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**Working Party No. 3 on Co-operation and Enforcement**

**National Security Considerations in Competition Enforcement – Note by BIAC**

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Despina PACHNOU  
Email : Despina.Pachnou@oecd.org

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## *BIAC*

### 1. Introduction

1. The question of whether and how national security considerations should be incorporated into competition enforcement is the subject of renewed debate. Two developments appear to be shaping this discussion.

2. First, there is a growing trend toward opening merger control to wider societal objectives beyond traditional competition analysis. The Draghi Report’s recommendations on security and resilience criteria, the ongoing revision of the EU Merger Guidelines, and similar initiatives in other jurisdictions all reflect pressure to expand the factors that competition authorities consider when reviewing transactions.

3. Second, the proliferation of parallel review regimes is imposing significant costs on businesses. Most jurisdictions with merger control regimes now also maintain separate screening mechanisms for national security, and the interaction between these regimes is a recurring source of delay, duplication and inconsistency. These themes are developed in Section II below.<sup>1</sup>

4. Both developments converge on a key business concern: predictability. Over several decades, modern merger control achieved improved predictability through transparent substantive standards, defined procedural timelines, and reasoned decisions subject to judicial review. Non-competition objectives operating under different institutional logics, incorporated into or layered onto competition assessment, erode predictability. Predictability is not merely a procedural nicety: it is the foundation on which parties structure transactions, allocate risk, commit capital, and implement their filings.

5. BIAC has addressed the relationship between competition enforcement and non-competition governmental objectives in prior submissions on public interest considerations in merger control, FDI screening, industrial policy, and state-owned enterprises.<sup>2</sup> Those submissions recognize a general principle: where governmental objectives go beyond pure competition aspects or are not a decisive factor in the competitive process, they are ideally pursued through separate institutional channels with their own defined criteria, transparency and judicial review, rather than an expansion of the competition authority’s mandate.

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<sup>1</sup> Hanna Stakheyeva, Ertugrul Can Canbolat & Ali Katoglu, *Reflecting on National Security Considerations in Merger Control: Insights from the EU and Türkiye*, 46 E.C.L.R. 207, 208 (2025) (citing OECD, *The Relationship Between FDI Screening and Merger Control Reviews* (2022), <https://web-archive.oecd.org/pdfViewer?path=/2022-11-03/644554-the-relationship-between-fdi-screening-and-merger-control-reviews-2022.pdf>).

<sup>2</sup> OECD, *Public Interest Considerations in Merger Control* — Note by BIAC, DAF/COMP/WP3/WD(2016)33 (June 6, 2016), [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2016\)33/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2016)33/en/pdf); OECD, *Competition Law and State-Owned Enterprises* — Contribution from BIAC, DAF/COMP/GF/WD(2018)73 (Nov. 22, 2018), [https://one.oecd.org/document/DAF/COMP/GF/WD\(2018\)73/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2018)73/en/pdf) [hereinafter BIAC SOE 2018]; OECD, *The Relationship Between FDI Screening and Merger Control Reviews* — Note by BIAC, DAF/COMP/WD(2022)115 (Nov. 18, 2022), [https://one.oecd.org/document/DAF/COMP/WD\(2022\)115/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2022)115/en/pdf); OECD, *Pro-Competitive Industrial Policy* — Note by BIAC, DAF/COMP/WD(2024)46 (May 23, 2024), [https://one.oecd.org/document/DAF/COMP/WD\(2024\)46/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2024)46/en/pdf).

6. That framework provides a useful starting point, but national security is not merely another public interest ground. It presents challenges to competition enforcement that are qualitatively different from environmental protection, regional development, media plurality, or other public interest factors. Accordingly, this submission focuses on what makes national security distinctive and what specific safeguards are required where security and competition intersect.

## 2. How National Security is Distinctive

7. Other public interest considerations can be examined within the normal competition based economic analysis, and the underlying rationale and motivating considerations are generally transparent and can be debated. Their costs and benefits can be quantified, their application can be guided by published criteria, and their outcomes can be evaluated by reviewing courts on a substantive basis. This combination of transparent criteria, quantifiable analysis, and substantive review is what enables parties to predict with reasonable confidence the likely outcome of merger review and to structure their transactions accordingly. National security does not generally share these characteristics. Understanding the importance of this distinction is essential to designing appropriate enforcement mechanisms.

### 2.1. Definitional Elasticity

8. The most fundamental challenge is definitional elasticity. Jurisdictions often do not follow a consistent and clear definition of what constitutes national security. The concept has expanded from traditional defence and military assets to encompass supply chain resilience, critical technologies, critical infrastructure, cybersecurity, access to personal data, media pluralism, and now “economic security” more broadly.<sup>3</sup> The OECD has recognized that public interest concepts vary across jurisdictions in “concept, interpretation and application” far more than core competition goals.<sup>4</sup> But national security is the most elastic of all public interest grounds, because governments often claim an inherent and unchallengeable sovereign right to determine what their security requires.<sup>5</sup> This sovereign

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<sup>3</sup> Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (EU FDI Screening Regulation), 2019 O.J. (L 79I) 1, art. 4; Joint Communication to the European Parliament the European Council and the Council on “European Economic Security Strategy,” JOIN(2023) 20 final (June 6, 2023), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52023JC0020>; Commission Recommendation (EU) 2023/2113 of 3 October 2023 on critical technology areas for the EU’s economic security for further risk assessment with Member States, 2023 O.J. (L 2113), <http://data.europa.eu/eli/reco/2023/2113/oj>. The December 2025 trilogue agreement further defines “hyper critical” technologies including GPAI with defence/space relevance. Press Release, Eur. Council, Foreign Direct Investment: Council and Parliament Reached Political Agreement to Improve FDI Screening (Dec. 11, 2025, rev. Feb. 11, 2026), <https://www.consilium.europa.eu/en/press/press-releases/2025/12/11/foreign-direct-investment-council-and-parliament-reached-political-agreement-to-improve-fdi-screening/>.

<sup>4</sup> OECD, Executive Summary of the Roundtable on Public Interest Considerations in Merger Control, DAF/COMP/WP3/M(2016)1/ANN5/FINAL, at 4 (Mar. 20, 2017), [https://one.oecd.org/document/DAF/COMP/WP3/M\(2016\)1/ANN5/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/M(2016)1/ANN5/FINAL/en/pdf).

<sup>5</sup> OECD, Recommendation of the Council on Guidelines for Recipient Country Investment Policies Relating to National Security, [OECD/LEGAL/0372](https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0372), at 5 (May 25, 2009), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0372>.

discretion, unbounded by the economic frameworks that channel competition analysis, makes national security directly susceptible to expansion driven primarily by political considerations. The Trump Administration’s February 2025 America First Investment Policy<sup>6</sup> has expanded CFIUS’s scope to include greenfield investments, agriculture, and additional sectors, each with definitions that the Atlantic Council has characterized as “expansive and vague.”<sup>7</sup> The Presidential Memorandum expressly states that “economic security is national security” and directs CFIUS to consider economic security in its reviews.<sup>8</sup>

9. The same elasticity is visible in the other major screening regimes. Canada’s Investment Canada Act authorizes review of foreign investments that “could be injurious to national security,” a standard the statute does not define.<sup>9</sup> In March 2025, the Canadian government amended its Guidelines on the National Security Review of Investments to introduce “economic security” as a free-standing factor, explicitly expanding national security review to encompass foreign investments that could exploit declining Canadian business valuations.<sup>10</sup>

10. The United Kingdom’s National Security and Investment Act 2021<sup>11</sup> apply across seventeen sensitive sectors ranging from advanced materials and data infrastructure to synthetic biology and critical suppliers to the emergency services, categories that commentators have described as “extremely expansive in scope.”<sup>12</sup> The United Kingdom’s policy framing has likewise moved to incorporate economic security within the national

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<sup>6</sup> America First Investment Policy, Presidential Memorandum (Feb. 21, 2025), <https://www.whitehouse.gov/presidential-actions/2025/02/america-first-investment-policy/>

<sup>7</sup> Alex Mills, Investment Screening Reform May Stifle International Investment in US, Atl. Council (Mar. 19, 2025), <https://www.atlanticcouncil.org/blogs/econographics/investment-screening-reform-may-stifle-international-investment-in-us/>.

<sup>8</sup> America First Investment Policy, supra note 6, § 1 (“America’s investment policy is critical to our national and economic security”), § 1 (treating economic security as a component of national security), and § 2 (f) (directing the use of all available legal instruments, including CFIUS, to restrict investments by foreign adversaries, with particular emphasis on the People’s Republic of China, in strategic sectors including technology, critical infrastructure, healthcare, agriculture, energy, and raw materials). The Memorandum’s framing illustrates the elasticity concern discussed in this Section: once economic security is folded into national security and assigned to CFIUS as a review criterion, the perimeter of reviewable transactions expands well beyond traditional defence-related concerns.

