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COMPETITION LAW REVIEW

## II. How the Draghi report may impact EU merger control

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## ABSTRACT

Mario Draghi's report, *The Future of European Competitiveness*, has given renewed impetus into the question of whether the European Commission should apply the EU Merger Regulation to advance European industrial policy, to strengthen the competitiveness of European companies, or to create European champions. This article describes the Draghi report's findings and recommendations in the fields of EU merger control, gives a brief historical perspective on its recommendations, and contains the authors' predictions of how EU merger control may evolve in the coming years.

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1. Mario Draghi's report, *The Future of European Competitiveness* (the "Draghi report" or the "Report"),<sup>1</sup> has given renewed impetus to the debate on whether the European Commission (the

"Commission") should apply the EU Merger Regulation (EUMR)<sup>2</sup> to advance European industrial policy and strengthen the competitiveness of European companies. This article describes the Draghi report's findings and recommendations in the fields of EU antitrust enforcement and merger control (I.), provides a brief historical perspective (II.), and outlines the authors' predictions of how EU merger control might evolve in the coming years (III.), before briefly concluding (IV.).

## I. The Draghi report's recommendations on antitrust enforcement & merger control

2. The Council and Commission have long been concerned about the EU's competitiveness. Over 30 years ago, in November 1994, the Council invited the Commission to publish annual reports on the competitiveness of European companies in the global marketplace.<sup>3</sup> In the intervening period, a series of reports addressing Europe's competitiveness has been published, including, in 2010, a report authored by Mario Monti, a former competition commissioner and prime minister of Italy, *A New Strategy for the Single Market: At the Service of Europe's Economy and Society*;<sup>4</sup> in 2020, a Commission communication outlining *A New Industrial Strategy for Europe*;<sup>5</sup>

1. M. Draghi, *The future of European competitiveness*, September 2024, [https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead\\_en#paragraph\\_47059](https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en#paragraph_47059).

2. Council Regulation No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139>.

3. Council Resolution of 21 November 1994 on the strengthening of the competitiveness of Community industry, OJ C 343, 6.12.1994, p. 1, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31994Y1206%2801%29>.

in 2023, Commission communications on the 30th anniversary of the single market<sup>6</sup> and the EU's long-term competitiveness;<sup>7</sup> and, in 2024, a report authored by Enrico Letta, a former prime minister of Italy, on the future of the Single Market.<sup>8</sup>

3. In 2023, Commission President von der Leyen commissioned Mario Draghi, a former president of the European Central Bank and former prime minister of Italy, to prepare a report analysing the EU's competitiveness.<sup>9</sup> His report, published in September 2024,<sup>10</sup> examines the implications of recent geopolitical and economic changes, increased global competition, and Europe's growing vulnerability.<sup>11</sup> It warns of an "existential challenge"<sup>12</sup> that could jeopardise the EU's core values and cause it to abandon technological leadership, climate action, and strategic independence should the EU fail to improve productivity.<sup>13</sup> The Report maintains that "the only way to become more productive is for Europe to radically change,"<sup>14</sup> by accelerating innovation and finding new growth engines, reducing

energy prices, responding to a radically changed security environment, and overcoming the EU's "complex governance structure and slow and disaggregated policymaking process."<sup>15</sup>

4. The Report proposes a "new industrial strategy" based on four building blocks: (i) full implementation of the single market; (ii) industrial, competition, and trade policies that interact closely and are aligned in their overall strategy; (iii) "massive" investment on a scale "unseen for half a century in Europe"; and (iv) reforms to the EU's governance that deepen coordination and reduce the regulatory burden on companies.<sup>16</sup> The Report's recommendations on competition enforcement, discussed below, propose expanding the Commission's reach in some areas while retrenching in others.

5. With respect to antitrust enforcement, the Report confirms the Commission's view as to the benefits of competition

<sup>17</sup> and acknowledges "overwhelming" evidence that, in addition to delivering lower prices, competition stimulates greater productivity, investment, and innovation.<sup>18</sup> The Report considers, however, that the "lack of innovation in Europe is sometimes blamed on competition enforcement"<sup>19</sup> and approvingly cites a view expressed by Joseph Schumpeter, one of the most influential European economists of the early 20th century, that "tough competition would erode the profit rents from innovation and thus disincentivise R&D."<sup>20</sup> The Report reasons that

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4. M. Monti, A New Strategy for the Single Market: At the Service of Europe's Economy and Society, Report to the President of the European Commission José Manuel Barroso, 9 May 2010.
  5. Communication from the Commission, A New Industrial Strategy for Europe, COM(2020) 102 final, 10 March 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0102>. The Commission updated this communication following the COVID-19 pandemic. See communication from the Commission, Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery, COM(2021) 350 final, 5 May 2021, [https://commission.europa.eu/document/download/9ab0244c-6ca3-4b11-bef9-422c7eb34f39\\_en?filename=communication-industrial-strategy-update-2020\\_en.pdf](https://commission.europa.eu/document/download/9ab0244c-6ca3-4b11-bef9-422c7eb34f39_en?filename=communication-industrial-strategy-update-2020_en.pdf).
  6. Communication from the Commission, The Single Market at 30, COM(2023) 162 final, 16 March 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023DC0162>.
  7. Communication from the Commission, Long-term competitiveness of the EU: looking beyond 2030, COM(2023) 168 final, 16 March 2023, [https://commission.europa.eu/system/files/2023-03/Communication\\_Long-term-competitiveness.pdf](https://commission.europa.eu/system/files/2023-03/Communication_Long-term-competitiveness.pdf).
  8. E. Letta, Much More Than a Market – Speed, Security, Solidarity: Empowering the Single Market to deliver a sustainable future and prosperity for all EU Citizens, April 2024, <https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf>.
  9. See 2023 State of the Union Address by President von der Leyen, 13 September 2023, [https://ec.europa.eu/commission/presscorner/detail/en/speech\\_23\\_4426](https://ec.europa.eu/commission/presscorner/detail/en/speech_23_4426) ("Europe will do 'whatever it takes' to keep its competitive edge").
  10. Address by M. Draghi, Presentation of the report on the Future of European competitiveness, European Parliament, 17 September 2024, [https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead\\_en](https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en).
  11. Draghi report, Part A, at 5.
  12. Ibid.
  13. Ibid.

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14. Ibid.
  15. Ibid. at 16.
  16. Ibid. at 17–18.
  17. Eur. Comm., *Protecting competition in a changing world: Evidence on the evolution of competition in the EU during the past 25 years*, Publications Office of the European Union, Luxembourg, 2024, at 15, [KD0924494enn\\_Protecting\\_competition\\_in\\_a\\_changing\\_world\\_staff\\_report\\_2024.pdf](https://ec.europa.eu/economy_finance/protected_content/KD0924494enn_Protecting_competition_in_a_changing_world_staff_report_2024.pdf).
  18. Draghi report, Part A, at 17.
  19. Ibid., Part B, at 298.
  20. Ibid. See J. A. Schumpeter, *Capitalism, Socialism and Democracy*, Harper and Row, New York, 1942, at 81–86 (Schumpeter maintained that large firms innovate more, as they have the resources to conduct R&D and can use their market power to reap the benefits of innovations); some though, believe that monopolists may have less incentive to innovate as they have less to gain (see, e.g., K. J. Arrow, Economic Welfare and the Allocation of Resources for Invention, in *The Rate and Direction of Inventive Activity: Economic and Social Factors*, National Bureau of Economic Research (eds.), Princeton University Press, 1962, pp. 609–626); while others have identified an "inverse U-relationship" between competition and innovation (see, e.g., P. Aghion, N. Bloom, R. Blundell, R. Griffith and P. Howitt, Competition and Innovation: an Inverted-U Relationship, *Quarterly Journal of Economics*, Vol. 120, No. 2, 2005, pp. 701–728) or have

“[a]lthough stronger competition will in theory generally both lower prices and foster innovation, there are cases where it can be harmful to innovation.”<sup>21</sup>

6. The Report considers intervention by competition authorities to be “critical” for the EU’s success<sup>22</sup> and proposes a series of changes to the Commission’s enforcement policy and practice, including: (i) providing clear guidance and templates on novel agreements, coordination, and co-deployment agreements between competitors, together with a “streamlined and simplified [process] to provide complete clarity to companies concerned about their liability for potential infringements of competition law;”<sup>23</sup> (ii) accelerating decision-making processes and increasing the predictability of decisions to overcome “a systematic conflict between the needs for accuracy and those for speed and certainty”;<sup>24</sup> and (iii) addressing a gap in the Commission’s enforcement powers, which are limited to sanctioning anti-competitive agreements and abusive conduct by dominant companies, by proposing to introduce a new competition tool (NCT)<sup>25</sup> similar to mechanisms that exist at the national level<sup>26</sup> that would enable the Commission to identify and remedy structural competition problems in certain markets.<sup>27</sup>

7. As to the first of these recommendations, the Commission has historically provided detailed guidance on its enforcement practice and approach to

different types of agreements and practices.<sup>28</sup> There may, though, be scope to do more, including by issuing guidance on the Commission’s approach to individual cases, as was anticipated following the modernisation of antitrust enforcement in 2004.<sup>29</sup> As to the second of these recommendations, successive Commissioners, including Commissioner Ribera,<sup>30</sup> have pledged to accelerate Commission investigations and decision-making, but have recognised the need to reconcile that objective with the EU courts’ rulings on the legal standard that Commission decisions must meet and the rights of defence of parties to Commission proceedings. As to the third of these recommendations, much may turn on the Council’s and Parliament’s readiness to consider expanding the Commission’s powers (and making available additional resources to support any such expansion). Commissioner Ribera has said that

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underlined the importance of contestability in incentivising firms to innovate (see, e.g., C. Shapiro, *Competition and Innovation: Did Arrow Hit the Bull’s Eye?, The Rate and Direction of Inventive Activity Revisited*, J. Lerner and S. Stern (eds.), University of Chicago Press, 2012, pp. 361–410, at 365).

21. Draghi report, Part B, at 298.

22. *Ib* id., Part A, at 17.

23. *Ibid.*, Part B, at 300.

