# Kluwer Competition Law Blog

## The Future of EU Merger Review under EVP Ribera

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With the new European Commission (Commission) confirmed, European Union (EU) competition policy will be directed through 2029 by Teresa Ribera Rodríguez as the Executive Vice President (EVP) for a Clean, Just and Competitive Transition from December 2024. EVP Ribera would have her hands full simply continuing the work started by outgoing EVP Vestager, 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 still under appeal. But EVP Ribera is tasked with nothing less than developing a "new approach to competition policy," notably in relation to merger control.

Clues as to the direction of EU merger review can be gleaned from President Von der Leyen's mission letter to Ribera (the Mission Letter) and her responses to Parliamentary questions in November, both written and oral. The Mission Letter directs Ribera 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, EU competition policy should support Europe's "new industrial policy," integrating competition policy within a broader mandate to meet climate goals while supporting objectives like innovation and resilience. This 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." Thus, the Mission Letter places EU competition policy firmly in a broader policy context, in particular EU industrial and environmental policy.

This policy-oriented approach was on display at Ribera's 12 November confirmation hearing, which largely focused on climate and energy issues. In her opening remarks, Ribera stated that she intends to implement her mission by "coordinating the green agenda […and …] enforcing a competition policy […] promot[ing] the alignment and synergies between the clean transition and a competitive European economy." The focus on climate and energy issues reflects Ribera's career to date, as she has previously held roles as the Secretary of State for Climate Change, the Director of Sustainable Development and International Relations, and Minister for the Ecological Transition in Spain and France. Similarly, in her written responses to the European Parliament, Ribera promised to "further modernize competition policy, by focusing on three overall key objectives. First, significantly simplify[ing] and speed[ing] up processes . . Second, . . . strengthen[ing] and better target[ing] competition enforcement. . . Third, . . . ensur[ing] a further effective alignment of competition policy with the EU's priorities. This of course includes contributing to the Clean

Industrial Deal for a sustainable and competitive European economy and deepening our Single Market."

What does Ribera's ambitious mandate mean for EU merger control? Ribera's written responses to Parliament noted that "the EU has traditionally taken a favourable view towards market consolidation and the benefits it can provide – with the clear exception of when consolidation significantly impedes effective competition. . . While this basic objective of impeding excessive accumulation of market power must remain in place, EU merger control must continue to evolve to capture contemporary needs and dynamics like globalization, digitalization, sustainability, innovation and resilience." Notwithstanding the strategic context of her mandate, Ribera stressed her commitment "to an independent and impartial handling of individual competition cases, in full respect of the integrity and confidentiality of the investigations."

Within this broader mandate, the Mission Letter specifically directs Ribera to review the Commission's horizontal merger guidelines (HMG) and to address the risks of "killer acquisitions."

**The HMG**

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 better understanding of platform economies, as well as 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.

According to the Mission Letter, the 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." "My aim in reviewing the HMG," noted Ribera in her written responses to Parliament, "is to ensure that merger control gives the right weight to the EU economy's needs and reflects overall policy objectives and market realities, including possible efficiencies. This would be a review with innovation, investment, and resilience among the core drivers."

Resilience, efficiency and innovation are key elements of the Draghi Report, a touchstone referenced frequently in the Mission Letter and by Ribera in her written and oral responses to Parliamentary questions. In a comprehensive assessment of EU competitiveness, the Draghi Report stresses 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*. First, the Draghi Report calls for "radical changes to the current way competition policy is enforced" to encourage innovation and support 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 providing clear indications to parties as to what evidence is required 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 (i.e., that the efficiencies be merger-specific, benefit consumers, and be verifiable) that the Commission must evaluate in its assessment of efficiencies. The Commission has generally interpreted these criteria conservatively; the Commission has never approved an otherwise anti-competitive transaction based on an efficiency defense.

The Mission Letter suggests that the efficiency defense may play a more prominent role in the revised HMG. Indeed, Ribera, in her written responses to Parliament, noted that the revised HMG should reflect "market realities," including "possible efficiencies". However, it remains to be seen to what extent a potentially greater openness to innovation-related efficiencies might lead the Commission to approve transactions deemed as anticompetitive. The Draghi Report itself states that the "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 economies of scale should be weighed against the merging parties' and competitors' future incentives to innovate. This tension was echoed by Ribera in her confirmation hearing; in addition to the Draghi Report, she referenced Enrico Letta's call for a strong, single EU market and Lagarde's emphasis on the role of fiscal and structural policies to promoted productivity and competition, highlighting her continued focus on promoting competition within the EU through investing in connectivity and infrastructure while "working towards champions with much greater capabilities in international markets".

How these priorities will be balanced remains uncertain, but the updated guidelines are likely to 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 challenging to quantify and verify (e.g., market power based on intellectual property rights, sustainability-related benefits, or shifting future market dynamics). In this regard, the Commission may draw upon the Commission's assessment of innovation-related theories of harm, notably in *Dow/Dupont* and subsequent cases. The treatment of innovation-related theories of harm in the current HMG will in any case need to be updated to reflect this recent case law.

For example, the revised HMG will likely incorporate lessons from the Commission's development of innovation-related theories of harms, as well as potential harms to other non-price competitive parameters (as discussed in a recent competition policy brief). Aligning EU competition policy with the Clean Industrial Deal will likely require more specific consideration of sustainability-related harms and benefits (as discussed in a recent merger brief).

