BCLP. Client Intelligent

Insights

PERSONALITIES, POLITICS AND PRIORITIES – WHAT'S NEW FOR M&A AND EU COMPETITION LAW IN 2025

Jan 30, 2025

SUMMARY

It's all change at the European Commission.

Teresa Ribera has taken over the stewardship of DG COMP from Margrethe Vestager, alongside a wider brief including environmental and social policy that could conflict with competition law orthodoxy. This is set against a backdrop of intensifying political pressure for EU regulation to support the development and productivity of the flat EU economy and possibly the promotion of European champions.

In this article, we consider the key EU competition law developments that are likely to impact M&A in 2025 within the world's largest trading bloc.

NEW COMMISSION, AND A NEW MISSION

Whenever there is a new leader of a major organisation, significant attention is paid to that person's background to understand what might be to follow. Ribera taking over the competition brief is particularly interesting, as she does not have a background in competition policy, economics or finance as was the case with previous Competition Commissioners

We have recently published our detailed thoughts on what can be expected from Ribera in the months and years ahead. Some of the key factors we discussed in that article that will shape EU competition policy for the next few years can be summarised under three key headings: personalities, politics and priorities.

PERSONALITIES

Ribera's lack of competition experience creates space for her key officials to exert greater influence on DG COMP's key policy areas. The roles of Director General and Deputy Director for Mergers have always been important, and whoever holds these positions going forward will exert an even greater influence over the EU's competition policy at least during the early part of Ribera's term. We are expecting a change in personnel in both positions in the coming months.

POLITICS

Ribera's Mission Letter from Commission President Ursula von der Leyen, influenced by the Draghi Report, the roadmap the EU is using to turn around its weak economy, emphasises the need for competition policy to support innovation and resilience within the EU. The drive for an "Innovation Defence" in merger control reviews, and greater support within the broader EU Commission and the European Council (the leaders of the EU Member States) for the creation of European Champions – along with calls for protections for certain industries – are all challenges to the way that the Commission has historically handled its merger control cases. In addition, DG COMP will come under greater pressure to ensure that its enforcement of competition laws support broader policy priorities, notably concerning employment and sustainability. Given Ribera's longstanding interest in sustainability and environmental protection, such policies are likely to be given greater priority across all areas of the Commission's competition work. We are expecting the influence of politics, pragmatism and the pressure of increasing the EU's economic performance to be strong during this Commission's five-year term, which could challenge the more "purist" views of DG COMP that largely stood against such influences during Vestager's ten years in office.

PRIORITIES

The political pressure to change the way that EU competition law is enforced suggests that the Commission's substantive merger control investigations could become increasingly more business friendly. However, this new approach may come with a few strings attached. On substance, the Commission, inspired by Draghi, may ask for investment remedies in exchange for a reduction in competition as outlined in the Draghi report. Interestingly, the UK Competition and Markets Authority (CMA) has just done exactly this in its recent conditional clearance of a 3-to-2 telecoms merger, taking a page from Draghi by requiring investment in UK telecoms infrastructure as the price for clearance. On jurisdiction, the Commission is also intent on enhancing its powers to review transactions that fall below its jurisdictional thresholds following their loss in the European Court of Justice ("ECJ")'s judgment in *Illumina v Commission* (discussed in more detail below). Such a move, depending on how it's formulated, could weaken legal certainty for transactions involving businesses with EU activities. This creates a paradox between the Commission's ambition to review more deals (which can be characterised as anti-business) and the pressure it is under to clear the way for European growth (which would be pro-business). Ribera and her Commission will have to juggle the conflicting goals of enhancing jurisdictional reach in merger control investigations and reducing the regulatory burden on European businesses. It is not clear at this stage which of these will be prioritised ahead of the other, or whether there could be a middle ground that satisfies everybody. What is clear is that the combination of likely substantive and procedural changes in the EU merger control regime will bring more nuance and complexity to the formulation (and prediction) of the EC's merger decisions.

CAN THE EU EXTEND ITS JURISDICTIONAL COMPETENCE?

The Commission's continued quest to review transactions that fall below its jurisdictional thresholds was dealt a hammer blow by the ECJ in September 2024. In its *Illumina/Grail* decision, the ECJ held that the Commission does not have jurisdiction to review transactions referred to it under Article 22 of the EU Merger Regulation where a referring Member State does not itself have jurisdiction to review the transaction. This put an end to the Commission's policy of accepting referrals from Member States when those Member States themselves did not have jurisdiction to review the transaction – a policy which had culminated in a number of legal challenges after the Commission blocked the *Illumina/Grail* merger in 2022 following such a referral.

The ECJ's *Illumina* decision means that the Commission has been sent back to the drawing board to find a new way to capture "killer acquisitions" that fall below its thresholds. One potential avenue would be for the Commission to encourage more Member States to enact their own below the thresholds "call in" powers (which already exist in several Member States, like Italy and Sweden), to give those Member States jurisdiction to refer transactions to the Commission. However, even this route has been called into question in an on-going appeal by Nvidia, whose acquisition of Run:AI was referred to the Commission by Italy under Article 22 – although the notification thresholds were not met in that case, Italy applied its call in powers to claim jurisdiction, and then referred the deal to the Commission. Although the Commission unconditionally cleared the deal, Nvidia has launched an appeal with the General Court relating to the Commission's jurisdiction. Although the specifics of the appeal are not yet clear, depending on its scope it is possible that even this approach to claiming jurisdiction would be challenged.

