The entry into force of the EU Merger Regulation (the “EUMR”) in 1990 heralded the modern era of antitrust enforcement. In the European Union (the “EU”), the adoption of a mandatory system of merger control, the development of an economically based analytical framework and the publication of motivated decisions at the end of every case led the European Commission (the “EC”) to modernize antitrust enforcement. The EUMR formed the model for merger control laws implemented in many other countries, the great majority of which adopted administrative systems based on similar jurisdictional, substantive and procedural rules.

Over the past 30 years, merger control has become a well-accepted tool of global regulation. Although generalizations risk obscuring or diminishing non-trivial differences, considerable progress has been made in ensuring that US and EU norms are broadly understood and respected; that decisions are taken by independent agencies unfettered by political influence; and that agencies cooperate with each other to avoid divergent outcomes. The system of multinational merger control that has developed since 1990 has considerable strengths, four of which are identified below.

Firstly, merger control has become widely accepted as an essential tool in maintaining competitive markets. When the EUMR came into force on 21 September 1990, there were only three effective merger control regimes, in the US, Canada and Germany. Today, over 150 jurisdictions have merger control laws. If effective merger control avoids creating anti-competitive concentrations that would lead to higher prices, reduced output or less innovation, then its widespread adoption around the world benefits consumers and competition.

Secondly, although political appointees play a role in merger control in a large number of jurisdictions, decisions are generally taken by independent agencies that have successfully insulated themselves from political pressure. And, although practice varies across the world, there is a widespread understanding that the assessment of transactions should be grounded in sound economics and hard data. Following the lead of the US agencies and the EC, antitrust agencies elsewhere have adopted guidelines, appointed economists, applied an array of economic and other techniques, and in recent years, started to review large numbers of internal business planning documents.

Thirdly, although there are significant outliers, including China and South Africa, where agencies take specific account of non-competition criteria, there has until recently been general agreement that mergers should be assessed by reference to the consumer welfare standard. The US agencies in particular have worked hard to establish a broad, bipartisan consensus that antitrust should be used to protect consumers, and that agencies’ enforcement work should be well grounded in modern economic analysis. In the EU, successive Competition Commissioners have resisted pressure to take positive account of industrial, social and employment considerations, and have made it clear that consumer welfare is the cornerstone of EU competition policy.
Fourthly, agencies around the world have collaborated to avoid divergent outcomes. The last significant disagreement between leading antitrust agencies was in 2001, when the US agencies criticized the EC’s prohibition of General Electric’s then-contemplated acquisition of Honeywell. Since then, antitrust agencies have invested in an array of formal and informal mechanisms (including bilateral agreements, multilateral exchanges through the International Competition Network, and collaboration in individual cases to ensure regular international discussion and cooperation).

After 30 years of growing consensus, merger control enforcement is at a critical juncture, facing an array of challenges and calls for reform unprecedented in their scope and intensity. Six distinct critiques can be identified. A first set of commentators maintain that enforcement has been too permissive and should be tightened with more stringent rules and deeper scrutiny to make it easier to challenge concentrations. Others advocate for more flexible enforcement standards to facilitate the creation of “champions” that are better able to compete with foreign rivals. A third set of commentators believes that the consumer welfare standard championed over decades as the appropriate basis on which to evaluate reportable transactions should be expanded to take account of social, industrial, environmental and other considerations. An additional critique contends that merger control should be overhauled to address the challenges of digitalization, including by broadening the jurisdictional scope of merger control rules. A fifth critique focuses on the need to harmonize merger rules to reduce inefficiency and the risk of divergent outcomes. A final set of commentators note that merger control rules increasingly operate alongside broadly scoped foreign investment rules that are designed to shield domestic companies from opportunistic acquisition by foreign investors.

Authored by leading legal practitioners, economists, enforcers and jurists, the Research Handbook on Global Merger Control discusses these critiques and seeks to address an array of jurisdictional, procedural, substantive and other issues that are generating intense debate across the antitrust community, including the scope and objectives of merger control, whether merger control can be reconciled with industrial policy, whether the consumer welfare standard is an appropriate tool for substantive assessment, whether merger control should be used to meet broader policy objectives, and whether existing rules and presumptions are appropriate for the digital age.

