

# COMPETITION & REGULATORY NEWSLETTER

## QUICK LINKS

[Main Article](#)

[Other Developments](#)

[Merger control](#)

[Antitrust](#)

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## The way forward: Commission sets out vision for EU's future competition policy with nomination of Teresa Ribera as new EU Competition Commissioner

Teresa Ribera Rodriguez has been nominated for the post of Executive Vice-President of the European Commission for a Clean, Just, and Competitive Transition. If confirmed in the post, she will juggle dual responsibilities: managing competition policy as well as spearheading the EU's green transition. In this newsletter, we consider Ms. Ribera's background, what her nomination signals for the future of competition policy and the key priorities set out in her 'mission letter' from the European Commission President, Ursula von der Leyen. We also consider the impact on the new Commissioner's mandate of the recent report by Mario Draghi on the future of European competitiveness.

### Teresa Ribera's background

A member of the Spanish Socialist Workers' Party (PSOE), Teresa Ribera has established herself as a key figure in Spanish politics and environmental advocacy. She has served as Spain's Minister for the Ecological Transition since 2018 and is currently the Third Deputy Prime Minister of Spain.

Ms. Ribera's political stance generally aligns with progressive and social democratic ideals. Her career has been marked by a focus on sustainability, environmental protection, and addressing climate change challenges. In recent years, she has prioritised Spain's green transition, championing renewable energy sources and advocating for the gradual phase-out of coal-fired and nuclear power plants. During Spain's tenure holding the EU Council's rotating presidency, she led critical legislative negotiations to reform the EU electricity market and address competitive imbalances through mechanisms like price control agreements. She has previously been vocal in her opposition to nuclear power.

### The future of EU competition policy under Ms. Ribera's leadership

#### *Mission letter for Teresa Ribera*

In nominating Ms. Ribera to one of the EU's new and most powerful dual policy portfolios, Ursula von der Leyen, President of the Commission, has emphasised the need for Europe to adopt *"a new approach to competition policy - one that is more supportive of companies scaling up in global markets, allows European businesses and consumers to reap all the benefits of effective competition and is better geared to our common goals, including decarbonisation and a just transition"*.

[Main Article](#)[Other Developments](#)[Merger control](#)[Antitrust](#)

Von der Leyen's [mission letter](#) for Teresa Ribera invites the latter to lead on the following competition workstreams and key areas of reform:

- modernising the EU's Horizontal Merger Control Guidelines to give adequate weight to the EU's current needs in respect of resilience, efficiency and innovation, strategic goals, as well as the *"changed defence and security environment"*;
- addressing the risks posed by 'killer acquisitions' of nascent competitors, particularly from foreign acquirers;
- strengthening and speeding up the enforcement of competition rules, and cooperating closely with the national competition authorities of Member States to do so. The letter mandates that accelerating the review of transactions (and state subsidies) in strategic fields should be a priority for the new Commission - as should ensuring timely clarity for companies that cooperate in strategic sectors (including artificial intelligence);
- working with other Commissioners to ensure that competition policy takes account of EU sectoral policies, such as those in the food and farming sector;
- developing a new State aid framework to accelerate the roll-out of renewable energy, to deploy industrial decarbonisation and to ensure sufficient manufacturing capacity of 'clean tech'; and
- pursuing simplification of the existing State aid framework - strong State aid control is expected to continue to play a key role *"to address market failures while avoiding inefficiencies in public spending"*.

The mission letter also calls for continuing robust enforcement of the EU Foreign Subsidies Regulation and the Digital Markets Act.

### ***The Mario Draghi report***

President von der Leyen has specifically directed Ms. Ribera and other nominated Commissioners to draw on the recently published and long-awaited report authored by Mario Draghi, entitled ["The future of European competitiveness"](#). Unsurprisingly, Ms. Ribera's mission letter therefore invites her to adopt an approach that gives greater weight to innovation and resilience in competition policy, in line with Draghi's recommendations.

