

business or have alternatives available if the merged entity raises prices or changes trading conditions.⁵⁵²

The competition authorities are less likely to prohibit a proposed merger where it is evident that other players in the market or customers have countervailing power.⁵⁵³ This is because the market would be able to self-correct through customers seeking alternatives and forcing the merged firm to either reduce prices or revert to trading conditions present before the merger.

However, where the customers of a merged firm are small or of little pecuniary significance, the merged firm often obtains market power without any countervailing power. In such an instance, the authorities must protect the consumers by conditionally approving or prohibiting the proposed merger. The latter was the case in *JD Group/Ellerine*,⁵⁵⁴ where the Tribunal blocked the large merger even though the Commission had recommended conditions, including divestiture.⁵⁵⁵ The Tribunal found that the proposed conditions did not reverse the anti-competitive effects of the proposed transaction, which would be felt most by the ‘least powerful’ of South African consumers (who had no countervailing power).⁵⁵⁶

⁵⁵² Neuhoff (2017) at 255.

⁵⁵³ See *Franco-Nevada Mining Corporation Ltd and Gold Fields Ltd* (77/LM/Jul00) [2000] ZACT 40 “Impact on competition” at 2, where the Tribunal approved the merger without conditions because it was of the belief that the parties had no market power owing to the fact that international gold price was influenced by factors such as the sale of new production by producers worldwide and the sale of reserves by financial institutions such as international central banks, the World Bank and the IMF. There was therefore countervailing power due to various large market players as well as the availability of alternatives.

⁵⁵⁴ See *JD Group/Ellerine* (2000) at para 4.3.

⁵⁵⁵ See discussion on divestiture as a remedy, discussed under section 3.3.5.

⁵⁵⁶ *JD Group/Ellerine* (2000) at para 4.8.

4.3.1.3 The dynamic characteristics in the market⁵⁵⁷

Dynamic markets are ones where there is constant growth, high levels of innovation and differentiated products. In such markets, there are often many players with limited market shares, making it difficult to gain and abuse market power.⁵⁵⁸ The dynamism of such a market challenges firms to be creative and employ innovative solutions to be competitive and edge out the competition. Where a market is dynamic, competition authorities are less likely to prohibit a proposed merger because if market conditions and products are constantly changing, there are low barriers to entry; therefore, a merger will not lessen competition.⁵⁵⁹

However, where a market is highly concentrated and has a long history of interdependence, a merger between two players in the same market would increase their market power and potentially lead to abuses of such power. The competition authorities will therefore be more inclined to approve a merger in a market with new and innovative products constantly, thus attracting newcomers and new customers on an ongoing basis, limiting the potential adverse effects of the merger.⁵⁶⁰

4.3.1.4 Whether the business of a party to the merger has failed or is likely to fail⁵⁶¹

The Act makes provision for the acquisition of a firm that has failed or is on the brink of failure, even though it may have anti-competitive effects. The rationale for allowing the failing firm consideration is that where a business has failed, it no longer effectively competes in the market; its acquisition, therefore, is not tantamount to removing an effective competitor. Further, there is an element of public interest where employment and social stability may be preserved through the acquisition of a failing firm.⁵⁶² Be that

⁵⁵⁷ Section 12A(2)(e) of the Competition Act.

⁵⁵⁸ Brassey (2002) at 272; Kelly *et al* (2017) at 192.

⁵⁵⁹ Neuhoff (2017) at 257.

⁵⁶⁰ Brassey (2002) at 272.

⁵⁶¹ Section 12A(2)(g) of the Competition Act.

⁵⁶² See Brassey (2002) at 273-274.

as it may, and as noble as the consideration sounds, the authorities seem to follow a stringent test when considering the failing firm doctrine. The parties to the proposed merger have to fulfil the following prescripts:

- the failing firm's market share must go to the acquirer;
- the prospects of reorganisation must be dim or non-existent;
- the failing firm must face the grave possibility of business failure;
- the acquiring party must be the only available purchaser;
- the assets of the failing firm would exit the market absent the merger.⁵⁶³

The onus to prove that the failing firm doctrine is applicable and should be applied by the authorities in a particular proposed merger is on the parties to the merger. The onus and other guidelines to the applicability of the failing firm doctrine were authoritatively provided in *Iscor*⁵⁶⁴ and reaffirmed in *Santam*,⁵⁶⁵ where the Tribunal specified that "The failing firm doctrine enjoys express statutory recognition in the Competition Act. Section 12A(2)(g) directs us to consider [the failing firm doctrine] as part of a non-exhaustive list of factors that must be considered in merger assessment".⁵⁶⁶

⁵⁶³ See Brassey (2002) at 273-274, wherein the authors also point to the paradox between the wording of the Act and the application of the test by the competition authorities. Citing the dangers of blindly adopting foreign law approaches (in this case, the American approach – which has been criticized by the American competition authorities as being too onerous).

⁵⁶⁴ *ISCOR Limited and Saldanha Steel (Pty) Ltd* (67/LM/Dec01) [2002] ZACT 17 at para 110.

⁵⁶⁵ *Santam Limited v Emerald Insurance Company Limited and Another* (57/LM/Aug09) [2010] ZACT 5 ("*Santam*").

⁵⁶⁶ *Santam* (2010) at para 52.

4.3.1.5 Whether there will be removal of an effective competitor⁵⁶⁷

A merger involves a diminution in the number of players within a particular market.⁵⁶⁸ This is not what section 12A(2)(h) of the Act denotes when it refers to removing an effective competitor. Instead, there is often a maverick firm in any market, which typically leads the way in innovation or price-cutting, thereby disrupting the market.⁵⁶⁹ The potential removal of such a player in the market through a proposed merger would place competition authorities on high alert. The closeness of competition may also indicate whether a firm is an effective competitor.

As stated in *Pioneer Foods*,⁵⁷⁰ “the closer two products are to one another as substitutes, the more a merger between them may mean the removal of an effective competitor”.⁵⁷¹ The logic for the above argument is that if the merging parties’ products are the closest substitutes of one another, then it makes a post-merger price increase more likely.⁵⁷² Based on the above, it can be deduced that a firm does not need to be one of the market’s biggest players to be considered an effective competitor. What the authorities focus on is the impact that the firm has on the market, either due to innovation or price-cutting ingenuity, alternatively, the closeness of competition to the acquiring firm to deem a firm as an effective competitor.

⁵⁶⁷ Section 12A(2)(h) of the Competition Act.

⁵⁶⁸ Brassey (2002) at 275.

⁵⁶⁹ See *Tongaat-Hulett Group Limited and Transvaal Suiker Beperk Middenen Ontwikkeling (Pty) Ltd / Senteeko (Edms) Bpk / New Komati Sugar Miller’s Partnership TSB Bestuursdienste (83/LM/Jul00) [2000] ZACT 47 (“Tongaat-Hulle”)*, where the Tribunal prohibited the merger because it believed that it would result in the removal of an effective competitor. According to the Tribunal, TSB was characterised as a maverick competitor, as the producer most likely to deviate from industry “standards” with respect to for example, credit terms (at para 66). The merger would have rid the market of a disruptive player, thus stifling innovation and competition; see also Kelly *et al* (2017) at 192; Neuhoff (2017) at 266-268.

⁵⁷⁰ *Pioneer Foods (Pty) Ltd v Future Life Health Products (Pty) Ltd (LM017May15) [2015] ZACT 130 (“Pioneer Foods”)*.

⁵⁷¹ *Pioneer Foods* (2015) at para 43.

⁵⁷² *Pioneer Foods* (2015) at para 45.

As already established, the factors listed in section 12A(2) do not comprise a closed list. As such, the purpose of the above subsections was not to discuss all the listed factors exhaustively but to illustrate how the factors are considered and applied by the competition authorities. What is evident is that the factors listed in section 12A(2) and any other factors that may be considered under the auspices of section 12A(2) are purely competition centric. The focus of the authorities is on the effect that a proposed merger would have on the competitiveness of the market post-merger and nothing else, hence the term ‘competition enquiry’. Having completed the competition enquiry, the authority considering a proposed merger will have to move to the next step and assess public interest considerations.

4.3.2 The Public Interest Enquiry

Public interest considerations in merger regulation are divisive, and the debate as to whether they should form part of a competition analysis seems far from settled.⁵⁷³ However, what is accepted is that non-competition considerations are tailored to the dynamics of a particular jurisdiction or society. South Africa’s shameful past of oppression and segregation, based on racial lines, was not only related to physical segregation but economic exclusion as well. As aptly captured by then CJ Mogoeng in *Mediclinic*,⁵⁷⁴

Colonialism, neo-colonialism and apartheid orchestrated an institutionalised concentration of ownership and control of all things of consequence in our national economy along racial lines. Unsurprisingly, the commanding heights of the corporate sector are seemingly the exclusive terrain of our white compatriots.⁵⁷⁵

⁵⁷³ See the different schools of thought discussed in Chapter 2 and their diverging opinions on what the goals of competition law are and ought to be – providing support to each’s stance on the inclusion of non-competition goals in competition legislation.

⁵⁷⁴ *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd* 2021 ZACC 35.