<sup>9</sup> Investment Canada Act, R.S.C. 1985, c. 28 (1st Supp.), s. 2; see also id. at ss. 25.2–25.3 (setting out the national security review mechanism).

<sup>10</sup> Guidelines on the National Security Review of Investments (Mar. 5, 2025), <https://ised-isde.canada.ca/site/investment-canada-act/en/investment-canada-act/guidelines/guidelines-national-security-review-investments>; Investment Canada Act Annual Report 2024–25, at 13 (2025), [https://ised-isde.canada.ca/site/investment-canada-act/sites/default/files/attachments/final\\_ica\\_annual\\_report\\_2024-25\\_en\\_0202.pdf](https://ised-isde.canada.ca/site/investment-canada-act/sites/default/files/attachments/final_ica_annual_report_2024-25_en_0202.pdf) (noting that the Guidelines were “updated to recognize the importance of economic security in assessments of Canada’s national security concerns”).

<sup>11</sup> National Security and Investment Act 2021 (Notifiable Acquisition) (Specification of Qualifying Entities) Regulations 2021, SI 2021/1264 (Eng.).

<sup>12</sup> Samantha J. Mobley, et al, UK Government Outlines Plans to Amend NSIA Mandatory Notification Sector Definitions, Baker McKenzie (July 2, 2025), <https://foreigninvestment.bakermckenzie.com/2025/07/02/uk-government-outlines-plans-to-amend-nsia-mandatory-notification-sector-definitions/> (noting that “many of the Mandatory Notification Sectors (in their current form) are extremely expansive in scope”).

security perimeter. The Integrated Review Refresh of March 2023 expressly identified economic security as a core component of national security, and the National Security Strategy of June 2025 reaffirmed and expanded that framing, instructing that the NSIA be deployed to address risks to the United Kingdom’s economic security and resilience.<sup>13</sup> Definitions that expand in response to changing political priorities make it difficult for parties to predict whether a given transaction will be caught by review, let alone how it will be assessed. Where merger control has steadily reduced uncertainty through published thresholds, defined relevant markets, and settled economic frameworks, the elasticity of national security works in the opposite direction.

## 2.2. Classified Reasoning That Defeats Transparency

11. When a government blocks a merger on employment grounds, the reasoning normally is public, the data are contestable, and the decision is reviewable. National security decisions routinely rest on classified intelligence assessments that neither the parties nor reviewing courts can examine. Spain’s 2024 veto of the Ganz-Mavag/Talgo transaction was justified on security grounds, but the reasoning is restricted under Spanish law. The parties and the public cannot evaluate whether the stated security concern was genuine and proportionate, or simply pretextual.<sup>14</sup>

12. The UK’s experience under the National Security and Investment Act 2021 has confirmed this structural problem in practice. In the FTDI/Future Technology Devices International judicial review, the High Court found that the Investment Security Unit’s stated reasons for ordering divestiture were “largely formulaic, uninformative and by no means comprehensive.”<sup>15</sup> Nonetheless, the court upheld the order, finding that the

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<sup>13</sup> HM GOVERNMENT, INTEGRATED REVIEW REFRESH 2023: RESPONDING TO A MORE CONTESTED AND VOLATILE WORLD, CP 811, 47 (Mar. 2023) [https://assets.publishing.service.gov.uk/media/641d72f45155a2000c6ad5d5/11857435\\_NS\\_IR\\_Refresh\\_2023\\_Supply\\_AllPages\\_Revision\\_7\\_WEB\\_PDF.pdf](https://assets.publishing.service.gov.uk/media/641d72f45155a2000c6ad5d5/11857435_NS_IR_Refresh_2023_Supply_AllPages_Revision_7_WEB_PDF.pdf) (describing “strengthening the UK’s economic security” as a priority area); HM GOVERNMENT, NATIONAL SECURITY STRATEGY 2025: SECURITY FOR THE BRITISH PEOPLE IN A DANGEROUS WORLD —PM FORWARD, CP 1338 (Aug. 29, 2025), <https://www.gov.uk/government/publications/national-security-strategy-2025-security-for-the-british-people-in-a-dangerous-world/national-security-strategy-2025-security-for-the-british-people-in-a-dangerous-world-html> (“we can unite society behind a simple argument that economic security is national security”). See also Dep’t for Bus. & Trade, National Security and Investment Act 2021: Statement for the Purposes of Section 3 (May 21, 2024), <https://www.gov.uk/government/publications/national-security-and-investment-statement-about-exercise-of-the-call-in-power/national-security-and-investment-act-2021-statement-for-the-purposes-of-section-3--2> (framing the regime as protecting the United Kingdom’s national security, including its economic resilience and supply chain integrity).

<sup>14</sup> Casto González-Páramo Rodríguez & Raquel Fernandez, *FDI — Spanish Government Blocks Takeover Bid For Railway Equipment Manufacturer By a EU Investor*, HOGAN LOVELLS (Sept. 23, 2024), <https://www.hoganlovells.com/en/publications/fdi-the-spanish-government-refuses-to-authorise-a-takeover-bid-for-railway-equipment-manufacturer-by-a-eu-investor>; Jose Gimenez, *Spain Issues First Public Veto Under The FI Rules Introduced In 2020*, LINKLATERS (Oct. 29, 2024), <https://www.linklaters.com/insights/blogs/foreigninvestmentlinks/2024/october/spain-issues-first-public-veto-under-the-fi-rules-introduced-in-2020>.

<sup>15</sup> FTDI Holding Ltd v Secretary of State [2025] EWHC (Admin) 1922 [133] (Eng.).

Secretary of State had reasons internally, even if they had not been disclosed in the Final Order itself.<sup>16</sup>

13. Hungary’s veto of VIG’s acquisition of AEGON Hungary was accompanied by no substantive justification whatsoever, only a bare assertion that the transaction “violates the national security interest of Hungary.”<sup>17</sup> This type of classified reasoning is antithetical to the transparency on which competition enforcement, and more specifically, merger control processes depend, and it structurally undermines the possibility of meaningful judicial review.

### 2.3. Intelligence and Defence Establishments

14. National security assessments involve intelligence and defence establishments that operate under fundamentally different legal frameworks, different standards of evidence, and different accountability structures than competition authorities or economic regulators. This contrasts with the probabilistic, evidence based, welfare maximizing approach that characterizes competition enforcement. When these institutions’ assessments feed into or override competition proceedings, they displace the evidentiary standards and analytical discipline of competition enforcement. As Kokkoris observes in his comparative study of U.S. sectoral regulators, the result of overlapping agency reviews, each applying different standards, is that transactions “can lead to contradictory outcomes, resulting in ineffective competitive dynamics in the sectoral market.”<sup>18</sup>

### 2.4. Geopolitical and State Actor Dynamics

15. National security concerns frequently involve geopolitical and state actor dynamics. These include SOE acquirers, sovereign wealth funds, and government-linked entities that raise questions about state direction, coordination, and strategic intent going well beyond the market-based analysis that competition authorities traditionally conduct. BIAC’s 2018 submission documented the challenges: should SOE revenues be included in merger thresholds? Can a government-linked acquirer’s commercial independence be assessed using standard competition tools?<sup>19</sup> These challenges are now compounding. A non-EU acquirer pursuing a transaction in the EU may face three parallel screening regimes: the EU Merger Regulation, one or more Member State FDI screening mechanisms, and the Foreign Subsidies Regulation, each applying different criteria and

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<sup>16</sup> Fiona Garside & Eleanor Popplewell, *High Court Rejects Second Judicial Review Challenge of NSIA Final Order*, ASHURST (Aug. 12, 2025), <https://www.ashurst.com/en/insights/high-court-rejects-second-judicial-review-challenge-of-nsia-final-order/>.

<sup>17</sup> Case M.10494 — VIG/AEGON CEE, Comm’n Decision (Summary), 2024 O.J. (C/2024/578), ¶10.

<sup>18</sup> Ioannis Kokkoris, *Public Interest Considerations in US Merger Control: An Assessment of National Security and Sectoral Regulators* (OUP, 2024); *see also* review in Emma Bursztejn, *Public Interest Considerations in US Merger Control: An Assessment of National Security and Sectoral Regulators*, (Nov. 1, 2024), Concurrences No. 4-2024, Art. N° 121318, pp. 277-278 (noting Kokkoris finds “a lack of transparency and predictability results from the U.S. government’s overly protective approach to foreign acquisitions”).

<sup>19</sup> BIAC SOE 2018, *supra* note 2, ¶¶ 8–16; *see* Case COMP/M.7850 – EDF/CGN/NNB Group, Comm’n Decision (Mar. 10, 2016), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016M7850> (Commission assessing whether Chinese SOE CGN was independent from Central SASAC).

operated by different authorities.<sup>20</sup> National security screening adds a further layer: even where a competition authority concludes a transaction poses no competitive harm, security agencies may conclude that state-linked ownership creates espionage, sabotage, supply chain dependency, or technology transfer risks that have nothing to do with market structure. These are real concerns that generally require different expertise, different evidence, and different institutional accountability than is employed in competition analysis.