24. *Ibid.* at 304.

25. *Ibid.* at 303.

26. See, e.g., Gesetz gegen Wettbewerbsbeschränkungen (German Act against Restraints of Competition), § 32e, [https://www.gesetze-im-internet.de/englisch\\_gwb/englisch\\_gwb.html](https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html); UK Enterprise Act 2002, Part 4, §§ 131–138, <https://www.legislation.gov.uk/ukpga/2002/40/contents>; and UK Digital Markets, Competition and Consumers Act 2024, Chapter 3, §§ 136–139, <https://www.legislation.gov.uk/ukpga/2024/13/enacted>.

27. The Report identifies four areas that it believes would be particularly suitable for review under the NCT: (i) tacit collusion; (ii) vulnerable consumer markets; (iii) markets characterised by weak economic resilience; and (iv) markets where past enforcement actions have not delivered effective competition. Draghi report, Part B, at 303–304.

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28. See, e.g., communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, OJ C 259, 21.7.2023, p. 1; communication from the Commission, Guidelines on vertical restraints, OJ C 248, 30.6.2022, p. 1; communication from the Commission, Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7; amendments to the communication from the Commission, Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 116, 31.3.2023, p. 1; Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 134, 11.5.2022, p. 4.

29. See Eur. Comm., press release IP/04/411 of 30 March 2004, Commission finalises modernisation of the EU antitrust enforcement rules, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_04\\_411](https://ec.europa.eu/commission/presscorner/detail/en/ip_04_411); and Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), OJ C 101, 27.4.2004, p. 78 (“Informal Guidance Notice”) (following the abolition in 2004 of the voluntary notification system for agreements and concerted practices, the Commission signalled its intention to provide guidance letters to companies encountering novel questions concerning EU competition rules); in practice, however, very few such letters have been issued (see, e.g., S. Ünekbas, *The Revised Informal Guidance Regime Brings Little to the Table – If Any*, *Kluwer Competition Law Blog*, 12 October 2022, <https://competitionlawblog.kluwercompetitionlaw.com/2022/10/12/the-revised-informal-guidance-regime-brings-little-to-the-table-if-any/>).

30. See L. Crofts, Ribera promises EU merger review ‘evolution’ and faster enforcement in antitrust, state aid, *MLex Insight*, 22 October 2024, <https://www.mlex.com/mlex/articles/2252059/ribera-promises-eu-merger-review-evolution-and-faster-enforcement-in-antitrust-state-aid>. See also EU, Questionnaire to the Commissioner-Designate Teresa Ribera, 22 October 2024 (“Questionnaire to Commissioner-Designate Ribera”), at 4, [https://hearings.elections.europa.eu/documents/ribera/ribera\\_written-questionsandanswers\\_en.pdf](https://hearings.elections.europa.eu/documents/ribera/ribera_written-questionsandanswers_en.pdf) (“I will significantly simplify and speed up processes to be effective in the current dynamic environment. (...) [W]e cannot afford unduly long antitrust investigations during which companies continue to benefit from their anticompetitive practices. We need to become more effective by assessing what the features should be of a possible update of the procedural rules, based on the ongoing evaluation of the procedural framework for antitrust investigations”).

the NCT “*merits an in-depth reflection,*” but should be “*resource-efficient,*” should complement “*existing tools of EU and national competition law,*” and should effectively deliver without weakening existing enforcement or reducing business predictability.<sup>31</sup>

8. With respect to the digital sector, the Report recommends that the Commission receive “*adequate resources*” with “*specialised knowledge*”<sup>32</sup> to ensure the effective implementation of the EU’s landmark Digital Markets Act (DMA), which entered into force in 2024.<sup>33</sup> The Report does not, however, address a possible tension between the DMA and the Report’s observations on the adverse effect that regulation and competition may have on innovation. Nor does the Report reference the EU’s view that, by lowering entry barriers, the DMA will “*spur overall technological innovation,*”<sup>34</sup> including by increasing the pressure on digital gatekeepers to innovate.<sup>35</sup> Instead, it maintains that effective implementation of the DMA is needed to maintain the Commission’s credibility and to avert economic damage in the form of “*reduced appetite of multinational companies to invest in Europe and the delayed deployment of technological advances.*”<sup>36</sup> Experience to date

suggests that the DMA may, if anything, have undercut the second of these objectives, as certain digital gatekeepers have attributed their decisions to delay deploying technological improvements in the EU to the DMA and other EU regulations.<sup>37</sup>

9. With respect to merger control, as described in greater detail below, the Draghi report believes that the Commission should be “*more forward-looking and agile,*” in particular in assessing mergers in markets characterised by rapid innovation.<sup>38</sup> It recommends that the Commission take greater account of innovation and future competition<sup>39</sup> and be more permissive in assessing concentrations that involve European companies active in strategic sectors.<sup>40</sup> These recommendations are designed to align the EU’s industrial policy with competition enforcement, an objective that has consistently been recognised by the Commission.<sup>41</sup> They reflect the

31. Questionnaire to Commissioner–Designate Ribera at 5 (“*The proposal for a ‘New Competition Tool’ from Professor Draghi’s report draws attention to structural problems in certain markets (. . .), without entailing a clear infringement of competition rules. I believe that it merits an in-depth reflection on how a new market study and investigation mechanism could identify such problems in specific areas, and how it could usefully resolve them in a resource-efficient way, in cooperation with relevant market operators and in complement to the existing tools of EU and national competition law, as recently reinforced by the Digital Markets Act and the Foreign Subsidies Regulation. The benchmark for any ‘New Competition Tool’ should be that it can effectively deliver and neither weakens enforcement against infringements of existing competition rules nor materially weakens predictability for businesses*”).

32. Draghi report, Part B, at 302–304.

33. *Ibid.* at 303.

34. Eur. Comm., Impact assessment of the Digital Markets Act, Part 1, para. 286 <https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-markets-act>.

35. Eur. Comm., The Digital Markets Act: ensuring fair and open digital markets, [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en). See also Speech by EVP Margrethe Vestager at the reception organised by Concurrences in her honor, 30 October 2024, [https://www.concurrences.com/IMG/pdf/keynote\\_speech\\_of\\_margrethe\\_vestager.pdf?130904/ec0b6eb1d17badf91d3b5b49094251747e41f3797937c5fac381346faf8f8a90](https://www.concurrences.com/IMG/pdf/keynote_speech_of_margrethe_vestager.pdf?130904/ec0b6eb1d17badf91d3b5b49094251747e41f3797937c5fac381346faf8f8a90) (“*We created the DMA for two main reasons: to preserve market contestability and to ensure that markets remain fair: Making digital markets contestable ensures that large platforms feel pressure from potential competitors. If they don’t, innovation and growth will slow down, harming citizens and society*”).

36. Draghi report, Part B, at 302.

37. In June 2024, Apple announced that certain AI features (Phone Mirroring, SharePlay Screen Sharing enhancements, and Apple Intelligence) would not be rolled out to EU users in 2024 because of regulatory uncertainties under the DMA. See F. Y. Chee, Apple to delay launch of AI-powered features in Europe, blames EU tech rules, Reuters, 21 June 2024, <https://www.reuters.com/technology/artificial-intelligence/apple-delay-launch-ai-powered-features-europe-blames-eu-tech-rules-2024-06-21/>. See also M. Zuckerberg and D. Ek, Mark Zuckerberg and Daniel Ek on Why Europe Should Embrace Open-Source AI, *The Economist*, 21 August 2024, <https://www.economist.com/by-invitation/2024/08/21/mark-zuckerberg-and-daniel-ek-on-why-europe-should-embrace-open-source-ai> (“*Given the current regulatory uncertainty, Meta won’t be able to release upcoming models like Llama multimodal, which has the capability to understand images. That means European organisations won’t be able to get access to the latest open-source technology, and European citizens will be left with AI built for someone else. The stark reality is that laws designed to increase European sovereignty and competitiveness are achieving the opposite. This isn’t limited to our industry: many European chief executives, across a range of industries, cite a complex and incoherent regulatory environment as one reason for the continent’s lack of competitiveness*”).

38. Draghi report, Part B, at 299.

39. *Ibid.*

40. *Ibid.*, Part A, at 17 and Part B at 300–301.

41. See Comm. EC, *European competitiveness report 2002*, Office for Official Publications of the European Communities, Luxembourg, 2002, at 85 (“*From a general economic perspective, there exists no a priori reason for conflict between competition and enterprise policies. They are both cornerstones of the EU policy framework for achieving high and sustainable productivity growth (. . .). But both policies contribute to high and sustainable productivity growth. Effective competition does so by inducing firms to search for efficiency-enhancing solutions that lead to product and process innovation. Enterprise policy does so by correcting market failures and enabling more firms to engage in market transactions, thus increasing the population of potentially innovative firms. The nature and the practical application of each policy have their own emphasis that need to be balanced in the decision-making process of the Commission*”); P. Lowe, Competition and industrial policy in Europe: how can they work together?, Oxera, 31 October 2019, <https://www.oxera.com/insights/agenda/articles/competition-and-industrial-policy-in-europe-how-can-they-work-together/>; and G. de Calignon and R. Hiault, Benoît Cœuré : “Il faut écouter Mario Draghi,” *Les Echos*, 18 September 2024, <https://www.lesechos.fr/monde/europe/benoit-coeuré-il-faut-écouter-mario-draghi-2119734> (“*there can be no industrial policy without competition (. . .) The aim of*

Report's belief that "*competition policy should continue to adapt to changes in the economy so that it does not become a barrier to Europe's goals.*"<sup>42</sup>

**10.** Conscious of the Commission's strong reservations about applying EU merger control to facilitate the creation of national or European champions,<sup>43</sup> the Report recommends "*avoid[ing] the pitfalls of the past,*" including "*defending incumbent companies or picking winners*"<sup>44</sup> or "*defending 'national champions' that can stifle competition and innovation.*"<sup>45</sup> It asks, however, whether "*vigorous competition policy conflicts with European companies' need for sufficient scale to compete with Chinese and American superstar companies,*"<sup>46</sup> the strong implication being that there may be a conflict and, to the extent there is, that competition enforcement should not be an obstacle to European companies scaling up to compete with global rivals. The Report proposes a recalibration of competition law enforcement to ensure that policy remains effective in an era of technological disruption and innovation.<sup>47</sup> It proposes a number of changes, certain of which it believes would be "*radical.*"<sup>48</sup>

**11.** First, the Draghi report emphasises the importance of innovation and future competition in merger control. It considers that the Commission's enforcement practice has, on occasion, been unduly

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*industrial policy is to encourage the emergence of new players and innovation (. . .) [I]ndustrial policy and competition need to be better articulated, so that each takes a step towards the other"* (free translation from French).