⁵⁷⁵ *Mediclinic* at para 4.

At the dawn of democracy, it was envisaged that laws in South Africa would contribute to, amongst other things, economic transformation and redress the imbalances created by past racial divisions, and, more importantly, foster the participation of the previously marginalized people to participate in the mainstream economy.⁵⁷⁶ Considering the need for redress, competition policy and the Competition Act were viewed and used as tools to facilitate effective participation in the economy of previously disadvantaged and disenfranchised persons.⁵⁷⁷ As such, South African competition law, particularly merger regulation, has been used to tackle some of the social and economic divides resulting from apartheid-era policies.⁵⁷⁸

The competition authorities must consider various substantial public interest grounds when considering a proposed merger.⁵⁷⁹ The provisions in the Act specifically mention 'substantial', meaning that the mere existence of a public interest ground is not enough; to be considered in a merger evaluation, a public interest ground must produce anticompetitive effects.⁵⁸⁰ Regardless of the determination made in terms of section 12A(1), which takes into account both competition and public interest grounds, the Commission or Tribunal must also independently determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).⁵⁸¹

⁵⁷⁶ Mncube L and Ratshisusu H "Competition policy and black empowerment: South Africa's path to inclusion" (2023) 11(1) *Journal of Antitrust Enforcement* at 74.

⁵⁷⁷ See the Preamble, read with section 2 of the Competition Act.

⁵⁷⁸ Changole PM & Boshoff WH "Non-competition goals and their impact on South African merger control: An empirical analysis" (2022) 60 *Review of Industrial Organization* at 367-368.

⁵⁷⁹ Sections 12A(1)(a)(ii) and 12A(1)(b) of the Competition Act.

⁵⁸⁰ See *Walmart Stores Inc v Massmart Holdings Ltd* (73/LM/Dec10) [2011] ZACT 42 ("*Walmart/Massmart*") at para 32 where the Tribunal noted that "subject matter and substantiality are not the only limitations in considering public interest. A further consideration is that the public interest consideration must be merger specific...unless the merger is the cause of the public interest concerns, we have no remit to do anything about them"; see also *JD Group/ Ellerine* (2000) at para 4.7; *Kelly et al* (2017) at 212; *Neuhoff* (2017) at 274.

⁵⁸¹ Section 12A(1A) of the Competition Act; see also *Anglo-American Holdings Ltd and Kumba Resources Ltd / Industrial Development Corporation (intervening)* (46/LM/Jun02) [2003] ZACT 45 at para 138.

Even where a merger would increase competition or, at worst, be neutral, the public interest enquiry takes place separately and independently, considering the five factors listed under subsection (3). When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on-

- (a) a particular industrial sector or region;
- (b) employment;
- (c) the ability of *small and medium businesses*, or *firms* controlled or owned by historically disadvantaged persons, to effectively enter into, *participate* in or expand within the market;
- (d) the ability of national industries to compete in international markets; and
- (e) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and *workers in firms* in the market.⁵⁸²

It is significant to note that the above list of public interest grounds is closed, unlike the competition enquiry list provided in section 12A(2). When considering the public interest in a merger evaluation, the authorities' scope is limited to consideration of the listed grounds.⁵⁸³ However, it would appear that in practice, the authorities have some

⁵⁸² Section 12A(3) of the Competition Act. Paragraph (e) inserted by s 9(f) of the Competition Amendment Act (2018).

⁵⁸³ See *JD Group/Ellerine* (2000) at para 4.7.1 where the Tribunal rejected the public interest ground raised (franchising) stating that it was not provided for by the Act and the list was limited to the four factors specifically listed in the Act (Note: the case refers to four instead of five factors as it was decided prior to the amendment inserting a paragraph (e) to s 12A(3) and increasing the list of public interest grounds to five); see also *Edgars Consolidated Stores (Pty) Ltd and Rapid Dawn 123 (Pty) Ltd* (21/LM/Mar05) [2005] ZACT 45, where the Tribunal ruled that where a "public interest ground" that is not provided for by the Act is cloaked as one that is, it would not succeed. See specifically paragraph 29, where the Tribunal noted that "SACTWU's concerns with the employment effects of this merger lie less with the relatively small number of jobs lost in direct consequence of the transaction rather than with the larger question of Edcon's alleged

discretion in extending the interpretation of section 12A(3) to include public interest grounds not explicitly listed but having a bearing on or being a sub-species of listed ones.⁵⁸⁴

Further, the public interest grounds raised must be merger-specific, meaning that they must be causally related to, or result/ arise from the merger. Where they exist independently of a specific merger, the authorities have no jurisdiction to adjudicate the matter.⁵⁸⁵ As noted under section 3.4.2, where the authorities consider public interest grounds, they can save an anticompetitive merger or may lead to the prohibition of an otherwise competitive one.⁵⁸⁶ This Janus-faced nature of public interest grounds was succinctly summarised in *Distillers/SFW*,⁵⁸⁷ where the Tribunal made the following observation:

“Thus the public interest asserted pulls us in opposing directions. However, the legislation expressly allows for this. Just as the legislation may allow for the public interest to resurrect a merger that will harm competition, it also contemplates a

support for imported merchandise. If this is indeed so, then SACTWU has chosen a bad example on which to mount its case.”

⁵⁸⁴ In this regard, see *Media 24 Ltd v Natal Witness Printing and Publishing Company (Pty) Ltd* (15/LM/Jun11) [2012] ZACT 49 at paras 9 and 63, where the Commission noted that the proposed merger was likely to raise competition and public interest concerns in relation to the post-merger ability of small independent community newspaper publishers in KwaZulu-Natal and the Northern-Eastern Cape to access printing services at competitive conditions of supply, including competitive prices and that the publishing businesses that the merged entity could potentially foreclose post-merger are typically small businesses which, furthermore, often are also black-owned. While the issue of media plurality is not a listed public interest ground, in the *Media24* case it was raised under s 12A(3)(c) - the ability of SMMEs to enter into, participate in or expand within the market. See further the Guidelines on the Assessment of Public Interest (2016) at para 11, where the Commission is given discretion to consider other factors on a case-by-case basis where the need to do so arises.

⁵⁸⁵ See *Walmart/Massmart* at paras 28, 30, 32 and 33.

⁵⁸⁶ See *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* (66/LM/Oct01) [2002] ZACT 13, which was one of the earliest cases involving public interests and where the Tribunal noted this aspect at para 38.

⁵⁸⁷ *Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd* (08/LM/Feb02) [2003] ZACT 15 (“*Distillers/SFW*”).

situation where a public interest ground may justify the prohibition of a merger even if a merger does not have an anti-competitive effect.”⁵⁸⁸

Regarding the actual enquiry conducted by the Commission, two lines of enquiry must be performed. First, following an adverse finding under the competition enquiry, the Commission must determine whether any substantial positive public interest grounds could justify the anti-competitive merger's approval.⁵⁸⁹ This means that the Commission could approve an anti-competitive merger if substantial merger-specific positive public interest grounds justify the merger's approval.⁵⁹⁰ Second, following a positive finding regarding the competition enquiry, the Commission must consider whether the merger raises any substantial adverse public interest effects.⁵⁹¹

In the above case, the Commission may prohibit a merger if it is established that it raises substantial adverse public interest effects or impose conditions to remedy the substantial negative public interest effect arising from a merger, even if the merger has a positive competition effect.⁵⁹² Both the lines of enquiry above require balancing competition and public interest issues and are dealt with on a case-by-case basis. In considering each public interest ground, as the case may require, the Commission must follow a five-step guideline in its analysis:

Step 1: determine the likely effect of the merger on the listed public interest grounds (whether positive or negative);

Step 2: determine whether such effect, if any, is merger specific;

Step 3: determine whether such effect, if any, is substantial;

⁵⁸⁸ *Distillers/SFW* at para 214; see also paras 211 to 248 on a more in-depth analysis of public interest grounds considered by the Tribunal.

⁵⁸⁹ Guidelines on the Assessment of Public Interest (2016) para 5.5.

⁵⁹⁰ *Distillers/SFW* at para 214; Guidelines on the Assessment of Public Interest (2016) at para 5.5.

⁵⁹¹ Guidelines on the Assessment of Public Interest (2016) at para 5.6.

⁵⁹² Guidelines on the Assessment of Public Interest (2016) at para 5.6; Neuhoff (2017) at 276; *Distillers/SFW* at para 214.

Step 4: consider any likely positive effects to justify the approval of the merger or determine whether a likely negative effect can be justified, which may result in the approval of the merger, with or without conditions; and

Step 5: consider possible remedies to address any substantial negative public interest effect.⁵⁹³

Having outlined what factors must be considered under the public interest enquiry and the guidelines that the Commission must follow, the below paragraphs briefly discuss how the competition authorities have interpreted and applied sections 12A(1)(a)(ii) and 12A(1A) of the Act in considering the public interest factors listed in section 12A(3).

