> although, of these, only Parker and Majumdar's *UK Merger Control* (2nd edition, Hart) has received semi-frequent updates.<sup>10</sup> Having only read the first edition of Parker & Majumdar, I cannot offer a direct comparison between the two texts. However, if the latest edition adopts a similar approach to the first, Parker & Majumdar can be seen to offer more in-depth discussion to the principles that underpin the economic effects of mergers, whereas Parr, Finbow & Hughes affords more emphasis to procedural and evidentiary requirements (and to evaluating the choices that practitioners need to make along the way). With both books being equally 'current' – having each been released towards the end of 2016 – the choice between the two will perhaps be determined by the reader's preference for additional economic or procedural insight.

Yet while *UK Merger Control: Law and Practice* may no longer attest to being a 'peerless' authority on UK merger control, its reputation as an invaluable resource for merger control practitioners is only further assured by this latest edition. Whether the authors intended it or not, the text will also be of interest to non-practitioners, who will derive unique insights into the decision-making and thought processes of practitioners in the field. This reviewer's copy will undoubtedly sustain much wear and tear in the years ahead and it is a reassurance to see it at the very centre of my bookshelf.

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<sup>8</sup> See reviews by Maitland-Walker and Baylis (n 2).

<sup>9</sup> Jonathan Parker and Adrian Majumdar, *UK Merger Control* (2nd edn, Hart 2016), [904 pages]; Scott, Hviid and Lyons (n 7), [642 pages]; and Charles Bankes and Morven Hadden, *UK Merger Control: Law & Practice* (Butterworths 2006), [544 pages]. A considerable discussion on UK merger control also features in Mark Furse, *The Law of Merger Control in the EC and the UK* (Hart 2007), [516 pages].

<sup>10</sup> Parker and Majumdar, *ibid.*