## 2.5. Political Weight of “Security”

16. There is the political weight of “security.” A government can defend blocking a merger on employment grounds and face political pushback from efficiency advocates. But characterizing a decision as necessary for “national security” invokes sovereign prerogative and patriotic sentiment in ways that make political or judicial challenge extremely difficult. The UK courts’ treatment of NSIA challenges illustrates this asymmetry. The High Court has held that national security assessment is a “predictive exercise about future risk” warranting “a high degree of judicial restraint,” and that it lacks the “institutional competence” to assess the severity of security risks.<sup>21</sup> As Reader observes, this creates an incentive for governments to characterize protectionist or industrial policy motivations as security concerns.<sup>22</sup> Goldstein similarly concludes that national security reviews have “often become politicized,” resulting in uncertainty for businesses and harm to diplomatic relations.<sup>23</sup> The Secretariat’s Background Note recognizes the same concern, noting that national security claims may be invoked opportunistically or strategically in competition enforcement, including where they overlap with or obscure other policy objectives such as preferences for domestic ownership, national champions or local consolidation.<sup>24</sup>

17. These five characteristics, taken together, make national security qualitatively more incompatible with competition enforcement than other public interest considerations. They also explain why the general principle of institutional separation is even more important in this context, and why additional safeguards specific to the security domain are needed.

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<sup>20</sup> See Enrico Zonta, *From Economic Security to Legal Uncertainty: Exploring the Impact of the FDI Screening Regulation and Foreign Subsidies Regulation on Mergers and Acquisitions in the EU*, 16(3) J. Eur. Competition L. & Prac. 167 (2025).

<sup>21</sup> LetterOne/Upp [2024] EWHC (Admin), 2963 [101], [199]; FTDI Holding Ltd v Secretary of State [2025] EWHC (Admin) 1922 (Eng.). See *UK NSIA Regime—2024–2025 Trends*, ADDLESHAW GODDARD (Oct. 28, 2025), <https://www.addleshawgoddard.com/en/insights/insights-briefings/2025/competition/uk-nsia-regime-2024-2025-trends/> (“Judicial review of NSIA final orders: a steep hill to climb”).

<sup>22</sup> David Reader, *Extending ‘National Security’ in Merger Control and Investment: A Good Deal for the UK?*, 14(1) COMPETITION L. INT’L 35 (2018).

<sup>23</sup> Kevin B. Goldstein, *Reviewing Cross Border Mergers and Acquisitions for Competition and National Security*, 3 Tsinghua China L. Rev. 215, 240 (2011).

<sup>24</sup> OECD, *National Security Considerations in Competition Enforcement*, OECD Roundtables on Competition Policy Papers No. 336, at 15 (June 2, 2026), [https://www.oecd.org/content/dam/oecd/en/publications/reports/2026/06/national-security-considerations-in-competition-enforcement\\_06204c23/1330d48b-en.pdf](https://www.oecd.org/content/dam/oecd/en/publications/reports/2026/06/national-security-considerations-in-competition-enforcement_06204c23/1330d48b-en.pdf) [hereinafter Secretariat Background Note].

### 3. National Security in M&A: Impacts on Business

18. National security considerations affect virtually every stage of the M&A process: transaction structuring, regulatory risk assessment, deal timetables, remedies, and post-closing obligations. Whether the security review is conducted by a dedicated screening body, a sectoral regulator, or a competition authority that has absorbed security inputs, the business impact is the same. The distinctive characteristics identified in this submission—including definitional elasticity, classified reasoning, intelligence agency involvement, geopolitical dynamics, and the political weight of security claims—generate specific and identifiable risks for deal participants that go well beyond those associated with other public interest interventions. The cases that follow illustrate these risks across a range of jurisdictions and transaction types.

19. The common thread across these cases is a loss of predictability at multiple stages of the transaction: what will trigger review, how long review will take, what substantive standards will apply, and what remedial or compensatory consequences may attach.

#### 3.1. Politics and Security Determinations: U.S. Steel/Nippon Steel

20. In December 2023, Nippon Steel, Japan’s largest steelmaker, announced its \$14.9 billion acquisition of U.S. Steel. Ninety eight percent of U.S. Steel shareholders voted in favour. The transaction received clearance from regulatory authorities in Mexico, Serbia, Slovakia, Turkey, the United Kingdom, and the European Union.<sup>25</sup> On January 3, 2025, after a CFIUS review that produced a split recommendation and no consensus, President Biden prohibited the transaction, citing the need for a “strong domestically owned and operated steel industry.”<sup>26</sup> Nippon Steel characterized the decision as reflecting “a clear violation of due process,” alleging the CFIUS process was “deeply corrupted by politics.”<sup>27</sup>

21. What followed underscored the problem. Three months later, President Trump ordered CFIUS to conduct a de novo review of the same transaction. On June 13, 2025, Trump reversed Biden’s prohibition and authorized the acquisition subject to a National

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<sup>25</sup> Press Release, Nippon Steel Corp., U.S. Steel and Nippon Steel Corporation Announce Receipt of All Non-U.S. Regulatory Approvals (May 30, 2024), [https://www.nipponsteel.com/en/news/20240530\\_100.html](https://www.nipponsteel.com/en/news/20240530_100.html).

<sup>26</sup> Statement of President Joe Biden on Decision to Block Nippon Steel's Acquisition of U.S. Steel (Jan. 3, 2025), <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2025/01/03/statement-from-president-joe-biden-13/>.

<sup>27</sup> Press Release, Nippon Steel Corp. & U.S. Steel Corp., Nippon Steel Corporation and U.S. Steel Condemn U.S. Government's Unlawful Decision to Block Proposed Acquisition of U.S. Steel, (Jan. 3, 2025), [https://www.nipponsteel.com/en/newsroom/news/2025/20250103\\_100.html](https://www.nipponsteel.com/en/newsroom/news/2025/20250103_100.html) (“the process was manipulated to advance President Biden’s political agenda”). The statement noted that “CFIUS did not give due consideration to a single mitigation proposal” despite four national security agreements offered over ten months. *Id.* On January 6, 2025, Nippon Steel and U.S. Steel filed a petition in the U.S. Court of Appeals for the District of Columbia Circuit seeking to set aside the CFIUS review process and the presidential order on due process and statutory grounds, and a separate complaint in the Western District of Pennsylvania against Cleveland-Cliffs, its chief executive, and the United Steelworkers president alleging coordinated anticompetitive conduct designed to prevent the transaction. Press Release, Nippon Steel Corp. & U.S. Steel Corp., Nippon Steel and U.S. Steel File Multiple Lawsuits in Response to Wrongful Interference with the Proposed Acquisition of U.S. Steel, (Jan. 6, 2025), <https://investors.ussteel.com/news-events/news-releases/detail/709/nippon-steel-and-u-s-steel-file-multiple-lawsuits-in>.

Security Agreement requiring Nippon Steel to make \$14 billion in new U.S. investment<sup>28</sup> and, for the first time in CFIUS history, issue a “golden share” giving the U.S. government veto authority over certain corporate decisions including board appointments and facility closures.<sup>29</sup> The acquisition closed on June 18, 2025.<sup>30</sup>

22. This case illustrates all the concerns identified in this submission. The “security” concern was indistinguishable from industrial policy. The block was widely attributed to election year politics and union endorsement dynamics. No publicly available credible security analysis explained why ownership by a company from a close U.S. ally posed greater risk than the status quo. And the “golden share” precedent, as Weil Gotshal observes, “could increase investor uncertainty by establishing new precedent involving perpetual” state oversight.<sup>31</sup>

### 3.2. Timing Failure from Parallel Reviews

23. In GlobalWafers/Siltronic (Germany, 2022), the Bundeskartellamt cleared the transaction on competition grounds, but the Federal Ministry for Economic Affairs did not complete its separate FDI and security review within the deal’s deadline.<sup>32</sup> The transaction collapsed, not because of any publicly disclosed competition or security concern, but because of process failure in the parallel review.<sup>33</sup> For investors and counterparties, the lesson is that deal certainty cannot be secured through competition clearance alone when a separate security process operates on its own calendar and without procedural alignment.

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<sup>28</sup> Executive Order of June 13, 2025, 90 Fed. Reg. 26185 (June 20, 2025).

<sup>29</sup> YONG W. KWON, CONG. RSCH. SERV., R48872, NIPPON STEEL’S ACQUISITION OF U.S. STEEL: POTENTIAL IMPLICATIONS FOR THE INDUSTRY 1 (2026), <https://crsreports.congress.gov/product/pdf/R/R48872>.

