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Mission Impossible? Teresa Ribera's Mission Letter and the Future of EU Merger Review

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Executive Vice President Vestager's momentous tenure as Commissioner responsible for EU competition policy is nearing its end. EVP Vestager will leave her successor with a full agenda, including the first full-scale revamp of the Commission's basic antitrust procedural rules in over 20 years, finalizing the controversial guidelines on exclusionary abuses under Article 102 TFEU and defending enforcement decisions under appeal. But Commission President Von der Leyen's [mission letter](#) to Teresa Ribera Rodríguez, her nominee for Executive Vice President for a Clean, Just and Competitive Transition (the Mission Letter), does not mention any of these tasks.

Instead, Ribera is mandated to “modernize the EU's competition policy to ensure it supports European companies to innovate, compete and lead world-wide and contributes to our wider objectives on competitiveness and sustainability, social fairness and security.” More broadly, Ribera's Mission Letter calls for a “new approach to competition policy” to support Europe's “new industrial policy.” The new industrial policy, dubbed the [Clean Industrial Deal](#), aims to “unlock investment, create lead markets for clean tech and put in place conditions for companies to grow and compete” to meet the “goals set out in the European Green Deal.”

What does this ambitious mandate mean for EU merger control? The Mission Letter instructs Ribera to review the Commission's [horizontal merger guidelines](#) (HMG) and to address the risks of “killer acquisitions.” Revised HMGs should “give adequate weight to the European economy's more acute needs in respect of resilience, efficiency and innovation, the time horizons and investment intensity of competition in certain strategic sectors and the changed defense and security environment.” The treatment of “killer acquisitions” is top-of-mind following the European Court of Justice's September 3 rejection of EVP Vestager's strategy of using Article 22 EUMR referrals to capture sub-threshold transactions, in [Illumina Grail](#).

Horizontal Merger Guidelines

The HMG – adopted in 2004 — are clearly overdue for an update. The past 20 years have seen major advances in the Commission's merger review toolkit, including, for example, novel theories of harm (e.g., an increased focus on protecting future innovation), increased scrutiny of digital markets and understanding of platform economies, as well as a renewed emphasis on coordinated

effects. The Commission has also explored topics addressed briefly or not at all in the HMG, notably [non-price parameters of competition](#) such as innovation and sustainability. The HMG therefore clearly require updating to reflect these developments, as well as related Commission initiatives like the 2024 [market definition notice](#).

But the Mission Letter surely doesn't highlight the HMG for revision simply because they are out of date. Rather, it calls for substantive changes in how the Commission assesses mergers under the EUMR. But what may change?

The Mission Letter says that the future HMG should give “adequate weight to . . . needs in respect to resilience, efficiency and innovation.” Resilience, efficiency and innovation are key elements of the [Draghi Report](#), a frequently referenced touchstone in the Mission Letter. In its comprehensive assessment of competitiveness and key issues in the European market, the Draghi Report highlights that the “economy has shifted towards more innovation-heavy sectors where competition is usually based on digital technologies . . . where both scale and innovation are critical to compete rather than just low prices.” Its proposed reforms call for a realignment of competition policy with the realities of these markets, characterized by high fixed costs, network effects and “winner-take-all” dynamics, as well as the key objectives of the Clean Industrial Deal. How might this realignment manifest in the revised HMG?

Innovation defense. The Draghi Report calls for “radical changes to the current way competition policy is enforced,” with the particular objective of enabling innovation and supporting companies operating in global markets to scale. To “emphasize the weight of innovation and future competition” in merger reviews, the Draghi Report recommends introducing an “innovation defense” as a “key element[] of a new approach to competition policy supporting a new Industrial Deal” and for the updated guidelines to give clear indications to parties as to what evidence must be provided to demonstrate the merger’s impact on their ability and incentive to innovate.

The HMG indeed contain no “innovation defense.” However, they do state that the Commission should appropriately account for “substantiated and likely efficiencies” in merger reviews, allowing for the possibility of approving a transaction that would otherwise significantly impede effective competition because efficiencies generated by the transaction outweigh the potential harms – the so-called “efficiency defense.” The HMG further outline criteria that the Commission must evaluate in its assessment of efficiencies; these criteria (i.e., that the efficiencies be merger-specific, benefit consumers, and be verifiable) have generally been interpreted conservatively by the Commission. It is notable that the Commission has never approved an otherwise anti-competitive transaction based on an efficiency defense.