4.3.2.1 Effect on particular Industrial sector or Region⁵⁹⁴

The provision relating to the impact on a particular industry or sector is not defined or delineated by the Act, suffice to deduce from available jurisprudence that section 12A(3)(a) relates to the ability of an industry or sector to remain competitive. An early decision of the Tribunal that points to what is considered under this factor is that of *Glencore/Xstrata*.⁵⁹⁵ The case involved a large merger in the energy supply industry, particularly relating to thermal coal supply.⁵⁹⁶ Several interested parties raised public interest concerns over the constrained supply, price and quality of coal that would be provided to Eskom post-merger.⁵⁹⁷

In making its decision relating to the post-merger costs of coal and, consequently, electricity in the local market, the Tribunal accepted that the public interest concerns related to a specific industry; however, they were not merger-specific as numerous

⁵⁹³ Guidelines on the Assessment of Public Interest (2016) at para 6.1; see also Neuhoff (2017) at 278-292.

⁵⁹⁴ Section 12A(3)(a) of the Competition Act.

⁵⁹⁵ *Glencore International PLC v Xstrata PLC* (33/LM/Mar12) [2013] ZACT 11 (“*Glencore/Xstrata*”).

⁵⁹⁶ *Glencore/Xstrata* at para 41-66.

⁵⁹⁷ *Glencore/Xstrata* (2013) paras 4 and 6.

factors could have an impact on the future of coal and electricity prices.⁵⁹⁸ While the merger was approved subject to employment-related conditions and not industry or region-related conditions, the case provided insight into what the competition authorities would consider as an impact or effect on an industrial sector or region.

The impact of a merger on an industrial sector or region was also considered in *AgriGroupe/AFGRI*,⁵⁹⁹ which was a merger involving the acquisition of an agricultural commodity trading company servicing more than 7000 farmers and therefore having an impact on the agricultural sector.⁶⁰⁰ Several third parties raised concerns relating to, among others, grain storage, grain trading, industrial infrastructure, food security, foreclosure to key strategic resources such as rail and post-merger diversion of grain to the United States of America, Canada and other countries; thus increasing the price of grain and maize in South Africa.⁶⁰¹

The Tribunal found, amongst other things, that trading of grain on SAFEX did not require a licence; therefore, there was no impact on food security⁶⁰² because AFGRI was a small player in the market for grain storage, there was no danger of increased prices or infrastructure foreclosure.⁶⁰³ As a result of the investigation relating to the impact on the agricultural sector and the merging parties' commitments, the merger was approved without conditions relating to the public interest of impact on the sector or region.⁶⁰⁴

Another case impacting some industries is the *AB InBev/SABMiller* case.⁶⁰⁵ The merger involved the largest beer company in the world buying its main global

⁵⁹⁸ *Glencore/Xstrata* (2013) paras 103-104.

⁵⁹⁹ *AgriGroupe Holdings (Pty) Ltd v AFGRI Ltd* (017939) [2014] ZACT 1 (“*AgriGroupe/AFGRI*”).

⁶⁰⁰ *AgriGroupe/AFGRI* at para 6.

⁶⁰¹ See *AgriGroupe/AFGRI* at paras 15-26.

⁶⁰² *AgriGroupe/AFGRI* at paras 55-57.

⁶⁰³ *AgriGroupe/AFGRI* at paras 58-59, 64

⁶⁰⁴ See *AgriGroupe/AFGRI* at paras 76 and 80.

⁶⁰⁵ *Anheuser-Busch InBev SA/NV v SABMiller plc* (LM211Jan16) [2016] ZACT 72 (“*AB InBev/SABMiller*”).

competitor and second-largest beer producer worldwide.⁶⁰⁶ The merger raised several public interest concerns relating to the agricultural industry and the glass and plastic manufacturing sectors, which the various intervening parties raised.⁶⁰⁷

To cure the concerns, the merging parties, as well as the South African Government, agreed to the establishment of the 'AB InBev Investment Fund', into which AB InBev would pay an amount of one billion rands (R1 000 000 000) to be spent on transformation and investment objectives (agricultural, enterprise and societal benefits) over five years.⁶⁰⁸ The merging parties also agreed to source inputs such as barley, cans, glass bottles, crowns and paper supplies from local suppliers so as not to disrupt those sectors.⁶⁰⁹ As a result of the proactive agreement entered into by the merging parties and Government and some modifications by the Tribunal, the merger was approved subject to conditions.⁶¹⁰

4.3.2.2 Effect on Employment⁶¹¹

The Act enjoins the authorities to consider a proposed merger's effect on employment. To be regarded as a public interest ground falling within the confines of section 12A(3)(b), the impact on employment must be merger-specific, substantial and not fall into any other category of public interest.⁶¹² The effect on labour usually and almost always relates to the loss of jobs. Notably, the loss of jobs due to structural changes and economic challenges that may befall a business is a topic covered under specific

⁶⁰⁶ *AB InBev/SABMiller* at para 1.

⁶⁰⁷ See *AB InBev/SABMiller* at paras 6 and 28.

⁶⁰⁸ *AB InBev/SABMiller* at paras 31-32.

⁶⁰⁹ See *AB InBev/SABMiller* at paras 55-65.

⁶¹⁰ *AB InBev/SABMiller* at paras 94-95.

⁶¹¹ Section 12A(3)(b) of the Competition Act.

⁶¹² See *DB Investments SA and De Beers Consolidated Mines Ltd / De Beers Centenary AG* (20/LM/Mar01) [2001] ZACT 20 at para 40, where the Tribunal notes that job losses must be linked to the merger and conditions cannot be placed on merging parties to provide guarantees against job losses post-merger where job losses are not an issue at the time of the merger.

labour legislation.⁶¹³ The LRA provides for a category of dismissals known as ‘no-fault’ dismissals for operational requirements.⁶¹⁴ An employer is under an obligation not to dismiss an employee for operational requirements if it can be avoided. To this end, dismissal should be the last available option.⁶¹⁵

Because retrenchments fall under the purview of labour and not competition law, reliance on the Competition Act and raising employment as a public interest should therefore be a matter of last resort, where no other remedy can be found in any other legislation. In that sense, job losses must thus be merger-specific and regarding specificity, it must be shown as a matter of probability that there is a nexus between the merger and the job losses – meaning that the job losses must be a direct result of the merger and absent the merger, the job losses would not have ensued.

The nexus may be inferred from, among other things, the acquiring firm's employment policies or treatment of employees. For instance, where the firm has a history and reputation of employee lay-offs post-merger or considering employees divisionally and not per country, as was the case in the *Walmart/Massmart* case.⁶¹⁶ Further, the timing of the job losses in relation to the merger may also be a valuable indicator of whether the job losses are linked to the merger. For example, in *Minister of Economic Development*, the CAC noted that even where the loss of jobs takes place immediately before a merger, it may raise public interest concerns as questions may be raised

⁶¹³ Labour Relations Act 66 of 1995 (as amended) (“LRA”); see also *Distillers/SFW* at para 232, where the Tribunal noted that there are other statutes and institutions better placed and resourced to deal directly with some of the public interest issues (specifically employment) .

⁶¹⁴ Sections 189 and 189A of the LRA.

⁶¹⁵ For a more detailed expose of dismissal for operational requirements as well as the requirements thereof see *National Union of Metal Workers of South Africa and Others v Aveng Trident Steel (a division of Aveng Africa (Pty) Ltd) and Another* (CCT178/19) [2020] ZACC 23 and Tavuyanago S and Dlamini-Jordan T “The new dawn birthed by amendments to section 187(1)(C) of the Labour Relations Act 66 of 1995: A reflection on National Union of Metalworkers of South Africa and Others v Aveng Trident Steel” (2023) 19(1) *Acta Universitatis Danubius. Juridica* 48-65, where the authors discuss in detail the Constitutional Court judgment providing protection from unfair dismissals cloaked as dismissals for operational requirements.

⁶¹⁶ See *Walmart/Massmart* (2011) at paras 40-41.

whether the decision forms part of the overall merger decision-making process, thus demanding the merging parties to justify their retrenchment decision.⁶¹⁷

The Act provides that the public interest ground of employment must be substantial; however, the challenge becomes the quantification of substantiality. Since the Act does not give any threshold regarding the number of jobs that must be lost before the retrenchment is deemed substantial, a general point of departure is to look at the numbers⁶¹⁸ and then translate the numbers into a percentage.⁶¹⁹ While the number of jobs lost is an indicator of or, at the very least, a factor in consideration of substantiality, it is apposite to note that the determination is not just a numbers game.

The competition authorities will not merely consider the number of jobs lost through a merger but will also look at the substantial effect of the merger on employment.⁶²⁰ To this end, the authorities will consider other factors, such as the provision of alternative employment, the nature and size of the retrenchment packages offered to the employees and whether the retrenchments were adequately negotiated.⁶²¹

The establishment that retrenchments are merger-specific and that the job losses are substantial produces a *prima facie* case of an adverse effect of a proposed merger on employment. Once the *prima facie* case is established, the onus shifts to the merging parties to show that the job losses are not contrary to the public interest ground of

⁶¹⁷ *Minister of Economic Development* at para 140.

