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2025 EU Antitrust, FSR and FDI Update

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2024 was a year of many developments across European Union (“EU”) competition law, foreign direct investment control (“FDI”) and the Foreign Subsidies Regulation (“FSR”). Below we provide an overview summarizing those developments, as well as a look ahead to what we can expect in 2025.

1. Changes Ahead to EU Competition Policy

Following the summer 2024 European elections, Spaniard Teresa Ribera Rodríguez, the new Competition Commissioner, was charged with developing a “new approach” to EU competition policy by the re-elected President of the European Commission (“EC”) Ursula von der Leyen via a “Mission Letter”. Commissioner Ribera is now tasked to “modernise” competition policy in a way that supports European companies’ efforts to scale up in global markets, innovate, compete and lead globally, while at the same time contributing to broader EU objectives such as sustainability, social fairness and security. The Mission Letter calls for an update of the EC’s horizontal merger guidelines, more speed in the enforcement of competition rules and a focus on future competition cases. The Mission Letter refers to the recently published report on the future of European competitiveness by former president of the European Central Bank Mario Draghi (the “Draghi Report”), which analyses why Europe has fallen behind the U.S. and Asia in terms of growth and productivity. The Draghi Report raises the question whether vigorous competition policy has previously, or may in the future, prevent European companies from achieving sufficient scale through mergers to compete successfully with Chinese and American companies.

2. Merger Control

Merger Statistics

The number of mergers notified to the EC in 2024 increased by 9% to 392 (from 356 in 2023), bringing it back to the five-year average of 377 cases. The vast majority of the

cases (~89%) were notified under the EC's simplified procedure.

The EC approved five cases in Phase 1 subject to commitments and three cases in Phase 2 subject to commitments. No transactions were prohibited in 2024, but seven transactions were abandoned in Phase 1 and two in Phase 2.

Illumina/Grail

In a landmark judgment the European Court of Justice ("ECJ") ruled that the EC cannot review below-threshold transactions under Article 22 of the EU Merger Control Regulation ("EUMR").

Under an updated referral policy published in 2021, the EC started to effectively "call in" transactions involving acquisitions of companies with significant competitive potential that generated only little or no turnover in cases that could potentially raise competition concerns. On that basis, the EC reviewed and ultimately prohibited Illumina's proposed acquisition of Grail in 2022 even though the transaction was not notifiable under national merger rules in any EU Member State (as Grail did not generate any revenues in the EU at the time). The EC also imposed a record €432 million fine on Illumina for closing the transaction during the merger review, also referred to as gun-jumping.

Following the ECJ's 2024 judgment, the EC withdrew its revised Article 22 referral guidelines, the decision to block the Illumina/Grail merger, as well as the gun-jumping decision. The EC has, however, made it clear that it will find other ways to pursue transactions below the merger thresholds. It has pointed out that more Member States now have powers to call in transactions that fall below the national jurisdictional thresholds, and therefore the possibilities of referrals are more extensive than they were even at the time of the Illumina case. In October 2024, in the first post-Illumina judgment case, the Italian competition authority used its national call-in powers to refer NVIDIA's proposed acquisition of RUN:AI to the EC, which cleared the transaction in December 2024. NVIDIA has nevertheless sued the EC before the European courts in relation to the EC's decision to review the transaction.

The EC could also encourage Member States to examine below-threshold transactions outside of merger control rules, analysing whether a transaction could be viewed as an abuse of dominance under Article 102 of the Treaty on the Functioning of the European Union ("TFEU"). In the 2023 *Towercast* judgment, the ECJ confirmed that Member State authorities can investigate below-threshold transactions as potential abuses of dominance following closing. However, in view of the narrow conditions of EU abuse of

dominance rules and strict procedural requirements, such reviews are expected only in exceptional cases.