Regardless of the outcome of the Nvidia decision, as we reported on in December 2024, dealing with this issue is likely to be one of the key challenges for Ribera and her team. Whether the solution is (depending on the Nvidia case) to continue encouraging Member States to enact call in powers, or otherwise amending the notification thresholds (e.g. to have alternative notification thresholds based on deal value and/or market shares) is an open question even DG COMP won't speculate upon yet – so this is definitely one to watch as the year goes on.

In the meantime, questions may be raised of the efficacy of certain aspects of the new Digital Markets Act ("DMA") in light of the *Illumina* decision. For instance, under the DMA specified "gatekeepers" (which include most major international tech companies) are required to inform the Commission of certain mergers, even when the notification thresholds are not met. Presumably, the Commission would have expected to be able to use Article 22 to review some of these transactions, even if no Member States had jurisdiction to do so. The ECJ's *Illumina* decision has put an end to that, and no doubt this will play some part in the Commission's decision making on how to address the perceived enforcement gap following *Illumina*.

ANTICIPATED UPDATES TO THE HORIZONTAL MERGER CONTROL GUIDELINES – A SIGN OF THINGS TO COME?

Ribera's Mission Letter includes an instruction to review the Horizontal Merger Control Guidelines. The Mission Letter that this this review should give "*adequate weight to the European economy's more acute needs in respect of resilience, efficiency and innovation, the time horizons and investment intensity of competition in certain strategic sectors, and the changed defence and security environment*." The implicit message from the top of the EU's hierarchy is for change along the lines of the political influences we noted above. We are expecting the Commission's President and her staff in the Secretariat to be following this workstream very closely. DG COMP's Chief Economist and his team, and the Legal Service, will also play key roles in this review.

The Horizontal Merger Control Guidelines indicate when, and what sort of, competition concerns might arise where a business acquires a competitor. It works through factors that indicate that an acquisition could result in anticompetitive effects, including for example: (i) large combined market shares of the transaction parties, (ii) the parties being close competitors, and (iii) limited possibilities for customers to switch suppliers.

Once this review commences in 2025, the Commission's approach – and its proposed amendments to the Guidelines – will be a strong indication of whether and how the Commission's priorities are changing in terms of its approach to substantive merger control decision-making.

FDI AND FSR – THE OTHER PILLARS OF M&A ENFORCEMENT

Foreign direct investment ("FDI") screening across EU Member States (and abroad), as well as the EU's Foreign Subsidies Regulation ("FSR") regime, will remain key parts of the assessment of potential filings for nearly all M&A transactions with an EU nexus.

On the FDI front, with Ireland's new FDI screening regime coming into force in January 2025, nearly all EU Member States have an FDI screening regime (with the final few in the process of implementing regimes). While the EU continues to have a coordinating role in FDI reviews, the final decision still rests with Member States. This means that dealmakers are potentially confronted with multiple disparate FDI filing regimes when making an acquisition with an EU nexus – which can lead to time consuming and costly filing assessments and, potentially, filing processes. Even when there are no obvious national security concerns, and filings are simply "procedural" in nature, the time, expense and delay caused by FDI reviews can have a significant impact on transactions. While there are currently no firm plans for a centralised FDI regime, we hope to see a continued push at an EU level for more harmonisation of regimes – both in terms of determining which transactions are notifiable, but also procedurally (e.g. information requirements and timelines).

The FSR's merger review regime is triggering a number of notification obligations, with some press reports suggesting that, to date, the Commission has engaged with parties under the FSR in relation to over 100 M&A transactions. The new regime has also shown teeth in its second year of operation, with the first conditional clearance being granted. On 24 September 2024, the Commission cleared the acquisition by Emirates Telecommunications (a UAE state-controlled telecommunications company) of PPF Telecom Group (a Czech company) subject to a number of commitments. The Commission raised concerns that foreign subsidies received by the acquirer from the UAE Government could lead to distortion in the EU market post-transaction. While the acquisition was ultimately cleared, it required conditions including the removal of any unlimited UAE state guarantee and a prohibition on state financing of the target's EU activities. The acquirer also agreed to inform the Commission of future transactions, even if they are not notifiable in the EU.

Although every case will turn on its facts, this first conditional clearance shows that the FSR will not always be a simple "procedural" filing that inevitably leads to an unconditional clearance – and also that the Commission will take seriously the risk of distortion in the EU from subsidies even where they are from "friendly" countries like the UAE. The Commission has a number of ongoing FSR reviews as we move into 2025, and businesses should consider the potential impacts of FSR reviews on their deals early on in the process, particularly when the target companies have a significant EU presence.

WANT TO KNOW MORE?

This year promises to be a big one in terms of changes in EU merger control driven by the personalities, politics and priorities we have analysed above, and the BCLP Antitrust & Competition team will be involved in and stay on top of developments as they progress. If you have any questions about how the EU's competition policy could affect your business' M&A activities in 2025 (or beyond) – or if you want to know more about merger control, FDI or FSR – please contact Dave Anderson, Paul Culliford, Tom Wright or your usual BCLP contact.

RELATED PRACTICE AREAS

- Antitrust

MEET THE TEAM

Dave Anderson

Brussels

david.anderson@bclplaw.com
+32 (0) 2 792 2421

Paul Culliford

Brussels

paul.culliford@bclplaw.com
+32 (0) 2 792 2424

Tom Wright

Brussels

thomas.wright@bclplaw.com
+32 (0) 2 792 2437