⁶¹⁸ See *Distillers/SFW* at paras 230 and 240, where in attempting to determine substantiality, the Tribunal asked the following question “How many jobs must be lost before one has grounds for substantial public interest? The legislature wisely does not seek to answer that for us, nor can we assume that it should be a uniform figure for all mergers – it would depend on the context.”

⁶¹⁹ *Distillers/SFW* at para 240; see also *Liberty Group Limited and Investec Employee Benefits Limited* (32/LM/Jun03) [2003] ZACT 42 at para 52.

⁶²⁰ Sutherland & Kemp (2014) at 10–96.

⁶²¹ *Distillers/DF* at paras 242-243.

employment or that the effect is not substantial enough to warrant an adverse finding by the authorities.⁶²²

Parties to a proposed merger may anticipate that the merger's effect on employment will be raised as a public interest ground and prepare for that eventuality by entering into agreements or proposing the imposition of conditions to protect jobs. For example, in *AB InBev/SABMiller*, the parties agreed to a moratorium on retrenching any employees due to the merger in perpetuity.⁶²³ The competition authorities may also impose conditions to cure the employment concerns of interested intervening parties to the proposed merger.⁶²⁴

While much of the discussion regarding the effect of a proposed merger on employment has focussed on mergers that have a negative effect through retrenchments, it is essential to realise that the Act also contemplates the converse. For example, a merger that positively impacts employment through job creation may also be considered by the authorities to justify a merger that would otherwise be anticompetitive on the public interest ground of employment.⁶²⁵ A proposed merger's

⁶²² *Metropolitan Holdings Ltd v Momentum Group Ltd* (41/LM/Jul10) [2010] ZACT 87 at paras 68-69, 100.

⁶²³ See *AB InBev/SABMiller* at paras 39-43.

⁶²⁴ See *Coca-Cola Beverages Africa Limited v Various Coca-Cola and Related Bottling Operations* (LM243Mar15) [2016] ZACT 68 ("*Coca-Cola Beverages*") at para 9 of Annexure A "Non-confidential Conditions", where conditions were imposed on the merging parties including a commitment not to retrench any employees for at least three years (para 9.1), a commitment not to retrench any bargaining unit employees (para 9.2) and a commitment to put in place suitable and appropriate measures to mitigate consequences of the retrenchments (para 9.3); see also *Sibanye Platinum Bermuda(Pty)Ltd v Aquarius Platinum Ltd* (LM186Nov15) [2016] ZACT 50 at paras 66-68, where the proposed merger was approved subject to conditions. The conditions relating to employment included a commitment not to retrench employees as a result of the merger for a period of 24 months from the date of implementation of the merger and where consolidation was to occur within the 24 months, the parties would limit the retrenchments to 260 employees.

⁶²⁵ See for example *Steinhoff Africa Holdings (Pty) Ltd and the North Eastern Cape Forest Joint Venture & Goeiehoop Farming (Pty) Ltd* (93/LM/Sep05) [2006] ZACT 6 at para 33, where the Tribunal noted that the proposed merger had no public interest concerns, instead having positive prospects relating to the creation of approximately 4 500 new jobs; *Rustenburg Platinum Mines*

effect on employment in terms of section 12A(3)(b) is a predominant public interest ground in South Africa. This is because the negative effect of a merger on employment has far-reaching consequences as the loss of jobs does not affect only the employees but their families and local economies as well. Due to the above, a merger's impact on employment is a high-priority area for competition authorities in South Africa.

4.3.2.3 Effect on the competitiveness of SMMEs and firms controlled or owned by HDPs⁶²⁶

It has been established that the Competition Act has a plurality of objectives, including protecting and promoting competition, advancing public interests such as opening opportunities for South Africans to enter, participating and expanding in the economy, and promoting a greater spread of ownership.⁶²⁷ When it comes to merger consideration, section 12A(3)(c) gives effect to the purpose of the Act set out in section 2(1). To illustrate how the authorities consider the public interest ground of the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market, the case of *Coca-Cola Beverages*⁶²⁸ is instructive.

To address concerns raised by the Minister of Economic Development relating to the proposed merger's effect on the competitiveness of SMMEs and HDP-owned firms,⁶²⁹ the Minister and the merging parties negotiated an agreement to settle outstanding concerns raised by the Minister.⁶³⁰ The negotiations yielded an agreement to specific conditions targeted at curing the concerns relating to the ability of SMMEs and HDP-

Ltd and Aquarius Platinum (South Africa) (Pty) Ltd Competition Tribunal Case No. 82/LM/Sep05 where through the merger, the parties anticipated that approximately 900 job opportunities would be created as a result of the extension of Marikana mine's lifespan.

⁶²⁶ Section 12A(3)(c) of the Competition Act.

⁶²⁷ Section 2(1) of the Competition Act.

⁶²⁸ *Coca-Cola Beverages* at para 6 of Annexure A "Non-confidential conditions".

⁶²⁹ *Coca-Cola Beverages* at paras 8, 12,

⁶³⁰ *Coca-Cola Beverages* at para 16.

owned firms to compete effectively.⁶³¹ Among others, the parties agreed to the imposition of conditions to address the Minister's concerns, including the following:

- the merged firm investing no less than R400 million over a period of five years in developing downstream distribution and retail aspects;⁶³²
- the allowance of Micro Outlets to provide 10% of their visible space in their coolers to local Smaller Competitors competing with CCBSA;⁶³³
- the allowance of Small Outlets to provide 10% of their visible space in their coolers to local Smaller Competitors competing with CCBSA;⁶³⁴ and
- the establishment of a fund for enterprise development in the agriculture value chain – to support Historically Disadvantaged developing farmers and Historically Disadvantaged small suppliers with a view of making them competitive.⁶³⁵

One of the biggest concerns relating to the ability of SMMEs and HDP-owned firms to be competitive is the impact of Global Value Chains (GVCs) on domestic supply and, by implication, on smaller businesses where imports replace domestic supply by small to medium firms. This is usually a result of a merger involving a foreign acquiring firm, which has access to global markets and may thus shift the merged firm's procurement strategy to imports.

The above concern was one of the public interest concerns raised in *Wal-Mart*.⁶³⁶ In this case, the concern was that Massmart, through its access to a global supply chain through its merger with Walmart, would shift its procurement policies and start

⁶³¹ *Coca-Cola Beverages* at paras 46-48.

⁶³² *Coca-Cola Beverages* at para 6.1 of Annexure A.

⁶³³ *Coca-Cola Beverages* at para 6.2 of Annexure A.

⁶³⁴ *Coca-Cola Beverages* at para 6.3 of Annexure A.

⁶³⁵ *Coca-Cola Beverages* at para 6.5-6.10 of Annexure A.

⁶³⁶ *Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc* (110/CAC/Jun11, 111/CAC/Jul11) [2012] ZACAC 6 ("*Wal-Mart*").

importing more.⁶³⁷ The CAC warned of extending the scope of the Act by taking an approach that was too liberal when interpreting the public interest ground of competitiveness of SMMEs and HDP-owned firms. It noted the following:

“To argue, however, that any private entity, no matter its size, should be the target of a condition which amounts to a comprehensive response to the challenges of globalisation in the context of global value chains amounts to an expansion of the scope of the public interest enquiry beyond that which must have been intended... It must also be remembered that the merged entity is not dominant in the relevant markets and that its competitors are large, extremely well-resourced firms with global chain footprints of their own.”⁶³⁸

Be that as it may, the CAC highlighted the need for addressing the concern of competitiveness of SMMEs and HDP-owned firms, emphasising that such concerns must be placed within the context of the objectives of the Act. The CAC thus determined that the purpose of the condition of establishing a fund,⁶³⁹ was to ensure that a programme may be developed and adequately funded to empower local SMMEs and HDP-owned firms to take advantage of the global chain of the merged entity, thereby promoting the purpose of section 12A(3) of the Act.⁶⁴⁰

In light of the purpose of section 12A(3), the CAC established a fund to develop small and medium producers of South African products to minimize risks associated with the impact of the GVCs.⁶⁴¹ One of the key takeaways from the *Wal-Mart* case is that it highlighted the need to balance delicately, on the one hand, consumer welfare through lower prices that may result from the merged entity’s access to GVCs and, on the other

⁶³⁷ See *Wal-Mart* at paras 14-18.

⁶³⁸ *Wal-Mart* at para 19.

⁶³⁹ See *Wal-Mart* at “Order” para [49].

⁶⁴⁰ *Wal-Mart* at para 20.

⁶⁴¹ *Wal-Mart* at paras [49] 1-2 and [49] 13.

hand, the impact that the access to the GVCs will have on smaller producers where the merged entity starts importing as opposed to buying local.⁶⁴²

4.3.2.4 Effect on the ability of national industries to compete internationally⁶⁴³

Often when a company is established, it is to service a customer base in a specific market, geographically or in terms of product supply. However, as competition within that market grows, companies have to outdo their competition through innovation and, in some cases, by expanding into other markets. Section 12A(3)(d) provides the recognition and enabling of 'national champions' seeking to enter or expand in international markets.

