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LUHNIP Monthly Brief on EU Industrial Policy

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Every month, our Monthly Brief on EU Industrial Policy provides a bullet-point recap of the month's main events, followed by three reasoned deep dives into significant developments in EU Industrial Policy. Our analysis is complemented by a monthly guest contribution from renowned experts or practitioners in the field.

Last Month in Brief

- **3 September**: The European Court of Justice issues a ruling on the Illumina/Grail case clarifying the European Commission's competence in merger control (**See Deep Dive 1**)
- **9 September**: Mario Draghi presents his report on the future of European competitiveness, identifying key economic challenges and providing recommendations for strengthening the EU's industrial position globally (**See Deep Dive 2**).
- **10 September:** The Artificial Intelligence (AI) Board meet for the first time to enhance the development and uptake of AI in the EU.
- **10 September**: The European Court of Justice confirms the fine of €2,4 billion imposed by the European Commission on Google and Alphabet.
- **17 September**: European Commission President Ursula von der Leyen presents her new College of Commissioners before the European Parliament and announces its political priorities for 2024-2029 (**See Deep Dive 3**).
- **19 September**: The European Commission initiates proceedings to clarify Apple's interoperability obligations under the Digital Markets Act.
- **19 September:** Commissioner for Trade Valdis Dombrovskis meets Chinese Minister of Commerce Wang Wentao to discuss the EU investigation on imports of battery electric vehicles (BEVs) from China.
- **24 September**: The European Commission conditionally approves the acquisition of parts of PPF Telecom by e& under the Foreign Subsidies Regulation.
- **25 September**: Over a hundred companies sign the EU AI Pact, committing to voluntary pledges that promote trustworthy and safe AI development, aligning with European values and regulatory frameworks.
- **26 September**: EU ministers for Competitiveness meet in Brussels to discuss the future of European competitiveness and the role of state aid in supporting EU industrial policy goals.

[1] We would like to thank Romain Cohen, Francesco Montaña Paladini, Giovanni Pacchiardi, Giulio Petrillo and Francesco Rosazza Boneitin for their research assistance.

LUHNIP's Deep Dives

1) The European Court of Justice ruling on the Illumina/Grail case and its consequences for EU merger control policy

On 3 September, the European Court of Justice (ECJ) issued a landmark ruling regarding the Grail/Illumina case. The judgment dismissed the interpretation of Article 22 of the European Merger Regulation (Regulation 139/2004) given by the European Commission in March 2022 and the General Court of the European Court of Justice in July 2022. According to the ECJ, the Commission cannot encourage or accept referrals from a National Competition Authority if that authority lacks the legal competence to do so. In addition, the ECJ ruled that the merger was not of a European dimension, since Grail had no sales in the EU. As a result of the ECJ's ruling, the Commission annulled its decisions concerning the acquisition of GRAIL by Illumina on the same day.

Following the French *Autorité de la Concurrence* referral of Illumina's acquisition of GRAIL, the European Commission issued in March 2021 an updated Guidance on the implementation of Article 22 of the EU Merger Regulation (EUMR). The Commission's Guidance outlined the conditions under which any EU Member State may request the European Commission to examine mergers and acquisitions, even if they do not meet the EUMR turnover-based thresholds. The document was published following the Commission's recent concerns about killer acquisitions. The Guidance targets such cases, particularly in the digital and pharmaceutical sectors. Consequently, Article 22 EUMR became a corrective mechanism, allowing referrals for those cases that did not meet the traditional notification criteria.

The adoption of this approach led the Commission to prohibit the acquisition of GRAIL by Illumina in September 2022. According to the European Commission, it would have stifled innovation and reduced choice in the emerging market for blood-based early cancer detection tests. The European Commission decision resulted in a legal challenge before the European Court of Justice. Illumina argued that the Commission had overstepped its legal authority by applying Article 22 of the EUMR to a transaction not subject to merger control by any national competition authority in any Member State. The ECJ supported this argument on 3 September 2024.

