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The Draghi Report: A Blueprint for the EU Competition Commissioner-Designate?

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The Draghi Report proposes substantial reform in the area of competition law, notably offering a critical assessment of recent policies implemented by the European Commission in merger control and antitrust enforcement. The Report will serve as a potential blueprint for Teresa Ribera Rodríguez, the Competition Commissioner-Designate and the European Commission to shape and execute competition policy.

A new Competition Commissioner and the Draghi Report

On 17 September, the President of the European Commission, Ursula von der Leyen, announced the designation of Teresa Ribera Rodríguez as executive vice-president for Clean, Just and Competitive Transition, charged also with the Competition Portfolio.

The appointment follows the publication of Mario Draghi's report "The future of European Competitiveness" that was commissioned a year ago by President von der Leyen and published on 9 September 2024. While competition is a relatively small part of the Report, a number of the other elements (the broad industrial policy goals; security considerations; trade defence) cut across classic competition law goals.

The 328-page Report is divided into two parts: Part A, A Competitiveness Strategy for Europe (here) and a Part B, In-Depth Analysis and Recommendations (here) which includes recommendations in relation to specific sectors including energy, clean technologies, telecoms, computing and AI, semiconductors, automotive, defence, space, pharma, transport as well as reform of horizontal policies. When it comes to competition, the Report proposes "*a new approach to competition policy supporting a new Industrial Deal*" (page 299). Von der Leyen's Mission Letter to Teresa Ribera Rodríguez draws inspiration from the Draghi Report in a call to modernise EU competition policy. We set out below the main proposals.

The weight of innovation and future competition

The Report recommends that emphasis be placed on "*the weight of innovation and future*

competition in DG COMP decisions", embracing a more forward-looking approach and advocating an assessment of the impact of competition enforcement on incentives to innovate. This would include reforming the Horizontal Merger Control Guidelines.

This is also reflected in Ursula von der Leyen's Political Guidelines, where the president of the Commission tasks the Commissioner Designate to review the Horizontal Merger Guidelines to "*give adequate weight to the European economy's more acute needs in respect of resilience, efficiency, and innovation*" (page 7).

Loss of innovation can be seen as a concern. However, an increase in innovation as an efficiency capable of offsetting any potential competitive harm should also be considered. We are yet to see cases where innovation is effectively deployed as an efficiency offsetting other potential competitive harm. In practice, the Commission does not fully appreciate the need of companies to scale in order to fund R&D. Furthermore, the standard to demonstrate pro-competitive efficiencies is generally just too high and impossible to meet. Finally, innovation is unpredictable which makes it very difficult to assess it *ex ante.* It remains to be seen whether there will be a change in mindset and if innovation defences will be successful in practice.

Clear guidance and templates on novel agreements, coordination and co-deployment between competitors

The Report highlights the "*need for a simple, streamlined process that groups of EU industries can follow to work together to reach scale*" (page 300). Specifically, the Report recommends the adoption of "*templates on novel agreements*" for the parties to such an agreement. The Report specifically lists "defence" as "*a crucial case where co-deployment and coordination are needed* (page 300).

In this respect, the Commission recently revised its Horizontal Block Exemption Regulation ("**HBER**") and Guidelines on the Applicability of Article 101 to horizontal co-operation agreements that provide guidance in relation, in particular, to agreements which promote **sustainability**. However, neither the HBER nor the accompanying Guidelines currently provide special treatment for agreements related to the **defence sector**. The implementation of the Report would probably mean an expansion of the HBER and of the Guidelines.

Develop security and resilience criteria by expert authorities and include them in DG COMP assessments

The Report calls for a "*security and resiliency assessment*" to be performed by a separate body "*outside the Competition unit*", e.g. a Resilience Assessment Body (page 300). The assessment would then "*be used as an input for DG COMP as an additional public interest criterion*" (page 300), mainly in areas like energy, security, defence, and space.

While the aim of the recommendation is clear, the practical implementation of this appears complex.

It is not immediately clear how this new instrument would be coordinated with the national FDI regimes of the EU Member States. Furthermore, the legal basis for these changes (Article 352 TFEU), would require all the Member States to vote in favour, making reform in this direction challenging.

State aid control as a competition tool for efficiency enhancing industrial policies

The Report advocates for two principal changes to State aid policies: (i) enhancing coherence between State aid and broader EU policies, and (ii) incorporating assessments of innovation and resiliency in decisions concerning State aid control. This comes at a time of fragmentation of the internal market following aid given in the context of the COVID-19 pandemic and energy crises.

In principle, all aid is deemed incompatible except for certain categories that are always considered compatible (Article 107(2) TFEU) and other categories that are presumptively compatible (Article 107(3) TFEU). Within the framework of Article 107(3)(b) TFEU, which allows Member States to grant aid to "*remedy a serious disturbance in the economy of a Member State*", or under Article 107(3)(c) TFEU, which permits aid to "*facilitate the development of certain economic activities or of certain economic areas*", the Commission's assessment is based on the criteria of appropriateness, necessity, and proportionality.

Given these existing provisions, there is already a basis for arguing that aid not aligned with broader EU policies should not be approved. Similarly, considerations of innovation and resiliency can already be integrated into the Commission's assessments. Therefore, the primary adjustment required is a shift in the Commission's policy to explicitly incorporate these elements. State aid policy appears prominently in the Mission Letter, as part of the Clean Industrial Deal.

Reform and expand the Important Projects of Common European Interest (IPCEIs)

Additional proposals in relation to IPCEIs include to (i) make part of EU funding available for these projects; (ii) lessen the burden for proposing projects; and (iii) streamline and accelerate the review process.

