

INTRODUCTION

THE STRUCTURE AND CONTEXT OF
MERGER CONTROL IN THE UK



1

THE STRUCTURE AND CONTEXT OF MERGER CONTROL IN THE UNITED KINGDOM

A. Introduction	1.01	(3) The Secretary of State for Trade and Industry	1.19
B. Evolution of the Substantive Principles	1.06	(4) The Competition Appeal Tribunal	1.20
C. The Institutional Architecture	1.13	(5) Workload	1.22
(1) The Office of Fair Trading	1.14	D. Sources of Law	1.25
(2) The Competition Commission	1.17	E. Summary	1.26

A. Introduction

The competition aspects of mergers have been regulated formally in the United Kingdom since 1965, when the Monopolies and Mergers Act extended the jurisdiction of what was then the Monopolies Commission.¹ The United Kingdom became only the second jurisdiction to possess a fully fledged merger control regime after the United States. The basic principles laid down in 1965 were subsequently confirmed in the Fair Trading Act 1973, which also provided more adequate administrative machinery with the Office of Fair Trading advising the Secretary of State on reference decisions after undertaking a preliminary screen of unproblematic cases. This system proceeded to operate for almost three decades. **1.01**

June 2003 saw the transition to a new regime, however, as the substantive provisions of the Enterprise Act 2002 came into force.² This revision was motivated by an amalgam of three objectives: first, the extrication of political **1.02**

¹ Prior to that time, the Government did possess informal means of influencing at least some mergers—see T Ellis, 'A Survey of the Government Control of Mergers in the United Kingdom' (1971) *Northern Ireland Legal Quarterly*, 22, 251–299 and 459–497, 277.

² The Enterprise Act 2002 (Commencement No. 3, Transitional and Transitory Provisions and Savings) Order 2003, SI 2003/1397.

influence from the process of merger control; secondly, the instigation of procedural reform to leave the regime more open and transparent, and thirdly, the installation of an exclusively competition-based standard against which mergers would henceforth be assessed. These principles, and the means by which they might best be pursued, were subject to much consultation and some revision in the years preceding their enactment.³

- 1.03** The culmination of this process is a system that resembles its forebear, but which has been enhanced in a number of respects. Qualifying mergers are identified by reference to quantitative criteria based on turnover and/or the share of supply of affected markets. The old assets test has been jettisoned as inadequate to the task of identifying mergers that may give rise to competition problems. In all but exceptional circumstances, it is for the Office of Fair Trading to refer qualifying mergers on to the Competition Commission should it believe, after review against a competition-based test, that the merger is potentially problematic. It is then for the Competition Commission to investigate the matter in more depth and to determine whether action need be taken to remedy competition harms. It is only where a merger impinges upon specific public interest considerations that these determinative functions may move from the independent competition authorities to the Secretary of State for Trade and Industry. The Competition Appeal Tribunal performs a judicial review function in respect of substantive merger decisions.
- 1.04** It is interesting that the UK merger control regime remains relatively uninfluenced, at least in formal terms, by the parallel system of control established at the EC tier of governance in 1990. As regards substantive law, harmonization is not pressing in this context, as any given merger will be subject to either the United Kingdom or the EC regime and not to both. The jurisdictions are exclusive.⁴ On the procedural side, while the EC regime provides for compulsory prior notification and the suspension of progress towards completion of notified mergers, the UK regime still allows for mergers to be considered *ex post* should the parties be willing to risk a subsequent prohibition and uncoupling. In addition, the UK has retained the involvement of two independent competition authorities in the assessment process, while the Directorate-General for Competition remains the sole arbiter of legality at the supranational

³ The development of the proposals can be traced through a number of government documents—see Department of Trade and Industry, *Mergers: A Consultation Document on Proposals for Reform* (URN 99/1028, London: DTI, 1999); *Mergers: The Response to the Consultation on Proposals for Reform* (URN 00/805, London: DTI, 2000); *Productivity and Enterprise: A World Class Competition Regime* (Cm 5233, London: The Stationery Office); *Productivity and Enterprise—A World Class Competition Regime?: Government's Response to Consultation* (London: DTI, 2001).