LUHNIP's take

The ECJ judgment clarifies that the European Commission's ability to review mergers that fall below the standard notification thresholds under Article 22 EUMR is limited to cases where NCAs have legal jurisdiction based on their own national merger rules. Some national competition laws already cover below-threshold mergers, allowing them to be referred to the European Commission for review. Additionally, Member States might spontaneously choose to amend their national laws to give NCAs the authority to handle cases where the target company has minimal or no presence in the EU. Several countries, including Denmark, Hungary, Ireland, Italy, Latvia, Lithuania, Slovenia, and Sweden, have expanded their national merger control rules to cover below-threshold mergers. More Member States will likely follow this trend in the future.

The ECJ's interpretation of Article 22 EUMR raises concerns in the context of the Digital Markets Act (DMA), where gatekeepers are required to report all intended mergers to the Commission, regardless of whether they meet the notification thresholds (Article 14(1) DMA). The Commission then forwards this information to national competition authorities, allowing them to potentially make a referral under Article 22 EUMR. However, after the ECJ's ruling in the Illumina/Grail case prohibiting referrals for mergers not subject to national merger control regimes, a key flaw has emerged in the process: Member States without the legal authority to review such mergers at the national level cannot refer them to the Commission. In the long run, this loophole will likely close, as Member States may revise their national laws to either review the mergers locally or refer them to the Commission.

For companies involved in future mergers and acquisitions, the ECJ ruling can be seen as a positive development. It restores institutional balance and provides much-needed legal certainty and predictability in EU merger control. Businesses now have clearer insight into NCA requirements and approaches in advance. However, this also means a shift in legal responsibility from the EU level to national authorities. Companies must remain vigilant in assessing notification obligations at the national level and know how to face these requirements.

Finally, the ECJ's ruling will have consequences for the future of the Commission's merger control policy. On 6 September, EU Executive Vice President Margrethe Vestager announced that reforms could be adopted in response to the judgment. Options include first lowering the notification thresholds or introducing value-based transaction criteria for deals that could impact competition. Secondly, the *call-in* power, which allows the EC to require transaction notifications if there are signs of potential competition distortion, could be applied. The first proposal could create a significant administrative burden for the Commission, while the second one might create legal uncertainty for businesses operating in Europe. Other options include introducing a safeguard mechanism in the EUMR that would give the Commission the legal authority to review below-threshold transactions or expand national jurisdictions and encouraging more referrals.

These reforms to EU merger control law should be adopted within a short timeframe, given the von der Leyen II Commission's approach of increasingly using competition law as a lever to strengthen the competitiveness of European industry. The mandate of the new Competition Commissioner Teresa Ribera Rodríguez includes the task of "modernising the EU's competition policy to ensure it supports European companies to innovate, compete and lead worldwide and contributes to the EU's objectives on competitiveness." Teresa Ribera, for her part, announced that, if confirmed by the European Parliament, she will reform the EU's competition law to support companies in scaling up and competing with their counterparts in the US and China.

2) The presentation of Mario Draghi's report on the future of European competitiveness

On 9 September, Mario Draghi, former ECB chief and Italian Prime Minister, presented to European Commission President Ursula von der Leyen his report on the future of EU competitiveness. The report was commissioned in 2023 to obtain recommendations for reforms that enhance the competitiveness of the European economy in a new global context marked by increasing foreign competition, geopolitical instability and lower access to overseas markets.

In his report, Draghi first assesses the EU's strengths, including a large Single Market and robust environmental and social protection. He then notes that European economic growth has been persistently slower than the EU's main economic competitors over the past two decades, mainly due to the EU economy's lack of productivity.

To reduce the productivity gap, Draghi emphasises the need to strengthen industry innovation by improving the transition from innovation to product commercialisation, removing barriers to innovation, financing businesses, and addressing skills gaps. Second, he highlights the importance of developing a joint plan for the decarbonisation and competitiveness of European industry. This plan would have the twin objective of reducing energy costs and investing in renewable energy sources to support decarbonisation efforts. Lastly, in light of the new geopolitical challenges, the Draghi report calls for the strengthening of the EU's economic security, industrial defence capabilities and the reduction of external dependencies.

