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Summary of Discussion of the Hearing on the Relationship between FDI Screening and Merger Control Reviews

Annex to the Summary Record of the 139th meeting of the Competition Committee

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This document prepared by the OECD Secretariat is a detailed summary of the Hearing on the Relationship between FDI Screening and Merger Control Reviews, held by the Competition Committee on 30 November 2022.

More documents related to this discussion can be found at:
www.oecd.org/competition/the-relationship-between-fdi-screening-and-merger-control-reviews.htm

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Summary of Discussion of the Hearing on the Relationship between FDI Screening and Merger Control Reviews

1. **The Chair** introduced the session on the relationship between FDI screening and merger control reviews. He mentioned that while merger reviews have been well established across OECD countries, there have been significant developments concerning FDI screening mechanisms. Four topics guided this discussion: the recent trends in FDI screening, the ways in which jurisdictions deal with national security considerations when there is no specific screening mechanism, the ways in which FDI screening and merger control interact, and international cooperation in this area. The discussion benefited from six country contributions five expert speakers: **Ashley Lenihan**, Deputy Director at MSFS and Professor of the Practice of International Affairs at Georgetown University; **Felipe Irarrázabal**, Director of the Centro Competencia (CeCo), Universidad Adolfo Ibáñez; **Edouard Sarrazin**, Partner at DLA Piper; **Ethan Thornton**, Acting Deputy Director for Risk Identification at NSI Review & Analysis, UK's Department for Business, Energy & Industrial Strategy; and **Ignacio Mezquita Pérez-Andújar**, Deputy Director General of Foreign Investments at the MINCOTUR Secretary of State for Commerce.

2. The **OECD Secretariat** presented the background paper for this session. The expansion of merger control reviews has been accompanied by an increase in the number of notifications (11,000 notifications). Over the last 30 years, there have been several changes with regards to FDI screening on national security grounds. The perception about the potential risks arising from foreign direct investment has also dramatically changed. This has led to the expansion of previously existing regimes, and the introduction of new ones. In 1990, only five countries among OECD+5 jurisdictions (OECD members plus five candidate countries, namely Brazil, Bulgaria, Croatia, Peru, and Romania) had operational FDI screening for national security, while they were 24 in 2022. This expansion may pose challenges to competition authorities. First, more transactions will be subject to both screenings in parallel and this may give rise to conflicting outcomes. Some jurisdictions already regulate potential conflicts under merger control reviews through public interest assessments. In this case, the law determines which interest prevails in the case of a conflict. However, most jurisdictions assess separately under different review mechanisms the risks for security and competition. Second, a question arises as to whether cooperation should also involve common challenges that may appear in both reviews, for instance gun jumping or firm failure to notify a transaction. Finally, the background paper explores whether enhanced cooperation could also foster the transposition of certain principles such as transparency and predictability across both review mechanisms.

3. **The Chair** introduced the first part of the discussion aimed at understanding the reasons of the rapid increase in FDI mechanisms. He called Professor **Ashley Lenihan** to the stand. She covered three main points: the rise in FDI control mechanisms, focusing on national security and the geopolitical reasons behind this change; current trends in national security based FDI screening mechanisms and their main features; and the broader implications FDI screening mechanisms can have for competition regimes.

4. She said that for over 70 years, the general trend across OECD countries has been a push towards investment liberalisation which allowed FDI to expand rapidly and act as a key driver of globalisation. By the 21st Century, investments occurred with few impediments, although in sectors identified as vital to national security, they faced greater scrutiny, were limited, or banned. During World War One, concerns emerged around the potential for foreign powers to gain strategic control over companies. This is why all states

have maintained the right to veto attempts by foreign entities to acquire domestically based companies or assets if they seem to pose a risk to national security. As competitors in the international system shift, perceived risk has varied: German investment during the World Wars; Japanese investment in the 1980s; Middle Eastern investment after 9/11 and through the financial crisis; Chinese investment since 2010; and Russian investment since 2014, and particularly since 2022. Investment from allied countries can also cause concern. There have been some vetoes, but they usually come in the form of mitigations of the transaction.