PART I: INSIGHTS ON SELECT TOPICS

In Chapter 1, Mark Leddy, Kenneth Reinker, and Lars-Peter Rudolf chart the international expansion of merger control that swiftly followed the enactment of the EUMR in 1989. Today, more than 150 countries have a system of merger control, accounting for the review of more than 11,000 transactions annually. The large majority of merger control regimes are ex ante and suspensory, and rely on a “significant lessening of competition” substantive review test. However, jurisdictions’ individual particularities and inconsistencies in their merger control regimes create complexities for global mergers, contribute to costly, protracted review processes and lead to uncertainty and inefficiency. They note that this risks undermining the numerous consumer benefits of globalized merger control and corroborates calls for more streamlined global merger review.

In Chapter 2, Frederic Depoortere, Andrew Foster, Barry Hawk and Ken Schwartz ask why antitrust authorities around the world are reaching substantially divergent conclusions when
evaluating the same transaction. Even though major antitrust regulators are achieving largely consistent conclusions and follow a similar methodology, there are a good number of cases that “break the rule” of uniform decision-making. Transactions that were unconditionally cleared in one jurisdiction required remedies in another, and authorities’ remedies differed in scope. They examine 13 international transactions that triggered divergent outcomes. Starting with the “usual suspects”, differences in facts and legal frameworks, the authors reveal what other reasons have led to divergent outcomes. The discussion covers less apparent factors, like differences in competition analysis, differences in institutional structure and procedure, and different national policies and interests. The chapter sheds light on the lack of uniformity in merger review outcomes in the EU, US and China and provides greater understanding of the reasons that may lead to divergence in specific cases.

In Chapter 3, Jorge Padilla, Joe Perkins, and Salvatore Piccolo discuss the fact that for more than 60 years, competition authorities and scholars have developed and refined an approach to market definition based on the extent to which a hypothetical monopolist in a candidate market could profitably increase its prices. However, this approach is rarely applied in practice. Of the more than 3,000 merger cases published on the EC website between 1990 and 2019, fewer than 3% mentioned a hypothetical monopolist test or related approaches at all. This gap between theory and practice raises the risk of inconsistent and opaque decision-making. There are important open questions about how market definition can best reflect, for instance, the dynamics of zero-price digital markets. But, they maintain, this should not be at the expense of abandoning the basic logic of market definition entirely. A mature approach to market definition would better align principle and practice, while recognizing that the process of market definition will always provide a rule of thumb rather than a definitive answer.

In Chapter 4, Pierre Régibeau and Hans Zenger provide an introduction to the economic effects of mergers in homogeneous goods markets. They discuss the origins of market power in such markets and assess when a merger is likely to increase market power significantly. While market shares tend to be a good indicator for assessing the level of market power in homogeneous goods mergers, the change in market power brought about by a merger is also affected by a number of additional important factors. Specifically, they explain the role of elasticity of demand and capacity constraints, and discuss indicators such as profit margins and pivotality that help gauge the likely competitive effects of horizontal mergers. Their assessment distinguishes between short-run competition on price given fixed capacities and long-run capacity competition. They show that, in the short run, merger effects tend to be most pronounced when demand and supply are relatively balanced, whereas in the long run the market share increment caused by a merger is particularly important.

In Chapter 5, Sven B. Völcker observes that 17 years have passed since the EUMR was recast to capture any form of “significant impediment to effective competition” (“SIEC”). While the EC initially applied the SIEC test cautiously, in recent years it has shifted to a significantly more interventionist approach. The EC determined that “close” competitors do not have to mean “closest” competitors, multiple competitors can be “close” in one and the same product market, and the concept of closeness can apply also to homogenous (rather than only differentiated) product markets. The EC broadly interpreted the notion of an “important competitive force”, moving beyond the elimination of “mavericks”, and finding that in an oligopolistic market almost any competitor can be viewed as an “important competitive force”. The EC has also applied the SIEC concept to innovation competition beyond well-defined product markets, and explored novel theories of harm such as pivotality and common minority owner-
ship, while narrowing the scope for defences such as failing firm and efficiencies. The General Court’s recent *CK Telecoms* judgment rolls back the EC’s increasingly broad interpretation of the SIEC test in a significant way, insisting on a rigorous competitive effects analysis even in highly oligopolistic markets. The future direction of EU merger control is now in the hands of the Court of Justice, which is hearing the case on appeal.