In *Nampak/Malbak*,⁶⁴⁴ the parties submitted that due to the static, even declining domestic market for packaging services, the proposed merger would substantially enhance their capacity to penetrate export markets and enable the merged entity to compete effectively for the business of multinational customers.⁶⁴⁵ The parties presented evidence to substantiate their submissions and illustrate the scale of operations required to compete in international markets and fight for multinational customers effectively, proffering the following reasoning:

“A would-be supplier would not be able to compete for the business of this corporation without the scale and the concomitant technology to match the output of this world scale plant – there is, in this production model, simply no room for the

⁶⁴² See *Wal-Mart* at para 20, where the CAC noted that the merger had shone a light upon the perils and challenges posed to a developing country by global value chains, which should serve to promote a comprehensive national response to both the risks and opportunities.

⁶⁴³ Section 12A(3)(d) of the Competition Act.

⁶⁴⁴ *Nampak Limited and Malbak Limited* Competition Tribunal Case No. 29/LM/May02 (“*Nampak/Malbak*”).

⁶⁴⁵ *Nampak/Malbak* at paras 8-9.

packaging producer geared to produce for the domestic market in which it is located plus a fractional export component.”⁶⁴⁶

In making its decision, the Tribunal acknowledged the importance of access to multinational customers by the parties. It noted the public interest ground of a merger's impact on national industries' ability to compete in international markets.⁶⁴⁷ However, because it found no substantial lessening of competition through the merger, it had no reason to prohibit the transaction. As a result, it was unnecessary to make a finding on the parties' public interest plea.⁶⁴⁸ In the merger of *Toyota (Japan)/Toyota (SA)*,⁶⁴⁹ the merger was approved unconditionally, with the Tribunal noting that, if anything, the merger would lead to Toyota (SA)'s integration into the global production network and expose it to previously uncharted markets.

It is important to note that while the Act provides for national champions through section 12A(3)(d) and the Tribunal has recognised this public interest ground in several cases; it has also highlighted the potential for opposing interests. In that vein, a merger enabling parties to penetrate global markets and compete internationally will not be approved on that public interest at the expense of domestic competition. The Tribunal emphasized the above point in *Tongaat-Hullet*, where it made the following remarks:

“In general, we are skeptical of arguments that insist that a precondition for successful international competition is domination of the domestic market. In select instances scale economies and rationalization of production units may support this argument. However, to the extent that broad generalizations assist merger

⁶⁴⁶ *Nampak/Malbak* at para 50.

⁶⁴⁷ *Nampak/Malbak* at para 63.

⁶⁴⁸ *Nampak/Malbak* at para 65.

⁶⁴⁹ *Toyota Motor Corporation (Japan) and Toyota South Africa (Pty) Ltd* (61/LM/Aug02) [2002] ZACT 56.

analysis, we incline to the view that the most aggressive and successful international competitors are those who face robust competition at home.”⁶⁵⁰

While there is limited jurisprudence on the consideration of the public interest ground of assessing the effect of a merger on the ability of national industries to compete internationally, it is nonetheless a public interest ground that the competition authorities have recognised.

4.3.2.5 Effect on the spread of ownership by HDPs and Workers⁶⁵¹

The latest amendments to the Act inserted a further public interest ground into the merger assessment framework.⁶⁵² In terms of paragraph (e), the authorities must assess the effect that a merger will have on the promotion of a greater spread of ownership to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market. This public interest ground seeks to enable the realisation of the purpose of the Act, specifically, the promotion of a greater spread of ownership to increase the ownership stakes of historically disadvantaged persons.⁶⁵³

While this public interest ground is relatively new, jurisprudence is already developing around its application. For instance, in *Simba/Pioneer*,⁶⁵⁴ several public interest concerns were raised, including the spread of ownership contemplated by section 12A(3)(e) of the Act.⁶⁵⁵ To address the concerns raised by the Minister of Trade Industry and Competition relating to the spread of ownership, the parties proposed to present a B-BBEE plan involving the establishment of a workers’ trust that would, for

⁶⁵⁰ *Tongaat-Hullet* at para 115.

⁶⁵¹ Section 12A(3)(e) of the Competition Act.

⁶⁵² Section 12A(3)(e) inserted by s 9(f) of the Competition Amendment Act (2018).

⁶⁵³ Section 2(1)(f) of the Competition Act.

⁶⁵⁴ *Simba (Pty) Ltd and Pioneer Food Group Limited* Competition Tribunal Case No. LM108Sep19 (“*Simba/Pioneer*”).

⁶⁵⁵ *Simba/Pioneer* at paras 38, 42-43.

five years, hold for the benefit of Pioneer's broad-based workers, shareholding in PepsiCo to the value of R1.6 Billion, equating to a 12.9% equity in Pioneer.⁶⁵⁶

After the five years of Pioneer workers' stock being held in trust, it was to be converted into a direct shareholding in Pioneer of up to 13%.⁶⁵⁷ The Tribunal was satisfied with the conditions and commended the progressive approach taken by the parties, noting that the agreement reached between the Minister and the parties was "progressive and practical...further strengthening the public interest conditions in furtherance of equitable participation in the economy as contemplated in the amendments to the Act".⁶⁵⁸

The spread of ownership was also considered in the *Burger King* merger,⁶⁵⁹ where the Commission had initially prohibited the merger between ECP Africa Funds, Burger King and Grand Foods Meat Plant because the merger would negatively impact the public interest, in particular the spread of ownership by historically disadvantaged persons ("HDPs").⁶⁶⁰ Before the merger, 95.36% of Burger King was controlled by Grand Foods Investments 1 Proprietary Limited – which is wholly owned by Grand Foods, which in turn is wholly owned by Grand Parade Investments (GPI), with GPI being an empowered company: 68.56% of its shareholding was held by HDPs; of which black women held 22.87%.⁶⁶¹

The proposed merger raised public interest concerns relating to section 12A(3)(e) in that ECP Africa Funds had no ownership by HDPs and workers. Thus, the merger would reduce an ownership stake by HDPs from 68.56% to zero.⁶⁶² To remedy this

⁶⁵⁶ See *Simba/Pioneer* at paras 44-49.

⁶⁵⁷ *Simba/Pioneer* at para 69.

⁶⁵⁸ *Simba/Pioneer* (2019) para 79.

⁶⁵⁹ *ECP Africa Fund IV LLC and Competition Commission in re ECP Africa Fund IV LLC and Burger King (South Africa) RF Proprietary Limited, Grand Foods Meat Plant Proprietary Limited* Competition Tribunal Case No. IM053Aug21 ("*Burger King*").

⁶⁶⁰ *Burger King* at para 4.

⁶⁶¹ *Burger King* at para 16.

⁶⁶² *Burger King* at para 28.

concern, the Department of Trade Industry and Competition (DTIC) proposed that ECP Africa Funds set up an Employee Share Ownership Program (ESOP) valued at a minimum of 5% of the issued share capital of the target firms,⁶⁶³ which the parties accepted as they revised their conditions.⁶⁶⁴ The merger was approved, subject to conditions including ensuring the spread of ownership to HDPs.

Because the amendment inserting section 12A(3)(e) into the principal Act is relatively recent, jurisprudence on this public interest ground is still developing. As recent as early 2023, several mergers were considered by the Tribunal, where the spread of ownership was a concern.⁶⁶⁵ What is evident from the few cases that the Tribunal has considered is that the competition authorities are ramping up their efforts to

⁶⁶³ *Burger King* at para 29.

⁶⁶⁴ *Burger King* at paras 48 and 53.

⁶⁶⁵ See Competition Tribunal South Africa “Agri Merger to benefit HDP farmers and promote the greater spread of ownership following Tribunal approval” (15 February 2023) at <https://www.comptrib.co.za/info-library/case-press-releases/agri-merger-to-benefit-hdp-farmers-and-promote-the-greater-spread-of-ownership-following-tribunal-approval> (accessed 3 May 2023), where the Tribunal imposed conditions on the merger between VKB Beleggings (Pty) Ltd (VKB) and Griekwaland Wes Korporatief Limited (GWK) to the effect that VKB and GWK are to ensure that qualifying workers (permanent VKB or GWK employees who have been employed for a minimum of 12 months) become beneficiaries of the VKB employee share ownership schemes (“ESOPS”) i.e. the VKB Landbou Workers Trust or the VKB Agri Processors Workers Trust, within three months of the merger implementation date and VKB and GWK to facilitate the provision of financing, in terms of their applicable credit policies and relevant legislation, to HDPs in the value chains and the geographical areas where they operate (currently and in future) over a 36-month period from the merger implementation date. The financing may include the facilitation of production loans to provide credit for inputs, monthly accounts, financing for acquiring implements and whole goods, term loans, financing for contract growth as well as the facilitation of financing to specific projects and/or communities. See also Competition Tribunal South Africa “Tribunal approves Heineken-Distell merger subject to competition and public interest-related conditions” (9 March 2023) at <https://www.comptrib.co.za/info-library/case-press-releases/tribunal-approves-heineken-distell-merger-subject-to-competition-and-public-interest-related-conditions> (accessed 3 May 2023) where regarding transformation and ownership it was recommended that the merger parties must establish a new evergreen/perpetual ESOP within three months after the closing date. The ESOP will hold a fully voting shareholding of approximately 6% in SA Co, the company that will own and control the combined South African businesses of Newco post-merger. This equates to a value of approximately R3.5 billion for the benefit of the South African Employees of SA Co (a majority of which shall always be HDPs).

progressively realise the purpose of the Act set out in section 2(1) of the Act, considering the broader aspirations espoused in the Preamble of the Act.

