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National Security Considerations in Competition Enforcement – Note by the European Union

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National and public security considerations in EU Competition Law

1. The security landscape facing the European Union has changed profoundly. Conflicts and instability across Europe's neighbourhood and beyond, as well as the expansion of military capabilities and the proliferation of hybrid threats—including cyberattacks, disinformation campaigns, the weaponisation of migration, and the exploitation of strategic dependencies—have altered the continent's threat environment. At the same time, a global technological race is influencing long-term economic growth and military pre-eminence, while vulnerabilities in the supply of critical raw materials and the protection of critical infrastructure have emerged as pressing strategic concerns[1]. This context has revived the question of how EU competition law interacts with public security and resilience and what role, if any, it can play in addressing these challenges.

2. Competition law aims at protecting undistorted and effective competition in the internal market of the European Union (EU). Effective competition drives market players to deliver the best outcomes for consumers, ensures that markets remain open and dynamic, spurs innovation and ultimately makes it possible to have strong and diversified supply chains, all of which contribute to EU public security and resilience. Merger control and the enforcement of the prohibitions against anti-competitive agreements (Article 101 TFEU) and abuses of dominant position (Article 102 TFEU) ensure that markets also function properly in strategically sensitive sectors, such as defence, cybersecurity, energy and critical infrastructure, where competition is no less important than elsewhere. In this way, competition law indirectly contributes to public security and resilience.

3. The EU competition law framework contains specific mechanisms through which public security concerns can be taken into account. Following a brief explanation of the concept of national and public security under EU law (Section 1), this paper examines how merger control takes into account public security. One central mechanism is Article 21(4) of the EU Merger Regulation (EUMR), which allows Member States to take appropriate measures to protect legitimate interests—including public security—that fall outside the scope of the EUMR's own appraisal criteria (section 2.1). We also illustrate how security concerns has also played a role in some Commission merger cases (section 2.2). Finally, Section 3 describes the interplay between EU antitrust rules and security and resilience considerations, including references to the Commission's enforcement practice as well as guidance to industry cooperation in security sensitive sectors.[2]

1. Definition of national and public security under EU law

4. Public security is a legitimate interest that is recognized in EU law as potentially warranting a derogation from the standard application of EU Law. Measures that are otherwise unlawful under EU law may be justified on the ground of public security. This is notably the case in relation to Treaty provisions protecting the freedom of establishment

1 White Paper for European Defence – Readiness 2030, 19.3.2025, JOIN(2025) 120 final, 19.3.2025, Section 2.

2 This paper will not cover other competition policy tools such as State aid or other instruments such as foreign direct investment screening that may be relevant to foster national or public security,

or free movement of capital.[3] Member States are, in principle, free to determine the requirements of public/national security in the light of their national needs.[4]

5. The concept of public security, as interpreted by EU courts in relation to the protection of the internal market, covers both the internal and external security of a Member State. Internal security may be affected by, inter alia, a direct threat to the calm and physical security of the population of the relevant Member State. External security may be affected by, inter alia, the risk of a serious disturbance to the foreign relations of that Member State or to the peaceful coexistence of nations.[5]

6. According to well established case-law of EU courts, the requirements of public security, as a derogation (from the EU Merger Regulation and/or fundamental principles of freedom of establishment and free movement of capital) must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Union institutions. Public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.[6]

7. Relatedly, EU courts case-law states that public security derogations must not be misapplied to serve purely economic ends.[7] Also, the European Commission has consistently taken the view that the protection of national interests and strategic sectors for the national economy would lead to a violation of the principles of freedom of establishment and free movement of capital inside the EU.[8] Hence, no justification on such grounds is in principle possible. In that respect, it should be noted that healthy competition is in itself a very important public interest.

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[3] Articles 52 TFEU and 65 TFEU respectively.

[4] Judgment of 22 May 2012, P.I. v Oberbürgermeisterin der Stadt Remscheid, C-348/09, EU:C:2012:300, paragraph 23 and Article 4(2) TFEU.