In Chapter 6, Mike Walker, Robert Ryan, and James Rutt explain that a reasonable reading of the available evidence indicates that there has been significant under-enforcement of merger control with respect to the digital platforms. They argue that this under-enforcement means that the standard against which we assess whether such mergers are anti-competitive should be changed. They outline several possible ways in which the standard could be changed and highlight the importance of improving competition authorities’ treatment of uncertainty. Finally, they discuss the type of analysis that competition authorities should carry out in order to give themselves the best chance of getting merger control decisions right in the digital arena. They highlight the importance of asking the right questions about dynamic competition, rather than focusing on traditional static competition approaches.

In Chapter 7, Nicole Kar discusses how “failing” and “flailing” firm claims have been successful in only a handful of recent cases, most often foundering on agencies’ requirement that there be no less anti-competitive purchaser available. Drawing on EU, UK and US merger guidance and case experience, she suggests a streamlined approach to claims involving agencies assessing, to a balance of probabilities standard, two questions: (1) whether the allegedly failing firm would have exited the market but for the merger; and (2) whether that firm made unsuccessful but good-faith efforts to elicit reasonable alternative offers for the purchase of the firm, or its relevant assets, from a less anti-competitive purchaser. She suggests that agencies should take greater account of documentary material produced by the failing firm and its advisers and, at moments of global financial upheaval such as the global financial crisis and the COVID-19 pandemic, should give greater recognition to evidenced flailing firm claims as part of a dynamic assessment of a merger’s competitive effects.

In Chapter 8, Bojana Ignjatovic and Joan de Solà-Morales discuss the (limited) role played by efficiency considerations in the assessment of horizontal mergers in Europe and set out a number of recommendations to try to increase that role going forward. They first explain that the theoretical and empirical literature clearly supports the consideration that mergers can give rise to substantial efficiencies, but not that they generally will. This calls for an open-minded approach whereby efficiencies are assessed on the merits on a case-by-case basis. They then show that unfortunately, this is not what happens in practice – in Europe, efficiencies play a very marginal role in merger assessment. They explain that although the test used by the EC to assess efficiencies is broadly sound, it is applied too strictly. And they argue that an alignment of standards of proof between efficiencies and anti-competitive effects would invite more, and better, efficiency submissions, and allow for a better-informed merger control.

In Chapter 9, Nicholas Levy, Andris Rimsa, and Bianca Buzatu consider how the jurisdictional scope of EU merger control has faced criticism in recent years for being insufficiently broad to capture all anti-competitive transactions. In March 2021, the EC published guidance encouraging Member State competition authorities to ask the EC to examine potentially anti-competitive concentrations that otherwise fall below national merger control thresholds. In July 2022, the EC’s application of that guidance to the Illumina/GRAIL transaction was validated by the EU’s General Court. In allowing Member State agencies to empower the EC to investigate transactions that do not meet national thresholds, the Guidance Paper blurred...
the EU Merger Regulation’s brightline jurisdictional rules, introduced a degree of uncertainty into the determination of whether a given transaction may be subject to merger control, and allowed the EC to investigate non-reportable transactions that had been completed. The authors describe the EC’s new policy and explore its principal legal and practical implications.