<sup>30</sup> Press Release, Nippon Steel Corp., Nippon Steel Corporation and U.S. Steel Finalize Historic Partnership, (June 18, 2025), [https://www.nipponsteel.com/en/newsroom/news/2025/pdf/20250614\\_100.pdf](https://www.nipponsteel.com/en/newsroom/news/2025/pdf/20250614_100.pdf). See also Shawn Cooley, Christina Carone & Sisi Liu, *Presidential Action Regarding Nippon Steel Establishes Two New Significant CFIUS Precedents*, WEIL GOTSHAL 3 (July 17, 2025), <https://www.weil.com/-/media/files/pdfs/2025/july/presidential-action-regarding-nippon-steel-establishes-two-new-significant-cfius-precedents.pdf?rev=8c263ff488e048f6ad7d84e1396b3c2f> (“two Presidents can view the same transaction facts and reach materially different conclusions with respect to whether a prohibition is warranted”).

<sup>31</sup> Cooley et al, *supra* note 30, at 3.

<sup>32</sup> Press Release, GlobalWafers Co., Siltronic Transaction Not Approved by German Government Before Long Stop Date, (Feb. 1, 2022), [https://www.sas-globalwafers.com/en/gwc\\_news\\_en\\_20220121/](https://www.sas-globalwafers.com/en/gwc_news_en_20220121/); Press Release, Siltronic AG, Ad Hoc Announcement, Public Tender Offer by GlobalWafers Will Not Be Completed as Offer Conditions Have Not Been Fulfilled Within the Applicable Deadline (Feb. 1, 2022), <https://www.siltronic.com/en/investors/financial-releases/ad-hoc-reports/siltronic-ag-public-tender-offer-by-globalwafers-will-not-be-completed-as-offer-conditions-have-not-been-fulfilled-within-the-applicable-deadline-2191243-1643673381.html>.

<sup>33</sup> Sebastian Faust, Stefan Kirwitzke & Philipp Reckers, *German FDI Regulator Spoils GlobalWafers’ €4.35 Billion Siltronic Deal*, HOGAN LOVELLS (Feb. 8, 2022), <https://www.hoganlovells.com/en/publications/german-fdi-regulator-spoils-globalwafers-435-billion-siltronic-deal>.

### 3.3. Unjustified Vetoes Enabled by Classified Reasoning

24. In VIG/AEGON (Hungary, 2021), Hungary blocked Vienna Insurance Group’s acquisition of AEGON’s Hungarian subsidiaries, providing no justification beyond a bare assertion that the transaction violated Hungary’s national security interest.<sup>34</sup> The European Commission found that Hungary had not demonstrated why an Austrian insurer posed a greater security risk than the Dutch incumbent owner. The Commission ordered the veto withdrawn and found violations of Article 21 EUMR’s Communication and Standstill Obligations together with failures of proportionality and nondiscrimination.<sup>35</sup> This case demonstrates a risk that is distinctive to national security: the bare invocation of “security” without substantiation. The Commission was able to intervene because the assertion was naked, and the Article 21 framework provided a procedural hook. Where employment or regional development grounds are invoked, those claims are inherently more amenable to evidentiary scrutiny, and review is correspondingly more straightforward. National security, by contrast, resists such scrutiny, and in jurisdictions without an equivalent corrective mechanism the invocation of security concerns may not be tested at all.

### 3.4. National Intervention Overriding Supranational Competition Clearance

25. In E.ON/Endesa (Spain, 2006 to 2008), the Commission approved E.ON’s bid under the EUMR, but Spain’s energy regulator unilaterally imposed conditions on the cleared concentration.<sup>36</sup> Spain argued the measures were necessary for energy supply security but failed to communicate the specific national interests at stake. The ECJ confirmed Spain’s breach and ruled that Member States cannot impose unjustified restrictions that undermine the Single Market, while construing narrowly the conditions under which national security measures can be justified.<sup>37</sup> The “energy security” justification illustrates the elasticity problem: energy supply is a legitimate concern, but invoking it to override a cleared merger without specifying the actual security interest at stake is indistinguishable from protectionism.

### 3.5. IntraEU Security Vetoes Against Allied Investors

26. In Ganz-Mavag/Talgo (Spain, 2024), Spain vetoed a €600 million bid by a Hungarian consortium for its leading railway manufacturer.<sup>38</sup> This was the first prohibition under Spain’s 2020 FDI screening legislation, and notably a veto against a fellow EU Member State investor. Spain justified the decision on grounds that Talgo’s variable gauge technology was critical to economic security, and that Hungarian and Russian commercial links posed a risk of technology transfer. The decision’s reasoning is classified under

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<sup>34</sup> Case M.10494 — VIG/AEGON CEE, Comm’n Decision (Summary), 2024 O.J. (C/2024/578), ¶ 10.

<sup>35</sup> *Id.* ¶¶ 15–16.

<sup>36</sup> Press Release, Eur. Comm’n, Mergers: Commission Rules Against Spanish Energy Regulator’s Measures Concerning E.ON’s Bid for Endesa (Sept. 26, 2006), [http://europa.eu/rapid/press-release\\_IP-06-1265\\_en.htm](http://europa.eu/rapid/press-release_IP-06-1265_en.htm).

<sup>37</sup> Press Release, Eur. Comm’n, Spain Has Infringed Community Law by Not Withdrawing the Conditions for E.ON’s Acquisition of Endesa (Mar. 6, 2008), [https://ec.europa.eu/commission/presscorner/detail/en/cje\\_08\\_13](https://ec.europa.eu/commission/presscorner/detail/en/cje_08_13).

<sup>38</sup> *See* Gimenez, *supra* note 14; González-Páramo, *supra* note 14.

Spanish law.<sup>39</sup> This case is significant because it demonstrates national security being invoked against an investor from within a common market. Classified reasoning and sovereign prerogative enabled a degree of discrimination that may be harder to sustain under transparent public interest review.

### 3.6. Forced Divestiture and Inadequate Compensation

27. The UK’s NSIA regime has generated two precedent-setting judicial reviews of forced divestiture orders. In *LetterOne/Upp*, an investment vehicle led by sanctioned Russian nationals was required to divest its shareholding in a UK fibre broadband provider.<sup>40</sup> The November 2025 Court of Appeal judgment established that investors ordered to divest under the NSIA are not automatically entitled to fair market value compensation, holding that “the important public interest purposes which lie behind the scheme of the NSIA” must be weighed against the property rights of the investor.<sup>41</sup>

28. In *FTDI/Future Technology Devices International*, Chinese funded investors were ordered to unwind their acquisition of a UK semiconductor company. The High Court rejected the challenge despite finding the ISU’s stated reasons “largely formulaic,” because the Secretary of State was found to have had internal reasons, even if not shared with the parties.<sup>42</sup> These cases confirm that national security divestiture operates under fundamentally different standards of accountability than competition enforcement remedies. These examples illustrate how national security processes operated with less transparency, impacted the level of compensation, and reduced judicial scrutiny.

### 3.7. SOE and State Actor Transactions

29. Transactions involving state-owned enterprises and sovereign wealth funds compound these risks. Security screening adds a further layer of uncertainty on top of the already complex procedural and substantive challenges BIAC documented in its 2018 submission.<sup>43</sup> For these transactions, the geopolitical dimension of national security is a genuine concern, but one that requires intelligence and foreign policy expertise, not competition economics. The February 2025 America First Investment Policy’s bifurcated approach offers a revealing example: the policy fast-tracks allied investors through a “Known Investor Program” while intensifying scrutiny of Chinese investment.<sup>44</sup> This

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<sup>39</sup> González-Páramo, *supra* note 14.

<sup>40</sup> Acquisition of Upp Corporation Ltd by L1T FM Holdings UK Ltd: Notice of Final Order (Dec. 19, 2022), <https://www.gov.uk/government/publications/acquisition-of-upp-corporation-ltd-by-l1t-fm-holdings-uk-ltd-notice-of-final-order/acquisition-of-upp-corporation-ltd-by-l1t-fm-holdings-uk-ltd-notice-of-final-order>.

<sup>41</sup> *R (L1T FM Holdings UK Limited) v Chancellor of the Duchy of Lancaster* [2025] EWCA (Civ) 1528 [92].

<sup>42</sup> *FTDI Holding Ltd v Secretary of State* [2025] EWHC (Admin) 1922 [133] (Eng.). ADDLESHAW GODDARD, *supra* note 21 (noting that the ISU’s “wide discretion and ability to withhold sensitive information under the regime makes it incredibly difficult to mount a successful challenge to ISU decisions”).

<sup>43</sup> BIAC SOE 2018, *supra* note 2, ¶¶ 8–16; see Case COMP/M.7850 – EDF/CGN/NNB Group, Comm’n Decision (Mar. 10, 2016), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016M7850>.

<sup>44</sup> Press Release, U.S. Treasury, Treasury Issues Request for Information on CFIUS Known Investor Program and Streamlining the Foreign Investment Review Process, (Feb. 6, 2026),

recognizes the distinction in principle but also illustrates how security screening can become an instrument of geopolitical alignment, as opposed to an objective assessment of transaction-specific risk.