42. Draghi report, Part A, at 17.

43. See M. Monti, former Competition Commissioner and Prime Minister of Italy, EU Merger Regulation 139/2004: 20 Years that Made a Difference, DG Competition, 18 April 2024, <https://www.youtube.com/live/-blncVcl-zLk?t=5665s> [01:34:25–01:36:08] ("*I was never a devout enthusiast or proponent of industrial policy (. . .), but today there are of course much stronger arguments for that [industrial policy]. (. . .) If one asks me the question: would you be in favour of European institutions and the European Commission promoting European industry and European champions? I would say yes, indeed. If the second question were to be: do you see ways in which even DG Competition could participate in this mundane and not so orthodox exercise, I would say yes. For example by doing things that have been done in recent years concerning checks on the depth of other non-EU states pockets when it comes to subsidies to their companies, selling or investing in Europe. So I would make a distinction by instrument and (. . .) I believe that of all the instruments the least adequate to be bent to legitimate continental interests is the merger control*").

44. Draghi report, Part A, at 17.

45. Ibid. at 13.

46. Ibid., Part B, at 298.

47. Ibid. at 299.

48. Ibid.

backward-looking and too focused on current market shares.<sup>49</sup> The Report calls for "*a change in operating practices and updated guidelines to make the current Merger Regulation fit for purpose.*"<sup>50</sup> Specifically, it recommends that updated guidelines should explain how the Commission assesses the impact of competition on the incentive to innovate, and advocates for an innovation defence that would allow merging companies to show that a given transaction will increase their ability and incentive to innovate.<sup>51</sup> The Report envisages that any innovation defence should be sustained where merging parties can show that pooling resources is needed to cover large fixed costs and achieve the scale required to compete effectively at the global level.<sup>52</sup>

**12.** Second, to prevent any misuse of the innovation defence, the Draghi report recommends that "*merging parties should commit to levels of investment that can be monitored ex post.*"<sup>53</sup> Non-compliance could expose companies to a risk of fines.<sup>54</sup> The Report cautions that an innovation defence should not "*be used to justify further concentration by already dominant companies or in cases in which the concentration poses significant risk of entrenching a dominant position*" and "*is unlikely to apply to non-tradable sectors,*" including those where there are no international competitors.<sup>55</sup> In the telecommunications market, the Report favours "*commitments to invest according to detailed time schedules, launch of services or access to data or platforms, rather than partial de-consolidations or the transfer of physical assets.*"<sup>56</sup>

**13.** Third, the Draghi report recommends giving greater weight to public interest considerations in assessing transactions in strategic sectors that are exposed to supply chain and sovereignty risks, including the security, defence, energy, and space sectors.<sup>57</sup> The Report recommends that the Commission take account of security, resilience, and

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49. Ibid.

50. Ibid.

51. Ibid.

52. Ibid.

53. Ibid.

54. Ibid. at 299–300.

55. Ibid.

56. Ibid. at 75.

57. Ibid. at 300.

the risk of disruption to the EU economy.<sup>58</sup> It observes that, while sectoral or supply chain fragility is not directly a competition policy objective, it can be affected by supply-side concentration and import diversification.<sup>59</sup> The Report recommends that an independent expert body be appointed to assess security and resilience and that the Commission should consider security and resilience in designing remedies.<sup>60</sup>

**14.** Fourth, to facilitate enforcement, the Draghi report recommends empowering the Commission to require merging parties to report specific metrics that help evaluate the extent of competition *ex post*.<sup>61</sup> Such reports would allow the Commission to intervene if competition concerns arise. To minimise the burden on companies, this reporting obligation should be restricted to cases that present the most significant competition concerns, including in particular mergers that are approved with remedies.<sup>62</sup> The Draghi report sees this monitoring and enforcement power as a complement to the NCT.<sup>63</sup>

**15.** Fifth, the Draghi report recommends a more permissive approach to mergers involving European companies active in strategic sectors, including in particular the telecommunications and defence sectors.<sup>64</sup> In the telecommunications sector, the Report responds to calls by senior executives in EU telecommunications operators for a more permissive approach,<sup>65</sup> citing the greater returns that their US

counterparts are able to secure in a market characterised by fewer players.<sup>66</sup> It observes that, due to *ex ante* regulation and competition policies that favour a plurality of players and low consumer prices, the number of operators exceeds the optimal level and lacks the scale to provide fibre and 5G access,<sup>67</sup> which in turn results in lower per subscriber revenues and capital expenditure compared with other major economies.<sup>68</sup> According to the Report, “*industrial policies have the potential to promote further consolidation without necessarily leading to price increases for consumers.*”<sup>69</sup> The Report calls for a change in “*the EU’s stance towards scale and consolidation of telecoms operators to deliver a true Single Market, without sacrificing consumer welfare and quality of service.*”<sup>70</sup> It proposes to “[d]efine telecom markets at the EU level (as opposed to the Member State level), particularly when this facilitates cross[-]border integration and creation of EU-wide players,”<sup>71</sup> to give greater weight to “*innovation and investment commitments,*”<sup>72</sup> and take account of “*efficiencies in the form of improved quality vis-à-vis price levels through extended assessment timelines (e.g. to five years).*”<sup>73</sup>

**16.** In the defence sector, the Draghi report observes that competition enforcement “*may prevent or discourage businesses from merging and scaling up,*” thereby affecting their performance in export markets.<sup>74</sup> According to the Report, fragmentation limits scale, which is essential in a capital-intensive sector with long investment cycles.<sup>75</sup> The Report therefore advocates for competition enforcement that enables consolidation of European defence companies “*when increased scale would deliver efficiencies or allow the realisation of globally*

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*with respect to other regions before it is too late. We need to move fast and get ready to face the future with confidence ( . . . ). Europe needs a robust and sustainable telecommunications sector. We need the European institutions to enable it. We need a proper definition of the relevant markets and in-market scale. We need a new approach to regulation”.*

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58. *Ibid.*

59. *Ibid.* at 300 fn. 2.

60. *Ibid.* at 300–301.

61. *Ibid.* at 303.

62. *Ibid.*

63. *Ibid.*

64. The Report also favours consolidation of European cloud providers and semiconductor manufacturers. *Ibid.* at 82, 84 and 90.

65. See J. Deutsch, G. Volpicelli, EU Should Let Mobile Operators Merge, Draghi Report Says, BNN Bloomberg, 9 September 2024, <https://www.bnnbloomberg.ca/business/company-news/2024/09/09/eu-should-allow-mobile-operators-to-merge-draghi-report-says/> (“*European telecom operators have pushed for in-market consolidation for more than a decade, arguing they are unable to achieve the scale in each country to make a return on capital,*” citing Joakim Reiter, Vodafone’s chief corporate affairs officer, “*Draghi rightly identifies the lack of scale in telecoms, outdated competition policy, poor spectrum allocations and persistent imbalances in digital ecosystems as key reasons for Europe falling behind ( . . . ). The responsibility now lies with the Commission to transform the regulatory framework for telecoms*”); and Telefónica, press release, José María Álvarez-Pallete: “*It is legitimate and necessary to regain Europe’s leadership,*” 18 March 2024, <https://www.telefonica.com/en/communication-room/press-room/alvarez-pallete-it-is-legitimate-and-necessary-to-regain-eus-leadership/> (“*It is time to bridge the clear asymmetry of Europe*

66. Draghi report, Part B, at 69.

67. *Ibid.* at 69–70.

68. *Ibid.*

69. *Ibid.* at 69.

70. *Ibid.*, Part A, at 35.

71. *Ibid.*, Part A, at 35 and Part B, at 75.

72. *Ibid.*, Part A, at 35.

73. *Ibid.*, Part B, at 75.

74. *Ibid.* at 162 and 164.

75. *Ibid.*, Part A, at 59.

competitive investments.”<sup>76</sup> It considers that consolidation of defence assets in critical and strategic areas would strengthen the EU’s defence base and enhance its strategic autonomy and that, by reducing duplication of industrial capacities across Member States, the EU would achieve economies of scale, reduce defence costs, and create globally competitive companies.<sup>77</sup>

17. Sixth, the Draghi report cites the 2023 Merger Simplification Package<sup>78</sup> as a positive initiative, but notes the need for clarity regarding the review of mergers that do not meet the EUMR’s jurisdictional thresholds.<sup>79</sup> Following the Court of Justice’s judgment of 3 September 2024 finding that the Commission’s assertion of jurisdiction over the *Illumina/GRAIL* transaction was unlawful because the EUMR did not permit the Commission to take jurisdiction over transactions that did not meet national merger control thresholds,<sup>80</sup> the Report suggests that a “simple solution to the ambiguity” that would allow the Commission to take jurisdiction over “killer acquisitions” would involve revising the EUMR’s thresholds to include a value-based test similar to the rules in Austria and Germany.<sup>81</sup>

76. Ibid., Part A, at 61 and Part B, at 168 and 170.

77. Ibid., Part B, at 163.

78. Commission Implementing Regulation (EU) 2023/914 of 20 April 2023 implementing Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings and repealing Commission Regulation (EC) No. 802/2004, OJ L 119, 5.5.2023, p. 22; Commission Notice on a simplified treatment for certain concentrations under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, OJ C 160, 5.5.2023, p. 1; communication from the Commission pursuant to Articles 3(2), 13(3), 20, and 22 of Commission Implementing Regulation (EU) 2023/914 implementing Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings and repealing Commission Regulation (EC) No. 802/2004 2023/C 160/02, OJ C 160, 5.5.2023, p. 11 (“2023 Merger Simplification Package”).