In Chapter 10, Bo Vesterdorf, Kyriakos Fountoukakos, Kristien Geeurickx, and Camille Puech-Baron look at the role of judicial review in merger control, comparing the regimes in key jurisdictions such as the EU, the UK and the US, before considering the effectiveness of the EU regime and possible areas for improvement. Although the European courts review the legality of the EC’s merger decision and do not re-examine the case on the merits, a closer standard of review by the courts has developed over the years, holding the EC to a high standard of proof. A review of EU case law over the last 10 years leads them to conclude that, from a substantive perspective, judicial review has been effective, but that lengthy delays before the courts continue to be a critical feature undermining the effectiveness of the regime. They conclude with a number of possible solutions to address the issue of timing, reiterating the importance of an effective judicial review regime, in particular in light of the EC’s increasingly aggressive enforcement approach in merger control.

In Chapter 11, Jonathan Faull examines how merger control and competition law more generally are in a state of flux. He assesses the politics and policies that are driving change, examines what happened in previous cycles, and asks how choices will be made and to whom decisions makers will be accountable if competition policy is more openly political.

In Chapter 12, Philip Lowe, Alec Burnside, and Adam Kidane describe how EU review of mergers has been an overwhelming success: the EC has established itself as a leading competition regulator on the strength of the transparency of its rules-based merger control regime. Nevertheless the independence of decision-making from political influence and industrial policy considerations has been a constant theme. These tensions were recently laid bare by the EC’s decision to block the combination of the train activities of Siemens and Alstom. This chapter examines that controversy, as well as the roles of Chinese outbound investment and COVID-19 in shaping the recently-launched EU Industrial Strategy. They conclude that, notwithstanding the challenges faced by European businesses as a result of an unlevel global playing field, the EU should not abandon its strict application of the EUMR. European interests have been well served by an independent competition policy based on antitrust orthodoxy. Finally, the chapter discusses how other instruments put forward by the EC are capable of preserving Europe’s industrial base and protecting firms from unfair competition without making industrial policy considerations into the EUMR.

In Chapter 13, Ioannis Kokkoris describes the role of national security considerations in EU merger control and the adoption of a new common foreign direct investment screening at the EU level. The analysis considers the implications of several seminal merger cases that have paved the way towards a foreign direct regulation in the EU and explores the different trade-offs of such a regulation. Among them are the fact that the EC’s interventions are confined to issuing opinions in this area of enforcement, the question whether Member States have the capacity to accurately identify investments that represent a real threat to security or public order, and the possibility that cooperation between Member States and the EC might prolong merger assessment timelines. This chapter explains the role that foreign investment plays in each Member State, describing how the levels of review are lenient in some and more rigorous in others. Professor Kokkoris argues that it remains to be seen whether the common system
of evaluation on national security grounds is an effective tool to repel undesirable foreign investors in the EU.

In Chapter 14, Anu Bradford examines whether EU merger control has been, or is likely to be, deployed towards protectionist ends. The EC has frequently been accused of deliberately targeting foreign – especially US – acquirers, while facilitating the creation of European national champions. To assess the validity of these claims, this chapter first examines the EU’s past merger enforcement record. Analysis of the over 5,000 mergers reported to the EC in 1990–2014 reveals no evidence that the EC systematically deployed its authority to advance protectionist goals. The discussion then turns to the present, explaining how some Member States are calling for the rethinking of EU competition law through a lens of industrial policy in light of the heightened global competition that European companies are facing. The last part of the chapter cautions against such a change in the EU’s enforcement philosophy and explains why neutral, non-protectionist merger enforcement is vital for European competitiveness and economic dynamism going forward.

In Chapter 15, Eleanor Fox considers that a fear of Chinese economic hegemony looms large in the Western world. Merger partners and other antitrust litigants take advantage of the frenzy and assert a defence: “We have to do it to compete with China.” This chapter tells three stories in which the private actors invoked the China defence. In the two US cases, the private actors won. In the one EU case – Siemens/Alstom – the EC won the battle, but it is unclear whether it will win the war. For competition authorities and policymakers, the moral of the stories is: be on the lookout for the China card. Professor Fox considers that it may be a diversion from the real fact that companies are consolidating significant market power and that antitrust retreat in the name of the Chinese dragon will not help the quest for global competitiveness.