5. The first-generation policies and review mechanisms focused on protecting a narrow range of sectors that were associated with national security; real estate, particularly in sensitive areas; and national champions in the defence industry. By mid-2021, 52 jurisdictions had some form of foreign investment and national security mechanism, showing that it is a global trend.

6. The increment in FDI control mechanisms, especially on national security grounds, is explained by several factors, including the technological revolution; the shift to a multi-polar, contested, and more competitive international environment; and the increased use of tools of economic statecraft to gain power in the international system. This has led to more sophisticated review mechanisms with dedicated resources and processes. Their goal is to better protect essential security without discouraging benign investment or affecting competition unnecessarily. However, given the primacy of national security for state survival, competition regimes should expect that national security decisions be given primacy even if this might have sub-optimal outcomes for competition or consumers.

7. Often in response to global events and changing systemic conditions, current trends focus on a widening of the definition of national security related to foreign investment. This has led to enhanced screening and to the adoption of new mechanisms and regulations in specific sectors. These changes may also occur in response to specific events. During the 2008 financial crisis, there were fears that depressed assets might be snapped up by strategic state-led or subsidised investors from foreign wealth funds. This concern re-emerged during the pandemic and led to an important rise in new and temporary screening mechanisms. Concern has also emerged over the fate of companies that control access to finite (or difficult to extract) resources. Following the Russian invasion of Ukraine, there has also been a renewed focus on energy security. The technological revolution has led to new concerns over foreign investment in frontier and high technology companies. It has also led to specific concerns over the production of semiconductors of all kinds, as well as over emerging and foundational technologies. During the COVID-19 pandemic, concerns also arose over the security and resilience of supply chains, particularly around sole-supplier risk. These trends appear to have been cumulative rather than cyclical, which means that the way in which countries understand national security is unlikely to diminish in the foreseeable future.

8. Professor Lenihan spoke of the current trends that have led countries to abide by the 2009 OECD guideline principles, especially in regard to transparency, predictability, and proportionality. In response to evasive tactics, countries have lowered the threshold requirements for reviews on national security grounds, added coverage of asset investments and green-field investment, and moved towards a hybrid regime style (mixing mandatory notification in some sectors with cross-sectoral call-in powers) such as the ones in the US, the UK, Germany, Australia, and China.

9. The professionalisation of these regimes and the recognition of their differing objectives has led to them being separated from competition reviews. This is critical when it comes to ensuring that the national security review regime is properly institutionalised, resourced, and staffed. However, the increase in the complexity and volume of FDI reviews on national security grounds means that increased cooperation and secure information

sharing with competition regimes will be necessary. It is likely that national security regimes are going to demand more information from competition authorities than they will be able to supply in return. In addition to ensuring cooperation and information sharing, Professor Lenihan advocated for a harmonisation of the timelines of both regimes in order to increase predictability for investors. Other important issues that must be kept in mind are that national security reviews take longer and are more unpredictable, and that flexibility is crucial.

10. She concluded by looking at some of the implications for investment and competition. While there is no clear evidence that FDI and national security regimes are going to deter benign investment, they can increase the costs of doing business across borders, and may need harmonisation and cooperation between investment control and competition regimes. Where transactions are reviewed by both regimes, national security decisions will take precedence even if they have suboptimal outcomes for competition; as states seek to ensure both security of supply and technological leadership, there may be intended and unintended consequences for competition; and as case volume increases, the complexity of the measures that are taken to mitigate national security risks is likely to increase, and coordination will be needed to ensure such measures satisfy the objectives of both regimes where possible.

11. **The Chair** noted that some of the consequences seemed particularly alarming for competition authorities, especially the fact that national security would take precedence over merger control. He emphasised that better cooperation could help overcome the possible conflicts between the two reviews. He then turned to **BIAC** that highlighted the importance of understanding the reasons behind the proliferation of FDI screening in order to understand the goals, the design, the concrete application, and the relationship to merger control of these reviews.