⁴ See further Chapter 5.

B. Evolution of the Substantive Principles

level.⁵ As a matter of substance, however, it is clear that the two regimes will continue to inform one another greatly. This process can be expected to deepen with the involvement of both authorities in the European Competition Network.⁶

In the paragraphs that follow the evolution of the underlying principles of the UK merger control regime is noted. This involved a slow transition from the application of a broad ‘public interest test’ to the current, more economically literate focus on the impact of a transaction on competition, subject to a limited range of exceptions based on specific public interest stipulations. The institutional architecture of merger control in the UK is then reviewed, and the sources of UK merger law identified. The chapter closes with a brief summary of the overall structure of the book. **1.05**

B. Evolution of the Substantive Principles

When the merger control regime was first introduced in 1965, it was merely grafted on to the pre-existing approach to monopoly control.⁷ The review of merger transactions was to be conducted by reference to a malleable conception of the ‘public interest’. Over time, this benchmark was revised through practice to become akin to a competition standard. It was replaced in the Enterprise Act by an explicit competition test. **1.06**

The public interest test was drawn from the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948, in which it had not been tightly defined. Such guidance on interpretation of the phrase as the 1948 Act did offer was expressed at such a level of generality as to amount to an invitation to take into account anything that might seem relevant.⁸ In addition, the determinative **1.07**

⁵ In formal terms, the decision after the second-phase assessment at the EC level is taken by the College of Commissioners—see generally Navarro *et al*, *Merger Control in the European Union: Law, Economics and Practice* (2nd edn, Oxford: OUP, 2005).

⁶ The Competition Commission must first be designated as a competent authority for the purposes of Articles 81 and 82 of the EC Treaty by the Secretary of State for Trade and Industry. Arguably, the cross-fertilization can be seen in the revisions made to the legal test in the EC Merger Regulation, and more tacitly in the guidance on the substantive assessment published by each authority.

⁷ The impetus for the introduction of merger controls had grown markedly in the early 1960s, not least in response to the ICI attempt to take over Courtaulds—see Editorial, ‘No Policy for Mergers’ (1962) *The Economist*, 202, 393; Board of Trade, *Monopolies, Mergers and Restrictive Practices*, Cmnd 2299 (1964). See generally S Wilks, *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission* (Manchester: MUP, 1999), 195–204; T Ellis ‘A Survey of the Government Control of Mergers in the United Kingdom’ (1971) *Northern Ireland Legal Quarterly*, 22, 251–299 and 459–497, 277–280; D Goyder, ‘Monopolies and Mergers Act’ (1965) *Modern Law Review* 29, 693.

⁸ s 14. One commentator with an American pedigree considered that the British accommodation of wider goals was ‘understandable’—although still easily criticized—given the absence of ‘a

aspects of the review process were to be administered by a Government minister who was allowed a broad measure of executive discretion. Perhaps unsurprisingly, the regime emerged at a time when the Government believed that ‘industrial performance [could] be improved, not by more competition, but by promoting mergers that restructure and concentrate . . . industry into fewer and larger units’.⁹ It is a fair assessment that the new regime reflected a strongly corporatist approach to government–industry relations,¹⁰ and that it seemed destined to achieve ‘a low priority, low profile and low impact’.¹¹

- 1.08** In its early years, the regime was widely criticized for the inconsistency and apparent arbitrariness of decisions reached, and for political interference on non-economic grounds.¹² The reference policy pursued by the Secretaries of State was described as at once ‘the most important and the most mysterious aspect of British merger control’.¹³ In 1980, one commentator reviewed the experience under the public interest test and categorized the reasoning of decisions under nine distinct headings, of which the effect on competition was only one.¹⁴ A formalized expression of the sometime importance of non-competition factors can be seen in the ‘Lilley doctrine’.¹⁵ This espoused that any proposed acquisition should be particularly closely scrutinized where the proposed purchaser was foreign (and especially if state-owned). It resulted in a number of references to the Commission in the early 1990s. Four of the five cases involved, however, were cleared by the Commission, while the fifth was prohibited on normal competition grounds. As regards the exercise of the executive

long-established abhorrence of governmental intervention (as has prevailed in the United States) or a ‘great fear of high economic concentration’—see T Ellis, ‘A Survey of the Government Control of Mergers in the United Kingdom’ (1971) *Northern Ireland Legal Quarterly*, 22, 251–299 and 459–497, 256.

