Merger notifications to the European Commission (Commission) under the EU Merger Regulation (EUMR) form a central part of the workload of most competition lawyers in private practice, in particular those working in the large commercial firms in Brussels and elsewhere in the European Union. Pre-Brexit, this would have been the case for their colleagues working in London and other legal centres in the UK, although many cross-border transactions that they work on will still be reviewed by the Commission, as well as by the Competition and Markets Authority (CMA).2

Following a slight drop in notifications in 2020 as a result of the COVID-19 pandemic, in 2021, the Commission reviewed a near-record 405 notified cases, adopting 391 Phase 1 clearance decisions (seven subject to commitments) and opening seven new Phase 2 investigations.4 Four mergers were cleared in Phase 2, subject to commitments and, in a fifth, the Commission adopted a decision under Article 8(4) EUMR to restore effective competition.5 Its enforcement action has continued into 2022, with (as at the end of July 2022) it adopting four Phase 1 clearances subject to remedies, in Parker/Meggitt,6 Prince/Ferro,7 Ali Group/Weilbilt8 and Bouygues/Nexans,9 opening a new Phase 2 investigation in Kronospan/Pfleiderer Polska,10 clearing two mergers at Phase 2 subject to remedies, Cargotec/Konecranes11 and Meta (formerly Facebook)/Kustomer,12 and it prohibiting the proposed merger between Hyundai and Daewoo.13

2 See, e.g. the proposed merger between Veolia and Suez, which was approved by the Commission subject to remedies (Case M.9696 Veolia/Suez (14 December 2021)) and is, at the time of writing, subject to a Phase 2 investigation by the CMA, which has recently published its provisional findings that the merger will give rise to a substantial lessening of competition in several markets in the UK: see CMA, Acquisition by Veolia Environnement S.A. of Suez S.A., Provisional Findings Report (19 May 2022).
3 European Commission, Merger Cases Statistics (31 July 2022), available at: https://ec.europa.eu/competition-policy/mergers/statistics_en (accessed 9 June 2022). The highest ever number of notified cases was in 2018, when the Commission received 414 notified cases.
4 Merger Cases Statistics (In 3).
5 Merger Cases Statistics (In 3).
6 Case M.10355 Kronospan/Pfleiderer Polska, Article 6(1)(c) decision (5 April 2022). See Commission press release, Mergers: Commission opens in-depth investigation into proposed acquisition of Pfleiderer Polska by Kronospan (IP/22/2284, 5 April 2022).
7 Case M.10078 Cargotec/Konecranes (24 February 2022). The Commission approved the merger subject to the divestiture of certain businesses of both parties, in a so-called ‘mix and match’ remedy: see Commission press release: Mergers: Commission clears the merger of Cargotec with Konecranes, subject to conditions (IP/22/1329, 24 February 2022). Although this merger concerned a number of global markets, the CMA prohibited this merger as it rejected the remedies accepted by the Commission, considering that the complex process of carving out these businesses from the parties’ existing businesses could have impaired their future competitiveness and the divestment business also lacked certain important capabilities: CMA, Anticipated merger between Cargotec Corporation and Konecranes Plc, Final Report (31 March 2022). The merger was subsequently abandoned.
8 Case M.10626 Meta (formerly Facebook)/Kustomer (27 January 2022). See Commission press release, Mergers: Commission clears acquisition of Kustomer by Meta (formerly Facebook), subject to conditions (IP/22/652, 27 January 2022). The CMA had previously cleared this merger unconditionally at the end of a Phase 1 investigation: Case ME/6920/20 Anticipated acquisition by Facebook, Inc. of Kustomer, Inc. (27 September 2021).
A fifth Phase 1 clearance subject to remedies was adopted in early August 2022.14

The European courts have also been busy with appeals in merger cases. The General Court has recently handed down judgments dismissing a competitor’s challenge to the Commission’s approval of easyJet’s acquisition of certain assets of Air Berlin,15 upholding the imposition by the Commission of a €28 million fine on Canon for ‘gun-jumping’16 and confirming that the Commission has jurisdiction, under Article 22 EUMR, over a merger that is not notifiable in any Member State but is referred to it by a Member State and that it can also invite Member States to send a referral request.17 A number of appeals are also pending before the Courts, including the Commission’s appeal against the General Court’s annulment of its prohibition of the Three/O2 merger18 and a challenge to its recent prohibition of the Hyundai/Daewoo merger.19

It is in the context of a continuing high level of both Commission merger investigations and merger-related litigation that the latest edition of this important practitioner reference text is published. Written by a team of experts from private practice, the Commission (both DG Competition and the Legal Service), the Court of Justice and academia, it covers, across two volumes, all jurisdictional, procedural and substantive aspects of merger control under the EU Merger Regulation. It is divided into 10 parts, seven in Book One and three in Book Two.