[5] See ECJ judgment of 2 May 2018 in H.F. v. Belgium, C-366/16, EU:C:2018:196, paragraph 42; ECJ judgment of 23 November 2010 in Land Baden-Württemberg v. Tsakouridis, C-145/09, EU:C:2010:708, paragraphs 43-44; ECJ judgment of 22 May 2012 in P.I. v. Oberbürgermeisterin der Stadt Remscheid, C-348/09, EU:C:2012:300, paragraph 28.

[6] See ECJ judgment of 4 June 2002 in Commission v Belgium, C-503/99, EU:C:2002:328, paragraph 47, ECJ judgment of 4 June 2002 in Commission v France, C-483/99, EU:C:2002:327, paragraph 48, and ECJ judgment of 13 May 2003 in Commission v Spain, C-463/00, EU:C:2003:272, paragraph 72. See also ECJ judgment of 14 March 2000, Église de scientologie, C-54/99, EU:C:2000:124, paragraph 17 and ECJ judgment of 18.6.2020 in Commission v Hungary, C-78/18, EU:C:2020:476, paragraph 91.

[7] See ECJ judgment of 14 March 2000 in Case C-54/99 Association Église de scientologie, EU:C:2000:124 paragraph 17 and ECJ judgment of 28 October 1975 Case 36/75 Rutili v Minister for the Interior [1975] ECR 1219, paragraph 30

[8] See e.g. European Commission Decision of 03/08/1999 in Case COMP/M.1616 — BSCH/Champalimaud.

2. Public security in merger control

2.1. Substantive and procedural aspects concerning the protection of public security in Merger Control under Article 21 EUMR

2.1.1. Public security as a legitimate interest Article 21(4) EUMR

8. The objective of the EU Merger Regulation («EUMR»)[9] is to ensure that competition in the EU internal market is not distorted.[10] To that effect, the EUMR establishes a «one-stop shop system», where transactions falling under its scope of application («concentrations of an EU dimension»)[11] must be notified to the European Commission[12] which will assess them exclusively on the basis of competition-related considerations.

9. Article 21(2) EUMR provides indeed that the European Commission "*shall have sole jurisdiction*" to control the compatibility of concentrations of an EU dimension.[13] Furthermore, Art. 21(3) EUMR indicates that "*[n]o Member State shall apply its national legislation on competition"* (emphasis added) to any such concentration.

10. Under the system of the EUMR, public interest considerations other than competition policy are not to be taken into account in the assessment by the European Commission of a notified concentration with a view to declaring it compatible (either unconditionally or subject to commitments) or incompatible with the internal market.

11. This notwithstanding, the EUMR recognises that there are other legitimate interests worthy of protection and allows Member States' authorities to take appropriate measures, under strict conditions. In particular, Article 21(4) EUMR reads that "*Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law."* Public security is expressly recognised as a legitimate interest in this provision.

12. Article 21 EUMR thus allows Member States to adopt, with regard to concentrations of an EU dimension,[14] measures to protect certain interests other than

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[9] Council Regulation Nº 139/2004 of 20 January 2004 on the control of concentrations between undertakings. Official Journal L 24, 29.1.2004, p. 1.

[10] Recitals 2 to 6 and 24 EUMR. For instance, Recital 24 indicates that «[i]n order to ensure a system of undistorted competition in the [internal] market, in furtherance of a policy conducted in accordance with the principle of an open market economy with free competition, this Regulation must permit effective control of all concentrations from the point of view of their effect on competition in the [EU]».

[11] Namely those transactions constituting a «concentration» for the purposes of the EUMR (cf. Article 3) and meeting the relevant turnover thresholds set forth therein [cf. Article 1(2) and (3)].

[12] The obligation of mandatory prior notification of concentrations is set out in Article 4 EUMR. The related obligation of the suspension of concentrations until clearance by the Commission («standstill clause») can be found in Article 7 EUMR.

[13] The EUMR sets up a system of referrals that allows, under certain conditions, the reallocation of cases between the European Commission and Member States' national competition authorities (cf. Articles 4(4), 4(5), 9 and 22 EUMR).