⁹ This was perhaps best expressed in the creation of the Industrial Reorganisation Corporation (IRC) by the Industrial Reorganisation Act 1966. The IRC was provided with broad powers to accomplish industrial rationalization and development—see *ibid* 274–277. Attitudes towards this ‘national champions’ policy have shifted markedly in the intervening time—see P Geroski, ‘Competition Policy and National Champions’, speech delivered to WIFO, Vienna, 8 March 2005.

¹⁰ S Wilks, *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission* (Manchester: MUP, 1999), 199.

¹¹ *ibid* 202.

¹² See, for example, C Rowley, ‘Mergers and Public Policy in Great Britain’ (1968) *Journal of Law and Economics* 11, 83; A Sutherland, *The Monopolies Commission in Action* (Cambridge: CUP, 1969). See also a number of chapters in J Fairburn and J Kay (eds), *Mergers and Merger Policy* (Oxford: OUP, 1989).

¹³ T Ellis, ‘A Survey of the Government Control of Mergers in the United Kingdom’ (1971) *Northern Ireland Legal Quarterly*, 22, 251–299 and 459–497, 286.

¹⁴ J Pickering, ‘The Implementation of British Competition Policy on Mergers’ (1980) *ECLR* 100.

¹⁵ Department of Trade and Industry, press release, 26 July 1990. See generally S Wilks, *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission* (Manchester: MUP, 1999), 226.

B. Evolution of the Substantive Principles

discretion, the record of ministers has been somewhat quixotic. It has been asserted that there is ‘absolutely no doubt that some Secretaries of State have been “softer” on merger control . . . [and] that legal practitioners have drawn the appropriate conclusions and advised their clients accordingly’.¹⁶ From 1973 to the end of 2001, the various Secretaries of State had acted contrary to advice received from the Director General of Fair Trading on 31 occasions.¹⁷

Over time, however, the very malleability that saw merger control begin life as a secondary adjunct to corporatist industrial policy was exploited to redirect attention in an increasingly economics-oriented direction. In part this was a response to unremitting criticism, and in part to the underlying shift in the political environment towards market-based economics that accompanied the election of Mrs Thatcher’s governments. While as a matter of form the Fair Trading Act 1973 reiterated that the assessment of mergers should proceed against a conception of the ‘public interest’ that comprised a range of considerations,¹⁸ the effect of a merger on competition has long been the pre-eminent aspect of the test. Therefore, at least to some extent, the reforms introduced by the Enterprise Act serve only to confirm the basis on which merger control has been conducted in practice over recent times.¹⁹ **1.09**

The ‘Tebbit guidelines’ are often cited as the single most important staging post in the transition to a competition-based test. First outlined in a Parliamentary answer in 1984, the guidelines consist of the injunction that the eponymous Secretary of State’s ‘policy has been and will continue to be to make references primarily on competition grounds’.²⁰ Similar statements have been endorsed by most of Lord Tebbit’s successors. After October 2000, the Government pursued an explicit policy of compliance with the recommendations of the Office of Fair Trading and Commission in all but exceptional circumstances.²¹ **1.10**

¹⁶ S Wilks (n 15 above), 226–227. This contention was supported by an analysis of the number of referrals made per year by successive Secretaries of State.

¹⁷ *ibid* 226 (1973–1997), and 376 HCDeb col 944W, 13 December 2001 (1997–2001). See, for example, *General Electric Co plc/VSEL plc*, Cm 2852 (1995); *National Power plc/Southern Electric plc*, Cm 3230 (1996).