In 2021, the Commission published a Communication on criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest. The Report proposes to lower the standard for a project to qualify as an IPCEI by embracing a "*broader notion of innovation*" (page 301).

The changes proposed by the Report would increase the relevance of IPCEIs. However, action from the Commission alone does not seem enough to achieve all the stated objectives of the Report. Notably, the Mission Letter specifically refers to the Draghi Report in relation to IPCEIs.

Incentivising the adoption of open access, interoperability, and adherence to EU standards through State aid and other competition tools

The Report proposes to expand the benefits of interoperability beyond the DMA, and that new regulations requiring open access and interoperability should be introduced when strong network effects and data-related barriers to entry hinder competitive dynamics in the market. To achieve this objective, the Report suggests using State aid tools as well as the New Competition Tool (see below).

Mandating further interoperability obligations, similar to those envisaged in the DMA, would require further regulation and a risk/benefit assessment. Supporting open standards via State aid, on the other hand, may be achieved relatively easily as the Commission enjoys a margin of discretion in the assessment of State aid.

Apply effectively the new powers associated with the enforcement of the Digital Markets Act (DMA) and the Foreign Subsidies Regulation (FSR)

The Report states that DMA and FSR enforcement is complex and that "*[a]dequate resources must therefore be provided to the enforcer*" (page 303). While the FSR division has reportedly been at least initially impacted by understaffing, the need for personnel has decreased in recent months in relation to both Regulations. Nonetheless, ensuring that both instruments are implemented effectively will not be easy considering the high level of specialisation required, particularly for the DMA. It will take a considerable amount of resources (and, therefore, political will) to ensure that the ambitions of the Report become reality. The DMA is also explicitly referenced in the Mission Letter to Henna Virkkunen, executive vice-president-designate for Tech Sovereignty, Security, and Democracy tasked with ensuring that "*the Commission takes rapid and effective enforcement actions under the **Digital Services Act** and the **Digital Markets Act** whenever necessary*" (page 7). In other words, the sharing of DMA competencies between DG COMP and DG CNCT will continue.

Reinforce ex-post versus ex-ante regulation and monitoring

The Report proposes that companies involved in competition decisions should be mandated to report metrics that enable the assessment of competition levels post-decision (*ex post*). Based on these reports, competition authorities may intervene if concerns arise. To facilitate this process, the Report suggests that the Commission be granted the authority to request parties to provide information on an on-going basis. The Report suggests that companies involved in mergers or antitrust proceedings, agree to provide this information as part of their commitment proposals.

While it is common for reporting obligations to be imposed in cases of merger control and antitrust proceedings concluded with commitments, the Report advocates for more extensive obligations. This would allow the Commission to potentially use the data and relevant information even after a case is closed. Implementing this recommendation may lead to further amendments to the EUMR and Regulation 1/2003 which has been under evaluation by the Commission after 20 years of existence. At the same time, if the Commission can use this information in the context of an NCT type of investigation (see below), there could be a substantial loss of legal certainty, many times more profound than in the context of the recent controversy around referrals of below-threshold mergers.

Introduce a 'New Competition Tool' (NCT) in four areas

The idea of an NCT is not a new one. The Commission had proposed introducing such a tool in December 2020, alongside what used to be called the "Ex Ante Regulation", and which turned into the DMA. The inspiration for such a tool comes from the UK system of market investigations which is aimed at addressing structural competition issues. The Report sees the following areas where such a tool could be employed:

- Tacit collusion;
- Markets requiring heightened consumer protection, particularly for vulnerable groups;
- Markets with weak economic resilience, such as reliance on a single supplier leading to shortages; and
- Insights from past enforcement actions that suggest further issues (see above on *ex post* assessments).

The Report does not clarify whether this NCT would "coexist" with the NCTs already available to Member States (such as Germany, Greece, Romania and other recent adopters), or if it would force the NCAs to "delegate" to the Commission the power to use this tool to address cross-border competition issues – which would be preferable. Obviously, if the Commission were to adopt such a tool, its enforcement powers would be seriously increased.

Accelerate the decision-making processes and increase the predictability of decisions

The Report advocates for quicker and more predictable decision-making processes. It specifically references "*[d]ecade-long cases like the Intel case*" (page 304) and the 2023 Merger Simplification Package. The Report identifies that merger control, exclusionary abuses, and the DMA require urgent streamlining.

The current merger control review process has become complex and uncertain due to several factors: the use of Article 22 of the Merger Regulation for non-notifiable mergers, the application of Articles 101 and 102 to review non-notifiable mergers, emerging theories of harm and innovative approaches, the FSR, and the DMA.

According to the Report, a proposed solution for the ambiguity of non-notifiable mergers is to establish a transaction value threshold for mandatory notifications, similar to practices in Austria and Germany.

The draft Guidelines on the enforcement of Article 102 leave excessive discretion in identifying exclusionary abuses. Examples include the lack of detailed conditions under which tying is presumed to have exclusionary effects and the absence of a safe harbour for dominant firms setting prices above average total cost.

Article 1(6.b) of the DMA, which states that the Regulation does not prejudice the application of national competition rules that impose additional obligations on gatekeepers, introduces uncertainties.

Outlook

Despite the initial hype surrounding the Draghi Report, it is important to temper expectations. Many of the ideas presented may be difficult to apply in practice. Additionally, some proposals will face significant challenges due to their legal basis and other intricate legal considerations that the report, authored by an economist, understandably overlooks. However, the fundamental purpose of this document is to provide a framework for Teresa Ribera Rodríguez and for the Commission at large. As such, it is crucial to pay attention to its contents, as it offers an interesting perspective on potential future directions in competition policy. The most likely upcoming changes include the introduction of a new mechanism to capture below-threshold transactions and a comprehensive revision of the horizontal merger guidelines.

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