The Mission Letter’s call for revising the HMG suggests that the efficiency defense might be given an increased role and weight, at least in transactions involving innovation competition. The extent to which this potentially greater openness to innovation-related efficiencies will lead the Commission to approve transactions deemed as anticompetitive remains to be seen. The Draghi Report itself states that this “innovation defense” cannot be used to “justify further concentration by already dominant companies or in cases in which concentration poses a significant risk of entrenching a dominant position” and that short-term benefits to innovation linked with increased scale should be weighed against the merging parties’ and competitors’ future incentives to innovate.

It seems likely, therefore, that the updated guidelines will expand upon the ways the Commission

will apply the current criteria in relation to innovation-related efficiencies. More guidance – and potentially greater flexibility – can be expected in relation to dimensions that are difficult to quantify and verify (e.g., market power based on intellectual property rights, sustainability-related benefits, or shifting future market dynamics). Also following a suggestion in the Draghi Report, the HMG and the Remedies Notice could allow for verifiable commitments (e.g., investments) to be accepted by the Commission, not only to address potential impediments to competition but also to buttress innovation-related efficiencies.

Resilience objectives. The Mission Letter mentions “resilience” as one of the objectives to be considered during the update of the HMG. Resilience-related considerations (e.g., supply chain vulnerabilities and geopolitical risks) are not mentioned in the current HMG. The Draghi Report acknowledges that the development and incorporation of security and resilience criteria in competitive assessments is one of the more radical proposed competition policy reforms.

How resilience might be incorporated in the HMG remains unclear. The Draghi Report suggests that, for parties operating in sectors where security might be particularly crucial (e.g., security, defense, energy), a separate security and resilience assessment might be carried out by a non-competition unit, as the assessment of security and resilience is materially different from the analysis of competitive effects. This assessment could then feed back into the EUMR analysis in a similar manner as efficiency considerations, or in the development of remedies. For example, the Commission might deem the harm to consumers to be larger if a proposed transaction, in addition to harming competition, also results in increased supply chain vulnerabilities. However, in an increasingly complex EU regulatory landscape – with increased foreign direct investment screening and a new foreign subsidies regulation hurdle – it is debatable whether adding a new “resilience” review by yet another Commission body would help make the EU more efficient and competitive.

Changed defense and security environment. In addition to the reference to “the economy’s more acute needs in respect of resilience,” the Mission Letter calls for a review of the HMG in light of changes in Europe’s defense and security environment. How should the HMG be revised to reflect this changed environment?

The current HMG do not mention defense and security. The EUMR only addresses defense and security indirectly; under Article 21 EUMR, the EU has exclusive jurisdiction to review concentrations with a Union dimension, and Member States are precluded from applying their legislation to such transactions, with limited exceptions, including “public security.”

Changes to the defense and security environment since the HMG were adopted include expanded EU competencies in foreign affairs and defense, the continuing war in Ukraine and Russian threats against EU Member States. Reflecting these changes in the merger review context could again involve an expansion of the efficiency defense. For example, the revised HMG could allow the Commission to approve otherwise anti-competitive transactions where these are considered to improve the defense and security of the EU.

Time horizons. Finally, the Mission Letter calls for revisions to the HMG to give greater weight to the time horizons and investment intensity of competition in certain strategic sectors. The Commission typically assesses the effects of notified transactions over a relatively short period of time, such as three to five years. In markets requiring significant investments and characterized by product life cycles much longer than five years (such as energy and pharmaceutical markets), the

current timeframe arguably does not reflect competitive realities nor allow the Commission to capture transactions' short- and long-term impacts.

The Mission Letter suggests that revised HMG might give the Commission flexibility to consider longer time horizons in relevant industries. This may be particularly important for the evaluation of efficiencies related to future innovation, security and resilience as well as, potentially, other non-price considerations, like sustainability-related objectives set out in the Clean Industrial Deal and European Green Deal. The Mission Letter, however, does not single out specific industries where such longer time horizons may be necessary.

Killer acquisitions

According to the Mission Letter, “killer acquisitions” raise the risk that “foreign companies” will eliminate possible sources of future competition. The Commission adopted a new approach to reviewing concentrations without a Union dimension – aiming to capture so-called “killer acquisitions” — in its [2021 guidance](#) on the application of the EUMR’s Article 22 referral mechanism.