### 3.8. Security as a Factor in Clearance

30. National security does not operate as a basis only for blocking transactions. In the TCA’s Mikes Mikrodalga decision, security was a positive factor supporting clearance of an acquisition in the electronic warfare systems market.<sup>45</sup> The Sasa Polyester case presented the inverse: a dissenting TCA member argued that clearance should have been refused because foreign ownership could create dependency in a strategically important market.<sup>46</sup> These cases illustrate that without clear criteria and institutional allocation, security considerations inject unpredictability regardless of whether they favour or oppose clearance.

31. The cumulative impact of all of these cases is the inherent danger of significantly chilling cross-border investment. Businesses cannot reliably structure transactions, set deadlines, or assess regulatory risk when security reviews operate with classified reasoning, open ended timelines, elastic definitions, and no published criteria. The UK’s NSIA regime is now characterized as “one of the world’s most active investment scrutiny regimes,” with UK investors themselves accounting for the largest share of call-ins (48% in 2024-25).<sup>47</sup>

### 3.9. Security Considerations Within Competition Agency Analysis

32. The Secretariat’s Background Note recognizes that gaps in available instruments may create pressure on competition authorities to absorb concerns that sit at the edge of, or outside, competition analysis.<sup>48</sup> The cases discussed below illustrate that dynamic in practice. The Turkish cases discussed above illustrate security considerations entering competition agency analysis in an ad hoc and unpredictable manner. Recent U.S. experience demonstrates similar risks. In January 2022, the FTC challenged Lockheed Martin’s \$4.4 billion vertical acquisition of Aerojet Rocketdyne, the last independent U.S. supplier of missile propulsion systems.<sup>49</sup> The FTC framed the competitive harm in explicitly security-laden terms, alleging the merger would “further consolidate multiple

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<https://home.treasury.gov/news/press-releases/sb0389>. See also America First Investment Policy, *supra* note 6, § 2 (f) (directing the use of CFIUS and other legal instruments to restrict investments by foreign adversaries, with particular emphasis on the People’s Republic of China, in identified strategic sectors).

<sup>45</sup> TCA decision dated 11 October 2002, No. 02-62/774-316; discussed in Stakheyeva et al., *supra* note 1, at 216.

<sup>46</sup> TCA decision dated 8 January 2015, No. 15-02/24-10; discussed in Stakheyeva et al., *supra* note 1, at 215–216.

<sup>47</sup> ADDLESHAW GODDARD, *supra* note 21; NATIONAL SECURITY AND INVESTMENT ACT 2021: ANNUAL REPORT 2024-25 ¶ 22 (July 22, 2025), <https://www.gov.uk/government/publications/national-security-and-investment-act-2021-annual-report-2024-25/national-security-and-investment-act-2021-annual-report-2024-25-html>.

<sup>48</sup> Secretariat Background Note, *supra* note 24, at 14-15.

<sup>49</sup> Press Release, Fed. Trade Comm’n, FTC Sues to Block Lockheed Martin Corporation’s \$4.4 Billion Vertical Acquisition of Aerojet Rocketdyne Holdings Inc. (Jan. 25, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/01/ftc-sues-block-lockheed-martin-corporations-44-billion-vertical-acquisition-aerojet-rocketdyne>.

markets critical to national security and defense.”<sup>50</sup> The FTC collaborated closely with the Department of Defense during its investigation, and DoD’s assessment was a direct input to the competition analysis. The transaction was abandoned in February 2022.

33. What happened next is revealing. When L3Harris proposed acquiring the same company in late 2022, the FTC cleared the \$4.7 billion transaction in July 2023.<sup>51</sup> The competitive structure was substantially similar: the same target, the same market concentration, the same concerns about independent supply. But the security policy environment had changed. DoD reportedly supported the later deal on the ground that consolidation would increase missile production capacity needed to replenish stockpiles drawn down in Ukraine.<sup>52</sup> The Aerojet Rocketdyne sequence thus mirrors the U.S. Steel/Nippon Steel reversal, but with a critical difference: here, the inconsistency occurred within the competition authority itself, driven by shifting security policy inputs.<sup>53</sup> This illustrates precisely the risk that institutional separation and appropriate safeguards applying to coordination between agencies are designed to prevent. When a competition authority’s analysis is conditioned on security assessments from defence agencies, its outcomes become dependent on political circumstances, independent of market structure, and competitive analysis.<sup>54</sup>

#### 4. The Case for Institutional Separation is Strongest Here

34. The Secretariat’s Background Note for this Roundtable provides analytical support for this position. The Note recognizes that where arguments rest on geopolitical assessments, intelligence inputs, preferences over domestic control, or distinctions between firms based on nationality, ownership or foreign influence, they fall outside the analytical

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<sup>50</sup> *Id.*; Press Release, Fed. Trade Comm’n, Statement Regarding the Termination of Lockheed Martin Corporation’s Attempted Acquisition of Aerojet Rocketdyne Holdings Inc. (Feb. 15, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/02/statement-regarding-termination-lockheed-martin-corporations-attempted-acquisition-aerojet>. The FTC stated the deal would harm competition “for programs that are critical to national security.” *Id.*

<sup>51</sup> Press Release, L3Harris Techs. & Aerojet Rocketdyne Holdings, Inc., L3Harris to Acquire Aerojet Rocketdyne (Dec. 18, 2022), <https://investors.l3harris.com/news/news-details/2022/L3Harris-to-Acquire-Aerojet-Rocketdyne-12-18-2022/default.aspx>; Press Release, L3Harris Techs., L3Harris Completes Aerojet Rocketdyne Acquisition (July 28, 2023), <https://www.l3harris.com/newsroom/press-release/2023/07/l3harris-completes-aerojet-rocketdyne-acquisition>.

<sup>52</sup> See Austin Ahlman, *After Blocking Lockheed Martin Acquisition, FTC Allows Another Defense Firm to Close the Deal*, THE INTERCEPT, (Aug. 31, 2023), <https://theintercept.com/2023/08/31/ftc-defense-mergers-lockheed-l3harris/> (noting that DoD’s support for the L3Harris transaction, in contrast to its posture on Lockheed, was reportedly driven by the need to increase missile production capacity in the context of Ukraine stockpile replenishment). The inconsistency between the two outcomes illustrates how security policy inputs can produce divergent competition results on substantially similar facts.

<sup>53</sup> DoD was effectively the monopsony customer for the relevant systems, and customer views ordinarily carry significant evidentiary weight in merger analysis. A difficulty here is that DoD’s position changed based on evolving operational and geopolitical judgments, in particular the Ukraine-related need to replenish stockpiles.

<sup>54</sup> Both Lockheed Martin and L3Harris are U.S. companies, and the Aerojet Rocketdyne sequence is therefore not a foreign ownership case. This example shows that shifting security policy inputs, on their own, can produce inconsistent competition outcomes.

reach of competition law.<sup>55</sup> The Note adds that competition authorities are not generally the bodies best placed to balance such considerations or to prioritize among competing national security objectives.<sup>56</sup> The Note reaches the same conclusion in the unilateral conduct context.<sup>57</sup> The recommendations in this submission are the institutional and procedural consequence of those analytical premises: if certain concerns fall outside the analytical reach of competition law, the institutional question becomes which body should be responsible for addressing them and what procedural safeguards must govern that assessment.

35. The cases set out in the preceding section show how national security considerations can impact the M&A process and create risks for competition enforcement that other public considerations do not. If the general principle is that non-competition considerations should be handled by non-competition institutions, the case is strongest for national security, precisely because of the characteristics identified above. Kokkoris’s comparative study of the U.S., EU, UK, and China demonstrates that where security review and competition review are conducted by different agencies applying different standards, contradictory outcomes are a systemic risk. But the answer, he rightly concludes, is better coordination among the agencies, not consolidation of their functions into a single agency.<sup>58</sup>

36. The jurisdictions with the most mature approaches maintain clear separation. The United Kingdom created the Investment Security Unit within the Cabinet Office under the National Security and Investment Act 2021, entirely separate from the CMA. The United States maintains CFIUS as a distinct interagency process, separate from DOJ and FTC antitrust enforcement. Germany’s ministerial authorization procedure under the Foreign Trade and Payments Ordinance insulates the Bundeskartellamt from political pressure by providing a separate channel.<sup>59</sup> The EU Merger Regulation itself reflects this architecture: Article 21(4) EUMR preserves the Commission’s exclusive competition jurisdiction while permitting Member State intervention on recognized interests including public security, subject to proportionality, nondiscrimination, and prior communication to the Commission for unrecognized interests.<sup>60</sup> The Draghi Report recommends that security and resilience assessments be carried out by a separate body “outside the Competition unit,” recognizing that these assessments require expertise that falls outside the competition unit’s mandate.<sup>61</sup>

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<sup>55</sup> Secretariat Background Note, *supra* note 24, at 14.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 28.