[14] As indicated, Article 21 EUMR only applies to transactions for which the European Commission has jurisdiction, i.e. concentrations that fulfil the EU turnover thresholds or have been referred by Member States.

competition, for as long as these measures are necessary and proportionate to their aim and are compatible with all aspects of Community law.

13. Pursuant to Article 21 EUMR, Member States can ultimately block transactions or impose (additional) conditions, in order to protect public security. These actions constitute an added regulatory layer to the European Commission's competition assessment. Such national measures, however, cannot go against the European Commission's merger decision: they cannot invalidate a European Commission prohibition decision (i.e. they cannot authorise a deal that has been blocked by the European Commission) or waive one or more of the remedies imposed by the European Commission in order to protect competition. This would go against the very rationale of the EUMR and the European Commission's exclusive competence to safeguard competition through merger control.

14. As mentioned above, public security can be relied upon, provided that there is a genuine and sufficiently serious threat to a fundamental interest of society.[15] Some relevant situations that can be envisaged could arise in relation to interventions in respect of a concentration connected with the production of or trade in arms, munitions and military material, and those concerned with security of supplies to the country in question of a product or service considered of vital or essential interest for the protection of the population. In line with the case law of the European Courts, public security may justify measures related to the security of energy supply to the extent that they are necessary to ensure a minimum level of energy supplies in the event of a crisis.[16]

15. Article 21 EUMR applies the grounds of justification for recognised interests strictly as far as their scope and/or application is concerned.[17] Even where grounds of justification apply, their application is subject to strict proportionality and non-discrimination requirements. In particular, for the proportionality test to be met, the measure under scrutiny should (i) be suitable for securing the objective which it pursues; and (ii) not go beyond what is necessary in order to attain it. In other words, the measure must be appropriate to achieve the stated interest and the objective that is sought could not reasonably be attained by less restrictive measures.

16. In its assessment under Article 21 EUMR, the European Commission is particularly vigilant as regards the need to safeguard the exercise of the freedom of establishment and the free movement of capital.[18] State measures that "impede" or "render less attractive" cross-border investment can amount to an "*obstacle to trade*" for the purposes of Article 21 EUMR.[19] The European Commission will scrutinise the Member State measures that

[15] Article 346 TFEU relating to essential interests of security

[16] Campus Oil v. Minister for Industry and Energy, Case 72/83, 1984 E.C.R. 2727

[17] For instance, in *Secil/Holderbank/Cimpor,* the European Commission rejected the alleged need for compliance with prudential rules as a recognized interest since none of the notifying parties had activities in the field of banking or provision of insurance services that would be captured by such prudential rules (European Commission Decision of 11/01/2000 in Case COMP/M.2054 — Secil/Holderbank/Cimpor; 2000).

[18] Articles 49 and 56 TFEU.

[19] E.g., in *E.ON/Endesa*, the European Commission considered that state measures liable to impede the acquisition of shares in undertakings and dissuade investors in other Member States from direct investments may restrict the free movement of capital (European Commission Decisions of 20/12/2006 and 26/09/2006 in Case COMP/M.4197 — E.ON /Endesa). Also, in *Enel/Acciona/Endesa,* the Commission found that a number of conditions amounted to "*obstacles to trade*", including the requirements to maintain Endesa's registered office and decision-making bodies in Spain as well as the obligation to use domestic coal in Endesa's coal-fired power plants and to

may interfere with a concentration of an EU dimension and assess whether: (i) the measure forms an obstacle to trade; (ii) "overriding public interest grounds" can justify such obstacle and (iii) the measure is proportionate and non-discriminatory.

17. Whereas the EU Courts consider a broad range of "overriding reasons in the public interest" as possible justifications for raising obstacles to trade, they have consistently ruled out considerations of a purely economic nature as a possible justification for restricting the fundamental freedoms underlying the EU single market.[20]

2.1.2. Applicable procedural framework: control of the respect by Member States of their obligations under the EUMR

18. The European Commission is, under Article 258 of the Treaty on the Functioning of the European Union («TFEU»), empowered to open infringement proceedings against national measures adopted in violation of Article 21 EUMR, including those based on national security.