12. **BIAC** focused on two specific trends: the developments driving the global rise of FDI screening reviews, and the fact that a broader range of national interest considerations have increasingly served as focal points. These broader considerations tend to stand in contrast to the more normative considerations that lie at the heart of merger control reviews. Businesses are therefore facing multiple reviews of transactions (within and across jurisdictions) that present challenges to the interests of legal certainty, transparency, and predictability, which are all essential for their growth and planning.

13. BIAC believes that understanding the reasons behind the proliferation of foreign investment screening reviews is essential to understanding the transforming concept of national security. They identified four reasons behind this transformation: rising protectionism, heightened focus on supply chain integrity, increased concern regarding state owned enterprises and specific country of origin, and concerns regarding cyber security and electronic warfare. They also mentioned the competitive dimension that may touch each one of these factors. On one hand, enhanced FDI screening may result in preventing acquisitions by firms whose investments are not determined by purely commercial motivations but rather reflect the bidding of a foreign government with a specific agenda. On the other, BIAC believes that regulators have to guard against domestic firms using these arguments to protect themselves from increased competition, as a result of direct foreign investment, which may bring efficiencies, innovation, and other benefits to the domestic market.

14. BIAC recommends that foreign investment reviews be conducted by a separate agency. The review should also be based on a set of objective criteria clearly articulated in either legislation or guidance. To the greatest possible extent, the review should take place in a coordinated fashion (in terms of timing, procedural transparency, remedies, and governmental accountability) with merger control reviews.

15. **The Chair** pointed out that in certain countries there are no specific institutions in charge of the national security reviews and that competition authorities assess both the competition dimension and the national security dimension. Until recently, this was the case of the **United Kingdom** where the Office of Fair Trading (OFT) and the Competition and Markets Authority (CMA) were responsible for both elements, although the functioning was slightly more complex.

16. Before the National Security and Investment Act came into force, the CMA was responsible for investigating mergers both in relation to competition concerns and public interest concerns relating to national security. When it comes to public interest issues other than national security, the old regime still applies. Under the old regime, the CMA would bring any merger which potentially entailed national security issues to the attention of the Secretary of State for Business, Energy, and Industrial Strategy (BEIS). If the Secretary of State suspected any national security concerns, he or she would issue a public interest intervention notice or pin. The Secretary of State would then set a new deadline for the CMA to report back. The CMA would then send a report setting out relevant aspects concerning both competition and public interest. The Ministry of Defence would produce a report which was attached to the CMA's report. In order to balance public interest and competition concerns, once it received the CMA's report, the Secretary of State could make a number of different decisions. The Enterprise Act stipulated that any anti-competitive outcome should be treated as being adverse to public interest unless it is justified by one or more public considerations. The Secretary of State was therefore obliged to set out any justifications if a balance was to be made between competition concerns and national security issues. There is only one case in which the Secretary of State cleared a merger despite competition concerns on the basis of a public interest ground: the Lloyds/HBO case.

17. The new stand-alone regime, operated by the Investment Security Unit within BEIS, allows the Secretary of State to intervene in certain acquisitions that could harm national security. Accordingly, the national security has ceased to be a public interest under the Enterprise Act, but the public interest regime and the ability for the Secretary of State to issue a pin remains for media plurality, financial stability, and public health emergencies. The CMA does not enforce the national security regime which is the responsibility of the investment security unit. The two regimes have different timelines and processes but they may sometimes work together. For instance, when a merger is investigated on both competition and national security grounds, it is important to liaise with the ISU in order to make sure that they are reviewed in parallel.

18. **The Chair** asked **Hungary** how its system works and how it differs from the UK's regime. **Hungary** said that under the Competition Act, there is an exceptional rule which allows the Ministry of the Interior to consider some specific sectors. In this case, the competition authority stops having jurisdiction over the given sector. The main differences between the two regimes reside in the thresholds.

19. When it comes to the similarities with the international trends, Hungary also has two separate regimes, with two separate institutions for reviewing the different sectors. What is interesting from a business planning perspective, is that there are fast track deadlines in both regimes. This means that they both take 30 days but when it comes to mergers, there are simplified procedures that only take eight days. The speaker pointed out that national security interest cannot be reviewed in eight days, so they try to carry out the review within 30 days. Because of these limited deadlines, predictability is high but transparency is low as not all documents get published.