79. Draghi report, Part B, at 304.

80. CJEU, 3 September 2024, *Illumina/GRAIL*, joined cases C-611/22 P and C-625/22 P, EU:C:2024:677, para. 222 (“the Commission could not rely on Article 22 of Regulation No 139/2004 to examine the concentration at issue. The Commission misinterpreted Regulation No 139/2004 by finding, in those decisions, that it could accept a request under Article 22 of that regulation in a situation where Member States making that request are not entitled, under their national merger control rules, to examine the concentration which is the subject of that request”).

81. Draghi report, Part B, at 304, fn. 9. Based on the thresholds introduced in 2017, transactions involving a transaction valuation exceeding EUR 200 million (Austria) or EUR 400 million (Germany) are notifiable under Austrian and German merger control rules, provided that certain revenue thresholds are met and the target has “significant” activities in Germany or Austria. See D. Schroeder, R. Polley, P. Bock, T. Kuhn, M. Mayr, Germany and Austria introduce Transaction Value Merger Notification Thresholds, *Cleary Gottlieb Alert Memo*, 28 June 2017, [18. Finally, the Draghi report identifies “concrete examples” that “need to be urgently streamlined,” because they have “become increasingly complex and uncertain,” including the allocation of jurisdiction and division of powers between Member States and the Commission, the Foreign Subsidies Regulation, “emerging theories of harm and innovative approaches,” and the DMA.<sup>82</sup>](https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/2017/</a></p></div><div data-bbox=)

## II. Historical perspective on the Draghi report’s recommendations

19. The Draghi report’s most far-reaching recommendation in the field of merger control proposes strengthening the competitiveness of European companies and enhancing their ability to invest and innovate by applying competition rules more permissively in certain strategic sectors. The suggestion that EU merger control should take account of industrial policy designed to strengthen European companies is not new.

20. The Commission’s first proposal for a merger regulation was made in 1973.<sup>83</sup> Among other things, that draft envisaged the possibility of exempting concentrations that were deemed “indispensable to the attainment of an objective which is given priority treatment in the common interest of the Community.” In the intervening 16 years before the EUMR’s adoption in 1989, there continued to be support for requiring the Commission to take account of non-competition criteria in its assessment of concentrations.<sup>84</sup> In the final negotiations during late

publications/alert-memos/2017\_06\_27-germany\_-austria-revised--new-merger-thresholds.pdf. In 2016, the Commission considered introducing value-based thresholds in the EUMR to close an enforcement gap in competitively significant transactions that were of high value but generated insufficient turnover to meet the EUMR’s thresholds. However, the Commission decided against proposing any change to those thresholds. Value-based thresholds were considered to risk being either ineffective (if set too high) or disproportionate and resource-intensive (if set too low), leading to an increase in irrelevant cases.

82. Draghi report, Part B, at 304, fn. 9.

83. Commission Proposal for a Regulation of the Council on the Control of Concentrations between Undertakings, OJ C 92, 31.10.1973, p. 1.

84. See, e.g., Opinion of the Economic and Social Committee on Community Competition Policy in the light of the Current Economic and Social



1988 and 1989 leading to the adoption of the EUMR, the principal debate at the time was between those favouring a competition-based test and those urging that explicit account be taken of social, industrial, and employment considerations, certain of whom envisaged the possibility of an exemption.

**21.** The Commission, however, was determined that the EUMR should not be used to impose a European industrial policy.<sup>85</sup> To assuage those who had supported a test based on social, industrial, employment, and other such criteria, Recital 23 of the original version of the EUMR adopted in 1989 did, however, require the Commission to “*place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty*,”<sup>86</sup> while Article 2(1)(b) of the EUMR refers to the “*development of technical and economic progress*.”<sup>87</sup> The provision does not,

however, allow industrial policy objectives to override competition criteria.

**22.** From the outset, the Commission defended the “*certainty that mergers will be exclusively assessed for their impact on competition*,”<sup>88</sup> described EU competition law enforcement as “*a tool at the service of consumers*,”<sup>89</sup> and resisted political pressure to approve transactions that it determined would harm competition.<sup>90</sup> The first occasion on which the Commission defied pressure to approve a concentration that it believed raised competition concerns was in 1991, when the Commission prohibited the *Aerospatiale-Alenia/de Havilland* merger despite strong pressure from the French and Italian governments to approve the transaction.<sup>91</sup> Subsequent transactions that were prohibited in the face of political pressure to approve them and thereby create national or European champions include *Volvo/Scania* (2000),<sup>92</sup> *Schneider/Legrand* (2001),<sup>93</sup>

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Situation, OJ C 322, 10.12.1981, p. 3 (“[b]usiness mergers should be vetted, though many cyclical and structural factors, including at the present time employment difficulties, militate in favour of policies free of legal and other rigidities”). See also Opinion of the Economic and Social Committee on the Amended Proposal for a Council Regulation on the Control of Concentrations between Undertakings, OJ C 208, 8.8.1988, p. 11, which disclosed support for the application of non-economic criteria, stating that “*the problem of controlling concentrations must (. . .) be approached on a ‘case-by-case’ basis within the framework of general principles and having regard to the economic and social provisions of the Treaty*.” The authors proposed that the EC be required to consider “*the importance of competition in promoting healthy economic growth (and the) satisfaction of the economic, social and regional needs of the population of the Community*.”

85. Lord Brittan, *The Early Days of EC Merger Control*, EC Merger Control: Ten Years On, London: International Bar Association, 2000, at 3 (“*Most important of all, we had to resist the pressures that were bound to be applied, and which were applied, by those seeking to use the Merger Regulation as an instrument of industrial policy, notwithstanding the clear tenor of the Regulation itself. I was determined to resist this, not because I was against any form of industrial policy, but because I thought that the best industrial policy was to ensure that competition prevailed in the EU*”).

86. See also Comm. EC, *Nineteenth report on competition policy*, Publications Office of the European Union, Brussels/Luxembourg, 1990, at 265–268, <https://op.europa.eu/en/publication-detail/-/publication/c75ce23d-7128-4db4-8e25-b0bc4809322/language-en> (“*The Commission states that among the factors to be taken into consideration for the purpose of establishing the compatibility or incompatibility of a concentration—factors as referred to in Article 2(1) and explained in Recital 13—account should be taken in particular of the competitiveness of undertakings located in regions which are greatly in need of restructuring owing inter alia to slow development*”).

87. See B. E. Hawk, *The EEC Merger Regulation: The First Step Toward One-Stop Merger Control*, *Antitrust L.J.*, Vol. 59, No. 1, 1990, pp. 195–235, at 213 (“[Recital 13 and Article 2(1)(b)] *reflect the Council of Ministers’ inability to resolve completely the differences between Member States favoring industrial, regional and social policy considerations (e.g., Spain, Portugal, and France) and Member States favoring a competition-based analysis more akin to the U.S. model of antitrust review (e.g., Germany and the United Kingdom)*”). See also J. A. Venit, *The “Merger” Control Regulation: Europe Comes of Age . . . or Caliban’s Dinner*, *C.M.L.R.*, Vol. 27, Issue 1, 1990, pp. 7–50, at 9 (“[Recital 13] *suggests that factors other than competition law may, to some extent, be taken into consideration*

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*in assessing concentrations*”).

88. M. Monti, former Competition Commissioner, *Merger Control in the European Union: A Radical Reform*, speech at the European Commission/IBA Conference on EU Merger Control, Brussels, 7 November 2002, [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_02\\_545](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_02_545). See also Commission, *Report on Competition Policy 2001*, Publications Office of the European Union, Brussels/Luxembourg, 2002, para. 252 (referencing EUMR’s “*fundamental objective of protecting consumers against the effects of monopoly power (higher prices, lower quality, lower production, less innovation)*”).

89. J. Almunia, *Competition and consumers: the future of EU competition policy*, speech at European Competition Day, Madrid, 12 May 2010, [https://ec.europa.eu/commission/presscorner/api/files/document/print/en/speech\\_10\\_233/SPEECH\\_10\\_233\\_EN.pdf](https://ec.europa.eu/commission/presscorner/api/files/document/print/en/speech_10_233/SPEECH_10_233_EN.pdf).

90. See, e.g., M. Vestager, Margrethe Vestager (EU Commission): *The legacy interview – Confidence in EU competition law for competitive, fair, and innovative European markets*, *Concurrences* No. 4-2024, art. No. 121361 (“*It is crucial to reaffirm that competition enforcement is not a tool in service of a political agenda. It remains a disciplined practice rooted in a case-by-case, facts- and evidence-based approach. Our decisions are made with an unyielding commitment to these principles, mindful that they are subject to strict judicial review, which serves as a safeguard for the integrity of our enforcement actions*”).

91. Comm. EC, decision 91/619/EEC of 2 October 1991, *Aerospatiale-Alenia/de Havilland*, case IV/M.053, OJ L 334, 5.12.1991, p. 42. The transaction would have created a leading European aircraft producer. See also Commissioner K. Van Miert, *European competition policy*, Speech at De Warande, Brussels, 6 May 1998 (“*the concept of national champions is dead*”).

92. Comm. EC, decision Art. 8(3) of 15 March 2000, *Volvo/Scania*, case COMP/M.1672. The transaction would have created a leading Nordic producer of trucks, buses and engines.

93. Comm. EC, decision 2004/275/CE of 10 October 2001, *Schneider/Legrand*, case COMP/M.2283, OJ L 101 du 6.4.2004, p. 1 (the Commission contended that national champions “*cannot be authorised unless the conditions of effective competition, ensuring in particular fair prices for consumers, continue to apply or are rapidly restored*”; see Comm. EC, press release IP/01/1393 of 10 October 2001, Commission prohibits acquisition of control of Legrand by Schneider Electric, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_01\\_1393](https://ec.europa.eu/commission/presscorner/detail/en/ip_01_1393)). The

and *Deutsche Börse/NYSE Euronext* (2012).<sup>94</sup>

**23.** The Commission's 2019 decision to prohibit the *Siemens/Alstom* merger revived the debate on whether the EUMR should take account of industrial policy.<sup>95</sup> The decision provoked calls from the French and German governments to reform EU merger control; together, they authored a Franco-German Manifesto for a European Industrial Policy (the "Manifesto"),<sup>96</sup> which advocated for European champions to "make our industry fit for tough global competition"<sup>97</sup> and ensure Europe's "economic survival."<sup>98</sup> The Manifesto proposed changes to the architecture of EU merger control that would give merging companies a right to appeal to the Council, which would be empowered to override Commission decisions.<sup>99</sup> The Manifesto's proposal to inject political oversight into EU merger control was characterised as a "genuine European industrial

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transaction would have created a leading French producer of electrical equipment.