19. Alternatively (and in practice more frequently), the European Commission may issue a decision concerning the legality of the national measure on the basis of Article 21 EUMR itself in a standalone administrative procedure and, if necessary, order the Member State concerned to withdraw the contested measure.[21] To protect the interests of involved parties, the European Commission may issue an interim decision ordering the suspension of the national measures at stake.

20. Should the Member State fail to comply with the European Commission's decision, the European Commission may start an infringement action under Article 258 TFEU and bring the Member State before the European Court of Justice (ECJ).[22]

21. Proceedings pursuant to Article 21 EUMR can only be initiated in relation to a Member State's interference with a particular transaction. In addition, the European Commission can initiate proceedings pursuant to Article 258 TFEU for the infringement of general internal market rules by other types of measures (such as those of more general application).[23]

2.1.3. Examples of cases applying Article 21 EUMR to public security considerations

22. Decisions under Article 21 EUMR are relatively infrequent. Negative decisions have sometimes been the result of a procedure initiated by a complaint. In some instances,

refrain from divesting Endesa's assets outside mainland Spain for a period of five years (European Commission Decision of 11/09/2007 in Case COMP/M.4685 — Enel/Acciona/Endesa).

[20] See e.g. Müller-Fauré and van Riet, Case C-385/99, 2003 E.C.R I-4509

[21] Article 21 EUMR provides thus a faster and more direct instrument than that of the general infringement proceedings foreseen in Article 258 TFEU.

[22] See Judgment of 6 March 2008, Commission v Spain, C-196/07, EU:C:2008:146

[23] These proceedings require the European Commission (lead by DG FISMA) to issue a letter of formal notice and a reasoned opinion before the matter is brought to the ECJ. Such infringement proceedings, where appropriate, may be initiated in parallel with an action under Article 21 EUMR against the application of the national measures to a particular transaction: see e.g. *Enel/Endesa*, *EON/Endesa* and *Abertis/Autostrade* (Decision of 04/11/2006 in Case M.4249 — Abertis/Autostrade).

the European Commission has opened preliminary investigations but has not ultimately adopted a formal decision.

23. The Commission may simply decide not to open an Article 21 EUMR case, where it appears prima facie that the measure is justified based on public security considerations. For instance, in the context of Case M.11253 - *Safran / Part of Collins Aerospace's Actuation and Flight Control Activities*, the Italian government raised concerns linked to the continuity of supply of components destined to military aircrafts, ultimately leading Safran to offer commitments to alleviate these concerns. The Commission did not find a violation of Article 21 EUMR.

24. Below are some key examples of negative decisions arising from Member States' attempts to seemingly protect national firms or otherwise intervene unjustifiably against certain transactions, on the basis of national security:

- *E.ON/Endesa* (2006)[24]: the Spanish energy company Gas Natural launched a public bid for Spain's electricity incumbent Endesa, together with a divestment of Endesa's assets to Iberdrola. As the merger was not of an EU dimension, the Spanish national competition authorities were competent to review it. The European Commission was however competent to review the competing bid of E.ON (Germany) for Endesa. Spain's Council of Ministers had, seemingly in reaction to the said bid, increased the power of the National Energy Regulator ("CNE") to review acquisitions in the energy sector. The European Commission challenged CNE's decision to subject E.ON's bid to demanding conditions and ordered its withdrawal on the basis of Article 21 EUMR. The Spanish authorities replied that these conditions were motivated by security of energy supply considerations and therefore did not require notification pursuant to Article 21(4) EUMR. The Spanish Minister of Industry subsequently lowered the contested conditions instead of abandoning them, which led to a second decision pursuant to Article 21 EUMR.[25] Given the Spanish authorities' failure to comply with its decisions, the European Commission brought Spain before the ECJ, claiming that the broad discretion that national administrative authorities applied represented a serious threat to the free movement of capital.[26] In March 2008, the ECJ concluded that Spain had failed to fulfil its obligations under the Treaty by not withdrawing the conditions as requested by the European Commission.[27]
- *Enel/Acciona/Endesa* (2007)[28]: E.ON agreed to share Endesa's assets with ENEL (Italy) and Acciona (Spain); ENEL and Acciona would acquire joint control of Endesa and subsequently divest to E.ON certain ENEL and Endesa's businesses and assets in Spain and Italy. The CNE subjected the transaction to conditions, comparable to the ones previously imposed on E.ON when seeking sole control over Endesa, without prior notification to the European Commission. The latter adopted a formal decision on 5 December 2007, requiring Spain to withdraw the

[24] See Case M.4197 - E.ON /Endesa. Two final Commission decisions were adopted pursuant to Article 21 EUMR, followed by two judgements of the European Courts.

