Reflecting on National Security Considerations in Merger Control: Insights from the EU and Türkiye

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Introduction

Geopolitical tensions, economic uncertainties, and technological advancements have prompted governments in many jurisdictions to strengthen regulatory frameworks to address national security concerns. While the need for screening mechanisms to safeguard national security and protect national interests is difficult to dispute,[1] this shift has significantly influenced the landscape of merger control, where traditional competition-based assessments are increasingly supplemented by public interest and security-based evaluations. These trends raise critical questions about the balance between fostering economic growth through open markets and protecting essential national interests.

Traditionally, it is the merger control systems that focus on assessing whether a transaction could harm consumer welfare, such as by leading to higher prices, and whether any potential negative effects are outweighed by efficiency gains. However, in several jurisdictions, competition reviews have been adapted to address threats to essential security interests linked to certain transactions.[2] This has been achieved through the incorporation of public interest tests or exceptions, allowing competition authorities or external bodies to evaluate essential security concerns within the merger review process and, where necessary, balance these concerns against competition-related issues.

It may be claimed that perceptions of the potential security risks associated with foreign investment have shifted significantly and prompted the introduction of new policies and the substantial reform/expansion of existing frameworks to address these risks in an increasing number of jurisdictions.[3]

- The proposed USD 14.9 billion merger was blocked between US Steel and Japan's Nippon Steel, citing national security concerns in 2025. The decision was based on the potential risks associated with foreign control over a major US steel producer, which is deemed critical to national security and essential supply chains.[4]
- The German government blocked the planned sale of the gas turbine business of MAN Energy Solutions, a Volkswagen subsidiary, to China's CSIC Longjiang GH Gas Turbine Co. based on security concerns, particularly the potential military applications of the technology involved in 2024.[5]
- The Spanish government blocked a EUR 600 million bid by Hungary's Ganz-Mavag consortium to acquire Spanish train manufacturer Talgo in 2024, citing national security concerns. The decision was influenced by Hungary's close ties with Russia and potential threats to Spain's rail infrastructure.[6]

These are just some of the headlines, confirming that countries around the globe are taking a cautious stance toward transactions in critical sectors. Indeed, there is a growing trend of adopting the national security measures/considerations in the assessment of concentrations and it is anticipated that this trend will persist.[7] The economic liberalisation spurred an increase

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[1] Martin Gelter, "Is Economic Nationalism in Corporate Governance Always a Threat?" (28 January 2022) European Corporate Governance Institute—Law Working Paper No 626/2022, Available at SSRN: *https://ssrncom/abstract=4020333*.

[2] OECD (2022), The Relationship Between FDI Screening and Merger Control Reviews, OECD Competition Policy Roundtable Background Note, p.8 *http://www.oecd.org/daf/competition/the-relationship-betweenfdi-screening-and-merger-control-reviews-2022.pdf*.

[3] OECD (2022), The Relationship Between FDI Screening and Merger Control Reviews, OECD Competition Policy Roundtable Background Note, p.8 *http://www.oecd.org/daf/competition/the-relationship-betweenfdi-screening-and-merger-control-reviews-2022.pdf*.

[4] "Biden blocks $14.1B sale of US Steel to Japanese buyer, citing national security concerns", Taylor Herzlich, (January 2025), *https://nypost.com/2025/01/03/business/biden-to-block-us-steel-sale-to-japanese-buyer-report/?utm_source*.

[5] Germany stops planned sale of VW's gas turbine business to China, (July 2024), *https://www.reuters.com/business/energy/germany-stops-planned-sale-vws-gas-turbine-business-china-2024-07-03/?utm*.

[6] "Spain blocks Hungarian train bid as 'national security' threat", *Financial Times*, (2024), *https://www.ft.com/content/c02d3f94-c56b-47f0-b82f-7b3c942e0a59?utm*.

[7] Apart from the USA and Austration, it is only around 2017 that security screening mechanisms began expanding to many more jurisdictions. This process was immediately thereafter accelerated in 2020 by the economic uncertainties and the stock price plunges generated by the Covid-19 pandemic. Varottil, Umakanth and You, Chuanman, Reconciling National Security Review with Takeover Regulation in the Global M&A Market (January 17, 2024). NUS Law Working Paper No. 2024/001, p.6. European Corporate Governance Institute—Law Working Paper No. 756/2024, Available at SSRN: *https://ssrn.com/abstract=4697440* or *http://dx.doi.org/10.2139/ssrn.4697440*.

in foreign investment, directing capital into sectors of critical importance to host nations, such as energy and infrastructure. This influx of foreign investment has heightened awareness among recipient countries about the potential risks to key economic sectors and national sovereignty.

The majority of countries implementing merger control regimes primarily focus on competition-based assessments. However, research indicates that nearly 90% of these regimes also include provisions for considering public interest criteria, with national security being the most common. These criteria are generally recognised as legitimate, as they allow for additional scrutiny of mergers involving firms with assets, operations, or locations critical to the safety and security of citizens. Beyond competition regimes, many countries have also integrated national security considerations into separate foreign direct investment review processes. These processes enable governments to evaluate not only mergers but also other types of investments, such as greenfield projects or the sale of individual assets, and subject them to regulatory approval. Consequently, such investments are increasingly subject to scrutiny and regulatory control by host states. This has also become common in the course of the merger control in some jurisdictions.

The number of jurisdictions implementing FDI review mechanisms, as well as the scope and concerns these mechanisms address, has expanded significantly in recent years. A growing number of countries, particularly advanced economies, are introducing, enhancing, or strengthening review frameworks in sectors deemed sensitive, guided by more comprehensive policies aimed at mitigating the security risks sometimes linked to inward investment. This trend has brought the interaction between FDI screening mechanisms and other regulatory frameworks—most notably merger control mechanisms under domestic competition laws—to the forefront of policy discussions.

Competition and investment policies are intertwined in a complex and often ambiguous relationship. Competition law can influence inward foreign direct investment by promoting open and competitive markets, limiting state subsidies that distort competition, enforcing principles of competitive neutrality, and creating a level playing field for competitors. At the same time, investment policies can impact competition by shaping market entry, affecting market concentration, and influencing innovation, among other factors.

So, on one hand, competition and investment policies share common long-term objectives, such as fostering economic growth, enhancing efficiency, and incentivising firms to improve productivity. However, conflicts may arise when these policies are used to pursue differing objectives in specific cases. For example, investment screening mechanisms might distort M&A markets by excluding or disadvantaging certain entities compared to others facing less scrutiny. Similarly, invoking essential security concerns for protectionist purposes or imposing excessive, disproportionate remedies under such arguments could undermine the efficiencies generated by mergers.