Part I, Introduction, is authored by my former colleague, Gavin Bushell, who is now a partner in Baker McKenzie’s European & Competition Law Practice in Brussels. It consists of three parts, which together provide an overview of EU merger control and developments since the first Merger Regulation entered into force in 1990. Not merely a history lesson, the author highlights many recent developments, including on the Commission’s use of Article 22 EUMR to assert jurisdiction over mergers falling below even national thresholds, its approach to minority shareholdings, the implications of Brexit, changes in the Commission’s procedures for investigating mergers and important recent judgments of the EU Courts in mergers cases, including CK Telecom. He also summarizes in one place the key Commission Notices and Guidelines and provides an overview of a typical merger investigation, which will be of assistance both to busy, seasoned practitioners and those who are just at the start of their careers in merger control.

One of the first tasks when advising on a proposed transaction is whether the Commission will have jurisdiction. This requires an assessment of both whether the transaction is a ‘concentration’ and whether the jurisdictional thresholds are met; it may also involve an assessment of whether jurisdiction may be transferred from the Commission to one or more national competition authorities or vice versa, whether before or after notification. Whilst it may seem to be a straightforward question as to whether a transaction falls within the scope of the Commission’s jurisdiction, there are traps for the unwary. Part 2 addresses all these issues and more in six chapters, authored by Ulrich von Koppenfels and Daniel Dittert, of the Commission and the EU Court, respectively. With reference to the Commission’s Consolidated Jurisdictional Notice,20 its decision-making practice and the Court’s case law, they examine when a transaction or a joint venture will constitute a ‘concentration’, in particular the concepts of ‘control’ and ‘full-function joint venture’. They also explain how turnover is to be calculated for each of the ‘undertakings concerned’ in the transaction. Finally, the substantive and procedural aspects of referrals of jurisdiction under Articles 4, 9 and 22 EUMR are considered, together with the Member States’ remaining competences under Article 21(4) EUMR, to protect legitimate national interests. Part 2 will be of invaluable assistance to those tasked with analysing whether a transaction must be notified to the Commission or, even if it does not meet the EUMR’s jurisdictional thresholds, the Commission might nevertheless seek to assert jurisdiction to review it.

Parts 3 and 4 consider the important substantive topics of market definition and the assessment of a

19 Case T-156/22 Hyundai Heavy Industries Holding v. Commission, pending.
concentration’s effects on competition. These both rely heavily on economic theory and analysis and, between them, cover over 430 pages, written by a combination of Commission lawyers and economists, one of whom Claes Bengtsson, has served in the Cabinets of both Commissioners Kroes and Vestager.

The authors of Part 3, Stephan Simon and Nicolas Listl, explain how the ‘hypothetical monopolist test’\(^{21}\) is used to define product and geographic markets, both in theory and in practice, including the information and evidence that the Commission will collect and the tools that will be used to apply the SSNIP test in particular cases, including to assess demand and supply-side substitution. This includes complex or new issues, such as market definition in differentiated products, technology and innovation markets, multi-sided markets and data markets.

Part 4 is authored by Claes Bengtsson, Josep M. Carpi and Anatoly Suboč. It consists of three chapters, a short introductory chapter and two lengthy chapters, concerning anti-competitive effects and countervailing factors. The authors commence with an examination of the counterfactual, against which the merger’s competitive effects must be considered, including the ‘failing firm’ counterfactual. They then explain the substantive test applied by the Commission, the ‘significant impediment to effective competition’ test, as well as the remaining relevance of the ‘dominance’ test. Chapter 2 examines in detail theories of harm based on horizontal, vertical and conglomerate effects, by reference to underlying economic theory (including the concepts of Bertrand and Cournot competition\(^{22}\)) the Commission’s Horizontal and Non-Horizontal Merger Guidelines,\(^{23}\) its decision-making practice and, importantly, the EU courts’ case law, including the General Court’s judgment in CK Telecoms. Unsurprisingly, the majority of the chapter is devoted to non-coordinated, or unilateral horizontal effects, since these are the most common effects of mergers investigated by the Commission and other competition authorities. There is a detailed assessment of the important concept of ‘closeness of competition’ and the different techniques used to assess whether a merger may have anti-competitive effects, including an assessment of market shares and concentration levels and economic modelling. The authors also consider the increasingly important topics of when mergers may have negative effects on innovation or R&D (for example in the pharmaceuticals, chemicals, industrial or financial services sectors), when a merger with a significant potential competitor may be anti-competitive and mergers in digital markets. The topic of coordinated effects is then considered, again in some detail. As well as horizontal effects, both vertical and conglomerate effects are considered in detail, with frequent illustration of these effects from the Commission’s decision-making practice and the Courts’ judgments. In Chapter 3, the different ways in which a merger that prima facie gives rise to competition concerns may nevertheless be found not to significantly impede effective competition are considered, i.e. entry and expansion, countervailing buyer power, efficiencies and the ‘failing firm defence’. These arguments are often made, but are hard to substantiate and not often accepted by the Commission. The authors set out in some detail how the Commission assesses claims of countervailing factors and the evidence that will be needed to make them successfully.