[25] See, inter alia, Press Release IP/07/296 of 7 March 2007.

[26] Press Release IP/07/427 of 28 March 2007.

[27] Kingdom of Spain v. European Commission, Case C-196/07, 2008 E.C.R. I-41.

[28] See Case M.4685 - Enel/Acciona/Endesa. A final Commission decision was adopted pursuant to Article 21 EUMR.

litigious conditions.[29] As a result, E.ON's bid was eventually allowed by the national authorities after the Commission's intervention even the transaction ultimately did not materialise as initially anticipated.

- *VIG/AEGON* (2022)[30]: VIG's acquisition of AEGON Group's Hungarian subsidiaries formed part of a wider transaction whereby VIG planned to acquire AEGON's Hungarian, Polish, Romanian and Turkish life and non-life insurance, pension fund, asset management and ancillary services businesses. The Commission unconditionally cleared the transaction under the EU Merger Regulation on 12 August 2021.[31] Prior to the Commission's clearance, the Hungarian government vetoed VIG's acquisition of AEGON Group's Hungarian subsidiaries, based on an emergency legislation on foreign direct investment introduced in the context of the coronavirus pandemic. The Hungarian authorities argued that the acquisition threatened Hungary's public security. On 29 October 2021, the European Commission opened an investigation in relation to the Hungarian decision. Following its initial assessment, on 20 January 2022, the Commission informed Hungary of its preliminary conclusion that the veto violated Article 21 of the EUMR. Following its investigation, and having heard the arguments of the Hungarian authorities, the Commission had reasonable doubts as to whether the veto genuinely aimed to protect Hungary's public security within the meaning of the EUMR. In particular, it was unclear how the acquisition by VIG of AEGON's Hungarian assets would pose a threat to a fundamental interest of society, given that VIG and AEGON are well-established EU insurance companies with an existing presence in Hungary. The Commission therefore concluded that the Hungarian authorities should have communicated their intended veto to the Commission prior to its implementation and that Hungary's failure to do so infringed Article 21 of the EUMR. In addition, the Commission found that the veto restricted VIG's right to engage in a cross-border transaction, and the Hungarian authorities failed to show that the measure was justified, suitable and proportionate. As a result, the Commission concluded that the veto was incompatible with EU rules on the freedom of establishment and that it therefore infringed Article 21 of the EUMR.

2.1.4. Ongoing stakeholder outreach in context of guidelines public consultation

25. The draft merger guidelines, published by the Commission on 30 April 2026 include guidance on Article 21 EUMR, following feedback from stakeholders that such guidance would be helpful.[32]

26. Part III of the draft includes a dedicated section on measures to protect legitimate interests, on both substantive and procedural aspects. It aims at providing guidance, including on the type of measure and the scope of legitimate interests relevant under Article 21 EUMR, including public security, notably providing a definition thereof based on that of EU courts as detailed in Section 1 above.

[29] Press Release IP/08/164 of 31 January 2008.

[30] See Case M.10494 – VIG/AEGON CEE (Art.21 procedure)

[31] See Case M.10102 – VIG/AEGON CEE

[32] As published on: https://competition-policy.ec.europa.eu/mergers/review-merger-guidelines_en

27. The draft also stresses that in the context of the EU project, Member States or their nationals are prima facie not a threat to the public security of another Member State. As a result, the draft indicates that to the extent a Member State claims that its public security would be impacted by a merger involving firms based in another Member State, or owned by nationals from other Member States, it should be able to adequately substantiate such claims upon request by the Commission.