The introduction, expansion, or strengthening of FDI screening mechanisms raises important questions about their interaction and coordination with merger control reviews, particularly in cases where both mechanisms apply to the same transactions. While FDI screening mechanisms and merger control reviews pursue distinct objectives and generally operate independently, their overlap in certain transactions may lead to concerns. This is especially true regarding the design and implementation of remedies, where conflicting decisions or a lack of coordination between the two mechanisms could risk undermining each other. Ensuring effective collaboration and alignment between these processes is therefore critical to avoiding such outcomes.[8] "An overall trend towards more open and transparent FDI frameworks. This overall tendency is weakening, with measures related to national security concerns associated with foreign investments taking a prominent place."[9]

The concept of national security is inherently broad and ambiguous, with its interpretation and application varying significantly between states. Each country retains the authority to define and enforce its own understanding of national security, often shaped by unique political, economic, and strategic considerations. Given the current geopolitical landscape—marked by wars, trade disputes, financial and environmental crises, and a global health pandemic—it is unsurprising that interest in protectionist and national security-focused measures is on the rise. In particular, it has prompted many nations to adopt a more cautious and assertive stance when reviewing mergers and acquisitions. These reviews are increasingly conducted through the lens of national security, creating additional scrutiny and regulatory hurdles for business transactions.

In fact, this reflects one of the key provisions of the Draghi Report.[10] The Draghi Report emphasises the importance of incorporating security and resilience considerations into antitrust evaluations to ensure that competition policies align with broader strategic objectives. At the same time, it also advocates for reassessing and potentially relaxing merger control regulations to support the development of European champions in key strategic industries. These recommendations could be particularly relevant for the defence sector. Given the current geopolitical landscape, including the war in Ukraine and the increasing focus on strengthening the sovereignty of EU member states, there is growing momentum for more efficient and expedited consolidation in the defence industry. As primary buyers

[8] OECD (2022), "The Relationship Between FDI Screening and Merger Control Reviews", OECD Competition Policy Roundtable Background Note, *http://www.oecd.org/daf/competition/the-relationship-betweenfdi-screening-and-merger-control-reviews-2022.pdf*.
[9] Accoding to the 31 OEDC/UNCTAD Report *https://www.oecd.org/en/publications/31st-oecd-unctad-report-on-g20-trade-and-investment-measures_ea409cda-en.html*.
[10] The future of European competitiveness, 2024, *https://commission.europa.eu/topics/eu-competitiveness/draghi-report_en*.

in this sector, national governments may play a role in shaping the EC's merger assessments by highlighting efficiencies and strategic advantages that align with Draghi's proposals.

For companies and investors, this evolving landscape introduces a substantial degree of uncertainty, as the criteria for what constitutes a national security risk remain fluid and, at times, unpredictable. The implications for cross-border investments and strategic business planning are significant, as decisions are now subject to heightened regulatory oversight.

Several case studies illustrate the practical implications of national security considerations in merger control. For example, the *E.ON/Endesa* case in the EU demonstrated the tension between Member States' public interest interventions and the EC's exclusive competence over mergers with the EU dimension. In Türkiye, cases such as the *Sasa Polyester* and *Mikes Mikrodalga* decisions reflect the potential consideration of national security concerns, even in the absence of explicit legal provisions. These cases underscore the growing importance of aligning competition and security objectives in regulatory frameworks.

This article focuses on the EU and Türkiye because these two jurisdictions are of critical importance due to their active trade, economic relations, and significant investment flows. The EU represents one of the world's largest economic blocs, setting the tone for global regulatory trends, while Türkiye serves as a strategic bridge between Europe, Asia, and the Middle East, with a dynamic and growing economy. Their strong trade ties and mutual investments make both jurisdictions key players in shaping and responding to regulatory practices involving national security.

The EU has established a rather comprehensive framework that allows Member States to address legitimate interests, such as national security and media plurality, within the scope of the EU Merger Regulation (EUMR) and FDI Screening Regulation. Conversely, Türkiye, has adopted a more competition-focused merger control regime under Law No. 4054 on Protection of Competition (Turkish Competition Law), with national security considerations playing a less explicit role, i.e. without specific provisions in the Turkish Competition Law addressing public interest or national security, however with presence of sector-specific regulations in industries such as defense and energy, which suggest an implicit recognition of these concerns. Despite this difference, both jurisdictions are actively engaged in shaping regulatory practices. Such differences also sometimes conflict, creating uncertainty for businesses navigating cross-border mergers and acquisitions. Moreover, the absence of consistent definitions and practices across jurisdictions complicates the regulatory environment, posing challenges for both policymakers and market participants.

In this context, the article offers an overview of some of the emerging trends in the application of national security considerations in merger reviews within these two jurisdictions. Specifically, it examines notable cases and the approaches adopted by the authorities. By analysing these developments, we aim to provide insights into how national security concerns are influencing regulatory practices and their broader implications for the business environment, what constitutes a "threat for a state" and how it is managed in the EU and Türkiye.

Each section of the paper outlines the relevant laws and regulatory bodies, examines how "national security" is defined—whether formally or informally—in each jurisdiction, and analyses whether this understanding of national security influences the legal framework governing merger reviews. The discussion also highlights the need for transparent and proportionate regulatory measures to strike a balance between national security and market competitiveness, ensuring both economic resilience and the protection of essential national interests.

The paper concludes that there is a need for more transparent, predictable, and proportionate regulatory measures when addressing national security concerns in the context of merger control. Ideally, such considerations should fall outside the scope of competition-based assessments to preserve the integrity and clarity of merger review processes. However, where national security factors are to be integrated, they must be governed by clearly defined, objective, and transparent criteria. While the EU has made some progress in developing a framework that accommodates these concerns, significant disparities remain among Member States, undermining legal certainty. Similarly, Türkiye's regulatory regime would benefit from a more structured and coherent approach—ensuring that any incorporation of measures to protect legitimate interests beyond competition concerns in mergers is both predictable and aligned with broader strategic economic priorities.

Key doctrine brief

The role of security considerations in merger control has been relatively underexplored in the literature, particularly in the comparative context of the EU and Türkiye. National security concerns have been primarily analysed in academic and policy literature in the context of foreign direct investment screening. Scholars have emphasised the growing importance of national security considerations as governments respond to emerging geopolitical and economic challenges. For instance,

U. Varottil argues that the proliferation of NSR systems complicates the global takeover market by intersecting with traditional takeover regulations, potentially creating a bifurcated regime. While domestic transactions remain governed by conventional takeover rules, cross-border takeovers face the added burden of stringent screening processes. This disparity significantly reshapes the landscape for foreign acquirers in cross-border deals,

while domestic acquirers competing for the same target continue to operate under the existing regulatory framework. [11]

I. Kokkoris addresses national security and public interest considerations in merger control as part of industrial policy, the emphasis is primarily on the expanding range of sectors subject to national security scrutiny and the strengthening of assessment frameworks in the EU, the US, China, and Japan.

Kevin Goldstein[12] provides a comparative look at how governments review cross-border mergers for both competition and national security concerns with a focus on the three major economic markets: the US, the EU (UK), and China. He emphasises that national security reviews have often become politicised, which result in uncertainty for businesses and can harm diplomatic relations with key trading partners. As the politicisation of merger reviews is likely to persist, the author insist that the competition authorities should be relieved from the burden of addressing non-competition factors. This approach would enhance transparency and foster better perceptions among investors and trading partners.