¹⁸ Section 84 of the Fair Trading Act 1973 refined the interpretative guidance offered by s 14 of the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948. It set out five considerations: maintaining and promoting effective competition; promoting the interests of consumers, purchasers and other users of products; encouraging the reduction in costs and new innovation; maintaining and promoting the balanced distribution of industry and employment, and promoting the competitiveness of national firms on international markets.

¹⁹ S Goodman, ‘Steady as She Goes: the Enterprise Act 2002 Charts a Familiar Course for UK Merger Control’ [2003] ECLR 331.

²⁰ Department of Trade and Industry, press release, 5 July 1984.

²¹ Department of Trade and Industry, ‘Byers Announces Major Overhaul of Mergers System’, press release, 26 October 2000. Clearly, as noted in the discussion of the Lilley doctrine above (para 1.08), there were aberrations from the competition benchmark in the practice of Secretaries of State after the mid-1980s.

- 1.11** Notably, however, the Tebbit guidelines were also pre-empted by statements made by some of his predecessors in post.²² Thus, the 1984 statement should not be seen as a fixed fulcrum in time around which the behaviour of Secretaries of State swung towards a competition standard. Rather, it has become an exemplary moment; a touchstone of a wider progressive trend. Indeed, the idea of an exclusively competition-based test has a long provenance in the UK. Even before the introduction in 1965 of merger controls based on protection of the public interest, government officials had mooted such an option only to see it foregone at that point in time.²³
- 1.12** Since the 1960s, the merger control process has been shaped by commitment to two goals: competition and pragmatism.²⁴ While the first of these has become increasingly dominant, the second helps to explain deviations from that standard. In some respects, the Enterprise Act reforms see the final confirmation of the centrality of the competition standard. It is difficult to contend that the reforms do not involve the elimination of ‘a layer of political risk from the investigation process’.²⁵ In restricting the role of the Secretary of State to exceptional cases, the reforms limit the ‘substantial room for the exercise of political preferences’ previously allowed.²⁶ The pragmatic tendency remains alive, however, in the retention of the public interest test for limited categories of merger transaction.²⁷

C. The Institutional Architecture

- 1.13** A mainstay of the reforms instituted by the Enterprise Act was the excision of the role of the Secretary of State in reference and remedy decisions. This leaves two central authorities responsible for merger control in the United Kingdom: the Office of Fair Trading, and the Competition Commission. The former performs a first assessment of merger transactions, referring problematic cases on to the latter for a more in-depth analysis. The Secretary of State has not been altogether excluded, however, as (s)he retains a role equivalent to that exercised

²² S Wilks, *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission* (Manchester: MUP, 1999), 222.

²³ *ibid* 197.

²⁴ *ibid* 233–235. Wilks adds the third tenet of ‘permissiveness’, and notes that an emphasis on general favourability towards mergers ‘echoes down the decades’ (205).

²⁵ Allen & Overy, *Response to the Competition White Paper*, 9 October 2001, para 4.

²⁶ S Wilks, *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission* (Manchester: MUP, 1999), 228.

²⁷ See Chapter 19. On opening the consultation that led to the 2002 reforms, Peter Mandelson MP explained that where ‘there are aspects of the public interest the public is going to expect their interests to be represented by someone who is elected’: see *Financial Times*, 30 November 1998.

under the Fair Trading Act 1973 in respect of the narrow category of (special) public interest cases. Moreover, the Competition Appeal Tribunal performs a supervisory role, and by doing so disciplines the procedural and substantive performance of the other three bodies.

(1) The Office of Fair Trading

The primary authority in the British merger control regime is the Office of Fair Trading.²⁸ This body was re-created as a corporate authority under section 1 of the Enterprise Act on 1 April 2003.²⁹ Prior to that date it had possessed a less concrete status, in that it was merely the label ascribed to the body of persons appointed to support the Director General of Fair Trading in the performance of his functions. This latter office has been abolished by section 2 of the 2002 Act, and its functions, property, rights, and liabilities transferred to the Office of Fair Trading. The Office of Fair Trading is headed by a strategic Board, the membership of which is appointed to allow the Office of Fair Trading a range and depth of relevant expertise. The role of the Board is to determine the strategic direction of the Office of Fair Trading; to set priorities, outline plans and oversee performance. The Office of Fair Trading employs a staff of in excess of 650 persons, including around 90 lawyers. The Mergers Branch, which is specifically responsible for merger control, comprises around 35 staff. In January 2003, Sir John Vickers, since October 2000 the Director General of Fair Trading, was appointed as both Chief Executive of the Office of Fair Trading and Chairman of its Board. The holding of this dual remit is no longer possible.³⁰ Philip Collins was appointed to succeed to the role of Chairman from October 2005.³¹ **1.14**