Update of Merger Guidelines

Further, the Mission Letter to Commissioner Ribera calls for a review of the EC's horizontal merger guidelines to give "adequate weight" to concepts of resilience, efficiency and innovation. The Draghi Report recommends that the updated guidelines include an "innovation defense" allowing merging parties to provide evidence that the merger would increase their incentive and ability to innovate. This should in particular be the case in sectors with high fixed costs where increased innovation would allow the parties to achieve the scale needed to compete globally (Airbus is mentioned as an example). The Draghi Report also recommends to include "security" and "resilience" criteria in the merger assessment in sectors where such aspects are particularly crucial, e.g. in energy or defence.

3. Abuse of Dominance & DMA

The EC's enforcement of abuse of dominance provisions continues to be focused on "Big Tech" companies. In 2024, seven EU investigations concluded with more than €3 billion in fines imposed. Under the Digital Markets Act ("DMA"), which provides for ex ante rules for digital gatekeepers, the EC designated Booking as a gatekeeper in 2024 and is currently pursuing six non-compliance investigations against three different gatekeepers.

In March 2024, the EC found 'anti-steering provisions' that banned app developers from informing users within their apps about subscription offers available through other distribution channels to be abusive under Article 102 TFEU. In November, the EC fined Meta over €797 million for tying its Facebook Marketplace to its Facebook social network as well as for using data generated from competitors' ads on Meta's platforms for the sole benefit of Facebook Marketplace. In June, the EC issued a statement of objections to Microsoft over the alleged tying of Teams with its Office 365 and Microsoft 365 software suits.

Outside of tech markets, the EC imposed the highest antitrust fine to date, €462 million, on a pharmaceutical company, alleging that the company may be abusing its dominant position by misusing patent procedures and disparaging a competing medicine by systematically spreading misinformation. In July 2024, the EC closed its investigation against another pharmaceutical company, Vifor Pharma, relating to a possible disparagement of its closest competitor by accepting Vifor Pharma's

commitments to rectify potentially misleading messages and to not engage in certain external communications regarding the safety profile of a rival medicine.

The EC's track record defending its decisions on appeal before the EU courts was mixed in 2024. In a setback for the EC, the General Court ("GC") annulled the EC's 2019 infringement decision in Google AdSense, ruling that the EC had failed to consider all the relevant circumstances in its assessment of the contract clauses that the EC had deemed abusive. By disregarding limited contract durations and early termination rights, the EC did not factor in if, and to what extent, Google's customers were able to switch to Google's competitors while negotiating their contract renewals. In October 2024, the ECJ upheld the GC's 2014 judgment that annulled the EC's 2009 decision fining Intel for abusing its dominant position in the x86 microprocessors market through anti-competitive royalty rebates.

The EC has also issued draft guidelines on exclusionary abuses, which the EC hopes will facilitate its ability to investigate dominant companies and find them liable for an anticompetitive abuse. The final guidelines are expected in 2025.

4. Cartels

The EC adopted only one cartel decision in 2024, fining the Austrian and Czechian rail incumbents ÖBB and ČD a total of €48.7 million for coordinating their sales of used ÖBB wagons, to the detriment of competitor RailJet. According to statements from EC officials, leniency applications are on the rise again (after historic lows of 2020), although we have not yet seen this development in the enforcement practice.

In 2024, the EC carried out dawn raids in the data center construction, financial services and tyre sectors. Having carried out unannounced inspections at Glovo and Delivery Hero in November 2023, the EC opened a formal cartel investigation into possible no-poach and other anticompetitive agreements in the online food delivery sector in July 2024. The EC also fined International Flavors & Fragrances €15.9 million for obstructing a dawn raid after a senior company executive deleted WhatsApp messages exchanged with a competitor in the course of the EC's inspection. Furthermore, the EC sent out statements of objections to six Atlantic salmon farming companies and closed one cartel investigation into the high-end fashion industry.

In a preliminary ruling, the ECJ confirmed that a "standalone" exchange of competitively sensitive information among competitors is considered a cartel-like infringement under Article 101 TFEU. Importantly, the ECJ found that regardless of any actual competitive impact, it was illegal for Portuguese banks to exchange information

on current and future commercial conditions that were not otherwise available in the public domain.

5. FSR

The FSR has now been in force for more than one year. It gives the EC far-reaching powers to intervene in, and prohibit, M&A transactions and public tender bids involving companies that have received distortive foreign subsidies from non-EU governments.