Alec Burnside and Adam Kidane[13] examine the interaction between the EU FDI Regulation and the EU Merger Regulation, emphasising how the absence of substantive and procedural alignment between these frameworks has intensified the difficulties in handling the increasing number of parallel regulatory reviews.

Kyriakos Fountoukakos, Veronica Roberts, and Ruth Allen[14] examine the evolution of the concept of "national security" in this context in recent years, including the effects of the Covid-19 pandemic. They then explore various approaches to addressing national security concerns in the merger context, including: (i) intervention under art.21(4) of the EU Merger Regulation; (ii) the application of art.346 TFEU; (iii) the integration of national security considerations within merger control regimes; and (iv) intervention through separate foreign direct investment frameworks.

Michael McLaughlin[15] explores the impact of defence mergers on national security, asserting that antitrust and national security objectives are largely aligned in achieving their respective goals. This is particularly when "the world has potentially entered a new Cold War between the West and China"[16] which has led to an increasing number of mergers and acquisitions in the defence sector and to more frequent weighing the transaction's competitive effects against its impact on national security.

David Reader[17] emphasises that although national security criteria are intended to serve a legitimate purpose, there is a risk of misuse by governments, who may broaden the definition of "national security" to pursue industrial policy objectives, such as limiting foreign takeovers sand restricting broader FDI in strategically important sectors. Indeed, such actions can raise concerns about protectionism, potentially diminishing the willingness of prospective foreign investors to explore opportunities in that country.

John Davies[18] stresses that the national rules for considering public interest factors in merger control vary considerably across the globe and that this causes considerable complexity. Public interest goals are generally broadly defined and, absent clear guidelines on their application, can create uncertainty and unpredictability. Businesses would welcome mechanisms to minimise these concerns, such as soft law (e.g. the South African guidelines) or imposing limitations on the discretion to consider and accept public interest grounds in merger assessment. Merger activity would benefit greatly from such steps being adopted more widely.

The business community[19] advocates for mergers to be evaluated solely based on competition principles, arguing that incorporating public interest considerations into the review process adds complexity and unpredictability, imposes additional costs and burdens on businesses, and could discourage mergers that enhance competition.

Focusing on the definition

The "national security interest" is widely recognised as allowing a state to determine which areas of its economy are restricted or prohibited to foreign investors.[20] Each country has a right to determine what is necessary to

[11] Varottil, Umakanth and You, Chuanman, "Reconciling National Security Review with Takeover Regulation in the Global M&A Market" (January 17, 2024). NUS Law Working Paper No. 2024/001, p.3. European Corporate Governance Institute—Law Working Paper No. 756/2024, Available at SSRN: *https://ssrn.com/abstract=4697440* or *http://dx.doi.org/10.2139/ssrn.4697440*.

[12] Goldstein, Kevin B., "Reviewing Cross-Border Mergers and Acquisitions for Competition and National Security: A Comparative Look at How the United States, Europe, and China Separate Security Concerns from Competition Concerns in Reviewing Acquisitions by Foreign Entities" (June 5, 2011). *Tsinghua China Law Review*, Vol. 3, p.215, 2011, Available at SSRN: *https://ssrn.com/abstract=1836892*.

[13] Alec Burnside and Adam Kidane, "Merger control meets FDI: the multi-stop shop expands, Competition Law and Policy Debate", 2022, pp.68–76, *https://doi.org/10.4337/clpd.2022.02.01*.

[14] Chapter 9: Addressing national security concerns in the merger context, In: Research Handbook on the Law and Economics of Competition Enforcement, ElgarOnline, 2022, pp.217–242 *https://doi.org/10.4337/9781789903799.00019*.

[15] Michael McLaughlin, "National Security and Competition: How Courts Evaluate National Security When Assessing a Merger, Journal of National Security Law and Policy," 2024 *https://jnslp.com/2024/06/27/national-security-and-competition-how-courts-evaluate-national-security-when-assessing-a-merger/*.

[16] Michael McLaughlin, "National Security and Competition: How Courts Evaluate National Security When Assessing a Merger, Journal of National Security Law and Policy," p.379.

[17] David Reader, "Extending 'National Security' in Merger Control and Investment: A Good Deal for the UK?" 2018, 14(1) *Competition Law International*, *https://www.regulation.org.uk/library/2018-David_Reader-Proposals_to_extend_national_security_in_merger_control.pdf*.

[18] Summary Of Discussion Of The Roundtable On Public Interest Considerations In Merger Control, OECD, DAF/COMP/WP3/M(2016)1/ANN4/FINAL, p.6, *https://one.oecd.org/document/DAF/COMP/WP3/M(2016)1/ANN4/FINAL/en/pdf/*.

[19] Executive Summary Of The Roundtable On Public Interest Considerations In Merger Control, DAF/COMP/WP3/M(2016)1/ANN5/FINAL, June 2016, p.2.

[20] Accaoui Lorfing, P. (2021) "Screening of Foreign Direct Investment and the States' Security Interests in Light of the OECD, UNCTAD and Other International Guidelines" in Titi, C. (eds) *Public Actors in International Investment Law. European Yearbook of International Economic Law* (Springer, Cham)*https://doi.org/10.1007/978-3-030-58916-5_10*.

protect its national security. "This determination should be made using risk assessment techniques that are rigorous and that reflect the country's circumstances, institutions and resources."[21] The national security consideration is a part of the more general "public interest" clause. According to the OECD Executive summary by the Secretariat,[22] there is no definitive list of public interest considerations applied by different jurisdictions. The concept can be broad, such as "legitimate public interest," "overriding public interest," or weighing "public benefits," or it can be more specific and tailored to the social, political, and economic needs of a country.

Specific considerations often target particular sectors, such as energy ("security of supply", "stable energy provision"), media ("plurality of the media"), finance ("prudential rules," "financial system stability"), and defence ("national security," "national defence").

Public interest considerations can also be categorised into those focused on economic factors, like "protection of small and medium enterprises," "international competitiveness of domestic firms," or "economic development of non-metropolitan areas," and those addressing broader goals, such as "protection of employment," "public health," or "environmental protection." Public interest clauses are specific to each jurisdiction and are therefore more likely to vary in concept, interpretation, and application compared to core competition goals.

This variability increases the risk of divergent outcomes, complicating the assessment of cross-border transactions and making it more challenging to design effective remedies. It produces certain uncertainty. In merger control such uncertainty is "especially costly, as 'firms need to deeply restructure and reorganise their production, distribution, research and marketing activities."[23] As a result, consultation and coordination among competition authorities become essential when public interest clauses are involved.