The Office of Fair Trading has wider functions in relation to competition law and consumer affairs. Its key—and oft-stated—goal is ‘to make markets work well for consumers’; it believes that this is the case ‘when there is vigorous competition between fair-dealing businesses’.³² Merger control is one aspect of this wider agenda. In order to perform this role, the Office of Fair Trading must obtain and review information relating to mergers on British markets.³³ Moreover, section 22(1) imposes upon it the duty to refer to the Commission any completed merger that evinces both ‘a relevant merger situation’ and ‘a **1.15**

²⁸ See further, Chapter 14.

²⁹ The Enterprise Act 2002 (Commencement No. 2, Transitional and Transitory Provisions) Order 2003, SI 2003/766.

³⁰ Sch 1, Enterprise Act 2002.

³¹ Department of Trade and Industry, ‘Hewitt Announces New Chair of OFT’, press release, 21 March 2005.

³² See the OFT web site: <http://www.offt.gov.uk/About/Aims+and+objectives/default.htm>.

³³ s 5.

substantial lessening of competition' on a UK market. Equivalent requirements are imposed in respect of anticipated mergers by section 33 of the Act. The authority has only a tightly constrained discretion to decide not to refer a relevant merger situation that poses a competition problem.³⁴

- 1.16** In its performance of these duties, the Office of Fair Trading supplants the former role of the Secretary of State. This is one central means by which the merger control process has been 'depoliticized'. In addition, the Office of Fair Trading can negotiate undertakings with parties to a merger in lieu of a reference where appropriate, and it performs further functions in respect of the enforcement of merger decisions.³⁵ Since September 2002, the Office of Fair Trading has also acted as the United Kingdom competent authority for the purposes of EC law.

(2) The Competition Commission

- 1.17** The second main authority that performs functions in respect of United Kingdom merger control is the Competition Commission.³⁶ This body assumed the mantle of the Monopolies and Mergers Commission following the Competition Act 1998.³⁷ Members of the Commission are appointed by the Secretary of State for an eight-year part-time term. There are around 50 such members; they are appointed on the basis of their relevant expertise and may be drawn from business, professional practice, academia, non-governmental organizations, and elsewhere. The Chairman of the Commission—a full-time position—and three Deputy Chairmen share the role of heading individual inquiry panels. The members of the Commission are supported by a staff that comprises accounting advisers, business advisers, economists, lawyers, administrators, and other support personnel. This staff is headed by a Chief Executive and Secretary, and numbers around 150.
- 1.18** The obligations of the Competition Commission in respect of merger control, as set out primarily in sections 35–41 of the Enterprise Act, are to conduct an in-depth investigation into each merger situation referred to it by the Office of Fair Trading,³⁸ to determine whether there has been (or will be) a substantial lessening of competition on the relevant market;³⁹ if so, to consider any necessary mitigative, remedial or preventative measures,⁴⁰ and to publish a report on

³⁴ s 22(2). In addition, s 22(3) outlines an exhaustive list of circumstances in which no reference should be made. See further Chapter 14, paras 14.104–14.107.

³⁵ See further, Chapter 16. ³⁶ See further, Chapter 15.

³⁷ For an excellent history of the MMC, see S Wilks, *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission* (Manchester: MUP, 1999).

³⁸ Or, as regards mergers involving some public or special public interest, the Secretary of State.

³⁹ See further, Part II: The Substantive Appraisal of Mergers in the UK.