In *Illumina/Grail*, the European Court of Justice held that Article 22 EUMR does not allow the Commission to accept jurisdiction over concentrations based on referrals from Member States that lack jurisdiction under their own merger review laws. Although this judgment was a defeat, it did not affect the Commission’s ability to accept referrals of sub-threshold transactions that do meet the notification criteria of one or more Member States, such as *Adobe/Figma* (where the Commission examined the transaction from a potential competition perspective; another area in which the 2004 HMG could benefit from an update, but not one specifically linked to killer acquisitions). In any case, a growing number of Member States have broad jurisdiction to review transactions that do not meet local turnover thresholds.

How might Ribera implement her mandate to strengthen EU protections against killer acquisitions? The Mission Letter does not call for changes to the EUMR’s jurisdictional thresholds (for instance, introducing a transaction value threshold). Such a change would require an EUMR amendment that could be politically controversial and in any event time-consuming. Rather, the Mission Letter’s reference to killer acquisition threats coming from “foreign” companies may hint at a new approach.

In January 2024, the Commission proposed a [new EU regulation](#) on Member State review of foreign direct investment (FDI). While the proposed changes would harmonize Member State FDI review and strengthen the Commission’s coordination powers, the proposed regulation will likely undergo significant revision under the new European Parliament before adoption. President Von der Leyen may envisage changes to further strengthen the EU FDI screening framework to address the competitive effects of killer acquisitions that involve key sectors and/or impact EU defense and security.

Conclusion

Mission letters that Commission Presidents send to their nominees for competition commissioner

are typically short on details. The specific elements they do contain rarely stoop to technical documents such as the HMG. However, the Mission Letter portends potentially significant changes to EU merger review policy, specifically calling for the revision of the 2004 HMG. While the concrete changes will become clear only over time, we can expect new thinking and probably more flexibility in the application of efficiency defenses. Changes could include greater consideration of sectoral factors (e.g., additional requirements to assess a transaction's impact on resilience and security for parties operating in critical sectors, or more flexible time horizons for R&D heavy markets) and a greater consideration of parallel objectives of the Clean Industrial Deal (e.g., supporting innovation, security and resilience). Whether these considerations will be reflected primarily in an expanded role of the efficiency defense or in other dimensions of merger review assessments (e.g., development of remedies and updates to the Commission's toolkit for competitive assessments) remains to be seen.

As important as these areas are, the Commission should not miss the opportunity to make other needed changes to the HMG. These could include, for example, a more thorough treatment of the role of non-price parameters outside the efficiency defense context, such as market definition and theories of harm. These should include not only the role of innovation, but also sustainability, which Commission officials [describe](#) as increasingly important in its merger review practice. The Commission should also not limit its review to the HMG; its 2008 [non-horizontal merger guidelines](#) (NHMG) are also overdue for an update.

Given the urgency highlighted in the Mission Letter, can the Commission update its merger guidelines fast enough? Reviewing and updating complex documents like the HMG and NHMG is a multi-year process. If the Commission launches this process in 2025, new versions might not be adopted until 2027 or even later. But the Commission does have options to move faster. In 2023, for example, the Commission published a [call for evidence](#) in connection with guidelines on the application of Article 102 TFEU to exclusionary abuses. This process will likely lead to the adoption of guidelines in 2025. In parallel, however, the Commission updated its 2008 [guidance](#) on its Article 102 TFEU enforcement priorities, with immediate effect. Similarly, the Commission could publish a non-binding document explaining changes to its merger enforcement policies consistent with the Mission Letter without awaiting the final adoption of new versions of the HMG (and hopefully NHMG).

The Mission Letter provides tantalizing hints of changes in EU merger policy that we can expect during the 2025-2030 Commission term. Ribera can expect penetrating questions on the issues outlined above during her November 2024 confirmation hearings at the European Parliament. Stay tuned!

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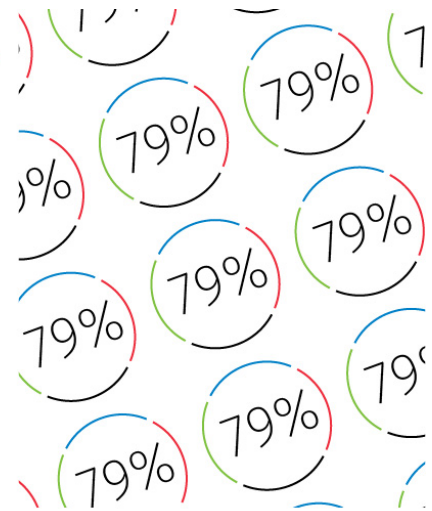
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