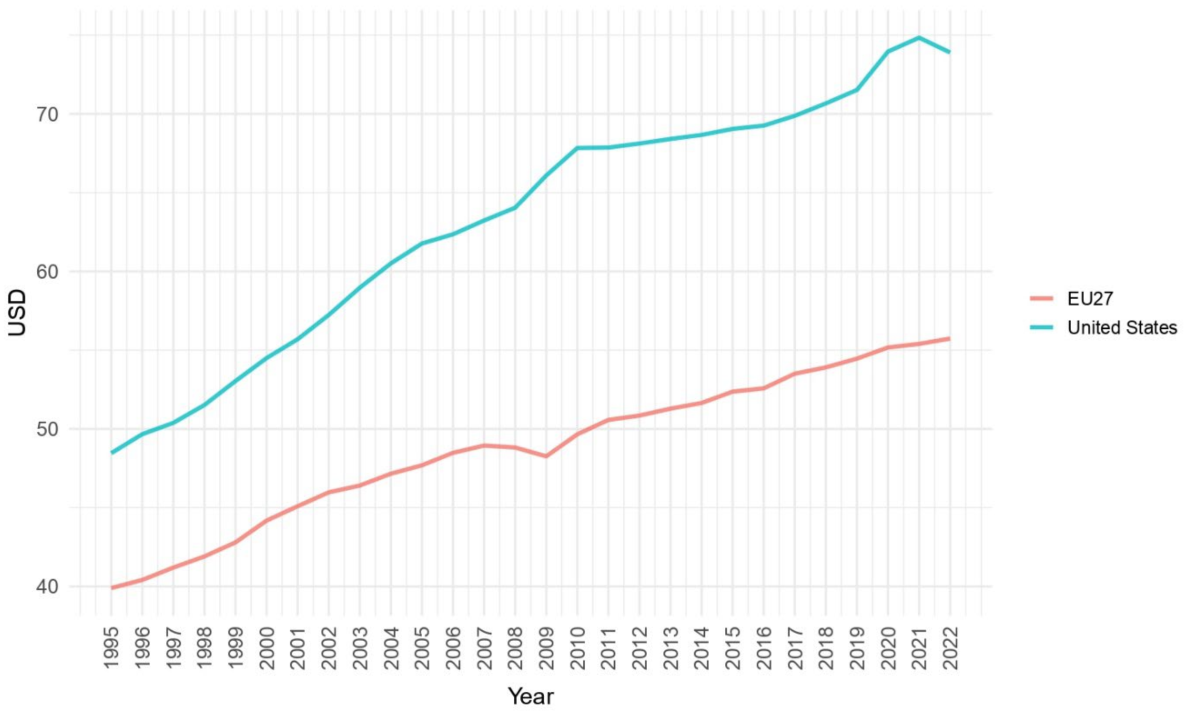
To meet these goals, the Draghi report advocates first completing the Single Market to enable European companies to scale and compete globally, developing markets for the decarbonisation of industry, negotiating preferential trade deals and mobilising large volumes of private investment. Next, the report calls for better alignment between EU competition, trade policies and industrial policy goals. It advocates for a competition policy that supports innovation by reforming merger control, for example, and expanding IPCEIs to include all forms of innovation essential for the competitiveness of strategic industries. Thirdly, Draghi defends the necessity to raise the EU's investment share from around 22% of GDP today to around 27% to enable the dual transition of industry and increase defence capabilities. The main instruments for reaching this objective would be the integration of Europe's capital markets and a reform of the EU to allow for more joint funding to increase public investment in key European public goods.