⁴⁰ See further, Chapter 16.

the merger.⁴¹ In undertaking these tasks, the Commission will have the benefit of access to the papers produced by the Office of Fair Trading in respect of the given merger.⁴² It has no power to undertake an investigation on its own initiative.⁴³

(3) The Secretary of State for Trade and Industry

The active involvement of the Secretary of State for Trade and Industry regarding references is retained only in respect of mergers that give rise to ‘public interest’ or ‘special public interest’ considerations.⁴⁴ The Secretary of State does retain some residual functions: (s)he will decide non-competition issues arising in mergers referred to national authorities from the European Commission under Article 21(4) ECMR on the grounds that they involve some ‘legitimate interest’ of the State;⁴⁵ appoints members of the Commission and the Office of Fair Trading; can review and modify aspects of the Act by order, for example in respect of merger fees and jurisdictional thresholds, and as a member of the government retains the ongoing legislative capacity to reform the merger regime as is thought fit. **1.19**

(4) The Competition Appeal Tribunal

The Competition Appeal Tribunal was established in April 2003 under section 12 and Schedule 2 of the Enterprise Act. This body takes over the functions of the Appeal Tribunals of the Competition Commission. The Tribunal is headed by a President, appointed by the Lord Chancellor, who must be a senior lawyer with competition law experience. The current President is Sir Christopher Bellamy. When hearing individual cases, the Tribunal sits as a panel of three: a chairman and two other members chosen by the President. The chairman sitting on each individual case must be drawn from a panel of chairmen; the other two members can be drawn either from the panel of chairmen or from a panel of ordinary members. Initially, there were no additional members of the panel of chairmen, and Sir Christopher Bellamy chaired all cases. In January 2004, Marion Simmons QC and the late Dan Goyder CBE were appointed by the Lord Chancellor.⁴⁶ Subsequently, the Lord Chancellor also appointed the **1.20**

⁴¹ s 38. ⁴² s 105(3)–(4).

⁴³ Indeed, when making a reference the Office of Fair Trading can decide to limit the breadth of the consideration that the Commission should undertake. For instance, the Commission can be asked to ignore one or other of the jurisdictional threshold tests (the turnover or share of supply test) (s 35(6) or s 36(5)), or to limit its investigation to only a specified part of the United Kingdom (s 35(7) or s 36(6)).

⁴⁴ See further, Chapters 20 and 21. ⁴⁵ See further, Chapter 5.

⁴⁶ Competition Appeal Tribunal, ‘Appointments to the Panel of Chairmen’, press release, 14 January 2004. Appointments are made under s 12(2)(b).

17 members of the Chancery Division of the High Court.⁴⁷ Currently, there are 19 members of the panel of ordinary members, each drawn from backgrounds in law, economics, business, accountancy and regulation. The Tribunal is funded and supported by a Competition Service.

- 1.21** In the context of merger control, the Tribunal is empowered to review decisions of the Office of Fair Trading, the Secretary of State, or the Commission on the application of an aggrieved party.⁴⁸ Furthermore, it can entertain an appeal against the imposition, size, nature, or date of a penalty imposed by the Competition Commission.⁴⁹

(5) Workload

- 1.22** Over time, the changes to the merger control regime are likely to have little impact on the heavy workload undertaken by the authorities involved in its operation. In the 21 months to 31 March 2005, the Office of Fair Trading had considered 283 mergers and merger proposals under the Enterprise Act, of which it had referred 22 to the Competition Commission. The Secretary of State had not yet intervened in any public interest cases. These figures would seem provisionally to indicate a downturn in merger activity on recent years. In its report on the fifteen months from January 2002, the Office of Fair Trading noted that it had considered 414 mergers and merger proposals of which 234 qualified for investigation. Of these, 21 were subsequently referred by the Secretary of State to the Commission, while in five cases undertakings in lieu of a reference were agreed.⁵⁰ Any such downturn is likely to be attributable to cyclical economic trends rather than the institution of the new merger control regime.
- 1.23** To appreciate more fully the impact of the regime it is important to recognize that many merger transactions will be designed to avoid being caught by the jurisdictional criteria.⁵¹ Moreover, emerging plans for a number of transactions will be shelved each year on account of perceived difficulties in satisfying the

⁴⁷ Department for Constitutional Affairs, 'Appointments to the Panel of Chairmen of the Competition Appeal Tribunal', press release, 2 July 2004.