20. **The Chair** then turned to **Mr Felipe Irarrázabal** who gave an overview on the extent to which competition authorities can engage in FDI screening and the different issues in Chile and Latin America. **Mr Irarrázabal** said that merger control is very recent in Latin

America. It is a very delicate mechanism, so it has not been easy to establish it. In order to have a merger control mechanism that works smoothly, it is crucial to build confidence between private parties and the public sector.

21. In the Chilean context, the competition law was enacted in 1959, but the mandatory merger control regime only came to be in 2016. The authority assesses whether the merger leads to a Substantial Lessening of Competition (SLC test). The system is therefore quite broad, and has no public interest test or exceptions. There was also an attempt to introduce a national champion argument in the law but the tribunal issued a negative opinion about such amendments. Before 2016, there was a system that required prior authorisation from the prosecutor's office in relation to press law and media pluralism. Trying to balance media pluralism with consumer welfare turned out to be quite complex. In the end, the Congress modified the law by referring to the impact on competition.

22. There are however some exceptions regarding borders, as well as protection laws on maritime cabotage that favour Chilean companies. Mr Irarrázabal said that Chile is a leading country in privatisation, which means that there are very few state-owned enterprises. On the other hand, there are numerous trade treaties with other countries. This is where the tensions between merger control and national security interest exist. He presented two cases in which a Chinese company tried to buy an important state-owned energy distributor. In the first case, the Fiscalía Nacional Económica (FNE) approved the transaction without making any reference to national interest or imposing any conditions, but, coupled with the subsequent second acquisition, more than 50% of the total energy distribution in Chile is owned by this company. Once again, the FNE did not take national security interest into account when deliberating on the case, saying that it was applying the law which only refers to competition issues. This case led Congress to present a bill for reforming the Constitution and asking for there to be a qualified quorum law for foreign investment in public utilities or companies related to national security. The case became a political issue, and certain Senators pointed out the need to preserve relations with Chinese investors.

23. When it comes to the challenges faced by Latin America, the speaker said that different countries will be facing the same types of tensions related to this issue, that is why he advocates for the establishment of FDI screening mechanisms. What has to be decided is what needs protection, who is in charge, and what the procedure is. Furthermore, when designing a new regime, it is important to keep in mind that investments are not easy to get in Latin American countries, and there is a lack of knowledge of geopolitical issues. Finally, Mr Irarrázabal pleaded for the establishment of a simple FDI screening system covering matters of national security, and that is carried out by a dedicated body separate from the authority in charge of merger control and with strong technical skills. This process should not be as transparent as the merger control system, confidentiality should be strong, and recourses should not be possible. The process should be predictable and based on international standards.

24. **The Chair** pointed out that the lack of an institution and of a framework to establish FDI screening is a real issue for Latin American countries. In order to continue to explore some of the conflicts that can arise, he turned to **Mr Edouard Sarrazin**. He asked him if there is a risk of tension or conflict and misalignment between the two reviews. **Mr Sarrazin** mentioned that the comprehension of a problem is very different when it comes to the discussion between regulators and policy makers and their practical understanding by companies. Currently, the main preoccupation of businesses is merger control, simply because of the volume and historical and geographical dominance of the mechanism.

25. Whether it is merger control or FDI screening, businesses tend to address them systematically. Right before the pandemic, a number of new legislations came to light and

they have been integrated in the processes of the companies and their counsel. Up to now, the fact that these processes remain fairly parallel is reassuring and it makes it easier for firms to consider the different constraints.

26. To this day, there has not been a clash between merger control and foreign investment concerns. However, it is necessary to look into the future, particularly since the goals pursued in each mechanism can be extremely different. He mentioned the transaction between AEGON and Vienna Insurance which was authorised by the European Commission but rejected by the Hungarian authorities pursuant to FDI laws generating a strong reaction on the part of the European Commission because of the primacy of European law. This type of situation opens a stressful perspective for the companies.