<sup>58</sup> IOANNIS KOKKORIS, MERGER CONTROL, NATIONAL SECURITY, AND FOREIGN DIRECT INVESTMENT SCREENING: A COMPARATIVE PERSPECTIVE (OUP, 2024); *see also* Joséphine Thorson, Merger Control, National Security, and Foreign Direct Investment Screening: A Comparative Perspective (Jan. 1, 2025), Concurrences N° 1-2025, Art. N° 122723, <https://www.concurrences.com/en/review/issues/no-1-2025/books/merger-control-national-security-and-foreign-direct-investment-screening-a-122723> (“a most interesting read to anyone interested in the phenomenon of how systems of merger control have increasingly become a legal tool to which security considerations have been attached”).

<sup>59</sup> Stakheyeva et al., *supra* note 1, at 213.

<sup>60</sup> Council Regulation 139/2004, 2004 O.J. (L 24) 1 art. 21(4).

<sup>61</sup> THE FUTURE OF EUROPEAN COMPETITIVENESS PART B | IN-DEPTH ANALYSIS AND RECOMMENDATIONS 300 (Sept. 2024), <https://commission.europa.eu/document/download/ec1409c1-d4b4-4882-8bdd->

Yet the Report nonetheless recommends that the resulting security assessment “be used as an input for DG COMP as an additional public interest criterion.”<sup>62</sup> Once security becomes a formal input to competition analysis, even through an external body, maintaining the boundary between the two functions becomes increasingly difficult.

37. The risks of combining competition and security mandates in a single authority are acute when the security dimension involves classified intelligence, geopolitical assessments, and sovereign prerogative. A competition authority that receives classified security briefings and acts on them in merger proceedings can no longer issue fully reasoned, publicly reviewable decisions. Once reasoned and publicly reviewable decisions give way to security-informed conclusions that the competition authority cannot fully justify, the predictability that gives modern merger control much of its business value is degraded. A competition authority that defers to defence ministry assessments on whether a transaction threatens security is no longer making independent, evidence-based decisions. A competition authority perceived by foreign counterparts as an instrument of national security policy will find international cooperation, including the exchange of confidential business information, far more difficult.

38. The principle of separation has been articulated forcefully even within competition agencies themselves. In clearing the Boeing/McDonnell Douglas merger in 1997, FTC Chairman Pitofsky stated that the Commission does not have “the discretion to authorize anticompetitive but ‘good’ mergers because they may be thought to advance the United States’ trade interests,” explicitly denying that the “national champion” rationale enabled clearance.<sup>63</sup> That the European Commission, reviewing the same transaction, modified its proposed remedies after the U.S. government raised concerns about the impact on U.S. national defence interests illustrates the complementary risk: even where a competition authority maintains its analytical independence, security considerations raised by other governments can shape remedial outcomes. Both outcomes reinforce the case for keeping the two functions institutionally distinct.<sup>64</sup>

39. The Turkish Competition Authority’s experience illustrates both the value and the limits of strict separation. In the UN RO RO/KKR decision, the TCA stated it could not consider national security concerns raised by third parties, including that the target’s vessels were a logistical asset in wartime and that port control by foreign entities posed

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[3519f86bbb92\\_en?filename=The%20future%20of%20European%20competitiveness\\_%20In-depth%20analysis%20and%20recommendations\\_0.pdf](#).

<sup>62</sup> *Id.* Under Proposal 3 of the competition chapter, “Develop security and resilience criteria by expert authorities and include them in DG COMP assessments,” the Report proposes introducing a new “security and resiliency assessment” into DG COMP assessments in certain areas, carried out by a separate body “outside the Competition unit (e.g. by a Resiliency Assessment Body).” DG COMP would then use this assessment as an “additional public interest criterion” in its own assessment, mainly in areas including energy, security, defense, and space. *Id.* See also Fiona Scott Morton, *The Draghi Report and Competition Policy*, BRUEGEL, BRUEGEL (Sept. 11, 2024), <https://www.bruegel.org/first-glance/draghi-report-and-competition-policy> (noting Draghi “could have been clearer in laying out which factors can be handled through existing competition procedures and which by an outside body”).

<sup>63</sup> Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney in the Matter of The Boeing Company/McDonnell Douglas Corporation, FTC File No. 971-0051 (July 1, 1997), <https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/statement-chairman-robert-pitofsky-commissioners-janet-d-steiger-roscoe-b-starek-iii-christine>.

<sup>64</sup> Case No IV/M.877 — Boeing/McDonnell Douglas, Comm’n Decision, 1997 (O.J. (L 336) 16.

security risks.<sup>65</sup> Article 20 of Turkish Competition Law provides that no authority may influence the TCA’s decisions. This preserves the authority’s credibility and analytical independence. But it also means that legitimate security concerns go unaddressed if no separate mechanism exists to evaluate them. The lesson is not that competition authorities should absorb the security function, but that governments must build dedicated security review mechanisms instead of allowing security questions to be absorbed into competition proceedings.

40. The Secretariat’s analytical framework, which asks whether a given concern can be expressed as a competition-relevant effect, presupposes certain procedural protections: transparent reasoning, evidentiary discipline, reasoned decisions, and judicial review. Where security inputs flow into competition proceedings through classified reasoning that the parties and reviewing courts cannot examine, the competition-relevant effects test cannot be applied in any meaningful way. The procedural safeguards set out below are therefore not additional refinements; they are the conditions precedent on which the Secretariat’s framework rests.

41. Where jurisdictions have not established separate mechanisms, or where overlap is unavoidable, minimum safeguards must include clear legislative specification of the security grounds that may be considered; defined and bounded criteria that constrain administrative discretion; mandatory publication of reasoned decisions to the greatest extent consistent with genuine security needs; and independent judicial review of the proportionality and necessity of any security-based intervention.

## 5. National Security in Coordinated and Unilateral Conduct

42. While the merger context generates the most visible cases, national security considerations also affect coordinated and unilateral conduct enforcement in ways that reflect the distinctive characteristics identified in this submission.

### 5.1. Coordinated Conduct

43. Enforcement agencies should account for the characteristics of each industrial sector, and this applies equally to sectors where national security considerations are directly relevant such as the defence sector. Accordingly, the European Commission’s recent Defence Readiness Omnibus Communication confirms that antitrust “should not be an impediment to urgent ramping up of the sector” and that the Commission will “take due account of the specificities of the defence industry” (including cooperation necessary to scale production or ensure supply chain resilience) in its antitrust and merger control enforcement.<sup>66</sup> This calibration is understandable, but it remains important that the political weight of such security claims do not jeopardize the competition analysis.

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<sup>65</sup> TCA decision dated 29 November 2007, No. 07-88/1113-435; *see also* Stakheyeva et al., *supra* note 1, at 216.

<sup>66</sup> Communication from the Commission to the European Parliament and the Council, Defence Readiness Omnibus, COM(2025) 820 final (June 17, 2025), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52025DC0820>; *see also* Joint Communication from the Commission and the High Representative of the Union for Foreign Affairs and Security Policy to the European Parliament, the European Council and the Council, Preserving Peace — Defence Readiness Roadmap 2030, JOIN(2025) 27 final, at 10 (Oct. 16, 2025), <https://defence-industry->

44. Any accommodations must be limited in duration, clearly defined in scope, subject to periodic review, and based on a demonstrated nexus between the cooperation and a specific, identified security need, not a general invocation of strategic importance. The COVID era cooperation frameworks provide a useful precedent: defined conditions, sunset provisions, and ongoing monitoring.<sup>67</sup> Blanket security-based exemptions could lead to abuse, create permanent distortions, or lead to discrimination between parties with differing national origins. In addition, it would diminish predictability of outcome and prevent a level playing field for all competitors.

## 5.2. Unilateral Conduct

45. Similarly, enforcement against unilateral conduct that accounts for national security may impede the predictability of outcomes and undermine the attainment of objectively verifiable outcomes. It may also lead to discrimination and facilitate stricter enforcement against foreign firms under security pretexts. This type of discrimination is particularly difficult to challenge when the underlying reasoning is classified or contains national security terms. Security considerations should be addressed through separate instruments; they should not dilute the analytical standards applied in competition proceedings. These risks reinforce the case for addressing security considerations separately from competition reviews.

## 6. Competition Advocacy in the National Security Policy Process

46. The distinctive characteristics of national security create a particular risk that security-motivated interventions will be designed without any input from competition expertise. Defence ministries and intelligence agencies do not always naturally consider market structure, innovation incentives, or consumer welfare when designing security measures. Therefore, competition authorities should be proactive advocates.

47. As the definition of “strategic” sectors expands, the scope for security motivated intervention in markets grows. The EU’s December 2025 FDI trilogue agreement defines “hyper-critical” technologies to include AI with defence and space relevance, quantum technologies, and semiconductors.<sup>68</sup> Competition authorities are better positioned to articulate the costs of security interventions that reduce competition, raise barriers to entry, or protect incumbents from efficient rivals.