⁴⁸ s 120. ⁴⁹ s 114.

⁵⁰ Office of Fair Trading, *Annual Report 2002–03*, HC906 (2002–03), 64–65. The fifteen-month reporting period was exceptional and designed to align the reporting regime with the financial year. In 2001, 356 mergers and merger proposals were considered with 200 qualifying for investigation. In that year, ten mergers were referred to the Commission, while six cases ended with the acceptance of undertakings in lieu of a reference—see Office of Fair Trading, *Annual Report 2001*, HC773 (2001–02), 56.

⁵¹ See further the chapters of Part I: The Scope of Merger Control in the UK, and Chapter 18.

E. Summary

competition authorities. In this sense, the merger regime can be seen as ‘a deterrent, a “speed bump” that makes people drive sensibly’.⁵²

The workload of the UK merger control regime has been affected greatly by the institution of a parallel system of control at the EC level. Since 1990, most very significant cases have been considered at the supranational tier of governance (albeit subject to the referral back to the national authority where national markets are particularly affected).⁵³ **1.24**

D. Sources of Law

A range of sources can be consulted in order to determine the parameters of the merger regime. Most obvious is Part 3 of the Enterprise Act 2002—the statutory foundation of merger control—and the jurisprudence flowing from it. Secondly, a chain of documents published and consulted upon during the pre-legislative process offers an insight into how the government has conceived the reformed regime.⁵⁴ Thirdly, guidance has been published (and will be revised from time to time) on a growing number of core issues by the Office of Fair Trading and the Commission.⁵⁵ While not legally enforceable, such documents indicate how those bodies perceive their powers and functions, and thus how they intend to proceed under the Act. Fourthly, given that many features of the new regime build upon familiar aspects of its predecessor, there is much older jurisprudence that remains pertinent.⁵⁶ **1.25**

E. Summary

The structure of the book comprises four parts. Part One centres on the scope of the United Kingdom merger control regime, highlighting both the jurisdictional requirements that must be satisfied before any particular transaction will be subject to review by the UK competition authorities, and the relationship of the UK regime with its EC counterpart. Part Two then focuses on the **1.26**

⁵² S Wilks, *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission* (Manchester: MUP, 1999), 195. See also, P Geroski, ‘Is Competition Policy Worth It?’ Speech delivered to the Centre for Competition Policy, Norwich, 14 September 2004.

⁵³ See further, Chapter 5.

⁵⁴ See, in particular: DTI, *Productivity and Enterprise: A World Class Competition Regime*, Cm 5233 (2001).

⁵⁵ This is published in accordance with s 106, Enterprise Act 2002.

⁵⁶ With the term here used to refer to decisions and reports of the Office of Fair Trading and the Competition Commission (Monopolies and Mergers Commission) as well as court judgments.

substantive criteria against which merger transactions are reviewed. It explains the legal framework, discusses the concept of market definition, and details the nature of potential competition problems (such as the emergence of detrimental horizontal, vertical and indirect effects on affected markets). The Part concludes with an explanation of the use of quantitative economic techniques in merger analysis.

- 1.27** Part Three of the book focuses on procedural and practical aspects of the merger control process. It discusses the procedures established by the Office of Fair Trading and the Commission in order to perform their respective functions, and notes the supervisory function of the Competition Appeal Tribunal. It then focuses in particular on the process of negotiating merger remedies at either stage of the review process. Part Three closes with practical guidance on how firms and their advisers can minimize allocate, and manage the regulatory risk that arises from interaction with the merger control regime in the UK. Part Four focuses on special cases in the UK merger control regime. It reviews how public interest and special public interest cases are assessed, before discussing the particular regimes for mergers in the media and water sectors. The book concludes with a brief reflection on the possible futures of the UK merger control regime.