In his report, Mario Draghi advocates for a revamped approach to competition and merger reviews to boost growth and innovation within the EU, taking account of geopolitical and other threats to supply chains. The report emphasises the importance of single market alignment and suggests that consolidation in sectors such as telecoms and defence should be encouraged to achieve industrial policy goals; it also reiterates existing concerns around killer acquisitions of smaller European companies - highlighting in particular the risks created by *"foreign companies"* engaging in such transactions. Draghi's proposals are set to influence the new Commission's agenda heavily.

One of Draghi's most striking merger control proposals is the introduction of an 'innovation defence', allowing transactions to be cleared on the basis that they would lead to increased innovation. His report points out that, in certain sectors, pooling resources is essential to cover high fixed costs and achieve the necessary scale to compete globally. In this context, innovation could be viewed as an efficiency that outweighs potential negative impacts on competition. To prevent misuse of this defence, Draghi suggests that companies should be required to commit to upfront investments, with strict monitoring of these commitments. If followed by the new Commission, this approach would mark a significant shift from the Commission's previous stance under the outgoing Commissioner, Margrethe Vestager, who has typically been highly sceptical of innovation arguments in blocking several high-profile mergers.

Additionally, Draghi proposes to revive the 'New Competition Tool', which would empower the Commission to conduct market-wide investigations to address structural competition problems. Initially proposed in 2020 but later dropped, Draghi suggests limiting the tool's use to four market scenarios: where tacit collusion is prevalent, where additional consumer protection is required, where weak resilience is a feature, and where previous

[Main Article](#)[Other Developments](#)[Merger control](#)[Antitrust](#)

competition remedies failed. The report recommends that remedies be determined and agreed “*together with firms*”.

## Next steps

Teresa Ribera’s appointment is not yet final as all Commissioner nominees must attend confirmation hearings in the European Parliament before taking office. The hearings are expected to take place in October.

As the Commission strives for a balanced path toward sustainable prosperity and global competitiveness, Ms. Ribera’s leadership is expected to be central to navigating these challenges and transforming these ambitious goals into actionable strategies. As far as competition policy is concerned, Ms. Ribera’s mission is expected to involve reshaping the EU’s approach to mergers, state aid and market regulation - guided by the Draghi report’s recommendations. While it remains to be seen precisely how, and to what extent, Ms. Ribera will seek to implement these recommendations, she has already publicly [discussed](#) her openness to lowering barriers to innovation, improving Europe’s global competitiveness and incentivising “*industrial ecosystems*” - clearly suggesting that, at the very least, she is conceptually aligned with a number of them.

## OTHER DEVELOPMENTS

### MERGER CONTROL

#### India revises its merger control framework

On 9 September 2024, the Indian Government announced that certain provisions in India’s [Competition \(Amendment\) Act 2023](#) would come into effect on 10 September 2024. As no transitional period was provided, all qualifying transactions that were not completed by 10 September 2024 will need to be re-assessed under the new merger control framework.

Most significantly, the new merger control framework introduces a new deal value threshold, capturing transactions valued over INR 20 billion (approximately £181 million) involving a target that has substantial business operations in India. In determining the value of the transaction, the Competition Commission of India (CCI) will look at all forms of consideration “*whether direct or indirect, immediate or deferred, cash or otherwise*” within a two-year period of entering the transaction.

The existing *de minimis* exception for targets with assets under INR 4.5 billion (approximately £41 million) or a turnover of INR 12.5 billion (approximately £113 million) will not be applicable if the deal value threshold is met.

Other notable changes include:

1. [Revisions to the categories of exempted transactions](#). The new framework specifically provides that minority share acquisitions, intra-group transactions, bonus issues, stock splits, and ‘creeping’ acquisitions will be exempted from prior approval as long as such transactions do not result in a change in control. However, ‘control’ is now defined as the ability to exercise material influence, which is lower than the previous standard of decisive influence.
2. [Changes to the definition of ‘affiliates’ for Green Channel automatic approvals](#). Under the existing merger control regime, transactions are automatically approved on the day they are notified if the parties and their respective group entities and/or affiliates have no horizontal, vertical or complementary overlaps. The new framework revises the definition of ‘affiliates’ such that it is now necessary to consider whether an enterprise has the right or ability to access commercially sensitive information of the other enterprise.
3. [Expedited review timeframe](#). Procedurally, the overall timeline for merger reviews has in general been reduced from 210 to 150 calendar days. The CCI has 30 calendar days to form a *prima facie* opinion as to whether a transaction causes or is likely to cause any appreciable anti-competitive effect. In the absence of such opinion, the transaction will be deemed to be approved.