While the addition of paragraph (e) and the elevation of public interests generally are not without criticism,⁶⁶⁶ I believe that given the dark history of South Africa as a country as well as the segregatory economic policies of the apartheid system, inclusion of non-competition considerations in merger regulation was not only prudent but imperative for the progressive realisation of constitutionally protected rights such as equality, dignity, freedom of trade, labour relations and numerous socio-economic rights.⁶⁶⁷ Further, South Africa is not alone in considering public interest factors in merger analysis. If anything, South Africa aligns with African best practices⁶⁶⁸ as developing countries have substantial redress to address.

4.4 CURRENT AND DEVELOPING CHALLENGES TO SOUTH AFRICAN MERGER REGULATION

The substantive consideration of mergers under the Competition Act is not without its challenges. Although there may be current trials facing the competition authorities in their review of mergers under the current regime, recent developments have highlighted future potential challenges that may plague the competition authorities. This section specifically discusses two areas of recent development that may create challenges for competition law enforcement and merger regulation.

⁶⁶⁶ Oxenham J, Currie MJ & Stargard A “Changing South Africa’s competition law regime: A populist departure from international best practices” (2019) 10(4) *Journal of European Competition Law & Practice* at 234-235; Angumuthoo M, Lotter D & Wood S “Public interest in mergers: South Africa” (2020) 65(2) *The Antitrust Bulletin* at 332; Uwadi EC “A case for public interest considerations in merger control analysis with reference to competition law enforcement in developing countries: The example of South Africa” (15 April 2020) *Transnational Dispute Management* at <https://www.transnational-dispute-management.com/journal-advance-publication-article.asp?key=1816> (accessed 3 May 2023) at 12-14.

⁶⁶⁷ See Chapter 2 of the Constitution of the Republic of South Africa.

⁶⁶⁸ Changole & Boshoff (2022) at 395.

The first area that the section will discuss is the regulation of mergers within digital markets. Due to rapid technological advancements, competition authorities are faced with enforcing competition law in a previously unchaperoned domain – digital markets. It is therefore apposite to consider competition enforcement in this area and identify potential challenges for the authorities.

The second area of emergent importance is that of cross-border merger regulation in the age of the African Continental Free Trade Area (AFCFTA).⁶⁶⁹ One of the aspirations of the Agreement establishing the AFCFTA is the free movement of goods and services across the African continent. Such an aspiration, if achieved, will raise concerns over competition within the African market and the enforcement of a supranational competition law. It is, therefore, also appropriate to have a brief discussion on the challenges that may be associated with such an ambitious plan.

4.4.1 Regulation of mergers in digital markets

It is not a secret that the COVID-19 Pandemic had a seismic impact on technology advancement. As the world shut down person-to-person interactions, technology became the mode of communication, work, learning and doing business. The confluence of the COVID-19 Pandemic and the Fourth Industrial Revolution (4IR)⁶⁷⁰

⁶⁶⁹ African Union “Agreement establishing the African Continental Free Trade Area (AFCFTA)” (n.d.) at <https://au-afcfta.org/> (accessed 5 January 2024).

⁶⁷⁰ Also known as the Digital Industrial Revolution or Industry 4.0, 4IR refers to the current and developing environment in which disruptive technologies and trends such as the Internet of Things (IoT), robotics, analytics, blockchain technology, cloud technology, human-machine interaction, virtual reality (VR) and artificial intelligence (AI) are integrated into manufacturing practices. In this regard, see generally World Economic Forum (WEF) “The Fourth Industrial Revolution: what it means, how to respond” (14 January 2016) at <https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/> (accessed 4 January 2024); DTIC “The digital industrial revolution” (n.d.) at <https://www.thedtic.gov.za/wp-content/uploads/fitp.pdf> (accessed 4 January 2024); Wigmore I “Fourth Industrial Revolution” (December 2020) at <https://www.techtarget.com/whatis/definition/fourth-industrial-revolution> (accessed 4 January 2024), McKinsey & Company “What are Industry 4.0, the Fourth Industrial Revolution, and 4IR?”

saw the convergence of multiple technological breakthroughs in the world of work, distance learning, communication, online shopping, banking and business.⁶⁷¹ With regard to competition, digitization through 4IR brought to the fore concerns around digital markets, particularly in relation to merger regulation.⁶⁷² While cognizance is

(17 August 2022) at <https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-are-industry-4-0-the-fourth-industrial-revolution-and-4ir> (accessed 4 January 2024).

⁶⁷¹ On the impact of the COVID-19 Pandemic on 4IR in relation to business, health and manufacturing, see generally IMF “How pandemic accelerated digital transformation in advanced economies” (21 March 2023) at [https://www.imf.org/en/Blogs/Articles/2023/03/21/how-pandemic-accelerated-digital-transformation-in-advanced-](https://www.imf.org/en/Blogs/Articles/2023/03/21/how-pandemic-accelerated-digital-transformation-in-advanced-economies#:~:text=Across%20advanced%20economies%2C%20digitalization%20increased,industries%20that%20had%20been%20lagging)

[economies#:~:text=Across%20advanced%20economies%2C%20digitalization%20increased,industries%20that%20had%20been%20lagging](https://www.imf.org/en/Blogs/Articles/2023/03/21/how-pandemic-accelerated-digital-transformation-in-advanced-economies#:~:text=Across%20advanced%20economies%2C%20digitalization%20increased,industries%20that%20had%20been%20lagging) (accessed 4 January 2024); Neto *et al* “The fourth industrial revolution and the coronavirus: a new era catalysed by a virus” (2020) 2 *Research in Globalization* e100024 at 5; Agrawal M *et al* “Industry 4.0: Reimagining manufacturing operations after COVID-19” (29 July 2020) at <https://www.mckinsey.com/capabilities/operations/our-insights/industry-40-reimagining-manufacturing-operations-after-covid-19> (accessed 4 January 2024); Renu N “Technological advancement in the era of COVID-19” (2021) 9 *SAGE Open Medicine* e20503121211000912 at 1-2; Kelley M “Why 4 technologies that boomed during Covid-19 will keep people home more after a vaccine” (7 October 2020) at <https://www.forbes.com/sites/oliverwyman/2020/10/07/why-4-technologies-that-boomed-during-covid-19-will-keep-people-home-more-after-a-vaccine/?sh=6e31e07bec3e> (accessed 4 January 2024).

⁶⁷² See Competition Commission (2021 [last updated 7 September 2020]) “Competition in the Digital Economy” at <https://www.compcom.co.za/wp-content/uploads/2021/03/Digital-Markets-Paper-2021-002-1.pdf> (accessed 4 January 2024); European Commission (2019) “Competition policy for the digital era” (n.d) at <https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en> (accessed 4 January 2024) at 19-21, 60-66, 110-112; McSweeney T & O’Dea B “Data, Innovation, and potential competition in digital markets – looking beyond short-term price effects in merger analysis” (February 2018) at https://www.ftc.gov/system/files/documents/public_statements/1321373/cpi-mcsweeney-odea.pdf (accessed 4 January 2024); Salomone E “Tech-over: An overview of mergers and acquisitions in digital markets” (n.d.) at <https://www.learlab.com/insights/tech-over-an-overview-of-mergers-and-acquisitions-in-digital-markets/> (accessed 4 January 2024); Lamesch J & Gautier A “Mergers in the Digital Economy” (January 2020) at <https://www.cesifo.org/en/publications/2020/working-paper/mergers-digital-economy> (accessed 4 January 2024) at 14-22; Ocello E & Sjodin C “Digital markets in EU merger control: Key features and implications” (February 2018) at <https://www.competitionpolicyinternational.com/wp-content/uploads/2018/02/CPI-Ocello-Sjodin.pdf> (accessed 4 January 2024); OECD “Theories of harm for digital mergers – Background note” (16 June 2023) at [https://one.oecd.org/document/DAF/COMP\(2023\)6/en/pdf](https://one.oecd.org/document/DAF/COMP(2023)6/en/pdf)

taken of the limitations of this study, particularly its focus on national security within merger regulation, it would be remiss to overlook this emerging and important topic. Therefore, a brief discussion of the challenges and arising from the advent of the 4IR and its impact on merger regulation is necessary.