94. Eur. Comm., decision C(2012) 440 final of 1 February 2012, *Deutsche Börse/NYSE Euronext*, case COMP/M.6166. The transaction would have combined Europe's two leading derivatives exchanges. Deutsche Börse's then-CEO, Reto Francioni, called the Commission's decision "a black day for Europe and its global competitiveness on financial markets" (BBC News, NYSE Euronext merger with Deutsche Börse blocked by EU, 1 February 2012).

95. Eur. Comm., decision C(2019) 921 final of 6 February 2019, *Siemens/Alstom*, case COMP/M.8677. The merging parties argued (among other things) that the transaction was necessary to create a European high-speed rail champion capable of competing with China's CRRC Corporation, the largest supplier of rolling stock in the world. The Commission ultimately concluded that CRRC's international expansion was insufficient to offset competition concerns in the EU, including as CRRC had not to date succeeded in selling high-speed trains in the EU.

96. Ministry for the Economy and Finance and Federal Ministry for Economic Affairs and Energy, A Franco-German Manifesto for a European industrial policy fit for the 21st Century, 19 February 2019, p. 1.

97. N. McNelis and N. Hirst, EU merger-reform drive by France and Germany advances with policy manifesto, *MLex*, 19 February 2019, <https://content.mlex.com/#/content/1066964/eu-merger-reform-drive-by-france-and-germany-advances-with-policy-manifesto>.

98. J. Brunsden and R. Toplemsky, France calls for biggest shake-up of EU merger rules in 30 years, *Financial Times*, 12 February 2019, <https://www.ft.com/content/ad7a02f4-2ebd-11e9-8744-e7016697f225>. See also European Parliament, Annual Report on Competition Policy, 18 December 2018 ("it is high time for a fundamental overhaul of competition policy"); President E. Macron's open letter to European citizens on 5 March 2019 ("Our borders also need to guarantee fair competition. (...) We need to reform our competition policy and reshape our trade policy"); and Chancellor A. Merkel, Speech at the Tag der Deutschen Industrie Conference, Berlin, 4 June 2019 ("If (in the case Alstom/Siemens) China has 60 or 70% of the global market shares, but is not yet active in Europe, how can you be certain that it won't get involved in Europe in the next five years? I find that a bold assumption. Therefore we need to talk to the European Commission on how to amend these rules, that we ourselves have made, so as to become truly competitive") (free translation from German).

99. Manifesto at 4.

policy" intended to address a binary choice: "unite our forces or allow our industrial base and capacity to gradually disappear."<sup>100</sup>

**24.** In response, Commissioner Vestager affirmed the scepticism of her predecessors towards flexing EU merger rules to permit the creation of national or European champions<sup>101</sup> and affirmed her commitment to maintain "a strong competition culture [that] keep[s] protectionism at bay"<sup>102</sup> free from political interference.<sup>103</sup> In particular, she resisted the Manifesto's suggestion that the Council be permitted to override Commission decisions, which would fundamentally change the architecture of European merger control, replacing expert analysis conducted within a well-defined legal framework with political decision-making.<sup>104</sup> Others, including the president of the German Federal Cartel Office, also criticised the Manifesto's proposals.<sup>105</sup> There nevertheless continued to be pressure on the Commission to relax enforcement.<sup>106</sup>

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100. Manifesto at 1.

101. See, e.g., N. Kroes, former competition commissioner, Competition, the crisis and the road to recovery, address at Economic Club of Toronto, SPEECH/09/152, 30 March 2009, at 4 ("We aren't about to let EU Member States create inefficient national champions so they can patch up their pride"), [https://ec.europa.eu/commission/presscorner/api/files/document/print/e/speech\\_09\\_152/SPEECH\\_09\\_152\\_EN.pdf](https://ec.europa.eu/commission/presscorner/api/files/document/print/e/speech_09_152/SPEECH_09_152_EN.pdf).

102. L. Crofts, Vestager Vows to Resist Protectionism, Antitrust Politicization, 29 September 2014, *MLex Insight*, <https://www.mlex.com/mlex/articles/1992628/vestager-vows-to-resist-protectionism-antitrust-politicization>.

103. M. Vestager, Independence is non-negotiable, Introductory remarks at the Chatham House Competition Policy Conference, London, 18 June 2015 ("Independence is simply non-negotiable. Because we know that our legitimacy, our credibility and – ultimately – the impact of our action depend on it. (...) Independence means enforcing the rules impartially without taking instructions from anyone").

104. See, e.g., F. Jenny and D. Neven, Competition policy in the aftermath of the *Siemens/Alstom* prohibition: An agenda for the new Commission, in Which competition and industrial policies for the new EU Commission after *Siemens/Alstom*?, *Concurrences* No. 2-2019, art. No. 89966, pp. 2–5.

105. See, e.g., A. Mundt, Head of the German Federal Cartel Office, International Conference on Competition, Berlin, 14–15 March 2019, who expressed concern that a European champions policy would lead to "higher prices, lessening of competition."

106. See, e.g., N. Hirst, European enforcers in 'denial' over industrial policy push, Coeuré says, *MLex*, 28 May 2024, <https://www.mlex.com/mlex/articles/2182655/european-enforcers-in-denial-over-industrial-policy-push-coeuré-says>.

# III. EU merger control following the Draghi report

25. Commission President von der Leyen welcomed the Draghi report as a timely and essential blueprint for Europe's economic resilience<sup>107</sup> and invited the incoming College of Commissioners to use the Report to guide the Commission's mandate.<sup>108</sup> In respect of competition law enforcement, she advocated for “a new approach to competition policy, better geared to our common goals and more supportive of companies scaling up in global markets – while always ensuring a level playing field.”<sup>109</sup> And, in her September 2024 mission letter to the new Commissioner for competition, she urged Ribera to “modernise the EU's competition policy to ensure it supports European companies to innovate, compete and lead world-wide” and to consider reforms that “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 defence and security environment.”<sup>110</sup>

26. Following her nomination, Commissioner Ribera has recognised a need “to ensure that merger control gives the right weight to the EU economy's needs

and reflects overall policy objectives,”<sup>111</sup> “to support bigger companies, but (...) to ensure that the entire ecosystem, including small and medium-sized companies, come along as a part of the value chain,”<sup>112</sup> and to deepen the single market.<sup>113</sup>

27. Predicting how, if at all, enforcement might change in light of the Draghi report is difficult. As the legendary US baseball player Yogi Berra quipped, “[i]t's tough to make predictions, especially about the future.” We have nevertheless endeavoured to make ten predictions on the potential implications of the Draghi report for EU merger control.

28. First, as to the EUMR's jurisdictional scope, following the *Illumina/GRAIL* judgment, we expect the Commission will consider an array of possible mechanisms to ensure that it has jurisdiction over “killer acquisitions from foreign companies seeking to eliminate [SMEs and small midcaps] as a possible source of future competition.”<sup>114</sup> In this respect, Commissioner Ribera has said that she “will look into all options without creating any unnecessary additional administrative burden or legal uncertainty for companies.”<sup>115</sup> For the time being, we think the Commission will continue to rely on referrals from those Member States that are able to “call in” below-threshold transactions “to continue to check potentially problematic transactions.”<sup>116</sup> In

107. Statement by President von der Leyen at the joint press conference with Mario Draghi on the report on the future of EU competitiveness, 9 September 2024, [https://ec.europa.eu/commission/presscorner/api/files/document/print/sk/statement\\_24\\_4601/STATEMENT\\_24\\_4601\\_EN.pdf](https://ec.europa.eu/commission/presscorner/api/files/document/print/sk/statement_24_4601/STATEMENT_24_4601_EN.pdf).

108. See, e.g., U. von der Leyen, Mission Letter to Teresa Ribera Rodríguez, 17 September 2024 (“Mission Letter to Ribera”), [https://commission.europa.eu/document/download/5b1aace5-681f-470b-9fd5-ae14e106196\\_en?filename=Mission%20letter%20-%20RIBERA.pdf](https://commission.europa.eu/document/download/5b1aace5-681f-470b-9fd5-ae14e106196_en?filename=Mission%20letter%20-%20RIBERA.pdf); and U. von der Leyen, Mission Letter to Stéphane Séjourné, 1 October 2024, [https://commission.europa.eu/document/download/c6589264-e9b1-4024-ba36-b12a59648dd3\\_en?filename=mission-letter-sejourne.pdf](https://commission.europa.eu/document/download/c6589264-e9b1-4024-ba36-b12a59648dd3_en?filename=mission-letter-sejourne.pdf). See also Eur. Comm., press release IP/25/339 of 29 January 2025, An EU Compass to regain competitiveness and secure sustainable prosperity, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_25\\_339](https://ec.europa.eu/commission/presscorner/detail/en/ip_25_339) (“Europe has everything it needs to succeed in the race to the top. But, at the same time, we must fix our weaknesses to regain competitiveness. The Competitiveness Compass transforms the excellent recommendations of the Draghi report into a roadmap”).

109. U. von der Leyen, Europe's choice: Political guidelines for the next European Commission 2024–2029, 18 July 2024, at 7, [https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648\\_en?filename=Political%20Guidelines%202024-2029\\_EN.pdf](https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en?filename=Political%20Guidelines%202024-2029_EN.pdf).

110. Mission Letter to Ribera.

111. Questionnaire to Commissioner-Designate Ribera at 5. See also Speech by Executive Vice-President Teresa Ribera at the CRA Annual Conference on the Competition policy adapted to the new global realities, 10 October 2024 (“Ribera CRA Speech”), [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_24\\_6341](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_24_6341) (The Commission “should (...) [consider] the need for resilience in certain sectors, such as energy, defence, and space”).