Finally, the Draghi report advocates for a reform of the EU's governance to better apply the subsidiarity principle, speed up decision-making, increase coordination between actors and simplify regulatory frameworks. For example, the report proposes the development of a competitiveness coordination framework to enhance the coordination of national policies or to extend the use of qualified majority voting in the Council of the EU.

LUHNIP's take

The Draghi report offers a critical assessment of the EU's economic challenges in a challenging global context. The problem of long-term productivity in the European economy is indeed a central issue for the competitiveness of European industry and it needs to be addressed by adopting important reforms. Graph 1 illustrates how, since the mid-1990s, a gap in labour productivity has developed and widened.

Graph 1: Evolution of labour productivity in the EU and the US (1995-2022) (GDP per hour worked in US dollars)



Source: our own elaboration based on OECD data.

To ensure that the measures proposed in the Draghi report do not increase territorial disparities within the European Union, the Commission will have to ensure that an effective EU cohesion policy is implemented. Coordination between the Vice-Presidents in charge of Industrial Strategy and Cohesion and their services will be key to achieve this objective.

Just like the Letta report published in April 2024 (see on this topic our Monthly Brief for April 2024), the Draghi report aims to influence the Commission's action for 2024-2029. It has already achieved the objective of setting the goal of strengthening the competitiveness of European industry and calling for a reform of EU competition and trade policies to support this objective to be among the priorities of the von der Leyen II Commission (**see Deep Dive 3**).

While there is broad consensus on the report's diagnosis, its policy recommendations have sparked a debate. NGOs and trade unions, making up only 5% of the report's 236 participants, feel sidelined and have raised concerns about ecological and social issues. Worries have emerged over deregulation undermining climate and environmental goals. Support within the European Parliament comes from the Socialists & Democrats (S&D), Greens, Liberals (RE), and the European People's Party Group (EPP). The EPP particularly advocates for regulatory changes, including revisiting Green Deal measures to boost the competitiveness of the industry. Far-right groups oppose joint EU debt, citing national sovereignty, while the Left fears that the focus on strengthening defence and free trade policies will hurt Europe's manufacturing revival.

Among the EU Member States, France, Spain, and Italy support the report's proposals. Germany and the Netherlands, for their part, remain resistant to collective borrowing but support deregulation measures. To this end, they, along with another 18 Member States, have called for a 2025 Single Market Strategy. Central and Eastern European countries, finally, complained that the report relied on Western models, and thus could deepen economic disparities within the EU. These divisions within the EU, and the presence of significant national budgetary constraints, may lead to difficulties in implementing the proposals outlined in the Draghi report in the coming months.

3) The Von der Leyen II Commission's priorities in the area of industrial policy

On 17 September, Ursula von der Leyen presented her proposal for the new College of Commissioners to the European Parliament. It includes 5 executive vice-presidents and 1 vice-president (the High Representative for Foreign Affairs and Security Policy). Stéphane Séjourné would be responsible for Prosperity and Industrial Strategy, Teresa Ribera Rodríguez for Clean, Just and Competitive Transition, Henna Maria Virkkunen for Tech Sovereignty, Security and Democracy, Roxana Mînzatu for People, Skills and Preparedness, and finally Raffaele Fitto for Cohesion and Reforms. Other Commissioners-Designate include Maroš Šefčovič for Trade and Economic Security, Valdis Dombrovskis for Economy and Productivity, Implementation and Simplification, Wopke Hoekstra for Climate, Net Zero and Clean Growth, and Andrius Kubilius for Defence and Space.

If confirmed by the European Parliament, this new College will need to implement the political guidelines for the next European Commission (2024-2029) presented by Ursula von der Leyen in July 2024. They include, first, drawing up "a new plan for Europe's sustainable prosperity and competitiveness." Its pillars would be the development of a "Clean Industrial Deal" to decarbonise and increase the competitiveness of industry, the deepening and simplification of the rules of the Single Market, the strengthening of research and innovation policies, and the reduction of the skills and investment gaps. At the same time, the von der Leyen II Commission will focus on building a European Defence Union to modernise national capacities, increase critical capabilities and create a Single Market for Defence products and services. In terms of trade policy, the new Commission plans to strengthen its economic security instruments, the Global Gateway initiative and its bilateral strategic partnerships. Finally, the new European Commission aims to modernise EU competition policy rules. New initiatives would include a new State Aid framework to support the Clean Industrial Deal, a review of Horizontal Merger Control Guidelines and the enforcement of the Foreign Subsidies Regulation.

