Editorial: Commissioner Ribera's "Post-Digital" Competition Mandate: Fostering Sustainability and Industrial Competitiveness

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On 27 November 2024, the European Parliament approved the composition of the new European Commission, paving the way for the 27 Commissioners to take office in December. Just as in the first von der Leyen Commission, "competition" is no longer a standalone portfolio but integrated into a broader mandate under an Executive Vice-President responsible for the strategic direction of an overarching political priority. That role is now held by Ms. Teresa Ribera Rodríguez, and the focus has shifted from the now discounted digital transition to the EU's "clean, just, and competitive transition".

During Ribera's parliamentary hearing, and despite the fact that only DG Competition falls directly under her purview, competition policy was only a side dish. For one, the meeting was dominated by pointed questions about Spanish politics, leaving limited room to discuss her portfolio. When relevant questions did arise, they mainly focused on her role as Vice-President in coordinating the work of Commissioners Hoekstra (Climate, Net Zero, and Clean Growth) and Séjourné (Prosperity and Industrial Strategy) on the Clean Industrial Deal, as well as the role of State aid in this context. Other facets of competition policy received minimal attention. Nonetheless, when considered together with Ribera's mission letter from President von der Leyen and her written answers to the European Parliament questionnaire, several key priorities and challenges for a "modernised" (this is getting old…) EU competition policy in the coming years did become apparent.

First, in relation to merger control, Ribera's mission letter instructs her to revise the 2004 Horizontal Merger Guidelines (HMG), emphasising the need to give more weight to "the European economy's more acute needs in respect of resilience, efficiency, and innovation".[1] This unusually specific directive is informed by the analysis and recommendations in the Draghi report on the future of European competitiveness,[2] though it also engages with a longstanding debate that even predates the EU Merger Regulation (EUMR). The EUMR does not permit an open balancing of competition and industrial policy concerns in merger cases.[3] However, since the European Commission blocked Siemens' proposed acquisition of Alstom in 2019, the question of whether EU merger control enforcement hampers the ability of European firms to achieve the scale needed to compete with Chinese or American giants has remained a hot-button issue.

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1 European Commission, Mission letter to Teresa Ribera Rodríguez [2024].

2 Mario Draghi, The future of European competitiveness: in-depth analysis and recommendations [2024].

3 When the European Commission initially proposed the Merger Regulation, it allowed for the authorization of concentrations "taking due account of the competitiveness of the undertakings concerned with regard to international competition", but the legislator ultimately decided to exclude industrial policy considerations from the substantive assessment. European Commission, amended proposal for a Council Regulation (EEC) on the Control of Concentrations between Undertakings [1988] OJ C 130/4, art 2(4).

It is reassuring that Ribera generally supports Margrethe Vestager's position that global competitiveness cannot exist without effective competition at home. Weakening competition in the internal market is not a viable solution.[4] She identifies State aid control, rather than merger control, as a tool that can bolster competitiveness. Yet it is clear that something's got to give. The mission letter suggests that in strategic markets requiring significant investments, the HMG should offer more flexibility to assess potential competitive constraints over a longer time horizon. Ribera adds that particular attention should be given to customers' preference for "more trusted and reliable local suppliers" – a clear nod to industrial policy - and to possible efficiencies.[5] While Draghi's proposed "innovation defence" is not mentioned, the Commission's growing focus on innovation-related theories of harm will likely be paired with a greater emphasis on innovation benefits.

The mission letter further tasks Ribera with addressing the risks associated with incumbent companies acquiring innovative start-ups with highly competitive potential, so-called "killer acquisitions". The Court of Justice's rejection of the Commission's Article 22 EUMR referral policy in the *Illumina/Grail* case has curtailed its main instrument to review such transactions. The Commission now depends on referrals from the Member States that have non-turnover-based thresholds or call-in powers to trigger notifications. By the end of 2025, 16 Member States will have introduced such a solution, and the Commission has been encouraging others to do the same. Yet Ribera is determined to "swiftly" find a more structural solution.[6] Amending the notification thresholds in the EUMR is seen as unattractive, as the new Commission seeks to reduce, rather than increase, the administrative burden on businesses. A legislative proposal to revise only Article 22 EUMR is probably the best option, but it still carries a risk that Member States use the opportunity to push for broader changes to promote consolidation and foster European champions, thereby also complicating the pursuit of a swift solution.

Second, in relation to antitrust, Ribera is committed to offering more "upfront guidance" and ensuring greater clarity in the assessment of pro-competitive collaborative initiatives under Article 101 TFEU. While the mission letter highlights data pooling for the development of artificial intelligence, this guidance should also extend to sustainability agreements or initiatives supporting other broader EU strategic objectives and ambitions. In view of the recent update of the guidelines on horizontal cooperation agreements and the limited attractiveness of informal guidance letters, this effort may well take the form of "no infringement" decisions.