28. The draft also mentions how to process classified documents, that may be relevant when Member States adopt decisions based on genuine public security concerns. The draft in particular indicates that Member States should submit non-confidential versions of the documents allowing the Commission to assess whether Member States genuinely rely on public security concerns.

2.2. Security concerns as part of the competitive assessment

29. Security concerns may be relevant for the assessment of mergers by the Commission. By preventing mergers that result in a significant impediment to effective competition, EU merger control supports inter alia the competitiveness and resilience of the internal market.

30. Resilience refers to the readiness and ability of the internal market or part of it to continue servicing customers and to anticipate, withstand and recover from shocks. Examples of factors that are particularly relevant for the resilience of the internal market include the security and diversity of supply chains, the security and cyber security of physical and digital critical infrastructure, defence readiness and the ability and incentives of companies to invest in critical technologies. In that context, the notion of resilience can overlap with that of public or national security.

31. Such concerns may particularly arise when access to a critical input, technology, or infrastructure is threatened by a specific transaction, ultimately to the detriment of European customers.

32. Another concern that may be of relevance would be transactions that could lead companies to access competitively sensitive information that may also be relevant to ensure public security. For instance, in *ASL/Arianespace*, the Commission was concerned that the transaction would contribute to aligning the incentives of Airbus, ASL and Arianespace leading to critical information about satellites or launch service competitors being shared between Arianespace and Airbus. In such case, remedies involving firewall remedies may be put in place to prevent information flows that could harm competitors and potentially public security.

33. Merger control also takes into account national security when relevant for the implementation of its decisions. It may lead it to accept deviations from established practice and templates. For instance, in *ASL/Arianespace*, the Commission accepted that the monitoring trustee may have a more limited access to the relevant documents and information from the parties, subject to applicable laws and regulation in matter of national security.[33]

[33] See Case M.7724 – ASL/ARIANESPACE, paragraphs 32 and 34 of the commitments.

3. Security concerns in antitrust

34. By preventing anti-competitive conduct that distorts effective competition, antitrust law indirectly contributes to public security and resilience. This contribution becomes most apparent where the impact of anti-competitive conduct extends beyond harm to consumers. Anti-competitive agreements in strategically sensitive sectors may increase prices, reduce output and hamper innovation—in the defence sector, for example, cartels between suppliers may translate into less favourable procurement outcomes for Member States, to the detriment of public budgets and operational readiness. Exploitative abuses of dominance, such as the imposition of excessive prices or unfair trading conditions, may deepen the dependence of buyers—including public authorities and critical infrastructure operators—on a single supplier, increasing systemic vulnerabilities. Furthermore, exclusionary abuses, such as foreclosing access to strategic inputs or infrastructure, may deter entry and reduce the diversity of supply chains.

35. The European Commission's enforcement activity in strategically sensitive sectors includes the *Hand Grenades* case[34]. In this case, the Commission fined a cartel in the defence sector, which consisted in the allocation of national markets for the sale of military hand grenades, and also included the exchange of competitively sensitive information. As emphasised by the Commissioner in charge of competition policy, "*at a time of evolving geopolitical realities, [this Commission decision] is also a reminder that we will not tolerate any cartels in any sectors, strategic ones or not*".

36. The Commission also intervened against alleged conduct by Gazprom that, in the Commission's preliminary assessment, had the effect of hindering the free flow of gas across the EU and imposing exploitative conditions on customers, ultimately entrenching and exploiting strategic dependency in European gas markets[35]. Specifically, the Commission accepted commitments from Gazprom aimed at (i) removing contractual and non-contractual obstacles to the cross-border resale and flow of gas (such as territorial restriction clauses), (ii) ensuring non-excessive pricing in Eastern Europe, and (iii) waiving the advantages gained by making gas supplies conditional upon EU energy operators' commitments in support of certain gas infrastructure projects (namely, the South Stream pipeline). In its decision, the Commission emphasised the '*pivotal role*' played by Gazprom in the European upstream wholesale market for natural gas, and particularly in several countries in Eastern Europe, where '*without its supplies in the short to mid-term, customers may not be able to cover their demand for gas*'[36]. The Commission's decision was upheld by the Court of Justice of the EU[37]. According to the Court, the Commission rightly and adequately verified that the commitments did not undermine the Treaty's objectives of security of energy supply and energy solidarity. In upholding the Commission's approach, the Court also found that the Commission—as a competition authority—should not impose

[34] Commission Decision of 21 September 2023 in case AT.40760 – *Hand Grenades*.