While states have the recognised right to implement measures, they deem necessary for their security, this right is not without boundaries. For instance, principles embedded in the OECD Guidelines for Recipient Country Investment Policies relating to National Security[24] provide certain guidance via envisaging four main principles of such security-based actions: non-discrimination among the investors subject to the screening mechanism, transparency and predictability of regulatory policies, regulatory proportionality to the perceived risk of national security it aims to mitigate, and accountability of the regulatory process. Additionally, international investment agreements may impose constraints on a state's ability to adopt security-related measures. Furthermore, customary international law, particularly the principle of good faith, provides a foundation for evaluating a state's actions. This framework helps to strike a more equitable balance between a state's rights and the protections afforded to foreign investors.

Let's explore the respective frameworks for the national security considerations in the EU and Turkiye.

EU Framework to National Security Consideration

In the EU, the concept of "national security" is addressed primarily within the context of foreign direct investments and merger control, but it is not explicitly defined in a single legislative instrument. Instead, it is referenced in various legal frameworks, leaving its definition and application to the discretion of individual Member States. The main approaches to address the national security concerns in the merger context, include: (i) intervention under art.21(4) of the EUMR; (ii) the application of art.346 TFEU;[25] (iii) the integration of national security considerations within merger control regimes; and (iv) intervention through separate foreign direct investment frameworks.[26] Let's look into the most common ones.

The EU Merger Regulation[27] governs merger control within the EU, and while it focuses on competition concerns, it allows Member States to intervene in mergers and acquisitions on grounds of public interest, which include national security. The EU, in the absence of a formal unified definition of "European security," relies on the individual Member States to determine and assess their own national security priorities.[28]

Specifically, art.21(4) of the EUMR outlines the circumstances under which EU Member States can take measures to protect legitimate interests beyond competition concerns in mergers that fall under the exclusive jurisdiction of the EC. Article 21 EUMR grants the EC exclusive jurisdiction to assess concentrations of the EU dimensions and includes a catchall provision that

[21] OECD, "Recommendation of the Council on Guidelines for Recipient Country Investment Policies relating to National Security", OECD/LEGAL/0372 p.5 *https://legalinstruments.oecd.org/public/doc/227/227.en.pdf*.
[22] Executive Summary Of The Roundtable On Public Interest Considerations In Merger Control, 2016 *https://one.oecd.org/document/DAF/COMP/WP3/M(2016)1/ANN5/FINAL/en/pdf*.
[23] Lecchi, E. (2023) "Sustainability and EU merger control" *European Competition Law Review*, 44(2), 70–80, *https://discovery.dundee.ac.uk/ws/portalfiles/portal/97184640/Author_Accepted_Manuscript.pdf*, p.2.
[24] OECD, "Recommendation of the Council on Guidelines for Recipient Country Investment Policies relating to National Security", OECD/LEGAL/0372, adopted on 25 May 2009.
[25] The TFEU allows Member States to "take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes." The treaty also incorporates a list of products covered by the security exception, which includes automatic firearms, artillery, bombs, torpedoes, rockets and guided missiles, tanks, and warships (see List of products covered by security exemption (April 15 1958), reprinted in Official Journal of the European Communities, 2001/C364E/091 (May 4, 2001), available at *http://aei.pitt.edu/935/01/Article_223_decision.pdf*).
[26] Chapter 9: "Addressing national security concerns in the merger context," in *Research Handbook on the Law and Economics of Competition Enforcement*, (ElgarOnline, 2022) pp.217–242*https://doi.org/10.4337/9781789903799.00019*.
[27] Council Regulation 139/2004.
[28] Kevin Goldstein, "Reviewing Cross-Border Mergers and Acquisitions for Competition and National Security: A Comparative Look at How the United States, Europe, and China Separate Security Concerns from Competition Concerns in Reviewing Acquisitions by Foreign Entities" p.3.

enables Member States to raise any issue deemed to be in the "public interest" as a basis for intervening in the EC merger clearance.[29] Specifically, it allows Member States to intervene in mergers to protect "recognised interests", such as public security, media plurality, prudential rules, or other public interests recognised by the EC. This provision ensures that while the EC has exclusive competence over mergers with the EU dimension, Member States can safeguard certain national interests, provided these measures are necessary, proportionate, and compatible with EU law.[30] Such measures aimed at protecting these recognised interests that could prohibit, condition, or affect a concentration with the EU dimension may be adopted and implemented without prior notification to or approval from the EC, provided they genuinely protect the recognised interest and adhere to the principles of proportionality and non-discrimination.[31]

For measures targeting interests other than the recognised ones, Member States must communicate such actions to the Commission before they take effect. This allows the Commission to ensure compliance through its control mechanism (the "Communication and Standstill Obligations").

According to the EC's established practice, to preserve the effectiveness of art.21 EUMR, as interpreted alongside art.4(3) of the TFEU (which imposes an obligation of sincere cooperation on the EU and Member States), the Communication and Standstill Obligations also extend to situations where measures ostensibly aim to protect a recognised interest. This applies when there are reasonable doubts regarding whether the measures genuinely pursue the recognised interest or comply with the principles of proportionality and non-discrimination.[32]

In other words, although Member States have the authority to invoke a "public interest" exception, the EC has the power to override its misuse if the invocation is deemed incompatible with the general principles and other provisions of the EU law.

Turning to the Foreign Direct Investment Screening Regulation,[33] it explicitly addresses the issue of national security and provides a framework for Member States to screen foreign investments that may affect security or public order. Foreign investment is generally beneficial for host economies but can raise concerns about national security or public order in certain cases. Risks include espionage or sabotage, such as access to sensitive information through proximity to critical sites or managing critical infrastructure. Dependency concerns arise when foreign control over supply chains or critical goods enables undue influence on the host government. Additionally, the acquisition of advanced technologies by foreign entities poses risks if used for defence purposes by adversarial parties.

So the Regulation lists several factors that Member States may consider when evaluating risks to national security, including: critical infrastructure (e.g., energy, transport, health, and communications), critical technologies (e.g., AI, robotics, and cybersecurity), supply of critical inputs (e.g., energy, raw materials, and food security), access to sensitive information or personal data, and media freedom and pluralism, etc.

It is important to note that historically, security screening mechanisms have concentrated on specific sectors, such as the defence industry, critical domestic infrastructure, and other sensitive areas. However, this previously narrow focus has recently been significantly broadened. Take for instance, the EC's Recommendation on critical technology areas for the EU's economic security,[34] identifying 10 key areas, including semiconductors and artificial intelligence, for collective risk assessments. This Recommendation builds upon the Joint Communication on a European Economic Security Strategy, which established a comprehensive strategic framework for ensuring economic security within the EU (and identifying novel threats?).[35] Member States that have not yet implemented national screening mechanisms were urged to establish them without delay.

Although the FDI Screening Regulation provides examples of national security risks, it does not provide a single, exhaustive definition of "national security," instead leaving it to Member States to interpret and apply the concept based on their own legal frameworks and national interests. So let us look into some national level interpretations of national security.

National-Level Interpretations

The authority to invoke a national exception to a merger control action by DG-COMP rests with each Member State. Consequently, Member States have had to incorporate provisions into their national laws to align with the EU law. So in practice, the concept of national security is defined and applied by individual Member States in their national laws.