48. Competition authorities should apply the OECD Competitive Neutrality Recommendation to evaluate whether security-motivated policies create unjustified

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[space.ec.europa.eu/document/download/9db42c04-15c2-42e1-8364-60afb0073e68\\_en?filename=Joint-Communication%20\\_Defence-Readiness-Roadmap-2030.pdf](https://space.ec.europa.eu/document/download/9db42c04-15c2-42e1-8364-60afb0073e68_en?filename=Joint-Communication%20_Defence-Readiness-Roadmap-2030.pdf)

<sup>67</sup> Communication from the Commission, Temporary Framework for Assessing Antitrust Issues Related to Business Cooperation in Response to Situations of Urgency Stemming from the Current COVID-19 Outbreak, C(2020) 3200 final, 2020 O.J. (C 116 I) 7 (withdrawn 3 October 2022). See also ECN Joint Statement on Application of Competition Law During the Corona Crisis (Mar. 23, 2020), [https://competition-policy.ec.europa.eu/system/files/2021-03/202003\\_joint-statement\\_ecn\\_corona-crisis.pdf](https://competition-policy.ec.europa.eu/system/files/2021-03/202003_joint-statement_ecn_corona-crisis.pdf). Note, the fact that the Commission formally withdrew this framework in October 2022 once the crisis passed reinforces the need that provisions are time limited.

<sup>68</sup> Press Release, Eur. Council, *supra* note 3.

distortions.<sup>69</sup> They also should actively promote the four principles established by the OECD Guidelines for Recipient Country Investment Policies Relating to National Security: nondiscrimination, transparency and predictability, regulatory proportionality, and accountability.<sup>70</sup>

49. This advocacy role is particularly important in jurisdictions building new security screening mechanisms, including in the MENA and Gulf region, where the institutional architecture is not yet fixed and competition authorities can help shape frameworks that maintain clear boundaries from the outset.

## 7. Cross-Border Coordination: The Fragmentation Problem

50. Cross-border merger cooperation has advanced significantly through OECD and ICN efforts. But national security considerations can act as a barrier to convergence that has made competition cooperation possible. Security assessments are inherently national, politically driven, and shaped by bilateral geopolitical relationships that differ across jurisdictions. The result is a fragmented landscape that imposes substantial costs on cross-border transactions. The Secretariat’s analytical framework may become more difficult to apply in practice as jurisdictions increasingly diverge on what constitutes a national security concern. Convergence on bounded definitions, transparency, and judicial review is therefore a prerequisite for the Secretariat’s framework to operate consistently across jurisdictions, and a precondition for the kind of cross-border cooperation that has supported competition enforcement to date.

51. The fragmentation produces concrete and often irrational outcomes. The same transaction may be cleared unconditionally in one jurisdiction, cleared with conditions in a second, and blocked outright in a third, not because the competitive analysis differs but because each jurisdiction assesses the national security threat differently based on its own geopolitical relationships and threat perceptions. A transaction involving a state-linked acquirer from a country that one screening jurisdiction considers an ally and another considers a strategic rival will produce divergent security outcomes on identical market facts.<sup>71</sup> The problem extends beyond acquisitions by third parties. Several screening regimes now capture purely internal corporate restructurings, including intra-group transfers of shares or assets that involve no change of ultimate ownership. The UK’s NSIA regime, for example, has called in transactions that amount to internal reorganizations, imposing notification obligations and review timelines on structures that raise no competitive or security concern but happen to fall within the broad statutory definition of a qualifying acquisition.<sup>72</sup>

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<sup>69</sup> OECD, Recommendation of the Council on Competitive Neutrality, [OECD/LEGAL/0462](https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0462) (May 31, 2021), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0462>.

<sup>70</sup> [OECD/LEGAL/0372](https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0372), *supra* note 5.

<sup>71</sup> See Kokkoris, *supra* note 58 (demonstrating that where security review and competition review are conducted by different agencies applying different standards, contradictory outcomes are a systemic risk); Stakheyeva et al., *supra* note 1, at 212–213 (documenting the variation in screening approaches across EU Member States).

<sup>72</sup> Under published ISU guidance, intra-group reorganizations of a group structure above a “qualifying entity” are caught by the notification requirement, even where the ultimate owner remains the same. See Al Mangan, Mark Crane & Katherine Cousins, *Some Early Observations on the NSIA*, ADDLESHAW GODDARD, (Apr. 6, 2022). The UK Government acknowledged this problem in July 2025, announcing reforms to ensure that mandatory notifications are no longer required for

52. Within the EU alone, approaches vary markedly. Germany screens under the Foreign Trade and Payments Ordinance (with a proposed uniform Investment Screening Act under consideration). France restricts investments through its FDI control regime with the SISSE mandated to detect relevant transactions. Italy's Golden Power rules cover defence, energy, transport, and communications. Austria requires all merger notifications to be forwarded for FDI assessment. Spain's FDI screening even covers intra-EU transactions in sensitive sectors. Hungary has invoked FDI legislation to review intra-EU insurance acquisitions.<sup>73</sup> The December 2025 EU FDI Screening Regulation reform intends to address this fragmentation but might not alleviate the burden for companies. Instead, it may create additional complexities, as it mandates screening in all Member States, creates a minimum scope covering "hyper-critical" technologies and critical infrastructure, requires screening Member States to explain how they considered Commission opinions and other Member States' comments, and introduces a shared database and coordination mechanism for multi-country transactions.<sup>74</sup> This might lead to an harmonized approach within the EU, but it does not and cannot tackle the source of the divergence as it preserves screening decisions as the "exclusive responsibility" of the host Member State, meaning that a single EU dimension transaction will continue to face parallel EC competition review and potentially divergent Member State security assessments. The 86% unconditional clearance rate suggests most cases are nonproblematic, but the expanded mandatory scope will inevitably capture more transactions and create additional procedural burden.

53. Several principles should guide efforts to reduce fragmentation. Security reviews should operate within defined, published timelines coordinated with competition review schedules. The EU's FDI reform's requirement that parties to multi-country transactions "endeavour" to submit filings simultaneously is a step forward but falls short of mandatory coordination. The obligation to file simultaneously remains advisory, not binding.

54. Review criteria, assessment timelines, and at a minimum the existence and general basis of security concerns should be disclosed. The EU reform's requirement that screening Member States explain their reasoning when departing from Commission opinions is a meaningful advance in transparency. Classified reasoning should be the narrow exception, limited to genuinely sensitive intelligence, not a default that insulates discretionary decisions from scrutiny. The Ganz-Mavag/Talgo, VIG/AEGON, and FTDI cases all illustrate the consequences of opaqueness.

55. Competition and security authorities reviewing the same transaction should establish protocols for sharing relevant information, subject to party consent and appropriate safeguards for classified material. The OECD should develop guidance specific to the security and competition interface, building on the 2009 Recommendation on Investment Policies Relating to National Security and the Competitive Neutrality Recommendation. This guidance should address jurisdictional coordination, remedial

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certain internal reorganisations and the appointment of insolvency practitioners, recognizing that "internal reorganizations have generally proven to pose very low risk." Press Release, Cabinet Office, National Security Powers to Be Updated to Reduce the Burden on Businesses (July 22, 2025), <https://www.gov.uk/government/news/national-security-powers-to-be-updated-to-reduce-the-burden-on-businesses>; see also National Security and Investment Act: Reforms, Written Ministerial Statement, HC Deb (July 22, 2025), <https://hansard.parliament.uk/commons/2025-07-22/debates/25072249000012/NationalSecurityAndInvestmentActReforms>.

<sup>73</sup> See Stakheyeva et al., *supra* note 1, at 212–213; White & Case, Foreign Direct Investment Reviews 2025: European Union (2025), <https://www.whitecase.com/insight-our-thinking/foreign-direct-investment-reviews-2025-european-union>.

<sup>74</sup> Press Release, Eur. Council, *supra* note 3.

coherence, prevention of contradictory outcomes, and the particular challenges posed by classified reasoning and intelligence agency involvement.

56. A recent U.S. legislative development illustrates the tension. The FY2024 National Defense Authorization Act now requires parties filing under the Hart-Scott-Rodino Act to concurrently notify the Department of Defense when a transaction requires DoD review.<sup>75</sup> This formalizes the very channel through which security policy inputs influenced the divergent Lockheed/Aerojet and L3Harris/Aerojet outcomes discussed above. While coordination between competition and security authorities is necessary, the mechanism must be designed so that security assessments inform a separate decision-making process, not the competition authority's substantive analysis. Without further safeguards, the NDAA model risks institutionalizing the problem the Lockheed/Aerojet sequence exposed: competition outcomes that shift with geopolitical circumstances rather than market structure and competition analysis.