[35] Commission Decision of 24 May 2018 in case AT.39816 – *Upstream Gas Supplies in Central and Eastern Europe*.

[36] Idem, para. 34.

[37] Following an action for annulment introduced by PGNiG (now part of Orlen) against the Commission's decision making commitments binding on Gazprom. For context, PGNiG had lodged in parallel with the administrative proceedings giving rise to this decision a complaint against Gazprom partly overlapping with the former.

obligations going beyond those intended to remedy the competition issues identified in its investigation[38].

37. Moreover, the Commission intervened in a number of cases concerning abuses of dominance aimed at restricting access to critical inputs and infrastructures, as well as at physically destroying such inputs to the detriment of competition[39]. For instance, the Commission found BP to have abused its dominant position by disproportionately reducing the supply of petroleum products to a major customer in the Netherlands during a period of shortage, namely the oil crisis of the mid-1970s[40].

Public security and pro-competitive cooperation

38. At the same time, the antitrust framework does not hinder forms of cooperation between undertakings or other business conduct that are pro-competitive and contribute to public security.

39. Under specific conditions the EU antitrust framework allows for national security considerations to be taken into account as a form of efficiency or justification[41]. For example, agreements that restrict competition within the meaning of Article 101(1) may still be compatible with Article 101 if they fulfil the four conditions of the exception provided by Article 101(3). Those conditions are that the agreement (i) must contribute to

[38] Judgment of the Court of Justice of 26 September 2024, *Orlen* v *Commission*, C-255/22 P, EU:C:2024:790, paragraphs 95-100. In paragraph 100, for instance, the Court emphasised that "*the decision at issue contains elements which clearly indicate that the Commission, at the time of the adoption of that decision, took account of the objectives of the European Union's energy policy, by ensuring, inter alia, the free movement of gas across borders and providing consumers of the EEC countries concerned with alternative supplies from neighbouring countries, as well as ensuring that prices do not depart from the Western European competitiveness indicators".*

[39] For an overview of the European case law and the Commission's enforcement practice on abuses of dominant positions consisting in restricting access to inputs and destroying inputs, see the Draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings, available at https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en. See in particular paragraph 60 lett. c) and Sections 4.2.3 and 4.3.4 of the Draft Guidelines. By way of example, see also the Commission Decision of 2 October 2017 in case AT.39813 – *Baltic Rail*. In this case, the Commission fined a rail infrastructure manager for abusing its dominant position by physically dismantling a 19-kilometre section of railway track connecting Lithuania to Latvia. This prevented a competing Latvian operator from entering the Lithuanian market and hindered a major customer from switching its rail freight services to that competitor.

[40] Commission Decision of 19 April 1977 in case IV/28.841 — *ABG oil companies operating in the Netherlands*. Although the decision was annulled, the Court of Justice held that the reduction in supply to ordinary customers had to be carried out on the basis of reasonable criteria and in particular by reference to a period fixed in the year before the crisis. See the judgment of the Court dated 29 June 1978, *BP* v *Commission*, C-77/77, EU:C:1978:141, para. 30.

[41] For instance, under Article 102 TFEU, companies can justify their conduct by invoking an objective necessity defence. This can relate to the pursuit of a genuine and objectively defined public interest objective, but such pursuit may not be used as a pretext for the dominant undertaking to disguise conduct that is aimed at strengthening its dominant position. Undertakings can also rely on an efficiency defence, if anticompetitive effects are counterbalanced or outweighed by advantages in terms of efficiency that also benefit consumers. See paragraphs 48, 58 and 169 of the Draft Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings, available at https://competition-policy.ec.europa.eu/public-consultations/2024-article-102-guidelines_en.

improving the production or distribution of products or to promoting technical or economic progress, while (ii) allowing consumers a fair share of the resulting benefits, without (iii) imposing restrictions that are not indispensable to the attainment of those objectives and without (iv) affording the participating undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned[42]. As recently indicated by the Commission, the existing framework allows consideration to be given to the specificities of the defence industry and the possible efficiencies generated by cooperation projects, including, for example positive effects of such cooperation in terms of defence readiness, resilience of the defence supply chains and of the internal market[43].