[29] Kevin Goldstein, "Reviewing Cross-Border Mergers and Acquisitions for Competition and National Security: A Comparative Look at How the United States, Europe, and China Separate Security Concerns from Competition Concerns in Reviewing Acquisitions by Foreign Entities" p.16

[30] Does the EC's Decision on Aegon Signal the Renaissance of Article 21 EUMR? Latham & Watkins LLP, March 2022, available at *https://www.lexology.com/library/detail.aspx?g=462a90b6-11da-4de6-a4de-15e70eb9fbd3&utm_source=chatgpt.com*.

[31] See the Commission's past practice in Commission decision of 20 December 2006 in Case M.4197 E.ON / Endesa, para.27; Commission decision of 26 September 2006 in Case M.4197 E.ON / Endesa, para.24; and Commission decision of 20 July 1999 in Case M.1616 BSCH / Champalimaud (interim measures), paras 65–67. The Court of Justice considered that a Commission decision following this approach did not contain any manifest errors of judgment; judgment of 6 March 2008 *Commission v Spain* (C-196/07) ECLI:EU:C:2008:146 at [35]–[36].

[32] Summary of Commission Decision of 21 February 2022 relating to art.21(4), of Council Regulation (EC) No 139/2004 (Case M.10494 – VIG/AEGON CEE (Art. 21 Procedure)), OJ C/2024/578, 2024 Paras 5–8, *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202400578*.

[33] Regulation 2019/452.

[34] See also European Commission, Joint Communication on European Economic Security Strategy, Brussels, 20 June 2023 JOIN(2023) 20 final.

[35] Commission recommends carrying out risk assessments on four critical technology areas: advanced semiconductors, artificial intelligence, quantum, biotechnologies, Press release, 2023, *https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4735*.

For example, in Germany, national security concerns are outlined in the Foreign Trade and Payments Ordinance (AWV)[36], which allows the government to block acquisitions of critical infrastructure or technologies. In France, national security is addressed under its FDI control regime, which restricts foreign investments in sensitive sectors like defense, energy, and telecommunications.[37] Décret 2019-206 du 20 mars 2019 relatif à la gouvernance de la politique de sécurité économique, Article 3.II specifically mandates the Service de l'Information Stratégique et à la Sécurité Économiques (SISSE) to carry out this role of detection and identification of transactions. In Italy, the "Golden Power" rules[38] enable the Italian government to scrutinise and potentially block or impose conditions on foreign investments and corporate transactions that may affect national security or public interest. The strategic sectors covered include defence, energy, transport, communications, and more. Austria introduced a provision, requiring that all merger control notifications are forwarded to the Federal Minister for Digital and Economic affairs competent for FDI assessment. This applies to notifications submitted after 10 September 2021.[39] Under Spain's FI screening rules, investments from EU Member States are subject to review if they involve sensitive sectors and either the target company's shares are publicly traded in Spain, or the investment exceeds EUR 500 million. This screening mechanism, originally set to expire at the end of 2024, has now been extended. Acquisitions of Hungarian companies operating in the insurance sector by entities from other EU Member States are subject to purview of the Hungarian FDI legislation by the Hungarian government, which retains the authority to oppose transactions if deemed necessary.

In summary, while the EU provides a framework for Member States to consider national security in merger and FDI contexts, the definition and application of national security are largely left to national laws and discretion, making it a variable concept across the EU.

Competition concerns and essential security risks may arise independently, even though some transactions may trigger both types of reviews. For instance, essential security risks could emerge from the acquisition of a company developing strategic advanced technology, even if the transaction does not meet the thresholds for merger control. Similarly, most transactions subject to merger reviews do not present essential security risks.

Occasionally, however, overlapping concerns may arise. A clear example is the acquisition of a competitor with sensitive assets in the defence sector, potentially creating a single-supplier risk. While the number of transactions raising issues under both mechanisms has been relatively limited so far, the recent broadening of what is considered "strategic" or linked to essential security interests—such as critical infrastructure, advanced technology, data, or natural resources—could make dual reviews more common in the future.[40]

Notable cases

As mentioned above, in the EU, merger control primarily focuses on maintaining competitive markets. However, national security considerations can also influence merger decisions, particularly when member states invoke public interest grounds to block or modify transactions. Notable examples include:

Spain's Block of Ganz-Mavag's Bid for Talgo (2024): On August 27, 2024, the Spanish government blocked[41] a takeover bid for Spain's leading railway manufacturer, Talgo, by Ganz-Mavag, a Hungarian consortium with ties to the Hungarian government. This marks the first known prohibition under Spain's foreign investment (FI) screening legislation introduced in 2020.[42] This decision is particularly notable because the investor, Ganz-Mavag, is owned by entities based within the EU. The consortium is jointly controlled by Magyar Vagon (55%), a Hungarian railway manufacturer owned by MOL Hungarian Oil and Gas Plc, a publicly traded energy company, and Corvinus (45%), a Hungarian sovereign investment fund.

While EU market freedoms, such as the free movement of capital and establishment, apply to cross-border transactions within the EU, Member States may invoke exceptions for reasons of public policy, security, or health. Such exceptions are permitted under art.52(1) of the TFEU if the threat is "genuine and sufficiently serious" to a fundamental interest of society. In this case, the Spanish government justified its decision on national security grounds, describing Talgo as a "strategic enterprise in a sector critical to Spain's economic security, territorial cohesion, and industrial development."

Although the government's decision does not provide extensive details—such information is classified under Spanish law—reports suggest that Talgo's advanced technology, specifically its variable gauge system for seamless travel across countries with different railway gauges, was a key factor. This technology is crucial for Spain's unique track widths and could potentially play a significant role in integrating Ukraine's railway system with the EU. Security concerns reportedly included the possibility of this technology being shared with Russia, potentially aiding its war logistics and railway operations in occupied Ukrainian territories. Additionally,

[36] *https://www.gesetze-im-internet.de/englisch_awv/?utm_source*.
[37] Evolution of the French Regulation on Foreign Investments in Sensitive Sectors (French FDI regulation) // *https://www.willkie.com/-/media/files/publications/2023/12/evolution_of_the_french_regulation_on_foreign_investments_in_sensitive_sectors.pdf*.
[38] Italian National Security and Investment Control Regime Golden Powers Guide, 2023, available at *https://www.squirepattonboggs.com/-/media/files/insights/publications/2023/01/italian-national-security-and-investment-control-regime-golden-powers-guide/italian_golden_powers_guide.pdf?utm_source=chatgpt.com*.
[39] See Austrian Cartel and Competition Law Amendment Act 2021 (KaWeRÄG 2021).
[40] OECD, 2022, p. 26.
[41] Decision 29 August 2024, *https://www.cnmv.es/webservices/verdocumento/ver?t=%7B0ec8258d-316a-42a7-9d1a-ed91364ea89a%7D*.
[42] Spain issues first public veto under the FI rules introduced in 2020, *https://www.linklaters.com/insights/blogs/foreigninvestmentlinks/2024/october/spain-issues-first-public-veto-under-the-fi-rules-introduced-in-2020*.

intelligence reports highlighted ongoing informal links between MOL and Russian oil companies, raising fears about potential disruptions to Ukraine's access to Talgo's technology.[43]

Hungary's Veto of Vienna Insurance Group's Acquisition of AEGON's Hungarian Subsidiaries (2021): In April 2021, the Hungarian government blocked Vienna Insurance Group's (VIG) acquisition of AEGON's Hungarian subsidiaries, citing national security concerns.[44] The EC investigated this decision and concluded that Hungary had violated Article 21 of the EUMR, which grants the EC exclusive competence over concentrations with an EU dimension, except in specific public interest cases.