When discussing antitrust enforcement priorities, it is notable that labour market practices have not been mentioned and that digital markets were referenced almost exclu-

4 See eg European Parliament, Questionnaire to the Commissioner-Designate Teresa Ribera [2024] p 2-5, 32.

5 idem, p 4-5.

6 European Parliament, Verbatim Report of the Confirmation Hearing of Teresa Ribera Rodríguez [2024] p 33.

sively in the context of the Digital Markets Act (DMA). Ribera primarily pointed to the energy and food sectors, in line with the priorities set out in her mission letter. In response to questions from Members of European Parliament (MEP) she noted that antitrust enforcement is not, as such, an anti-inflation tool.[7] Nevertheless, she pledged to closely monitor markets where prices appear artificially high, stressed the need to deploy all available instruments to combat energy poverty, and highlighted the importance of also addressing exploitative abuses. At the same time, she reiterated the directive from the mission letter to concentrate DG Competition's resources on tackling the most distortive market practices.

The new Commissioner has further been instructed to speed up antitrust investigations, a point also raised in the Draghi report. However, this is not a novel concern. The recent evaluation of the EU antitrust enforcement framework underscored the pervasive need for faster decision-making, and the Commission has already identified specific areas where procedural innovations could be implemented to address this issue.[8] Therefore, a legislative proposal to update Regulation 1/2003 can be anticipated.

Third, in relation to regulatory instruments, the mission letter instructs Ribera to continue taking "rapid and effective" enforcement actions under the DMA and to "vigorously" and "proactively" enforce the Foreign Subsidies Regulation (FSR). However, these ambitions must be tempered against the backdrop of a capacity issue, especially in relation to the FSR. The Commission had estimated that it needed at least 145 full-time employees to ensure effective enforcement, but DG competition's FSR task force currently has fewer than 20 staff members who are overwhelmed by an unexpected number of notifications under the FSR's mandatory merger notification regime. Also regarding the DMA, Ribera acknowledges the need to structurally reinforce the limited capacity of the Commission. She notes that while it is beneficial for DG Competition to have the support of the national competition authorities, there remains a "need to strengthen our capacities back home".[9]

In light of the urgency highlighted in the mission letter, Ribera is likely to commence addressing these priorities immediately, considering the extensive consultation and even legislative processes required for many of the tasks. The year ahead promises to be a transformative one!

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This issue of CoRe includes various contributions that touch upon the above-mentioned current developments and challenges in the field of European competition law and policy. The first article, "Sustainability Agreements in Light of the European Com-

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7 European Parliament, Questionnaire to the Commissioner-Designate Teresa Ribera [2024] p 5-6.

8 Commission Staff Working Document, Evaluation of Regulations 1/2003 and 773/2004, SWD [2024] 216 final.

9 European Parliament, Verbatim Report of the Confirmation Hearing of Teresa Ribera Rodríguez [2024] p 25, 42.

mission's Horizontal Guidelines", by Joana Fraga Nunes, explores the practical effectiveness of the guidance given by the guidelines on horizontal cooperation agreements on the appraisal of collaborative efforts to meet sustainability goals under Article 101 TFEU. The second article, "Assessment of the Context in Determination of By Object Restrictions – How Deep to Go?", by Mária T. Patakyová, delves into the Court of Justice's jurisprudence on the need for an (extended) analysis of the legal and economic context when determining the anti-competitive nature of competition restrictions.

The country reports section includes an analysis of the Belgian Competition Authority's advice on legislative proposals to strengthen the bargaining position of the agricultural sector vis-à-vis wholesale buyers and distributors (by Jeroen Dewispelaere and Rasmus Van Heddegem), of the amendments to the Czech Competition Act, introducing a new competition tool and call-in powers for concentrations (by Michal Petr), of an important ruling by the Norwegian Competition Appeals Tribunal overturning a cartel decision on standalone information exchanges (by Haakon Rønn Stensæth), and of the Slovak's Antimonopoly Office's approach to labour-related agreements such as wage-fixing and no-poach agreements under the cartel prohibition (by Peter Hodál).

This issue further features case notes on important judgements from the Court of Justice in *Google LLC and Alphabet v Commission (Google Shopping)* (Case C-48/22), *Illumina, Inc./Grail v Commission* (Joined Cases C-611/22 P and C-625/22 P), *BPN v BIC Português and Others* (Case C-298/22), and *APVE and Others* (Case C-671/15) and from the General Court in *Qualcomm v Commission* (Case T-671/19). Finally, the current issue contains a book review of Gönenç Gürkaynak's thought-provoking *Innovation Paradox in Merger Control*.

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