112. N. McNelis and N. Hirst, Strong competition fosters European champions, EU's Ribera says, *MLex*, 10 October 2024, <https://content.mlex.com/#content/1616319/strong-competition-fosters-european-champions-eu-s-ribera-says>.

113. T. Ribera, Interview for CNBC, 22 January 2025, <https://www.youtube.com/watch?v=Sa5FjSx6Js0> [54:44-55:23] (“(.) this is not building lots of national champions but trying to build European champions and defend European interest also in the economic field and in the industrial field and in the services field. Into that exercise we need to keep on building and deepening the single market. It doesn't make sense to empower a national champion against another national champion ongoing through a kind of subsidy race among different Member States but how we can build on these complementarities; how we can facilitate horizontal mergers that ensure that things that can be complimentary but build bigger European capacities are in place”).

114. Mission Letter to Ribera.

115. Questionnaire to Commissioner-Designate Ribera at 5.

116. Draghi report, Part B, at 304, fn. 9. See also B. John, EU “actively encouraging” member states to adopt call-in powers, Guersent says, *GCR*, 26 November 2024, <https://globalcompetitionreview.com/article/eu-actively-encouraging-member-states-adopt-call-in-powers-guersent-says>

particular, if there is legal uncertainty about relying on such referrals, the Commission may propose changes to the EUMR's jurisdictional thresholds, including providing for transaction value thresholds of a kind that the Draghi report suggests would represent a “*simple solution*.”<sup>117</sup> Any such change would, however, need to address the practical difficulties associated with transaction value thresholds.<sup>118</sup> The Commission might also want to avoid re-opening the entire text of the EUMR, potentially leading to unwanted pressure to change other aspects of EU merger control.

**29.** Second, we expect the Commission will be more open to defining broader geographic markets that take account of competition from non-EU companies. In this connection, the 2024 update of the Market Definition Notice already placed greater emphasis on the global dimension of certain markets.<sup>119</sup> Commissioner Ribera has suggested that account should be taken of “[c]hanges (. . .) in the geographic scope of operations of rival firms” if there is a “willingness of customers over time to consider novel suppliers which have developed products in other regions.”<sup>120</sup> The Commission will want to ensure that any evolution in its approach towards market definition is consistent with the economic evidence,<sup>121</sup> including because of the role played by the

Commission's Chief Economist in merger control, the need to insulate Commission decisions from judicial review, and the precedential value of Commission decisions in the EU and elsewhere.

**30.** Third, we expect the Commission will update the Horizontal Merger Guidelines<sup>122</sup> to reflect changes in its decisional practice since the Guidelines were first published in the early 2000s and to reaffirm the importance it attaches to “*tak[ing] full account of innovation and future competition* [in EU merger control].”<sup>123</sup> In early 2025, the Commission published a “*Competitiveness Compass*” that identified updating the Horizontal Merger Guidelines as a priority, including to give “*adequate weight*” to innovation.<sup>124</sup> To some extent, however, the Commission already takes account of innovation: the Horizontal Merger Guidelines recognise that mergers may increase pressure to innovate,<sup>125</sup> the Commission routinely examines the role of (and implications of a merger for) innovation in its competitive assessments of transactions,<sup>126</sup> the

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(“*Olivier Guersent* [director-general of DG COMP] has said that a further eight EU member states could gain powers to review below-threshold transactions by the end of next year as the European Commission continues to rely on jurisdictions with call-in powers to refer problematic deals following Illumina/Grail”). See also A. Boyce, Increasing merger call-in powers may see companies seek out EU review, *Loriot* says, *MLex*, 26 September 2024, <https://www.mlex.com/mlex/articles/2121461/increasing-merger-call-in-powers-may-see-companies-look-out-eu-review-loriot-says> (“*Companies involved in takeovers that don't meet EU review thresholds may want to come forward to the European Commission to ask for the deal to be reviewed, rather than see it embroiled in multiple investigations at the national level*”). See also Eur. Comm., press release IP/24/6548 of 20 December 2024, Commission approves acquisition of Run:ai by NVIDIA, [https://ec.europa.eu/commission/press-corner/detail/en/ip\\_24\\_6548](https://ec.europa.eu/commission/press-corner/detail/en/ip_24_6548) (according to Competition Commissioner Ribera, “[t]his case, referred by Italy, highlights the importance of Member State referrals in enabling the Commission to continue to check potentially problematic transactions”).

117. Draghi report, Part B, at 304, fn. 9.

118. See, e.g., N. Levy, A. Rimsa and B. Buzatu. The European Commission's New Merger Referral Policy: A Creative Reform or an Unnecessary End to ‘Brightline’ Jurisdictional Rules? *European Competition and Regulatory Law Review*, Vol. 5, Issue 4, 2021, pp. 364–379.

119. Communication from the Commission, Commission Notice on the definition of the relevant market for the purposes of Union competition law, OJ C, C/2024/1645, 22.2.2024, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C\\_202401645](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202401645).

120. Questionnaire to Commissioner-Designate Ribera at 4–5.

121. See J. Vickers, Should Competition Monopolise Merger Policy? ACE

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Keynote Lecture, Milan, 16 November 2024 (“Vickers ACE Keynote Lecture”), at 15, [https://www.competitioneconomics.org/\\_files/ugd/9203cc\\_0ccee88c86644027b61142c48e8c220d.pdf](https://www.competitioneconomics.org/_files/ugd/9203cc_0ccee88c86644027b61142c48e8c220d.pdf) (“*defining markets at EU level is a good idea if the facts of demand and supply indicate that the relevant geographic market is EU-wide, but a bad idea if not. Defining markets so as to ‘encourage consolidation’ seems especially questionable*”).

122. Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings OJ C 31, 5.2.2004, p. 5 (“Horizontal Merger Guidelines”), <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:031:0005:0018:en:PDF>.

123. Ribera CRA Speech.

124. Communication from the Commission, A Competitiveness Compass for the EU, COM(2025) 30 final, 29.01.2025 (“Competitiveness Compass”), at 6 and 8, [https://commission.europa.eu/document/download/10017eb1-4722-4333-add2-e0ed18105a34\\_en\\_6](https://commission.europa.eu/document/download/10017eb1-4722-4333-add2-e0ed18105a34_en_6) (“*This should be reflected in revised guidelines for assessing mergers so that innovation, resilience and the investment intensity of competition in certain strategic sectors are given adequate weight in light of the European economy's acute needs*”).

125. Horizontal Mergers Guidelines, paras. 8 and 38 (“*In markets where innovation is an important competitive force, a merger may increase the firms' ability and incentive to bring new innovations to the market and, thereby, the competitive pressure on rivals to innovate in that market*”).

126. See, e.g., N. Levy, C. Cook and I. Rooms, *European Merger Control Law: A Guide to Merger Regulation*, Matthew Bender Elite Products, Newark, 2024, Chapter 4 – Application and Evolution, pp. 33–34, citing Eur. Comm., decision C(2015) 538 final of 28 January 2015, *Novartis/GlaxoSmithKline Oncology Business*, case COMP/M.7275 (the Commission expanded its analysis into merging parties' research projects, taking under review products at the early stages of development); Eur. Comm., decision C(2015) 6179 final of 8 September 2015, *General Electric/Alstom (Thermal Power – Renewable Power & Grid Business)*, case COMP/M.7278 (the Commission was concerned that, by removing an important innovator, the transaction would reduce “*the overall competitive pressure on the remaining competitors, with a reduction in the overall incentives to invest significantly in innovation*” (para. 1128)); and Eur. Comm., decision C(2017) 1946 final of 27 March 2017, *Dow/DuPont*, case COMP/M.7932 (the Commission was concerned that the transaction

Director-General for Competition has acknowledged the relationship between scale and the ability to innovate, along with the relationship between competition and innovation,<sup>127</sup> and, shortly after her appointment was confirmed, Commissioner Ribera recognised that innovation constitutes one of the main drivers of competition.<sup>128</sup> In practice, though, the Commission has historically been sceptical of economic literature suggesting consolidation may enhance innovation<sup>129</sup> and has more often found that increased scale will reduce (rather than increase) innovation.<sup>130</sup>

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would reduce the parties' innovation incentives and reducing competition in several "innovation spaces").

127. O. Guersent at the 26th Annual IBA Competition Conference, Florence, Italy, 9 September 2022. See N. McNellis, Innovation is key 'to everything we are doing' at EU competition enforcer, Guersent says, *MLex*, 9 September 2022, <https://www.mlex.com/mlex/articles/2205544/innovation-is-key-to-everything-we-are-doing-at-eu-competition-enforcer-guersent-says> ("Big is not a problem. You need big, sometimes. You need big as long as the market is contestable by the small. If you look at our policy throughout the last years, this is a thread. You need the big guys to remain under threat by the small, or else they won't innovate. (. . .) Innovation is at the core. If we can't manage to innovate, we won't make it, and if this innovation doesn't happen in Europe, we will become subcontractors").

128. Questionnaire to Commissioner-Designate Ribera at 5.

129. See, e.g., V. Denicolò and M. Polo, The Innovation Theory of Harm: An Appraisal, *Bocconi Working Paper* No. 103, March 2018, at 27, <https://repec.unibocconi.it/iefc/bcu/papers/iefewp103.pdf> ("the effect of mergers on innovation can be negative or positive, and that they are more likely to be positive for mergers that pass the standard static tests. A presumption that horizontal mergers always hamper innovation risks blocking many procompetitive mergers. If any presumption is to be adopted, it must be that mergers are innovation neutral"); B. Jullien and Y. Lefouili, Horizontal Mergers and Innovation, *Journal of Competition Law & Economics*, Vol. 14, Issue 3, 2018, pp. 364–392, at 384 ("academic literature on mergers and innovation does not support a presumption of a negative impact of mergers on innovation. This conclusion follows from the existence of potential positive effects of mergers on innovation, even in the absence of spillovers and R&D complementarities"); and A. Ezrachi and M. Stucke, Digitalisation and its impact on innovation, *R&I Paper Series*, Working Paper 2020/07, 2020, at 41, <https://www.sipotra.it/wp-content/uploads/2020/09/Digitalisation-and-its-impact-on-innovation.pdf> ("Market concentration, on its own, does not offer a conclusive indicator for the likely level and nature of innovation. Some degree of market power, at times in some industries, serves as reward incentive which stimulates innovation (. . .). But while greater concentration might result from a firm's welfare-enhancing innovation, one cannot say that increasing market concentration by itself will necessarily spur welfare-enhancing innovation").