The EC concluded that Hungary had not sufficiently demonstrated why the Austrian insurance company VIG, as a prospective new investor in AEGON Hungary, would pose a greater risk to public security compared to the current owner, AEGON, a Dutch insurance company. Additionally, the EC noted that it regularly evaluates mergers in the insurance sector with an EU dimension, and Member States typically do not raise public security concerns in such cases.[45]

Hungary also failed to provide the EC—or the involved parties, VIG and AEGON—with any substantive reasoning to justify its veto decision beyond a general claim that the transaction would threaten Hungary's public security. Based on this, the EC determined there were reasonable doubts about whether the veto decision was genuinely intended to protect a legitimate interest, such as public security, and whether it complied with the general principles and provisions of EU law. Moreover, Hungary had failed to show that the Veto Decision was suitable and proportionate to its aim of safeguarding public security.

Given these shortcomings, the EC concluded that Hungary's veto decision should have been communicated to and approved by the Commission before its implementation. By failing to do so, Hungary infringed on the Communication and Standstill Obligations under EU law. The EC ordered Hungary to withdraw its veto, emphasising the need for member states to communicate and justify such interventions appropriately.[46]

News Corp/BSkyB transaction in the UK (2010): The EC approved the transaction[47] focusing solely on competition aspects, such as market power and potential anticompetitive effects in the audiovisual, newspaper publishing, and advertising sectors. The EC emphasised that its decision did not interfere with the UK's assessment of the deal under its media plurality rules. The UK government, under art.21 of the EUMR, has the right to assess whether the acquisition aligns with public interest considerations, such as the diversity of media ownership. The UK Secretary of State for Business Innovation and Skills had issued a European intervention notice, requiring an investigation into whether the deal poses risks to media plurality. Ultimately, the company announced the withdrawal from the bid.[48]

In the energy sector, the *E.ON/Endesa* case, involving the acquisition of Spain's electricity incumbent, led to multiple interactions between the EC and Spain. In April 2006, the EC approved E.ON's proposed bid for Endesa under the EUMR. However, in July 2006, the Spanish energy regulator, CNE, imposed a series of conditions on the concentration already approved by the EC.[49] The EC determined that these conditions violated art.21 of the EUMR (because it had taken the decision without prior communication to and approval of the EC) and required Spain to withdraw the measures deemed incompatible with EU law. When Spain did not withdraw

[43] In response to the veto, Ganz-Mavag announced its intention to challenge the Spanish government's decision in court. If pursued, this would be the first judicial review of a decision under Spain's 2020 FI legislation. Observers have speculated that the veto prompted Spain to extend its FI screening mechanism for EU investors beyond 2024 to prevent a renewed takeover attempt by Ganz-Mavag. Spain's Minister of Economy, Carlos Cuerpo, has since confirmed that the temporary rules will remain in place for at least another year. // *https://www.linklaters.com/insights/blogs/foreigninvestmentlinks/2024/october/spain-issues-first-public-veto-under-the-fi-rules-introduced-in-2020*.

[44] On the basis of this amended FDI legislation, VIG notified its acquisition of AEGON Hungary to the Hungarian Ministry for the Interior. On 6 April 2021, Hungary's Minister for the Interior adopted a decision prohibiting VIG's proposed acquisition of AEGON Hungary (the "Veto Decision"), without providing any justification other than that the Transaction violates the national security interest of Hungary. Summary of Commission Decision of 21 February 2022 relating to art.21(4), of Council Regulation 139/2004 (Case M.10494 – VIG/AEGON CEE (art.21 Procedure)), OJ C/2024/578, 2024, *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202400578*.

[45] Summary of Commission Decision of 21 February 2022 relating to art.21, OJ C/2024/578, 2024 paras 15–16, *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202400578*.

[46] Summary of Commission Decision of 21 February 2022 relating to art.21(4), of Council Regulation 139/2004 (Case M.10494 – VIG/AEGON CEE (Art. 21 Procedure)), OJ C/2024/578, 2024 paras 5–8, *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C_202400578*.

[47] See Case No COMP/M.5932 – News Corp/ BSkyB, 2010. The European Commission approved News Corporation's proposed acquisition of BSkyB under the EU Merger Regulation finding no substantial concerns, given that News Corp and BSkyB mainly operated in different markets and their overlapping activities were minimal. Key issues such as the licensing of premium movie content, bundling of services, and advertising practices were evaluated, and the Commission determined that the transaction would not negatively affect competition. EC, Press-release, 2010, IP/10/1767 *https://ec.europa.eu/commission/presscorner/detail/en/ip_10_1767*.

[48] UK Secretary of State for Business Vince Cable tasked Ofcom with investigating the merger's potential impact on media plurality. However, after Mr. Cable's controversial remarks against Murdoch, responsibility for the matter shifted to Secretary of State for Culture, Media, and Sport, Jeremy Hunt. In January 2011, Ofcom recommended referring the merger to the Competition Commission. To address media plurality concerns, NewsCorp proposed spinning off Sky News as an independent company, and a public consultation on these undertakings followed.

Despite expectations that the merger would proceed, a series of events derailed the process. Revelations about widespread phone hacking and illegal payments by News of the World, a NewsCorp-owned newspaper, led to its closure and triggered public and political outrage. These developments raised serious concerns about NewsCorp's credibility and media ethics. On July 11, 2011, Jeremy Hunt referred the bid to the Competition Commission after NewsCorp withdrew its proposed undertakings. The same week, Prime Minister David Cameron announced a two-part public inquiry into press ethics, unlawful practices, and related police investigations. Amid mounting public pressure, NewsCorp formally withdrew its bid for BSkyB.

The fallout from the scandal extended beyond the merger. Questions arose about BSkyB's broadcasting license and whether it still met the "fit and proper" standard to hold such a license. While Ofcom closely monitored ongoing investigations, it concluded in September 2012 that BSkyB, now renamed Sky, remained fit to hold its broadcasting license. This marked the end of a contentious chapter in the UK's media landscape, spotlighting the interplay between corporate conduct, public interest, and regulatory oversight. Antony Seely, Media ownership & competition law: the BSkyB bid in 2010–11, House of Commons Library, 2017 *https://commonslibrary.parliament.uk/research-briefings/sn06028/#_ftnref3*.