40. The Commission has also issued block exemption regulations[44] and guidelines to provide a simplified set of rules for businesses to assess the legality of their agreements under Article 101, thereby increasing legal certainty and facilitating the conclusion of pro-competitive agreements. For instance, the Guidelines on horizontal cooperation agreements provide extensive guidance on a wide array of forms of cooperation between companies, including joint production and joint purchasing[45]. Beyond these general instruments, in the specific sector of critical raw materials, the Commission is currently engaging in a dialogue with stakeholders to assess how competition law can further support industry cooperation to procure, recycle and reuse key raw materials[46].

41. Furthermore, under the Informal Guidance Notice, the Commission may provide informal guidance to businesses in cases which present novel or unresolved questions for

[42] Detailed guidance on the Commission's approach to assessing each of these conditions is contained in the Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (OJ C 259, 21.7.2023). *See* also Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004).

[43] Communication from the Commission to the European Parliament and the Council, Defence Readiness Omnibus, COM(2025) 820 final, pp.9-10.

[44] Block exemption regulations disapply the Article 101(1) prohibition in respect of categories of agreements that can be assumed to fulfil the conditions of Article 101(3) TFEU, thereby providing a legal safe harbour. See for instance Commission Regulation (EU) No 2023/1066 of 1 June 2023 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements (OJ L 143, 2.6.2023, p. 9–19), and Commission Regulation (EU) 2026/877 of 16 April 2026 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements (OJ L 2026/877, 21.4.2026).

[45] Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (OJ C 259, 21.7.2023).

[46] See https://competition-policy.ec.europa.eu/sectors/manufacturing-basic-industries/critical-raw-materials_en (last accessed on 6 May 2025). These initiatives were announced in the context of the EU Clean Industrial Deal and build on the objectives of the Critical Raw Materials Act (CRMA) which underscores the significance of securing a sustainable and diversified supply of critical raw materials and are complementary to the system for demand aggregation of critical raw materials foreseen by the CRMA. See Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials, OJ L, 2024/1252, 3.5.2024, and Commission Communication of 26 February 2025, The Clean Industrial Deal: A joint roadmap for competitiveness and decarbonisation, COM(2025) 85 final.

the application of Articles 101 or 102 TFEU[47]. In the Communication accompanying the Defence Readiness Omnibus, the Commission expressed its readiness to provide the European defence industry with guidance on cooperation projects, particularly where such collaboration is necessary to scale up production or where individual companies would otherwise be unable to develop or manufacture a product on their own. This may also be the case in joint procurement of raw materials by defence companies[48]. The Commission has also previously demonstrated its willingness to provide guidance in the context of exceptional crises[49].

[47] Commission Notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases (guidance letters), SWD(2022) 326 final, 3 October 2022.

[48] Communication from the Commission to the European Parliament and the Council, Defence Readiness Omnibus, COM(2025) 820 final, p.10.

[49] To address situations of urgency in the context of the Covid-19 pandemic, the Commission adopted on 8 April 2020 a Temporary Framework Communication that set out the criteria that the Commission would follow when assessing cooperation projects aimed at addressing a shortage of supply of essential products and services during the coronavirus outbreak, and which also foresaw the possibility for the Commission to exceptionally provide companies with written comfort (via ad hoc 'comfort letters') on cooperation projects aimed at addressing the same. With the gradual improvement of the sanitary situation and the lifting of mobility restrictions, the Commission withdrew the Temporary Framework in October 2022, noting that the extraordinary conditions that had justified its adoption were no longer present. *See* Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak, 2020/C 116 I/02, 8 April 2020.