In light of the above, the Competition Commission's report on 'competition in the digital economy' is instructive insofar as it outlines the potential challenges emanating from the regulation of digital [market(s)]. In the report, the Commission noted that until the *MIH/WeBuyCars* merger was prohibited, there had been underenforcement in the area of digital markets.⁶⁷³ To address this underenforcement, the Commission set out a framework for increased and robust assessment of digital markets including:

- the issuing of a guidance note to clarify the valuation of assets for digital companies in respect of merger thresholds;
- requiring specific tech companies that dominate different digital markets in South Africa to inform the Commission of all small domestic acquisitions, including investments in start-ups and global acquisitions of targets with some presence locally;
- prioritising digital markets within merger control for the 2020-2025 period;

(accessed 4 January 2024) 6-10; Rahim M "Regulation of mergers in the digital markets: A comparative analysis" (2022) *Jindal Global Law Journal* at 1-9; Bundeskartellamt (German Federal Cartel Office) "Merger control in the digital era – Challenges and development perspectives" (29 September 2022) at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2022/Working_Group_on_Competition_Law_2022.pdf?__blob=publicationFile&v=2 (accessed 4 January 2024) at 6-10; Nazzini R "Mergers in the Digital Economy" (6 June 2022) at <https://www.networklawreview.org/nazzini-mergers/> (accessed 4 January 2024).

⁶⁷³ See Competition Commission (2021) "Competition in the Digital Economy" at 7, where the Commission states that between 2011 and 2018, only 87 mergers were notified within digital markets, with 82 being unconditionally approved and 5 being conditionally approved; see also *MIH eCommerce Holdings Pty Ltd t/a OLX South Africa v WeBuyCars Pty Ltd* (LM183Sep18) [2020] ZACT 93 (7 December 2020) at paras 34, 254, 373, 390.

- developing a practice note on the assessment of digital market mergers, updating the existing toolkits to account for the specific features of digital markets;
- issuing a practice note on the assessment of merger creep and when such mergers would warrant intervention;
- ensuring that domestically notifiable global tech mergers are concurrently filed in South Africa and other major jurisdictions such that the Commission may benefit from collaboration with other major jurisdictions in the assessment of the merger.⁶⁷⁴

The Commission subsequently issued revised small merger guidelines that addressed one of the aspirations listed above, namely, the need to address potentially anticompetitive acquisitions in the digital or technology markets. In terms of the guidelines, the Commission now requires tech companies that dominate different digital markets in South Africa to inform it of all small domestic acquisitions, and it will also remain vigilant in identifying small mergers within digital markets that may require notification.⁶⁷⁵ The Commission also took note of the fact that while the disruption caused by the 4IR has been largely positive for competition and consumers, providing new services at lower costs, there were also challenges that digital markets posed.⁶⁷⁶ Some of the challenges identified are as follows:⁶⁷⁷

- the vast majority of competition authorities are not in a position to review some mergers in digital markets because the turnover thresholds may not fully capture

⁶⁷⁴ Competition Commission (2021) “Competition in the Digital Economy” at 8.

⁶⁷⁵ See Competition Commission of South Africa (2022) “Commission’s Final Guidelines on small merger notification”; Competition Commission (2022) “Guidelines on Small Merger Notification: Revised Small Merger Guideline”.

⁶⁷⁶ Competition Commission (2021) “Competition in the Digital Economy” at 26.

⁶⁷⁷ As stated above, it is not the object of this thesis to analyse mergers in digital markets. However, the study is alive to the fact that this is an emerging and topical area of competition enforcement, which creates the opportunity for further research. An overview rather than a critical analysis is therefore provided.

all relevant mergers in this space - because the usual thresholds for merger notification are typically turnover or asset-based and a nascent firm operating in the digital space may not necessarily record a significant turnover nor will it have sufficient assets to trigger merger notification;⁶⁷⁸

- the existence of merger creep situations where countless small startups are acquired by bigger tech companies, which are collectively significant but potentially not individually so;⁶⁷⁹
- the jurisdictional question. Where many of the digital platforms are based outside of South Africa, the Commission will not have jurisdiction over the firms that own the platforms where they do not generate revenue in South Africa or do not have a physical presence in the country;⁶⁸⁰
- the power wielded by big tech firms versus developing countries. Where halting global merger activity might have a disproportionate effect on the jurisdiction of

⁶⁷⁸ This fact is also acknowledged by the Commission in its merger guidelines for small merger notification, where the Commission states that acquisitions in the digital markets are escaping scrutiny due to acquisitions taking place at an early stage in the life of target firms, not considering prospective future value of the target firm.

⁶⁷⁹ See Furman J “Unlocking digital competition Report of the Digital Competition Expert Panel” (March 2019) at https://assets.publishing.service.gov.uk/media/5c88150ee5274a230219c35f/unlocking_digital_competition_furman_review_web.pdf (accessed 4 January 2024) at 12, where the author observes that over the last 10 years, the largest 5 firms have made over 400 acquisitions globally, with none being blocked and very few conditions being imposed; Cabral L “Big Tech Acquisitions” (June 2023) at <http://luiscabral.net/economics/workingpapers/bigtech%202023%2006.pdf> (accessed 4 January 2024) at 1, where the author discusses some of the large tech companies such as Alphabet, Amazon, Apple and Meta, citing that one of the major contributors to their big tech power is their ability and systemic “snapping-up” of start-up firms.

⁶⁸⁰ Competition Commission (2021) “Competition in the Digital Economy” at 27, where the Commission gives examples of the 2015 Facebook/Whatsapp merger not being notifiable in South Africa because Whatsapp did not generate any revenue in the country and the Google/Fitbit merger because the companies are not based in South Africa.

developing countries given the relative unimportance of those markets to these firms;⁶⁸¹

- the contemplation or investigation of the relevant theories of harm particular to mergers in the digital space, especially where the acquisition targets are smaller startups and regulators must take specific industry characteristics into account when evaluating the competitive impact of a merger – but access to data is not guaranteed and investigators do not have in-depth knowledge of the business models used by companies in digital markets, making sustaining findings of substantial lessening in competition attributable to a merger harder;⁶⁸² and
- the sharing or transmission of individuals' personal sensitive data. Where platforms owned by one parent company as is the example with Meta (Facebook/Whatsapp/Instagram) share individuals' personal data in the group of companies but may also make it available to affiliates. This also creates a challenge where a big tech firm acquires a smaller or start-up firm and in so doing, also acquires individuals' data without the consumer's prior knowledge or consent.⁶⁸³

⁶⁸¹ Competition Commission (2021) "Competition in the Digital Economy" at 27, where the Commission gives the example of instances where a global firm threatened to cease servicing South Africa rather than be subject to a merger prohibition or remedy.

⁶⁸² Competition Commission (2021) "Competition in the Digital Economy" at 28.

⁶⁸³ See Swanson A & Mozur P "MoneyGram and Ant Financial call off merger, citing regulatory concerns" (2 January 2018) at <https://www.nytimes.com/2018/01/02/business/moneygram-ant-financial-china-cfius.html> (accessed 5 January 2024) and The Guardian "US blocks MoneyGram sale to Alibaba boss over China security concerns" (4 January 2018) at <https://www.theguardian.com/business/2018/jan/03/us-blocks-moneygram-sale-chinese-firm-security-concerns> (accessed 5 January 2024), in relation to the failed acquisition of MoneyGram by Ant Financial in 2018 where the CFIUS raised concerns over the safety of data that can be used to identify US citizens; in relation to the value of data in the digital market as well as its transferability, see generally Petropoulos G & Liem C "The economic value of personal data for online platforms, firms and consumers" (14 January 2016) at <https://www.bruegel.org/blog-post/economic-value-personal-data-online-platforms-firms-and-consumers> (accessed 5 January 2024); Martinelli S "Sharing data and privacy in the platform economy: the right to data portability and "porting rights"" (October 2018) at https://www.researchgate.net/publication/327932822_Sharing_data_and_privacy_in_the_platform_economy_the_right_to_data_portability_and_porting_rights/link/5c8e0b7d92851c1df9463

Mergers in digital markets are of particular interest to this thesis to the degree that section 18A of the Competition Act may become applicable to some digital mergers. The national security clause in terms of section 18A seeks to consider national security interest factors such as the use or transfer of sensitive technology or knowhow outside of the Republic,⁶⁸⁴ the security of infrastructure, including processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic wellbeing of citizens and the effective functioning of government,⁶⁸⁵ the enabling of foreign surveillance or espionage,⁶⁸⁶ and the enabling or facilitation of the activities of illicit actors, such as terrorists, terrorist organisations or organised crime.⁶⁸⁷

The above factors will interface with the digital economy to the extent that digital platforms will be the medium through which sensitive personal data is transmitted,⁶⁸⁸ people communicate and plan activities (including illicit actors), foreign surveillance may be conducted, and systems, technologies and critical infrastructure will be hosted and or managed. There is therefore a strong correlation between digital mergers and national security concerns, which will be discussed in the succeeding chapter.

[71c/download?_tp=eyJjb250ZXh0Ijp7ImZpcnN0UGFnZSI6InB1YmxpY2F0aW9uIiwicGFnZSI6InB1YmxpY2F0aW9uIn19](https://www.oecd-ilibrary.org/sites/15c62f9c-en/index.html?itemId=/content/component/15c62f9c-en) (accessed 5 January 2024); OECD “Enhancing access to and sharing of data: Risks and challenges of data access and sharing” (26 November 2019) at <https://www.oecd-ilibrary.org/sites/15c62f9c-en/index.html?itemId=/content/component/15c62f9c-en> (accessed 8 January 2024); OECD “Enhancing access to and sharing of data: Understanding enhanced access to and sharing of data” (26 November 2019) at <https://www.oecd-ilibrary.org/sites/b4d546a9-en/index.html?itemId=/content/component/b4d546a9-en> (accessed 5 January 2024).