130. See Eur. Comm., decision C(2017) 1946 final of 27 March 2017, *Dow/DuPont*, case COMP/M.7932, paras. 2042 and 2021 (the Commission found that "[t]he economic principles laid out in the economic literature (. . .) indicate that a merger between two out of a limited number of significant innovators is likely to reduce product innovation when appropriability is high (that is, when IPRs are effective), and when there no merger-specific efficiencies associated with the merger" and that the economic literature "support[s] a theory of harm by which a merger between firms competing in innovation is likely to reduce incentives for the merging firms to innovate"). See also G. Federico, G. Langus and T. Valletti, A Simple Model of Mergers and Innovation, *Economic Letters*, Vol. 157, Issue C, 2017, pp. 136–140, at 136 ("We analyze the impact of a merger on firms' incentives to innovate. We show that the merging parties always decrease their innovation efforts post-merger while the outsiders to

31. Fourth, we expect to Commission to consider innovation in situations where companies advance an efficiencies defence.<sup>131</sup> If, however, the Commission is to materially change its enforcement practice in this respect, it will need to be more open than it has been in the past to allowing merging companies to benefit from that defence,<sup>132</sup> including by more readily accepting that consumers may benefit from innovation<sup>133</sup> and that the approval of mergers may be conditioned on investment commitments.<sup>134</sup>

32. Fifth, we think the Commission will become more permissive in assessing concentrations that involve European companies active in strategic sectors, including space and defence. More broadly, the Commission may face renewed pressure to

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*the merger respond by increasing their effort. A merger tends to reduce overall innovation. Consumers are always worse off after a merger").*

131. G. Lorient, New Frontiers of Antitrust conference ("Lorient New Frontiers of Antitrust Speech"), 22 November 2024, <https://www.concurrences.com/en/events/new-frontiers-of-antitrust-118893>, ("I think everyone is fully aware that it's crucial to preserve innovation through competition. One of the lessons of all the studies is that it really is a parameter of competitiveness, productivity and so on. So I think we're all on the same wavelength. (. . .) Now, technically, we need to refine our practice. I think this is a subject for economists. How do we measure? How to quantify? Is it quantifiable?" (free translation from French)). See also N. McNellis and A. Boyce, Comment: Revising merger guidelines would be a slow start to Ribera pursuing Draghi's aims, *mLex*, 25 September 2024, <https://content.mlex.com/#/content/1597819/comment-revising-merger-guidelines-would-be-a-slow-start-to-ribera-pursuing-draghi-s-aims>.

132. See, e.g., N. Levy et al., *supra* note 126, Chapter 15 – Efficiencies and the Failing Firm Defense. See also P. Régibeau and K. E. Rockett, Mergers and Innovation, *Antitrust Bulletin*, Vol. 64 Issue 1, 2019, pp. 31–53 ("We (. . .) reviewed a number of additional sources of potential merger-related efficiencies, which are specific to innovative activities, i.e. they arise because of the peculiar 'knowledge' nature of innovation and are therefore additional sources of efficiencies that would not arise in the absence of innovation. While it seems proper to let the parties bring evidence to support such efficiency claims – and we indicated the type of evidence that might be needed – it seems unavoidable that these inefficiencies cannot be fully documented. If so, then there is an argument for treating mergers with a significant innovative dimension more leniently than purely 'static' transactions"). Régibeau is the former chief competition economist of DG COMP (2019–2023).

133. See, e.g., Lorient New Frontiers of Antitrust Speech ([on innovation defence] "The question of whether a merger could be justified based on innovation considered not only a 'sword', but also as a 'shield', as the Draghi report suggests, is very relevant. I think there is a clear framework for this (. . .) the principles of efficiency gains will not change. This means that these gains must be verifiable, that there must be a causal link and, of course, a tangible benefit for the consumer") (free translation from French).

134. See, e.g., *ibid.* about the Commission decision of 12 November 2009, *EDF/Segebel*, case COMP M.5549 ("I think only one investment remedy had been considered back in 2000. It was a famous remedy where EDF had promised to invest in an interconnector between France and Spain. (. . .) I don't think this investment ever took place, because indeed, there can be external circumstances: changes, environmental causes, and so on. These external circumstances have made competition authorities rather skeptical about this type of remedy. Indeed, there can always be external causes influencing results, and in this case what do we do? Do we revoke the merger? This is a subject, which raised a certain amount of scepticism to put it mildly") (free translation from French)).

approve concentrations designed to create national or European champions,<sup>135</sup> particularly if the enforcement practice of the incoming US administration is seen to favour mergers involving US companies at the expense of European rivals. The Commission would, however, need to take account of the following considerations should it approve concentrations that raised competition concerns but were expected to create national or European champions, including: (i) the possibility that, in creating a national or European champion, consumers could be harmed;<sup>136</sup> (ii) the possibility that, in approving the creation of one Member State's champion, the Commission might disadvantage companies based in other Member States; (iii) the legal requirement that the Commission treat EU and non-EU companies similarly and its long-standing rejection of any suggestion that its enforcement practice has favoured European companies at the expense of US or Asian rivals;<sup>137</sup> (iv) the risk that agencies in other jurisdictions might apply a similar approach to their own domestic champions, thereby harming European companies;<sup>138</sup> and (v) the

possibility of provoking criticism from other competition agencies and members of the European antitrust community.<sup>139</sup>

**33.** Sixth, we expect the Commission will view cross-border consolidation of telecommunications providers favourably (consistent with its historical position).<sup>140</sup> It may also be ready to consider on a case-by-case basis whether the Commission's more recent precedent involving combinations of four to three national providers could be distinguished. As recently as the early 2010s, the Commission approved a number of transactions that reduced the number of national telecommunications providers from four to three.<sup>141</sup> Following Commissioner Vestager's appointment in 2014, however, the Commission became less ready to approve such combinations:<sup>142</sup> it caused the abandonment of a

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Global Village, NYU Law address, New York, 20 April 2015 (political protectionism in merger control may trigger long-term adverse effects and "poison the well" of international antitrust cooperation).

135. See, e.g., M. Motta, former DG COMP chief economist, Webinar: Competition Policy and the Covid-19 Crisis, Royal Economic Society, 4 June 2020, <https://www.youtube.com/watch?v=hDrt7hnUmak> [46:00-46:25] ("We are probably going to see competition authorities squeezed ( . . . ) by lots of political pressure, because there are lots of governments in Europe which are basically making pressure on competition authorities and the European Commission to relax merger control rules"); and P. Rey and J. Tirole, Keep Politics Out of Europe's Competition Decisions, Project Syndicate, 4 March 2019 ("politicians are subject to intense lobbying by large firms and industry organizations, which may be more interested in limiting competition than promoting it").

136. N. McNelis and N. Hirst, *supra* note 112 ("I think it could be good to count on bigger players at the global scale, but at the same time to ensure that the European market does not kill the competition among ourselves, allowing market-power positions that could impact negatively on consumers").

137. See J. Almunia, Merger Review: Past Evolution and Future Prospects, 2 November 2012 (SPEECH/12/773) ("I am often asked why the Commission is raising hurdles against the creation of large European companies; why Brussels is not supporting 'European champions.' I am always a bit surprised by such remarks – and by their dogged reiteration – because they do not correspond at all to the facts. ( . . . ) So, let's recognize the facts: it is simply not true that the Commission is putting the brakes on the legitimate efforts of Europe's firms to scale up"). See also T. J. Muris, former chairman, US Federal Trade Commission, Merger Enforcement in a World of Multiple Arbiters, prepared remarks at the Brookings Institution Roundtable on Trade and Investment Policy, Washington, D.C., 21 December 2001 ("First, I do not believe that the EC discriminates against U.S. firms. Statistically, it has cleared the vast majority of mergers involving U.S. firms. At the same time, the EC has blocked, or required substantial undertakings in, a significant number of deals involving only European firms, including, in just the past few years, Volvo/Scania, Airtours/First Choice, Vodafone Airtouch/Mannesmann, and Tetra Laval/Sidel").

138. Vestager, *supra* note 103 ("legitimacy, [its] credibility and – ultimately – the impact of [its] action depend on [maintaining a non-politicised regime]"). See also M. Vestager, Enforcing Competition Rules in the

139. See T. Gil and C. May, EU's competitiveness won't improve by reducing competition, Germany's Mundt says, *MLex*, 11 September 2024, <https://www.mlex.com/mlex/articles/2100143/eu-s-competitiveness-won-t-improve-by-reducing-competition-germany-s-mundt-says> (citing A. Mundt, Head of the German Federal Cartel Office, "sheltering European companies from competition worldwide will not enhance the EU's 'competitiveness'"); CRA, CRA Brussels Conference 2024 - Session 1: Regaining competitiveness, 12 December 2024, [https://youtu.be/P26tROR0HDk?si=Z3\\_QvG2j3CGhWj8k&t=3095](https://youtu.be/P26tROR0HDk?si=Z3_QvG2j3CGhWj8k&t=3095) [00:51:35-00:53:46] ("I do believe that champions are needed ( . . . ) but they have to make it on competition on the merits and not [be] driven by state interventions or state subsidies. The state is never doing a good job in that"); and F. Micheletti, New rules to build corporate giants won't reverse EU decline, officials say, *Politico*, 30 October 2024, <https://www.politico.eu/article/merger-reform-europe-competition-officials-telecoms-antitrust/> ("Opening the door to deals where the law is applied differently to create 'a European champion' is 'surreal,' Austrian competition authority chief Natalie Harsdorf-Borsch told Politico. 'When I hear that we need to create a champion, my natural tendency as an enforcer is to ask, wait a minute, who decides, [based] on which parameters?"). See also N. Levy, H. Mostyn and D. R. Little, European champions – Why politics should stay out of EU merger control, in Which competition and industrial policies for the new EU Commission after Siemens/Alstom?, *Concurrences* No. 2-2019, art. No. 89966, pp. 23–30, para. 4.