27. Mr Sarrazin said that cooperation can be a good idea when it comes to having a broader discussion on the different issues, and balancing problems that must be anticipated. However, efficiency and unification must not be confused. In more complex cases, some form of cooperation may be interesting, but the issues are different enough so that a form of systematisation or unification is not desirable. French authorities recently mentioned that they were not in favour of rigid coordination which could instate an inefficient system presenting a risk for the companies. What the companies want is for there to be coordination in order to avoid being held hostage by the rules.

28. Mr Sarrazin referred to the issue of commitments. When it comes to merger control, things go very smoothly because it is possible to anticipate and prevent a risk. When it comes to foreign investment, things are very vague. However, the recourse to commitments as a way to address concerns seems to be intrinsic to the control of foreign investments and much more present than in matters of merger control. Starting from the moment when there has been an assessment, regulators are tempted to seek commitments. On the one hand, the pressure to submit commitments cannot be anticipated, and on the other, there is a high probability they occur. Consequently, it is difficult to design commitments consistently so that they address concerns arising from the rational process of merger control and the less predictable and more speculative process of FDI screening.. Philosophically, these types of commitments are often contradictory. On the one hand, there is an "efficiencies" logic (i.e., merger control reviews aim to avoid competition concerns and possibly achieve efficiencies), and on the other there are criteria of efficiency in conducting FDI screening which may ultimately lead to contradictions between the merger control regime and the FDI screening regime. The power of competition authorities in matters of merger control and the prominence of merger control mechanisms can be observed throughout time. With the very strong development of the foreign investment control and its different logic, it will be interesting to see how things evolve and when they will evolve.

29. **The Chair** pointed out a confusing element in the discussion: Mr Sarrazin mentioned that the two reviews have a different logic and pleaded for separate reviews while Australia calls for a debate because both processes seem to be aligned. He gave the floor to **Australia** who said that foreign investment has always been a critical aspect of its prosperity. Over the last four years, Australia's growth in FDI has actually been higher than in other OECD countries. Since it remains an attractive place to invest, there is a mature FDI screening regime that dates back to the 1970s and has been adapted over time to address emerging risks. The most recent reforms were made in 2021 in response to global developments and to heightened national security risks. They allow to attract foreign investment while protecting the national interest and maintaining public confidence in foreign investment. This is done through the implementation of the national interest test that considers five factors: national security, competition, policies such as tax, the impact on the economy and the community, and the character of the investor. The Treasury administers the foreign investment screening process and consults with different areas of

government. At this point, the speaker introduced their colleague from the Australian Competition and Consumer Commission (ACCC).

30. The speaker from the ACCC said that Australia's merger regime is voluntary. This means that parties filing for FDI clearance are not required to also notify the ACCC. It is the Foreign Investment Review Board (FIRB) that decides on which transactions it will consult with the ACCC regarding the impact on competition. When there is a low SLC risk, the ACCC conducts a short assessment. If the FIRB asks for a comment, it will not decide on the proposed transaction until it receives the ACCC's input on the competition impact. FDI proposals are therefore suspended until the assessment is complete. In 2021-2022, the ACCC considered 463 mergers out of which 290 were referrals from the FIRB that were not opposed. Referrals from the FIRB may involve transactions that would not have been brought to the ACCC's attention otherwise. It is also possible that in some transactions, the ACCC reaches a different view. In that case, the mandatory suspensory aspect of the FIRB proposal can assist it as parties cannot complete until they have approval from the Treasurer. The ACCC does not have visibility on which FIRB's transactions are not referred to it.

31. **The Chair** asked Australia to develop on whether there is an alignment in the substance of the two reviews. **Australia** answered that the final decision in the foreign investment space is made by the Treasurer. The ACCC's advice on competition matters is taken into account, but there are several other factors that must be considered. The final decision may or may not be in line with what the ACCC said. There is also a close engagement on the conditions that might be imposed on an approval if that is considered appropriate by the Treasurer. This happens after a public review by the ACCC. For example, in 2022 there were seven public review decisions, three led to a decision not to oppose, three to clearance subject to conditions and one notification was withdrawn.