Where a merger raises concerns about potential harms to innovation-related competition, the Draghi Report also suggests potential changes in the Commission's practice in relation to merger remedies. The Draghi Report suggests that the Commission could accept verifiable commitments

(e.g., investments) to address innovation-related concerns or to buttress innovation-related efficiencies. Such changes would presumably be addressed in a revised remedies notice, not (or not only) in revised HMG.

*Resilience.* The Mission Letter identifies "resilience" as a second objective to be considered during the update of the HMG. Resilience-related considerations (e.g., supply chain vulnerabilities and geopolitical risks) are not mentioned at all in the current HMG. 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. 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.

The Commission could instead consider resilience as a form of non-price competitive parameter and assess a notified transaction's potential effects on resilience as a new theory of harm. For example, if a proposed transaction would result in increased supply chain vulnerabilities, this finding could lead the Commission to consider that the transaction would significantly impede competition in the EU. Conversely, as with innovation, if a transaction would significantly contribute to resilience, the resilience benefits could be considered as part of an updated efficiency defense analysis.

Whether resilience is considered as part of a theory of harm or an efficiency defense, new thinking will be required on how to quantify resilience-related benefits and harms and how to balance them against other competitive benefits and harms.

*Defense and security*. Third, the Mission Letter calls for a review of the HMG in light of changes in Europe's defense and security 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 competences in foreign affairs and defense, the continuing war in Ukraine and Russian threats against EU Member States.

As with innovation and resilience, a proposed transaction's negative effects on European defense and security could be considered as a competitive harm, while improvements could be considered as efficiencies. 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. Quantifying such impacts and integrating them into the HMG framework would be challenging, however. Arguably, defense and security-related considerations are better addressed in the foreign-direct-investment (FDI) context than in the EUMR framework.

*Time horizons*. Finally, the Mission Letter calls for revisions to the HMG to place greater emphasis on the time horizons and investment intensity of competition in certain strategic sectors. The Commission typically assesses the effects of notified transactions over relatively short periods,

such as three to five years. However, in markets requiring significant investments and characterized by product life cycles exceeding five years (such as energy and pharmaceutical markets), this timeframe fails to reflect competitive realities or account for both the short- and long-term impacts of transactions.

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. Ribera further discussed the role for time horizons in her confirmation hearing, stating that updating the HMG could help account for challenges posed by potential foreign investors (e.g., from authoritarian states).

**Killer acquisitions**

The threat of so-called "killer acquisitions" is a second key area for revisions to merger control. According to the Mission Letter, these acquisitions raise concerns that "foreign companies" will eliminate possible sources of future competition, particularly in innovation-driven markets.

Aiming to capture such "killer acquisitions," the Commission adopted a new approach to reviewing concentrations without a Union dimension in its 2021 guidance on the application of the EUMR's Article 22 referral mechanism. However, the 2021 guidance was withdrawn following the European Court of Justice's holding in *Illumina/Grail* 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. However, *Illumina/Grail* 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, as in *Adobe/Figma*, or are "called in" for review under broad Member State laws, as in *Nvidia/Run:AI* (see on the latter also the recent blog post here).

How might Ribera implement her mandate to strengthen EU protections against killer acquisitions? Ribera's hearing indicated a clear intent to address the "enforcement gaps" following the Article 22 ruling. 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; the Commission decided not to pursue this route following a 2016 consultation. Rather, the Commission may encourage Member States to give national authorities broad powers to review transactions not meeting mandatory thresholds (where they don't have such authority already) and to rely on authorities' jurisdiction under such widened powers to support Article 22 EUMR references to potentially worrying "killer acquisitions." Ribera may order preparation of new guidance on Article 22 EUMR references to replace the 2021 version.

The Mission Letter's reference to threats from "foreign" companies may also hint at a new approach. In January 2024, the Commission proposed a new EU regulation on Member State FDI review to harmonize Member State FDI reviews and strengthen the Commission's coordination powers. However, 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**

EVP Ribera has a broad mandate to carve out a "new approach to competition policy" and five years to put this new approach into practice. For merger review, this means – first and foremost – reviewing and updating the HMG, notably in relation to the treatment of innovation, resilience and EU defense and security. The revised HMG will no doubt incorporate the Commission's experience assessing theories of harm based on innovation (and other non-price competitive parameters). How the HMG will incorporate notified mergers' impact on resilience and defense and security is less clear since the Commission does not have a significant body of merger review experience to draw upon.

Updates to the HMG could include greater considerations for sectoral approaches (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 markets in which R&D plays a significant role) and a greater consideration of parallel objectives of the Clean Industrial Deal (e.g., supporting innovation, security and resilience). How these considerations will be integrated into updated HMG remains to be seen. Work during EVP Vestager's tenure on the assessment of sustainability benefits from otherwise anti-competitive agreements may be useful if the Commission seeks to modernize the HMG's treatment of efficiency defenses under the EUMR.

Important as these areas are, the Commission should not miss the opportunity to make other needed changes to EU merger control. For example, the 2008 non-horizontal merger guidelines (NHMG) are also overdue for an update. Changes to the HMG and NHMG may also need to be reflected in updates to the Commission's remedies notice, and the Commission may issue an updated version of its guidance on Article 22 EUMR referrals. EVP Ribera should also consider ways to streamline the review process for mergers not qualifying for the simplified procedure.

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 final adoption of new versions of the HMG (and hopefully NHMG).

Ribera's Mission Letter and responses to questions from the European Parliament provide tantalizing hints of changes in EU merger policy that we can expect during the 2024-2029 Commission. Stay tuned!

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