In Chapter 16, Suzanne Kingston observes that within the current intense debate on the relevance of environmental considerations within competition policy, merger policy has received relatively little attention. This chapter assesses the potential role of environmental considerations in merger policy, and the arguments for and against their inclusion in merger assessments, in light of practical examples. It proceeds by: (1) examining the classic approach to “public interest” factors in merger control; (2) offering a deconstruction of the orthodoxy; (3) proposing a conceptual framework for environmental issues in merger control; and (4) applying that framework by considering issues of market definition and the relevance of environmental benefits and harm in merger assessment.

PART II: JURISDICTION-SPECIFIC INSIGHTS

In Chapter 17, Deborah Healey and Rhonda Smith focus on the history and scope of the competition law merger provisions in Australia, which have been well established since 1974. Section 50 of the Competition and Consumer Act 2010 (“CCA”), prohibits mergers and acquisitions which have the effect or likely effect of substantially lessening competition in a market (the SLC Test). Australia does not have mandatory filing for mergers. Instead, a practice has grown up outside the scope of the CCA which involves parties approaching the competition regulator, the Australian Competition and Consumer Commission (“ACCC”), seeking informal clearance. If the ACCC objects and the parties persist with the merger, the ACCC will seek an injunction in court to prevent the transaction. Around 90% of mergers are dealt with informally, but the ACCC has had little success in court since the introduction
Introduction and synopsis

of the current test in 1992. Difficulties have involved standards of proof and the reception of expert economic evidence in court. Alongside global discussions around the impact of digital platforms on standard competition law tools, the failure of the ACCC to prove cases in relation to mergers has led to proposals for amendment of the Australian law.

In Chapter 18, Alexandre Cordeiro Macedo notes that merger review is crucial in reaching a healthy economic and competitive environment: in a globalized world, international cooperation can help antitrust agencies obtain the best results for providing innovation and consumer wellbeing. He discusses some global mergers analysed by CADE, and also reflects on how multijurisdictional cooperation can be implemented to ensure timely and effective decision-making in order to overcome the major challenges of different jurisdictions jointly assessing global mergers.

In Chapter 19, Cunzhen Huang and Yiming Sun observe that the past 14 years have witnessed the Chinese merger control regime evolving into one of the world’s major merger control regimes and, with its unique features, shaping international transactional practices. This chapter provides a comprehensive overview of the Chinese merger control regime, including its jurisdictional test, merger review procedure, substantive assessment (including remedies) and policies (including non-competition factors). It also discusses proposed amendments to the Anti-Monopoly Law and China’s recent merger control enforcement in the digital sector, with a focus on China’s 2021 Antitrust Guidelines in the field of the Platform Economy.

In Chapter 20, Étienne Chantrel describes how merger control has been modernized in France through simplification of the notification file (2019), an online notification platform (2019) and new merger control guidelines (2020). He also discusses procedural infringements, particularly gun-jumping. The chapter discusses the most prominent appeal cases in front of the Conseil d’État (French supreme administrative court) as well as European jurisprudence, and considers the Illumina/GRAIL case of 2021. The most important decisions since 2015 are summarized, including the first two prohibition decisions in the history of the Autorité. The chapter concludes by discussing recent policy debates, focusing on digital markets.

In Chapter 21, Nisha Kaur Uberoi provides an overview of the merger control regime in India, and the Competition Commission of India’s (“CCI’s”) role in its evolution over the past decade. The chapter examines the jurisdictional and substantive issues from a regulatory and industry standpoint. It analyses the applicability of the minority acquisition exemption, the interpretation of “control” by the CCI, the requirement to notify inter-connected transactions, the introduction and acceptance of novel remedies, and the issues arising from common shareholders in competing enterprises. The chapter discusses recent policy issues and legal developments, such as the recommendations of the Competition Law Review Committee Report, 2019, the amendments in the Competition (Amendment) Bill, 2020, the introduction of the “green channel” route, and the CCI’s increased scrutiny in the e-commerce market. It concludes by commending and critiquing the nascent Indian merger control regime which is constantly evolving in line with the international best practices.