32. **The Chair** said that there seemed to be a consensus on the idea that review of foreign direct investment should be done by a separate body from the competition authority. However, **Consumers International** highlights that from a competition perspective, the screening process by non-competition authorities may provoke potential harms. He gave the floor to **Consumers International** who said that FDI is not harmful for competition. It is often strongly pro-competitive but needs to be reviewed case by case. The current merger processes by competition bodies are generally satisfactory.

33. From a competition perspective, the screening process of non-competition authorities can sometimes give rise to potential harms. Domestic entities, especially competitors, may take steps to have unwelcome takeovers blocked in the interests of reducing competition or of clearing the way for their own acquisition. FDI review bodies must be aware of these dangers. They have to be well informed of the assessment by the competition body and they should seek the views of the competition bodies on the economic effects of their proposed rejection of any foreign acquisition. Negative decisions may lead to a form of protectionism, harming competition, innovation, and efficiency.

34. The processes by non-competition authorities fall short of the regulatory standards. They often lack political independence, transparency, accountability, answerability to legislators and to the public, and have inadequate follow-through on compliance. This is why, in order to minimise competition harm, Consumers International pleaded for a broad policy approach that fosters independence, transparency, and accountability as well as satisfactory compliance monitoring.

35. **The Chair** gave the floor to **Poland** where the Office of Competition and Consumer Protection has decision-making power in relation to merger control and FDI screening. He asked how they balance the interests between competition and public interest.

Poland mentioned that their country operates two separate FDI screening systems. The first one is permanent, it is located within ministries, and concerns 13 companies of strategic importance. The second one was introduced in 2020 in order to address risks in relation to the COVID-19 pandemic. It was initially established for two years and prolonged for another three years.

36. The Polish competition authority is in charge of FDI screening and it also has decision-making power in merger control. However, it conducts separate proceedings under distinct rules. Despite the difference in thresholds, FDI screening and merger control may be triggered by the same transaction. Even in this scenario, the reviews are carried out separately, respecting distinct rules and timelines.

37. To answer the concern on the politicisation of merger control, the speaker said that the Polish authority assesses a given transaction against different criteria. FDI screening's goal is to safeguard national security interests, while merger reviews seek to enhance consumer welfare and market efficiency. FDI screening has only been in force for 2.5 years, and the five decisions that have been issued have granted clearance. The authority has not yet reviewed a transaction that poses a threat to public security, public order, or public health. However, reviews are separate and can result in either aligned or contradicting decisions. Remedies can only be developed under a merger review, which means that there is no risk of imposing potentially conflicting sets of measures on the transaction parties. As public security concerns are reviewed separately from merger review, there is no procedural room for leveraging one another.

38. **The Chair** then gave the floor to **Belgium** where the competition authority prefers not to be involved in FDI screening. Belgium has also asked that the screening criteria and the notification requirements be strictly limited to national security concerns because it can be very tempting to use this legislation for gathering information on what happens in the economy.

39. Then**, Chinese Taipei** asked to have the floor in order to share its experience because they have a very stringent FDI reviewing regime, especially when Chinese companies are involved. The process is initiated by the competition authority. Even if the transaction is approved, it will be sent to the FDI reviewing committee. If there is a public interest or a national security issue, it is very likely that the merger might be rejected by the committee. When it comes to whether or not both reviews should be handled by the same authority, Chinese Taipei is rather pessimistic because national security is not only an issue in merger review. When considering a transaction, there may be geopolitical issues that must be considered in order to find the best solution for the mechanism design. The other issue that must be considered is whether or not it is likely for the competition review to incorporate national security into the reviewing process.