LUHNIPs take

The political guidelines presented by Ursula von der Leyen in July and her mission letters to the candidate commissioners show that the strengthening of EU industrial policy will be an essential pillar of the new von der Leyen II Commission. After her first mandate that focused on the adoption of measures for the European Green Deal and the digital transition of industry, the Commission is now planning to give priority to the development of "Europe's prosperity and competitiveness" by taking action to support companies' investment and develop workers' skills. The implementation of the European Green Deal will remain central in the Commission's strategy for the environmental transition of industry, but stronger measures to support the competitiveness of European industry will be adopted to better reconcile this goal with the objective of EU environmental transition. The Commission's intention to adopt, in the first 100 days of its mandate, a Clean Industrial Deal and to be an "investment Commission" is a strong signal in that direction. So too is the Commission's determination to reform the EU's trade and competition policies so that they can better support the competitiveness of industry. At the same time, the strategy of strengthening defence industrial policy is being pursued, with the creation for the first time of a portfolio dedicated solely to defence and space. Finally, the creation of a Vice-Presidency for "Tech Sovereignty, Security and Democracy" shows the willingness of the European Commission to deepen the EU's efforts in the field of digital policy and cybersecurity.

This policy shift is a result of the considerable pressure on the Commission by European industry, trade unions and other EU institutions in recent months to adopt measures along these lines (see our monthly briefs for May and June 2024). It is also the consequence of the debate triggered by the two high-level reports on the Single Market and on the future of European competitiveness, which call for a significant change in the EU's industrial policy to meet the current geopolitical challenges. However, the success of this strategy will depend on various factors: first, the Commission's ability to pursue competition and trade policies that benefit industry and consumers, while preserving the unity of the Single Market and avoiding trade protectionism; second, efficient coordination between the different Commission services and members of the Commission (while it is good news that the EU's industrial strategy is now the subject of a vice-presidency, the fact that the competence is fragmented into various portfolios in the new Commission's proposal will make it difficult to apply a coherent holistic strategy in this area); third, the Member States' ability to go beyond their national interests. To strengthen the competitiveness of European industry, national governments will have to further Europeanise their industrial policy practices, particularly regarding State aid through the IPCEI (Important Projects of Common Interest) instrument or investment financing.

*** Guest Contribution of the Month ***

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The EU's New Industrial Policy: Balancing Economic Competitiveness, Norm Diffusion and Geo-economic Rivalry

2024 marks the start of a new political cycle for the European Union, following the European elections and the appointments of new leaders for the European Council, the European Commission and the European External Action Service. Among the many challenges facing the new leadership will be tough choices in the areas of economic and industrial policy, which are required to address the substantial risks coming with rising economic competition globally, and the risk of fragmentation of global trade in the context of geo-economic rivalry. These developments present Europe with key questions to be addressed in the coming years: How can the EU maintain its regulatory frameworks, protecting citizens, industries, workers and consumers, without losing out in the face of such ever-greater global competition?

One answer to this question was recently provided by former Italian Prime Minister and European Central Bank President Mario Draghi when he presented his long-awaited report on enhancing the EU's global competitiveness to Commission President Von der Leyen in September 2024. The Draghi Report highlights how research and innovation (R&I) remains a weak point for Europe, suggesting that deregulatory measures are necessary to close the innovation gap between the EU, the US, and China. However, this presents two – potentially controversial – policy decisions to be made: the need to incur debt to increase public spending on R&I and the imperative of addressing the competitive situation with Chinese industries.