By the end of September 2024, the EC had received over 120 M&A-related notifications, significantly exceeding the EC's initial expectations of around 30 cases per year. Of these M&A-related notifications, more than 90 transactions have been cleared unconditionally. One such case has been cleared conditionally after a Phase 2 investigation: the proposed acquisition of the Czech-based telecoms operator PPF by e&, a UAE state-controlled telecoms operator. The EC found that e& (and its sovereign wealth fund controller, the Emirates Investment Authority ("EIA")) received guarantees, grants, loans and other debt instruments from the UAE government, which could have led to a distortion of competition in the EU. To address these concerns, the parties entered into behavioral commitments to waive an unlimited state guarantee, inform the EC about any future acquisitions and ensure that the target does not receive any financing from e& and the EIA.

Finally, EC officials have recently indicated that a simplified FSR procedure for M&A transactions may be introduced, which may simplify and facilitate the review of private equity deals captured by the FSR regime. This would align FSR with EU merger control, which has a simplified process for no-issues cases can be expected.

6. FDI

The number of EU Member States with FDI regimes continues to grow. Bulgaria introduced a new regime in 2024 and the Irish FDI regime entered into force at the beginning of 2025, bringing the total number of EU Member States FDI regimes to 24 of 27 (only Croatia, Cyprus and Greece remain). Existing regimes continue to be expanded. By way of example, the Dutch government intends to add AI and biotech as sensitive sectors. The countries that submit the most notifications to the EC under the EU FDI cooperation mechanism are Austria, Germany, France, Italy and Spain.

In a rare prohibition of an intra-EU investment, the Spanish government vetoed in September 2024 the €620 million takeover bid by Hungarian company Ganz-Mavag to

acquire Spain-based railway manufacturer Talgo. The Italian government has gone one step further by announcing in 2025 that it will use its “golden power” procedure to intervene in the proposed domestic merger between two Italian banks (UniCredit’s €10 billion bid for Banco PM).

Two deals that had initially been blocked by EU governments in 2023 were ultimately approved in 2024 – Safran/Collins Aerospace in Italy (following the submission of substantial commitments) and Hamamatsu/NKT in Denmark (after re-submitting the deal for review following consultations).

The EU continues to consider additional changes to the EU FDI Screening Regulation, with a view to harmonizing national screening rules. The EU also continues to assess the introduction of a regime for certain outbound investment transactions (comparable to the recently established U.S. Outbound Investment Security regime).

7. Outlook – What to expect in 2025

The new Commissioner Ribera holds the challenging task of modernizing EU competition policy in 2025, in addition to having additional responsibilities outside of the competition portfolio (relating to sustainability). Continued calls will be made by the relevant stakeholders to allow for the creation of “European Champions” in light of the Draghi Report. However, in her first formal speech Commissioner Ribera did not suggest a dramatic change in policy – instead, she said that “shielding companies from competition would be a trap” and that the solution for the issue of lack of scale lies in the completion of the EU Single Market. However, we expect to see continued political pressure from Member States to protect the European industry in light of new global economic and geopolitical realities.

In merger control, the acquisition of nascent competitors and the protection of innovation competition will remain high on the agenda of the EC. It can be expected that the EC will lean on call-in powers of Member States in order to review below-threshold transactions that may be harmful to competition in the EU. FSR procedures will continue to mature and the Mission Letter to Commissioner Ribera asks for “vigorous” enforcement, although we would expect a lighter touch approach for transactions involving private equity buyers. In the FDI space, all 27 Member States are likely to have introduced or implemented their own regimes in 2025, and we expect existing regimes to continue to expand further in terms of the scope of affected sectors.

We also expect that Commissioner Ribera will focus on competition enforcement in

other areas but given that the EC's competition portfolio now also includes DMA and FSR enforcement in addition to merger control, antitrust and State aid, the EC will have to define clear enforcement priorities to allocate resources efficiently and effectively. As Commissioner Ribera's mandate also includes sustainability aspects, it is possible that sustainability will be a more prominent feature in transactional and behavioral cases.

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