In Chapter 22, Kozo Kawai and Madoka Shimada discuss the Japanese merger control rules and the Japan Fair Trade Commission’s (“JFTC’s”) decisional practices, and describe the key challenges that its merger control regime is currently facing. One is how to cope with the contemporary issues of the aging Japanese society, such as population decline, which makes the regional economy shrink, and the industries with old legacy, which are motivated to consolidate their aging facilities. Mergers and acquisitions provide solutions for such industries, but may create significant competition issues for the JFTC. At the same time, the JFTC should
enhance digital markets by introducing new guidelines and aggressively examining mergers between digital tech companies. In particular, the JFTC is concerned that digital platform operators may reduce competition in research and development by accumulating big data, or by acquiring competitors with key technologies.

In Chapter 23, Andrey Tsyganov, Lesya Davydova, and Anastasia Dokukina observe that analysis of mergers and acquisitions (M&A) has always been one of the main directions of antimonopoly control in Russia, in particular, preventing possible violations of antimonopoly laws by carefully analysing the potential competition risks of proposed transactions. The new economic era requires the application of new approaches in M&A analysis. In order to increase the efficiency of merger review, FAS – the Russian competition agency – uses various tools at the national and international levels. The chapter focuses on how the system to control M&A has developed in Russia, FAS’s recent experience, challenges, decisions, and the methodological tools used to assess transactions.

In Chapter 24, Tembinkosi Bonakele discusses the modern South African merger regime that has been in operation since 1999. The Competition Act 89 of 1998 (“Competition Act”) established three agencies to administer the Competition Act: namely the Competition Commission of South Africa (“CCSA”), the Competition Tribunal of South Africa (“CTSA”) and the Competition Appeal Court (“CAC”). The CCSA receives small, intermediate and large merger applications and assesses these transactions in accordance with the Competition Act. The CCSA is authorized, by the Competition Act, to decide the outcome of small and intermediate mergers while it is required to recommend the outcome of large mergers to the CTSA. The CTSA serves as a court of first instance in respect of large mergers while the CAC serves as an appeal body. Substantively the CCSA’s assessment of M&A follows international trends. However South Africa’s merger regulation regime differs from most jurisdictions in that the Competition Act requires the CCSA and CTSA to consider the impact of mergers and acquisitions on the public interest. This is a stand-alone assessment which applies regardless of the competition issues presented by a merger. The CCSA is increasing its focus on digital markets, having assessed a number of transactions in the digital sector.

In Chapter 25, Colin Raftery, Elie Yoo, and Andrew Hilland provide an overview of the UK merger control regime. They consider some of the regime’s unique features, including its voluntary nature and the Competition and Markets Authority’s (“CMA’s”) flexible jurisdictional tests. The chapter outlines the substantive test in UK merger control and responds to the suggestion that the CMA has adopted an increasingly interventionist approach to enforcement in recent years. It sets out the challenges of ensuring effective merger control in digital markets and highlights significant themes in the CMA’s recent practice. It also summarizes the CMA’s approach to the assessment of remedies. The chapter concludes by addressing the impact of the UK’s departure from the EU, and considering potential legislative reforms that may shape the future of UK merger control.

In Chapter 26, Bruce Hoffman and Gabriel Lazarus assess merger review by the Federal Trade Commission (“FTC”) and the Antitrust Division of the Department of Justice (“DOJ”) in the USA. They begin with the premerger notification process. They then turn to examining how agencies scrutinize mergers. They explain that agencies rely heavily on economic tools in analysing transactions and proposed remedies. This process starts with identifying the relevant market(s). Next, the agencies consider whether a transaction is likely to reduce competition under theories of horizontal and vertical harm as described in the relevant Merger Guidelines. When the agencies determine that a transaction threatens competition, they may seek to block
the transaction outright, or may negotiate remedies with the parties. The ability of parties to close a merger may also be litigated, and the authors provide a brief overview of the judiciary’s role in this circumstance. The chapter concludes with other policy considerations that may impact how the FTC, DOJ, and other government agencies view proposed transactions.