The solution to increasing European competitiveness implies substantial public spending, as the private sector alone cannot meet the financial demands, potentially increasing the EU's debt burden. While the report was warmly welcomed by EU Commission President Ursula von der Leyen, and its conclusions largely accepted, the idea of incurring debt was firmly rejected. It remains outside the reach of political possibilities as long as Germany's Finance Minister and other 'frugal' actors consider it unacceptable in the context of their 'stability-oriented' stance.

At the same time, the Draghi Report stresses that the EU must confront the trade-off between competitiveness and regulation. Over the past two decades, the EU has promoted the use of trade agreements as a tool for advancing norms and principles in environmental sustainability and human rights, aligning with its self-image as an ethical and normative power. Examples include the GDPR

Regulation and the EU's Digital Markets Act (DMA). However, critics argue that the EU's regulatory framework, while designed to protect European consumers' interests, may prevent the EU from becoming a competitive market in such future technologies because excessive regulation will restrict foreign companies from fully operating or expanding there. The flip side of alleged 'over-regulation' is that it not only deters foreign operators from adapting their products to the EU's regulatory requirements (as illustrated by Apple withholding the AI enhancements to its operating system from the EU) but it also limits the global reach of European products, since EU products may not be fit – or competitive enough – for export.

The optimistic perspective is that EU regulations not only protect consumers and maintain a level playing field within the Single Market, but also act as a means of norm diffusion towards the rest of the world; therefore, trade with systemic rivals such as China presents significant challenges given their stark differences regarding industrial policy, market access, and government subsidies. In its commitment to achieving normative objectives through trade, the EU adheres to World Trade Organization-compliant tariffs and restricts foreign direct investment only in critical infrastructure and areas of national security. Yet, we also see how the EU's aspiration towards norm diffusing is not immune to power-political pressures arising from both within and outside the bloc, as in the example of the Commission's decision to delay the implementation of the regulation that would ban agricultural products sourced from deforested areas, despite this being at odds with the premises of the Green Deal. The delay was an apparent response due to opposition from some of the EU's trading powers in the Global South, but it also affected companies and political forces in the EU, demonstrating how the EU's aim to diffuse environmental norms may be compromised by political convenience and the strength of industrial interests.

In the context of geo-economic rivalry, the EU has taken a stronger position, despite internal dissent (German opposition no less): in the looming trade dispute about electric vehicles (EVs) produced in China, the European Commission secured sufficient backing from Member States to impose tariffs of up to 45% on these Chinese EV imports. With the European Commission advocating a de-risking strategy for critical sectors, it is evident that decision-making in EU trade policy reflects the strategic tensions between normative objectives, the needs of economic competitiveness, and the temptations of political convenience.

Looking ahead to the future of EU competitiveness in relation to China, political leaders on both sides will likely continue to advocate for openness in trade and investment. However, Brussels must carefully navigate the delicate balance between risks and opportunities in its trade relations with China, and indeed also the US. In fact, the EU risks becoming caught in the intensifying confrontation between the US and China. In this regard, the Commission's strategy suggests that the EU may, at times, distance itself from its traditionally close relationship with the US and engage more with China when no other options are available. Nevertheless, until there is greater clarity following the upcoming presidential elections in the US, it remains to be seen if and how the EU and the US will unite against Chinese competition or continue to pursue uncoordinated strategies.

As for the internal challenges the EU will face over the 2024-2029 legislative term, a more sustained effort at de-regulation may be necessary if it wants its industrial base to withstand global competition. Yet, also following Draghi and others, this requires a greater commitment to agreeing on a new industrial policy that is *genuinely* European, which means allocating greater fiscal resources to the EU rather than handing the reigns to the Member States by removing long-standing constraints on national subsidies. For the time being, and in the face of these tough global choices, the EU's industrial policy appears unbalanced: while there is much talk about the importance of enhancing the competitiveness of the European economy and the need for more sustained public investment towards that aim, too much of the action occurs at the national and not at the EU level, where it arguably belongs.