40. **The Chair** insisted on how linked these mechanisms are to the geostrategic circumstances of the country. He then gave the floor to the **European Union** that specified that FDI cases are exclusively decided at the Member State level. The legal basis is the FDI screening regulation that creates a network of enforcers that exchange information. This includes the Commission, which does not have decision-making powers. In contrast, the EU merger regulation gives exclusive competence to the Commission for mergers with an EU dimension, which is complemented by national merger regimes. The FDI screening regulation allows the Commission to share security or public order concerns with the notifying Member States. It can also share its concerns on a transaction that may undermine a project or a programme of Union interest. The Commission's role in FDI screening is to adopt non-binding opinions that can provide relevant information to Member States or highlight potential mitigating measures to address detected risk.

41. Article 21 of the European merger regulation provides that, as long as they are compatible with the general principles and other provisions of community or EU law, Member States may take appropriate measures to protect legitimate interests including those recognised by the regulation (public security, plurality of the media and prudential rules). They may also take measures which could prohibit concentrations, subject them to conditions, or in any other way harm concentrations that are reviewed by the Commission if they protect other legitimate interests. Such measures can be adopted and enter into force without prior communication or approval by the Commission, provided that they aim at protecting recognised interests and are in clear compliance with the principles of proportionality and non-discrimination. However, the Commission may investigate such measures to assess whether the overarching principles of EU law are protected. When an FDI also constitutes a concentration falling under the scope of the Merger Regulation, the EU advocates that both regulations should be applied in a consistent manner.

42. The Chair asked **Mr Ethan Thornton** to express his views on whether or not there can be conflicts, and on the different cooperation instruments that have been foreseen in the UK. **Mr Thornton** said that since the new legislation was introduced at the beginning of 2022, there are four ways in which it can directly interact with merger control. First, a new unit that advises the Secretary of State on national security decisions was created. Second, as regards timing, the UK expects national security investigations to be shorter. Third, the mandatory notification under the National Security and Investment (NSI) Act means that the government is required to identify any non-compliance with it and therefore be able to find the cases that are not being notified. Fourth, the Act is incredibly broad and gives the government powers across all sectors of the economy.

43. The mechanisms will interact in big takeovers, particularly large mergers that are likely to have a competition element and a national security element. There are a number of ways in which the analysis being conducted by both entities needs to be consistent.

44. There may be instances where the insolvency of a company may only be resolved by an acquisition from someone in the same industry. For example, in some cases, a niche defence company can only be bought by a larger defence company. In those circumstances, an anti-competitive takeover might be positive from a national security perspective. When it comes to overlap and potential conflict, the UK government intervened on both competition and national security grounds in the takeover of an aerospace company (Meggitt). There was a competition angle which resulted in the divestment of part of the business, and a national security angle that looked at the security of supply to the Ministry of Defence. The competition and national security undertakings did not conflict. It was up to the private lawyers to work out exactly how that would be implemented. There was only one quirk which was the divestment of part of the business as a result of the competition remedy. This led to another national security review and another competition review. Hypothetically, there could be scenarios where this becomes a never-ending cycle of reviewing the remedy impact. In this case, two things needed to happen: there had to be a mechanism to establish cooperation and one to establish primacy. The way in which the CMA and the UK government would interact in terms of sharing information was publicly determined. It is not only about the powers that are in the legislation, there is a lot of informal sharing of what is going on in the market and how that might interface with both national security and competition.

45. Finally, he said that the CMA was very well versed in national security before the Act came to be. The final piece of the puzzle is how to establish primacy. A very specific clause has been added to the new legislation that enables the Secretary of State to direct the CMA to disregard any kind of competition concerns. There are clearly defined limits to that power: it can only be done after an investigation is concluded and a final order or

remedy has been applied, or once something has been cleared through the full national security investigation.

46. Reflecting on the first year of application of the Act, ten final orders have been issued, three of which were either blocking or unwinding. The key is that there have been no directions to the CMA. This leads to expect that it would be incredibly rare that the competition authority be solicited with respect to a national security investigation.

47. **The Chair** then gave the floor to Romania where the competition authority is part of a body called the CEFDI which reviews the foreign direct investment. He asked them to describe its system and to express whether or not it is a good arrangement when it comes to facilitating cooperation and avoiding risk. **Romania** said that it has had FDI screening since 2012 and that the competition authority has been involved in the process since the beginning because it was linked to the merger review process. Once the competition authority received the notification of a merger related to a sector of the economy that was sensitive from a national security perspective, the information had to be sent to the Supreme Council of National Defence in order to receive security clearance. Only then could the merger be approved.