[Main Article](#)[Other Developments](#)[Merger control](#)[Antitrust](#)

With the introduction of the legislation, it is expected that the CCI will adopt revised guidelines (e.g. on determining the deal value threshold, the definition of change in control, etc.) to shed more light on the new changes in the coming months.

## ANTITRUST

### CMA sees hydrocortisone market sharing decision upheld by Court of Appeal

On 6 September 2024, the Court of Appeal [ruled](#) in favour of the UK Competition and Markets Authority (CMA), upholding the CMA's finding of a market-sharing cartel in respect of hydrocortisone tablets.

In July 2021, a CMA investigation found that Auden Mckenzie and Actavis UK (now known as Accord-UK), who had acquired Auden Mckenzie in 2015, charged excessive and unfair prices for hydrocortisone tablets (as reported in a [previous edition](#) of this newsletter). The CMA also found evidence of a market-sharing agreement whereby Auden Mckenzie, and subsequently Actavis UK, had colluded with certain potential competitors to refrain from entering the market to supply hydrocortisone tablets. According to the CMA, the conduct led to an increase in NHS spending on hydrocortisone tablets from £500,000 to over £80 million annually. As a result of the investigation, the CMA imposed over £260 million in penalties.

In separate rulings in September 2023, the Competition Appeal Tribunal (CAT) upheld the CMA's findings of excessive pricing and market-sharing, noting that the latter finding was provisional due to concerns over due process. In March 2024, the CAT found that the CMA had failed to observe due process by not fully putting its case on the market sharing agreement during the cross examination of Advanz's CEO, John Beighton, and set aside the market-sharing findings.

In this latest judgment, the Court of Appeal has now endorsed the CMA's approach to cross-examination and criticised the CAT's conduct as "*inappropriate*" and "*unjust*". The decision reinstates the CMA's market-sharing findings and penalties.

### Qualcomm loses predatory pricing appeal at EU General Court

On 18 September 2024, the EU General Court (GC) largely [upheld](#) the fine imposed by the European Commission on Qualcomm for predatory pricing practices.

In July 2019, the Commission [found](#) that Qualcomm had abused its market dominance between 2009 and 2011 by selling certain baseband chipsets to Huawei and ZTE below cost with the aim of driving its rival Icera out of the market. The Commission found that "*Qualcomm's strategic behaviour prevented competition and innovation in this market, and limited the choice available to consumers in a sector with a huge demand and potential for innovative technologies*". Qualcomm was fined €242 million.

Qualcomm challenged the decision in October 2019. Qualcomm's pleas cited manifest errors of assessment, failure to state reasons regarding a number of aspects of the decision and procedural irregularities in the Commission's investigation, including the excessive duration of the investigation and the overly brief nature of certain notes taken during unrecorded Commission interviews with third parties. Qualcomm also argued that the Commission had failed to apply the as-efficient-competitor (AEC) test. The GC [rejected](#) these arguments, including finding that the Commission had "*implicitly*" applied the AEC test by proving that Qualcomm had priced below average total cost but above average variable cost. The GC also found that the Commission had substantiated its finding that Qualcomm intended to drive Icera out of the market by providing both direct and indirect evidence.

Nevertheless, Qualcomm's appeal against the size of fine was partially successful. The GC reduced the initial fine from €242 million to around €238.7 million, having found that the Commission had deviated from its 2006 guidelines without justification when calculating the fine.

[Main Article](#)

[Other Developments](#)

[Merger control](#)

[Antitrust](#)

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