[49] The Royal law-decree n. 4/2006 subjects to prior authorization the acquisition of certain energy assets and the acquisition of at least a 10% shareholding in an energy operator. Giannino, Michele, "The Spanish Prior Approval Regime for the Purchase of Certain Shareholdings and Assets in the Energy Sector Breaches EC Law" (May 24, 2009) P.3.

these measures, the EC initiated infringement proceedings and referred the case to the Court of Justice of the EU (ECJ) in March 2007.[50]

The ECJ confirmed that Spain had failed to comply with EC decisions requiring the withdrawal of illegal conditions imposed on E.ON's bid for Endesa, and ruled[51] that Spain had breached its obligations under the EU law. In its defence, Spain argued that the measure taken by the National Energy Commission was necessary to ensure the security of energy supplies. However, the ECJ was unable to assess the validity of this defence, as Spain failed to inform the Commission of the specific national interests the measure was intended to protect. The decision was ruled as incompatible with the EC exclusive jurisdiction on mergers review and could create obstacles to cross-border mergers. M. Giannino correctly points to the fact that the ECJ "embraces quite a wide perception of national measures infringing the free movement of capitals, but it also narrowly construes the conditions in which such restrictive national measures can be justified under EC law."[52]

The ECJ's ruling reaffirmed the EC's exclusive competence in cross-border mergers and emphasised that Member States cannot impose unjustified restrictions that undermine the benefits of the Single Market. This judgment strengthens the Commission's ability to monitor and enforce compliance with EU merger rules, ensuring that national measures do not interfere with mergers of the EU dimension unless they are necessary and proportionate to protect a legitimate public interest.

Prevailing Approach to Non-Competition Factors in Türkiye

In Türkiye, the regulation of mergers and acquisitions primarily focuses on preserving competitive market conditions, with the Turkish Competition Authority (TCA) overseeing the assessment of such transactions in line with Turkish Competition Law and Communiqué No. 2010/4.[53] Generally, this evaluation is limited to competition-related aspects, without considering non-competition factors[54] such as public interest or national security. This ensures the TCA's independence in fulfilling its responsibilities. Article 20 of the Turkish Competition Law establishes that no authority, entity, or individual may influence the TCA's final decisions through orders or directives. To date, the TCA has maintained its independence and impartiality in enforcement activities for both domestic and foreign investors. Certain industries in Türkiye are subject to additional regulations due to their strategic importance. For example, sectors like defence, maritime, energy, banking and broadcasting may undergo heightened scrutiny or restrictions to address national security concerns. Such sector-specific rules operate alongside the broader competition laws to safeguard Turkiye's critical interests.

There is limited publicly accessible information on specific cases where mergers or acquisitions have been explicitly blocked on the grounds of national security. Unlike jurisdictions with more formalised systems for reviewing foreign direct investment based on national security, Türkiye's interventions in this area are less documented. This makes it challenging to identify detailed examples of cases where national security considerations have played a central role in the decision-making process.

While the legislation outlines the framework for the merger control regime in Türkiye, it does not include a definition of the concept of "national security." Furthermore, the TCA has not defined the concept of "national security" in its decisions related to the merger control regime. Given the lack of a clear definition, either in legislation or in TCA decisions, it is arguable that "national security" has not been established as a primary consideration in merger and acquisition assessments. This absence highlights the need for clearer guidance on this concept, particularly in the context of the merger control regime. Although rare, national security considerations may play a role during the review process of a merger transaction. However, it is important to note that there is no consistent approach adopted by the TCA on this matter.

The national security aspect of a merger transaction was examined by the TCA in *Sasa Polyester*[55] case. In the relevant decision, the TCA assessed the possible anti-competitive outcomes of a proposed transaction involving the acquisition of 51% of Sasa Polyester Sanayi A.Ş.'s (Sasa) shares by Indorama Netherlands B.V. (Indorama), resulting in a change of Sasa's control structure. Sasa is active in the polyester industry, where some products are subject for anti-dumping measures[56]. The acquirer Indorama is also involved in the polyester industry with several horizontal overlapping activities and one vertically overlapping market.

Throughout the clearance process, third parties, including Istanbul Textile and Raw Materials Exporters' Association (İstanbul Tekstil ve Hammaddeleri İhracatçıları Birliği) raised their concerns about the transaction's impact on the affected markets. These concerns included:

[50] Mergers: Commission refers Spain to Court for not lifting unlawful conditions imposed on E.ON's bid for Endesa, 2007, *https://ec.europa.eu/commission/presscorner/detail/en/ip_07_427*.
[51] *Commission v Spain* (Case C-196/07) ECLI:EU:C:2008:146, *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli%3AECLI%3AEU%3AC%3A2008%3A146*.
[52] Giannino, Michele, "The Spanish Prior Approval Regime for the Purchase of Certain Shareholdings and Assets in the Energy Sector Breaches EC Law" (May 24, 2009). P.1. Available at SSRN: *https://ssrn.com/abstract=1648225* or *http://dx.doi.org/10.2139/ssrn.1648225*.
[53] Communiqué No. 2010/4 Concerning the Mergers and Acquisitions Requiring the Authorization of the Competition Board.
[54] Merger control 2024, Turkiye, *https://practiceguides.chambers.com/practice-guides/merger-control-2024/turkey*.
[55] Please see the TCA's decision dated 8 January 2015 and numbered 15-02/24-10.
[56] For the sake of completeness, it should be noted that the TCA has no authority to exercise anti-dumping measures on undertakings. These measures are imposed by the Ministry of Trade in Türkiye.

- Sasa's dominant position in certain products in the relevant markets, which was considered strategically important for Türkiye;
- the fact that key raw materials for the textile industry were predominantly produced by companies incorporated in the Far East; and
- Indorama's direct links to Indorama Ventures Public, a corporation incorporated in Thailand, which raised concerns that Sasa's dominant position could be possessed by/transferred to companies from the Far East. This transfer could lead to challenging competitive environment for the local market players. Accordingly, it was argued that anti-dumping measures might not adequately address the risks posed to domestic undertakings and local markets.

Regarding the horizontally affected markets (i.e., low viscosity polyester chips market, polyester staple fiber market, and polyester filament yarn market), the TCA concluded that there was no risk of an import-based anticompetitive outcome due to several factors:

- anti-dumping measures were already in place in some of the markets;
- there were sufficient local competitors to fill any potential gap created in the in the absence of Sasa as a local player;
- Sasa's and Indorama's market shares over the past three years were unstable and showed no growth trend; and
- there were enough global players to provide customers with alternatives.

The transaction was cleared ultimately. However, in the dissenting opinion, one TCA member argued that such transaction should not have been cleared, as Sasa's acquisition by Indorama could allow foreign undertakings to strategically influence the competitive dynamics of the relevant markets and might lead to the relevant markets becoming dependent on foreign entities, i.e. indirect national security concern.