## 8. Recommendations

### 8.1. Institutional Separation

57. National security assessments should be conducted by purpose-built agencies separate from competition authorities. The case for separation is strongest for national security because of classified reasoning, intelligence agency involvement, geopolitical dynamics, and the political weight of security claims, all of which are incompatible with the transparency, evidence-based analysis, and independence on which competition enforcement depends.

### 8.2. Bounded Definitions

58. Security grounds for intervention must be defined in legislation with sufficient specificity to constrain administrative discretion. Open-ended concepts of "economic security" risk converting every enforcement matter in strategic sectors into a security question. Definitions should be linked to identified and specific risks such as espionage, sabotage, supply chain dependency, and weapons proliferation, as opposed to general assertions of strategic importance. The U.S. Steel/Nippon Steel episode demonstrates the consequences of definitions so broad that industrial policy objectives can be pursued under the label of security. Canada's March 2025 introduction of "economic security" as a free-standing factor under its national security review framework illustrates how readily the category can expand under political and economic pressure. The United Kingdom's National Security Strategy 2025 and the United States' February 2025 Presidential Memorandum similarly each treat economic security as part of national security and channel investment review accordingly.

### 8.3. Transparency and Predictability

59. Security review processes should feature published guidelines, clear timelines, and reasoned decisions. These are the foundations on which predictability rests, and predictability is itself an essential condition for investment, deal certainty, and the efficient

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<sup>75</sup> National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, § 857, 137 Stat. 117 (2023). (requiring concurrent notification to DoD of proposed mergers or acquisitions subject to Hart-Scott-Rodino filing when such transaction "will require a review" by DoD).

allocation of capital that are vital for investment and business decisions. Classified reasoning should be limited to genuinely sensitive intelligence; it should not be the default mode of decision making. The EU’s December 2025 FDI reform requirement that screening Member States explain departures from Commission opinions provides a model, as do soft law instruments such as published guidelines and interpretive notices.<sup>76</sup>

#### 8.4. Effective Judicial Review

60. Decisions that restrict transactions on security grounds must be subject to independent judicial review of proportionality, necessity, and nondiscrimination. Reviewing courts must have access to classified material through appropriate security cleared procedures. The UK experience demonstrates that judicial review confined to procedural legality, with courts deferring entirely on the substance of security risk, provides insufficient accountability. The VIG/AEGON outcome (the Commission ordering withdrawal of an unjustified veto) and the E.ON/Endesa litigation (the ECJ confirming breach) demonstrate both the necessity and the efficacy of substantive oversight mechanisms, as against the UK model where the High Court has held that national security assessment involves “matters of judgment and policy which the court is not equipped to decide” and that “the scope for the intervention of unelected judges is limited.”<sup>77</sup>

#### 8.5. Fair Compensation for Security-Based Divestiture

61. Where governments require divestiture on security grounds, investors should receive fair market value compensation. The UK Court of Appeal’s November 2025 ruling in *LetterOne/Upp*, establishing that investors are not automatically entitled to fair market value when forced to divest, sets a concerning precedent. Security-based divestiture is an exercise of sovereign power, not a market outcome; the cost should be borne by the state, not the investor.

#### 8.6. Protection of Competition Enforcement Independence

62. Competition authorities should limit their analysis of security-related considerations to those relevant to competition, like viable scale. Where security agencies provide input to competition proceedings, the competition authority’s analysis and decision should remain its own, based on competition principles. The Commission’s recent acknowledgment that defence sector “specificities” will be considered in merger and antitrust assessment should be carefully bounded to prevent security considerations from diluting analytical standards generally.

63. This distinction provides a workable boundary. Whether a market requires a minimum viable scale for firms to compete effectively, to sustain necessary investment in research and development, or to maintain innovation incentives, is a competition question,

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<sup>76</sup> Stakheyeva et al., *supra* note 1, at 217 (recommending soft law instruments, citing South African Guidelines 2024); *see also* OECD, Summary of Discussion of the Roundtable on Public Interest Considerations in Merger Control, DAF/COMP/WP3/M(2016)1/ANN4/FINAL, at 6 (Feb. 7, 2017), [https://one.oecd.org/document/DAF/COMP/WP3/M\(2016\)1/ANN4/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/M(2016)1/ANN4/FINAL/en/pdf).

<sup>77</sup> Case M.10494 — VIG/AEGON CEE, Comm’n Decision (Summary), 2024 O.J. (C/2024/578); *Commission v Spain* (Case C-196/07) ECLI:EU:C:2008:146; *LetterOne Holdings S.A. v Secretary of State for Business and Trade* [2024] EWHC 2882 (Admin), ¶¶ 101, 117; *see also* *R (L1T FM Holdings UK Limited) v Chancellor of the Duchy of Lancaster* [2025] EWCA Civ 1528 (Court of Appeal affirming broad executive discretion in NSIA matters).

amenable to the evidence-based, welfare-oriented analysis that competition authorities are equipped to conduct. The question of whether a particular transaction creates espionage risk, compromises classified technology, or shifts geopolitical leverage is not. Competition authorities can and should assess the competitive implications of transactions in security-sensitive sectors, including efficiencies, failing firm considerations, and the relationship between scale and innovation. What they should not do is absorb security assessments that depend on classified intelligence, foreign policy judgments, or threat analysis that falls outside their institutional competence and accountability structures.

### 8.7. Proactive Competition Advocacy

64. Competition authorities should participate in national security strategy formulation, conduct market studies in security critical sectors, apply competitive neutrality principles to security motivated policies, and promote the OECD's four principles of nondiscrimination, transparency, proportionality, and accountability. The Secretariat's Background Note supports this recommendation, recognizing that interventions must remain targeted, periodically reviewed, and not distort competition beyond what is necessary, and that policy responses targeting the source of distortions, such as international co-operation or targeted instruments, may be more effective than relaxing domestic competition rules.<sup>78</sup>

### 8.8. International Coordination

65. The OECD should develop best practice guidance specific to the security and competition interface, addressing mandatory time limits for parallel reviews, jurisdictional coordination, remedial coherence, and the particular challenges of classified reasoning and intelligence agency involvement. The EU's December 2025 FDI reform, with its coordination mechanisms, transparency requirements, and shared database, provides elements of a model, though its preservation of exclusive Member State screening authority demonstrates the limits of harmonization in this domain.

### 8.9. Time-Limited Accommodations

66. Any exemptions for security-related cooperation among competitors should be narrowly drawn, limited in duration, linked to specific identified security needs, and subject to periodic review. The Secretariat's Background Note records the same concern, observing in its discussion of liner shipping conference agreements that co-ordination mechanisms introduced for stability and security-related reasons became entrenched over time and ultimately weakened the competitive dynamics they were intended to support.<sup>79</sup>

## 9. Conclusion

67. National security is not merely another public interest consideration to be weighed against competition. It is qualitatively different: in its definitional elasticity, its reliance on classified reasoning, its involvement of security and intelligence establishments, its geopolitical dimensions, and its political weight. These characteristics make it uniquely

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<sup>78</sup> Secretariat Background Note, *supra* note 24, at 9.

<sup>79</sup> *Id.* at 25.

challenging to the integrity of competition enforcement if not properly channelled through separate institutional mechanisms with appropriate safeguards.

68. The pace of development is accelerating. The U.S. recently reversed a presidential CFIUS prohibition and created a “golden share” precedent. Canada formally introduced “economic security” as a standalone factor in its national security review framework. The EU has agreed to make FDI screening mandatory in all Member States. The UK has confirmed through judicial review that security divestiture orders are subject to minimal substantive oversight. The Commission has begun calibrating competition enforcement to defence sector “specificities.” Each development further blurs the boundary between competition and security, and each makes the safeguards recommended in this submission more urgent.

69. Equally important, the U.S. experience with defence sector merger review demonstrates that even where institutional separation nominally exists, the flow of security policy inputs into competition analysis can produce inconsistent outcomes driven by political circumstances, as opposed to market structure and competition analysis. Formalized coordination mechanisms, such as the FY2024 NDAA concurrent notification requirement, risk entrenching this problem unless designed with clear boundaries that preserve the competition authority’s analytical independence.

70. The Secretariat’s Background Note for this Roundtable reaches a complementary conclusion: competition authorities are best placed to assess conduct and competitive effects using economically grounded, evidence-based analysis, while broader geopolitical and security trade-offs are more appropriately addressed by governments and specialized bodies. The recommendations advanced in this submission are the institutional and procedural architecture necessary to give effect to that principle: separate purpose-built security agencies, bounded definitions, transparency and predictability, effective judicial review, fair market value compensation for security-based divestiture, protection of competition enforcement independence, proactive competition advocacy, international coordination, and time-limited accommodations.

71. At the same time, competitive, innovative markets are themselves a primary source of national resilience and security. The erosion of competition enforcement independence and predictability in the name of security ultimately harms both objectives. The OECD is well positioned to recognize norms that incorporate this complementarity and promote frameworks that protect both competition enforcement and legitimate security interests.