48. In April 2022, Romania amended its legislation in order to comply with the European FDI Regulation. A new commission dedicated to analysing the foreign investment was established. It brings together representatives from the government, the ministries, the secret intelligence agencies, and the Competition Council. Within this framework, the competition authority plays several roles: it is the secretariat, it hosts the institution who receives the notification of foreign investment, it is the focal point between the other member states and the Romanian government, and it is a voting member of the commission.

49. The speaker presented the new mechanism: after receiving all the information regarding the investment, it is sent to the members of the new commission. If their opinion is negative, or if it is subject to certain conditions, the government of Romania is involved in the process. Only the government can block an investment or authorise it under certain conditions. Presently, the Romanian Competition Council is involved in both mechanisms and its main goal is to make sure that the new FDI screening mechanism will not delay the merger review process. They also have to make sure that only the investment really affecting national security will be blocked because the new mechanisms should not become a barrier for potential investors.

50. The Chair introduced the last topic on the fact that some transactions may be scrutinised in different jurisdictions. His question was whether there is international cooperation in the mechanism of FDI screening. For this he turned to **Mr Ignacio Mezquita Pérez-Andújar** who said that the EU is being asked to react with open strategic autonomy. When FDI regulation was passed in October 2020, there was no comprehensive framework at the EU level for the FDI screening on the grounds of security or public order. Since decisions are ultimately made by Member States, some factors must be considered: cooperation, procedural predictability, and proper handling of information. The Commission has the right to issue its opinion on certain issues. FDI screening is understood as a last resort instrument. It leads to handling regulatory overlaps, as it coexists with legal provisions in different fields. The interplay is not only with competition, it can also be with things such as drug use provisions, data protection, and the promotion of start-ups, among others. In these two years of application of FDI screening, no particular conflicts have come up.

51. In the case of the EU, when it comes to substantive analysis, guiding principles set by regulation have been adopted. Considering the vulnerabilities, the fields in which

investment takes place, with the exception of the analysis of supply of critical inputs, all the others are analysed on criteria alien to competition. When considering the threats, none of them actually deals with competition concerns. In its two-year experience, most transactions communicated under the exchange mechanism from the part of Spain were cleared with no mitigating measures. There was only one FDI prohibition, and the transaction was not subject to merger control. 9% of screened FDI transactions were authorised subject to mitigating measures. Only half of them were also subject to merger control, but none required competition remedies.

52. Some notions from merger control can be considered in FDI screening. European subsidy regulation is also a sort of FDI screening procedure, and in the absence of rules to address the destructive effects of foreign subsidies on the internal market, this regulation will specifically tackle the distortions that subsidies cause to the level playing field.

53. When it comes to transparency and predictability, there is room for improvement. However, some considerations have to be made, such as the nature of the information handled and of the assessments made under FDI screening regimes. If vulnerability is evaluated, governments do not want to publicly acknowledge it. In the EU, there are legal restrictions in the exchange mechanism and information is classified. This is creating leeway to advancing procedural convergence.

54. In terms of international cooperation, competition networks and practises outdo those regarding FDI screening. FDI screening within the EU is a new tool that has not yet been deployed in every Member State. As the system matures, cooperation is proving to be extremely helpful.

55. Although there is a theoretical risk of clashing between merger control and FDI screening, in practical terms it is limited. In order to preserve the identity of merger control, he thinks that FDI screening regimes should remain separate from competition authorities.

56. **The Chair** pointed out that during the discussion, nobody contested the legitimacy of foreign investment control. Since they are completely different exercises, FDI screening and merger control may overlap and be in contradiction. There have been very few conflicts in the past, but in the future, there may be more intersections creating potential risks. One of the vexing issues is the difference in the transparency level. Also, coordination is relevant, because there are different possibilities to set up the systems in order to allow it.