In the TCA's *Mikes Mikrodalga Decision*,[57] national security considerations were regarded as a positive factor in clearing the transaction. The case involved the acquisition of Mikes Mikrodalga Sanayi ve Ticaret A.Ş (Mikes), an undertaking primarily engaged in fighter aircraft electronic warfare self-protection systems, radar warning systems, electronic warfare support systems and their maintenance services. The transaction was approved based on several factors:

- the market structure, where the Ministry of National Defence serves as a single buyer with directive authority, made it difficult for undertakings to become dominant.
- The recovery of know-how, licenses and investments was deemed necessary due to Mikes', deteriorating financial situation.
- The transaction was considered critical in a sensitive market directly related to national security, under the leadership of institutions guiding the defence industry.

The decision also highlighted that the defence industry, particularly in the production of weapons, is generally dominated by state-owned companies. Although private companies may also operate in limited areas, the field of activity requires substantial investments, has low profit margins, and involves risks associated with leaving it to the private sector for military reasons.

Another similar example can be found in the TCA's *TEİAŞ/Türk Telekom decision*.[58] In this decision, the acquisition by Türk Telekomünikasyon A.Ş. (Türk Telekom) of two pairs of fiber optic cables on the Istanbul-Bulgaria route, owned by Turkish Electricity Transmission Company (TEİAŞ) through a 10-year lease was assessed. Once again, security concerns were considered as a positive factor. It was noted that the transaction would contribute to safer and/or faster transportation of domestic or international traffic for operators based in Türkiye. Although the decision did not elaborate on the meaning of a "safer transportation", it can be argued that this refers to the protection of shared data, which may be viewed as a national security concern.

In the TCA's decision concerning the acquisition of UN RO RO İşletmeleri A.Ş. (UN RO RO), U.N Gemicilik Sanayi ve Ticaret A.Ş., U.N Denis Taşımacılığı A.Ş., U.N Denis İşletmeciliği A.Ş., Köprü Deniscilik ve Ro Ro Taşımacılığı A.Ş. by Kohlberg Kravis Roberts & Co (KKR) through a share transfer,[59] the TCA precisely stated that it could not consider the national security aspect of the transaction. It was a third party that raised its concerns under five main points:

- the ships belonging to U.N Ro Ro were considered a logistical asset for Türkiye and could potentially be used in the event of war,
- if KKR operated these vessels on routes outside of Türkiye, the transportation and logistics sector could be negatively impacted,
- U.N Ro Ro was seen as a national asset and should be offered to the public instead of being sold to foreign entities,

[57] TCA's decision dated 11 October 2002 and numbered 02-62/774-316.
[58] TCA's decision dated 11 July 2007 and numbered 07-59/675-234.
[59] Please see the TCA's decision dated 29 November 2007 and numbered 07-88/1113-435.

- the sale of U.N Ro Ro, Pendik and Ambarlı Ports coming under foreign control, which was deemed potentially risky for Türkiye, and
- given winter conditions on highways and issues with transit documents, transporters were reliant on ro-ro transportation, and any potential price increases in ro-ro transportation could place them in a difficult position.

The TCA stated that under the Turkish merger control regime it was not possible to examine the first four claims, meaning that these concerns could not be taken into account in the assessment of the transaction.

As a final remark on the matter is the technology undertaking exception in the Turkish merger control regime. Accordingly, an undertaking titled as a "technology undertaking" will be treated different regarding the turnover thresholds stipulated in the Communiqué. In this manner, the TCA enlarges its scope for evaluating mergers including a technology undertaking, basically disregarding the necessity for the technology undertaking to exceed the threshold consisting of TRY 250 million as long as it conducts its activities in Türkiye. The definition of technology undertaking is made widely, i.e. undertakings operating in the field of digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and healthcare technologies or the assets thereof. In this manner, the definition of technology undertaking is left open to be shaped by the TCA's decisions.

In a recent decision, [60] the TCA assessed an undertaking active in the defence industries, alongside with other fields of activities such as information technologies and more, as a technology undertaking and made its assessments accordingly. Although this exception has not a direct link between the national security aspect of a merger or an acquisition, since it affects the notifiability analysis for a transaction to be realised, it still bears importance in its own terms.

Conclusion

The increasing integration of national security considerations into merger control regimes reflects a global shift towards safeguarding critical sectors and strategic interests. This trend, influenced by heightened geopolitical and economic uncertainties, underscores the need for balanced and transparent frameworks. In jurisdictions like the EU and Türkiye, merger control mechanisms demonstrate differing levels of integration of national security concerns, shaped by unique economic and strategic priorities.

While the EU has implemented provisions allowing Member States to address national security and public interest concerns within merger reviews under certain conditions, Türkiye has not (yet) explicitly incorporated such considerations into its merger control regime, but rather it can be seen in the sector-specific regulations. To strike a balance between regulatory oversight and market dynamics, there is the need for clearer definitions and consistent practices both in the EU and Turkiye, especially in sensitive sectors like defence and energy. Such measures can help ensure that competition laws remain effective while addressing legitimate security concerns.

It is also essential for policymakers to ensure that national security frameworks are transparent, predictable, and proportionate. This approach not only supports fair competition but also fosters confidence among investors, reducing the uncertainty and complexity often associated with cross-border transactions. As the interplay between competition policy and national security continues to evolve, both the EU and Türkiye have an opportunity to refine their approaches, aligning them with international best practices while addressing domestic priorities (e.g. OECD Guidelines for Recipient Country Investment Policies relating to National Security[61]).

Concerns arise regarding the manner in which national security consideration mechanisms have expanded, leading to paradigm shifts that appear to create a fragmented legal framework. As a result, administrative agencies have been granted significant discretion under investment screening procedures, which are increasingly marked by politicisation, ambiguity, uncertainty, and protectionist tendencies. Simultaneously, shareholders, boards, and other private stakeholders are left without any authority to evaluate the merits of takeovers blocked by government authorities.

Unlike in the EU, in Turkish merger control regime, the national security aspect of mergers or acquisitions is not considered as a factor to be examined. Although we may not exclude such an option, particularly when practice shows that such concerns are being raised by the interested third parties mostly. Particularly considering the rapid and strong development of the Turkish markets with strategic importance such as defence industry, such markets can be considered more likely to become a subject for a potential national security criterion under the merger control regime in the future.

Legal certainty, transparency, and predictability can be enhanced through the adoption of soft law documents,[62] such as guidelines or notices, that provide clarity on the assessment of public interest provisions in merger regulations. Merger activity would benefit greatly if such guidelines are being adopted more widely.

[60] Please see the TCA's decision dated 10 November 2022 and numbered 22-51/745-309.
[61] OECD, "Recommendation of the Council on Guidelines for Recipient Country Investment Policies relating to National Security", OECD/LEGAL/0372, adopted on: 25 May 2009.
[62] See, for example South African Guidelines 2024, Department Of Trade, Industry And Competition *https://www.gov.za/sites/default/files/gcis_document/202404/50323gon4544.pdf*.

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