140. See, e.g., G. Lorient, keynote speech: Preserving competition across the spectrum, GCR Live Telecoms, Media & Technology Conference, London, 20 March 2024, [https://competition-policy.ec.europa.eu/document/download/8d60e1b5-ec5d-4220-9d54-6d3360e863b5\\_en?file-name=20240320\\_GCR\\_TMT\\_Conference\\_Guillaume-Lorient\\_keynote\\_speech.pdf](https://competition-policy.ec.europa.eu/document/download/8d60e1b5-ec5d-4220-9d54-6d3360e863b5_en?file-name=20240320_GCR_TMT_Conference_Guillaume-Lorient_keynote_speech.pdf) ("Cross-border consolidation in itself has never been a problem from a competition standpoint and the Commission has never intervened in a single transaction between telecom operators that have not been active in the same market already. Acquisitions by a well-known French player in Ireland and Poland; a Slovak/Czech player's acquisition in Bulgaria and Hungary; or a Norwegian player's acquisition in Finland – these cases have all been unconditionally cleared").

141. Eur. Comm., decision C(2012) 9198final 12 December 2012, *Hutchison 3G Austria/Orange Austria*, case COMP/M.6497; Eur. Comm., decision C(2014) 3561 final 28 May 2014, *Hutchison 3G UK/Telefonica Ireland*, case COMP/M.6992; and Eur. Comm., decision C(2014) 4443 final of 2 July 2014, *Telefonica Deutschland/E-Plus*, case M.7018.

four-to-three transaction between two Danish telecommunications operators;<sup>143</sup> prohibited a four-to-three transaction between two UK operators;<sup>144</sup> and approved a transaction between two major Italian telecommunications operators only after the merging companies agreed to divest sufficient assets to facilitate the establishment of a new market operator.<sup>145</sup> Commission President von der Leyen’s endorsement of the Draghi report’s call for consolidation in the telecommunications sector<sup>146</sup> may encourage providers to renew their attempts to consolidate at the national level, although, as in other areas of enforcement, the Commission will need to take account of its extensive and detailed precedent<sup>147</sup> and the need to ensure that its decisions are sufficiently reasoned to survive judicial review by the EU courts.

**34.** Seventh, while we do not expect a significant change in the Commission’s enforcement practice in assessing transactions affecting non-strategic sectors, the Commission may become more open to taking account of efficiencies, as anticipated in the text of the EUMR and the Horizontal and Non-Horizontal Merger Guidelines.

**35.** Eighth, notwithstanding the Commission’s long-standing preference for structural remedies,<sup>148</sup> we think the Commission will become more open to

approving concentrations on the basis of investment commitments and taking account of security and resilience in remedy design, as advocated in the Draghi report.<sup>149</sup> Any such change could imply a more flexible approach to remedies of a kind that have not been accepted in the past in the EU.<sup>150</sup> A possible template for such remedies was provided by the UK Competition & Markets Authority (CMA), which, in 2024, conditioned approval of a transaction that brought together two of the four largest UK mobile network operators on an array of remedies, including a commitment to invest and a three-year price cap.<sup>151</sup> Remedies of this kind would, however, be novel,<sup>152</sup> and the Commission would want to ensure that it could monitor and enforce any investment commitments.<sup>153</sup>

**36.** Ninth, we expect the Commission will explore additional measures that could shorten review periods, reduce notification requirements for straightforward cases, and ease the burden on merging parties.<sup>154</sup> We would expect any such

142. Eur. Comm., Protecting competition in a changing world – Public workshop, 15 October 2024, [https://competition-policy.ec.europa.eu/about/reaching-out/protecting-competition-changing-world-public-workshop\\_en](https://competition-policy.ec.europa.eu/about/reaching-out/protecting-competition-changing-world-public-workshop_en) [23:35-24:00] (quoting Director-General O. Guersent: “If we think that all telcos need to scale up ( . . . ) then we need to build a real single market. And the real single market will not be built by relaxing merger rules”).

143. Eur. Comm., decision aborted/withdrawn of 11 September 2015, *TeliaSonera/Telenor/JV*, case COMP/M.7419.

144. Eur. Comm., decision C(2016) 2796 final 11 May 2016, *Hutchison 3G UK/ Telefónica UK*, case M.7612. Confirmed on appeal by the Court of Justice. See CJEU, 13 July 2023, *CK Telecoms UK Investments and EE*, case C-376/20 P, EU:C:2023:561.

145. Eur. Comm., decision C(2016) 5487 final of 1 September 2016, *Hutchison 3G Italy/WIND/JV*, case M.7758.

146. See M. Pollet, Europe eyes bigger, fewer telco firms in envy of US and China, *Politico*, 24 September 2024, <https://www.politico.eu/article/telecoms-profit-fund-european-industry-cutting-edge-ecb-mario-draghi-digital-networks-act/>.

147. In *Hutchison 3G UK/Telefónica UK*, for example, the Commission decision prohibiting a three-to-four merger in the UK telecommunications market spanned 730 pages (including 150 pages of annexes). See *supra* note 145.

148. Commission notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004, OJ C 267, 22.10.2008, p. 1, para. 17, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52008XC1022%2801%29> (“[d]ivestiture commitments are the best way to eliminate competition concerns resulting from horizontal overlaps, and may also be the best means of resolving problems resulting from vertical or conglomerate concerns”).

149. Draghi report, Part B, at 301.

150. N. McNellis and N. Hirst, European champions: Not if, but how?, *mLex*, 27 December 2024, <https://content.mlex.com/#/content/1620296/european-champions-not-if-but-how>.

151. CMA, Anticipated Joint Venture Between Vodafone Group Plc and UK Hutchison Holdings Limited Concerning Vodafone Limited and Hutchison 3G UK Limited, Final Report, ME/7064/23, 5 December 2024, [https://assets.publishing.service.gov.uk/media/6756f990f96f5424a4b877b77/Final\\_report\\_9\\_December\\_2024.pdf](https://assets.publishing.service.gov.uk/media/6756f990f96f5424a4b877b77/Final_report_9_December_2024.pdf). The remedies included: (i) a legally binding commitment to undertake the network investment programme proposed by the merging parties over the next eight years; and (ii) time-limited protections for at least three years to ensure that retail customers and mobile virtual network operators continued to secure good deals before the benefits of the network investment programme were realised.

152. G. Loriot reportedly characterised the CMA decision as “surprising,” in particular given the UK’s strong support for the Commission’s 2016 prohibition of a similar combination between O2 and Three (see letter from A. Chisholm (then CMA Chief Executive) to M. Vestager, 11 April 2016, [https://assets.publishing.service.gov.uk/media/5a816cebe5274a2e87dbd8f6/CMA\\_letter\\_to\\_Commissioner\\_Margrethe\\_Vestager.pdf](https://assets.publishing.service.gov.uk/media/5a816cebe5274a2e87dbd8f6/CMA_letter_to_Commissioner_Margrethe_Vestager.pdf)). N. McNellis, Vodafone-Three clearance would be a ‘surprising’ UK U-turn, Loriot says, *MLex*, 22 November 2024, <https://www.mlex.com/mlex/state-aid/articles/2264759/vodafone-three-clearance-would-be-a-surprising-uk-u-turn-loriot-says>.

153. See, e.g., Vickers ACE Keynote Lecture at 16 (investment commitments are “costless to [the parties] and worthless to customers” unless they are “significantly above and beyond the level that the parties would themselves wish to do post-merger”); and T. Duso, M. Motta, M. Peitz and T. Valletti, Draghi is right on many issues, but he is wrong on telecoms, *VoxEU*, 17 September 2024, <https://cepr.org/voxeu/columns/draghi-right-many-issues-he-wrong-telecoms> (consider Draghi’s recommendations on telecommunications markets “misguided and dangerous” and caution “against remedies consisting in merging parties’ promises of higher investments and the allocation of scarce spectrum” as “[e]mpirical evidence consistently shows that telecoms mergers lead to higher prices and are unlikely to boost investment”).

154. Competitiveness Compass at pp 6-7 (“More generally, the new approach to EU competition policy requires us ( . . . ) to simplify and speed up

measures to be relatively modest in scope and effect.

37. Finally, as to the Report's recommendation that the Commission "*urgently streamline*" certain of its tools,<sup>155</sup> many would clearly welcome consistency, certainty, streamlining, and less regulation. It is unclear, however, what the Report's authors have in mind or how they propose disparate policies and legal mechanisms should be changed. Accordingly, while we expect the Commission will endeavour to ensure consistency in implementing different tools, we do not expect any significant refashioning of these mechanisms in the coming years.

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enforcement (. . .)").

155. Draghi report, Part B, at 304, fn. 9.

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See also:

I. Europe's response to a shifting world order and the implications for EU competition policy – *February 2025*

A new agenda for growth: The Draghi report and competition policy – *February 2025*

IV. New competition tool as a duty to cooperate in regulation – *February 2025*

III. Facts and fiction in the Draghi report – *February 2025*

V. Competitiveness versus competition? The Draghi report and a new vision for competition policy and innovation in Europe – *February 2025*

## IV. Conclusion

38. The Draghi report creates challenges and opportunities for the Commission, including: (i) to continue to demonstrate that EU competition enforcement and merger control benefit consumers and the EU's competitiveness; (ii) to protect the Commission's independence from political pressure; (iii) to ensure that the Commission takes full account of dynamic competition, innovation, and global competition in assessing reportable concentrations; (iv) to maintain certainty and predictability in the division of powers between the Commission and Member State agencies; (v) to continue to render well-reasoned decisions that are substantiated by sound data and hard evidence; and (vi) to identify additional ways in which the administrative burden on merging parties can be reduced and non-problematic transactions approved quickly.



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