Where a merger gives rise to competition concerns, whether in Phase I or Phase II, it will be necessary for the merging parties to provide remedies to the Commission in order to obtain clearance. Remedies often need to be devised, offered, assessed and agreed under considerable time pressure, so the guidance in the book will be of invaluable assistance to practitioners. The procedural aspects of remedies are explained in Part 6, which also addresses all aspects of a Commission merger investigation, from pre-notification to the Commission’s final decision. Part 7 covers the legal framework, criteria and procedures used by the Commission to assess and test remedies. It also explains the different types of remedies that may be used, whether structural or behavioural, the applicable purchaser standard and special cases, such as ‘fix it first’ and ‘upfront’ buyer remedies. Implementation and enforcement of merger remedies are an important part of the success of a remedy and are, accordingly, considered in some depth. Throughout Part 7, the author, Simon van de Walle, who formerly worked in DG Competition, refers to relevant Court judgments on merger remedies, the Commission’s Remedies Notice\(^{24}\) and its decisions.

The remaining Parts of this comprehensive work address the following subjects: ancillary restraints, the

\(^{21}\) Or ‘SSNIP test’: ‘small, but significant non-transitory increase in price’ test.

\(^{22}\) Cournot competition exists in markets where producers set output and the price is determined by the market. By contrast, in a market characterized by Bertrand competition, producers set prices and output volumes are determined by the market.


validity of which must be assessed by the merging parties themselves and which may have important ongoing commercial effects (Part 5); merger control in the financial services, telecommunications and media, electricity and gas and transport sectors (Part 8); judicial review by the EU courts (Part 9); and the international dimension of merger control, including under the European Economic Area Agreement, cooperation between the Commission and other authorities, and the impact of Brexit on EU/UK cooperation (Part 10). Part 8 will doubtless be an important reference source for those advising on mergers in those sectors, with each chapter providing a comprehensive guide to market definition, competitive assessment and remedies in such mergers.

Commission merger decisions have important effects on both the merging parties and third parties, such as competitors, consumers and potential remedy-takers. It is therefore inevitable that disputes about some merger decisions, whether procedural, substantive or imposing fines and penalties, will end up being challenged in the General Court and, on appeal, by the Court of Justice. Part 9 on judicial review will therefore be of guidance and assistance to those challenging Commission decisions or wishing to intervene. The authors, Giuseppe Conte and Cristina Sjödin, both of the Commission’s Legal Service, explain what acts of the Commission may be challenged and by whom, the applicable time limits for bringing an action, the grounds for annulment and the Court’s standard of review in merger cases. The position of interveners is also considered. The procedure before the General Court and the consequences of a decision by it to annul, in whole or part, a merger decision are explained.

Merger control is an integral part of EU competition law. For many practitioners working in the EU, whether in Brussels or elsewhere, it will be an important part of their overall work. For those working outside the EU (including, post-Brexit, in the UK), the review of mergers by the Commission is also important, whether because they are working on a cross-border, multi-jurisdictional merger that is being reviewed in parallel by both their own competition authority (e.g., the CMA in the UK) or simply because the Commission’s approach to substantive merger assessment or remedies is instructive generally. This new work is impressive and, unusually, addresses all aspects of EU merger control in a single work, across two volumes and more than 1,500 pages. It does so in both an authoritative and accessible manner, drawing on the team of authors’ breadth and depth of experience and knowledge and illustrated by frequent references to relevant legislation, guidelines, Court case law and Commission decisions. It is, like its predecessor editions, destined to be an invaluable guide and reference for all involved in merger control work, whether before the Commission, national competition authorities or the courts.

25 Plus over 100 pages of tables of legislation, cases and decisions.