⁶⁸⁴ Section 18A(4)(b) of the Competition Act.

⁶⁸⁵ Section 18A(4)(c) of the Competition Act.

⁶⁸⁶ Section 18A(4)(e) of the Competition Act.

⁶⁸⁷ Section 18A(4)(g) of the Competition Act.

⁶⁸⁸ Through social media and communication platforms such as Whatsapp, WeChat, Telegram, TikTok, X (formerly Twitter), Facebook and Instagram to name a few.

It is also sensible to note that other than those listed above, there may be more challenges yet to manifest, which leads to the question of whether the orthodox competition regime and its tools are sufficient to deal with competition challenges in digital markets. Since this is still an emerging area of competition regulation, the literature is limited and thus, a conclusive finding cannot be made on whether the South African competition authorities are equipped to tackle competition abuses by big tech companies.

Some scholars have already opined that competition authorities generally are ill-equipped to deal with concerns arising out of mergers in digital markets.⁶⁸⁹ The Commission's stance is that in attempting to tackle the identified challenges, it does not intend to import solutions applied in foreign markets, although there is much to be learnt from the experiences of foreign jurisdictions – both the concerns that arose and the remedies applied – which may be informative in how South Africa chooses to proceed with its interventions in digital markets.⁶⁹⁰

4.4.2 Cross-border Mergers and the AFCFTA

Cross-border mergers represent the main vehicle of FDI globally,⁶⁹¹ their existence and significance therefore cannot be overlooked. A cross-border merger occurs where

⁶⁸⁹ Motta M & Peitz M “Big tech mergers” (27 July 2020) at <https://econ-papers.upf.edu/papers/1736.pdf> (accessed 5 January 2024); Motta M & Peitz M “How to deal with Big Tech mergers” (11 February 2020) at <https://cepr.org/voxeu/columns/how-deal-big-tech-mergers> (accessed 5 January 2024) at 27, 36, where the authors among other things consider the preparedness of authorities to deal with big tech mergers.

⁶⁹⁰ Competition Commission (2021) “Competition in the Digital Economy” at 26.

⁶⁹¹ Brakman S, Garretsen H & Van Marrewijk C “Cross-border mergers and acquisitions: On revealed comparative advantage and merger waves” (January 2008) at <https://repub.eur.nl/pub/11079/2008-0132.pdf> (accessed 5 January 2024) at 4; see also Deloitte “Cross-border M&A: Springboard to global growth” (2017) at <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/mergers-acquisitions/us-m-a-cross-border-pov-spread.pdf> (accessed 5 January 2024) at 3, where it is acknowledged that cross-border mergers have become a favoured method of quickly gaining new market and customer access for companies that seek increased competitiveness and growth in new

the acquiring firm and the target firm are headquartered in different countries, or where regardless of where the merging parties are established, the merger affects markets in more than one country.⁶⁹² In light of the above definition, it is important to look at the challenges that the integration project of the African Continental Free Trade Area may precipitate.

The Agreement establishing the African Continental Free Trade Area (AFCFTA) states, as some of its general objectives in relation to competition:

- the creation of a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent and in accordance with the Pan African Vision of “An integrated, prosperous and peaceful Africa” enshrined in Agenda 2063;
- create a liberalised market for goods and services through successive rounds of negotiations;
- contribute to the movement of capital and natural persons and facilitate investments building on the initiatives and developments in the State Parties and RECs; and
- enhancement of the competitiveness of the economies of State Parties within the continent and the global market.⁶⁹³

Among its specific objectives, the AFCFTA aims to:

geographies; Kang NH & Johansson S “Cross-border mergers and acquisitions: Their role in industrial globalisation” (January 2000) at <https://www.oecd-ilibrary.org/docserver/137157251088.pdf?expires=1704416907&id=id&accname=guest&checksum=27D9DF31367B0B319069678A0F3CA544> (accessed 5 January 2024) at 5-6, where the authors note the role of cross-border mergers in the globalisation of industry and reshaping of industrial structure at international level;

⁶⁹² See Jacobsberg I & Shahim C “Cross-border mergers and competition regulations” (2013) November *Without Prejudice* at 28, where the differentiation is made between “structure-based” and “effect-based” mergers.

⁶⁹³ Article 3(a)-(c), (f) of the Agreement establishing the AFCTA.

- progressively eliminate tariffs and non-tariff barriers to trade in goods;
- progressively liberalise trade in services;
- cooperate on investment, intellectual property rights and competition policy;
- cooperate on all trade-related areas; and
- cooperate on customs matters and the implementation of trade facilitation measures.⁶⁹⁴

The implementation of the above aspirations may lead to an increase in mergers within the African continent, which will need to be regulated. In anticipation of the competition implications of the AFCFTA, the final draft of the Protocol on Competition Policy (PCP) was published in January 2023.⁶⁹⁵ The PCP applies to all economic activities by persons or undertakings within or having a significant effect on competition in the ‘market’; and to conduct with a continental dimension and having a significant effect on competition in the ‘market’.⁶⁹⁶

However, the PCP does not apply to matters falling within the respective jurisdiction of the national competition authorities,⁶⁹⁷ and where there is a conflict between the provisions of the PCP and regional agreements on competition laws, the provisions of

⁶⁹⁴ Article 4 (a)-(e) of the Agreement establishing the AFCFTA.

⁶⁹⁵ AFCFTA “Protocol to the Agreement establishing the African Continental Free Trade Area on Competition Policy” (January 2023) at https://www.bilaterals.org/IMG/pdf/en_-_draft_afcfta_protocol_on_competition_policy.pdf (accessed 5 January 2024); also see Karanja J, Kimonye M & Mwamulima J “Harnessing Africa’s Free Trade Agenda – AFCFTA Protocol on Competition” (26 September 2023) at <https://bowmanslaw.com/insights/competition/harnessing-africas-free-trade-agenda-african-continental-free-trade-agreement-afcfta-protocol-on-competition/> (accessed 5 January 2024); Elitcha KAM, Joergensen MV & Tekleworld N “Deepening the AfCFTA: celebrating the adoption of new protocols on investment, intellectual property rights and competition policy” (16 March 2023) at <https://uneca.org/stories/%28blog%29-deepening-the-afcfta-celebrating-the-adoption-of-new-protocols-on-investment%2C> (accessed 5 January 2024).

⁶⁹⁶ Article 3(1) of the Protocol on Competition Policy.

⁶⁹⁷ Article 3(2) of the Protocol on Competition Policy.

the PCP will prevail.⁶⁹⁸ The 'market' is defined by the PCP as "the African Continental Free Trade Area (AfCFTA) market or a substantial part thereof, where exchange or substitution of goods or services takes place between suppliers and buyers of those goods, services and technologies".⁶⁹⁹

The PCP seeks to regulate among other things, mergers and acquisitions within the market.⁷⁰⁰ The PCP provides that undertakings falling within the scope of Article 10, that seek to enter a merger of continental dimension shall notify the Authority and no merger shall come into effect before the written approval of the Authority.⁷⁰¹ The authority mandated with the consideration of mergers is the [Competition] Authority, an autonomous body with an independent legal personality and composed of a decision-making body to be headed by a Chairperson of the Board, and an Investigative Body to be headed by an Executive Director.⁷⁰²

⁶⁹⁸ Article 3(3) of the Protocol on Competition Policy; regarding the role of regional authorities and the harmonization of competition law, see generally Dawar K & Lipimile G "Harmonization and integration in Africa: The case of competition law and policy" in Amao O, Olivier M & Magliveras KD (eds) *The emergent African Union law: Conceptualization, delimitation, and application* (2021); Ndlovu PN "Mergers and acquisitions and the incorporation of the public interest in Africa's regional competition laws: A case study of COMESA" (2022) 66(2) *Journal of African Law* 257-279; Buthe T & Kgwiru VK "The spread of competition law and policy in Africa: A research agenda" (2020) 1 *African Journal of International Economic Law* 41-83; Hartzenberg T "Cooperation on competition in the AfCFTA" (17 May 2019) at <https://www.tralac.org/blog/article/14078-cooperation-on-competition-in-the-afcfta.html> (accessed 5 January 2024), where the author suggests building AfCFTA competition enforcement on the regional economic communities that already exist; Mwemba W & Askin M "The role of regional competition regimes in supporting international enforcement cooperation" (25 August 2021) at <https://www.afronomicslaw.org/category/analysis/role-regional-competition-regimes-supporting-international-enforcement> (accessed 5 January 2024); Gachuri E "Regional Integration and the role of National Competition Agencies in Competition law enforcement: Lessons from the Covid-19 Pandemic" (20 August 2021) at <https://www.afronomicslaw.org/index.php/category/analysis/regional-integration-and-role-national-competition-agencies-competition-law> (accessed 5 January 2024).

⁶⁹⁹ Article 1 of the Protocol on Competition Policy.

⁷⁰⁰ Article 10 of the Protocol on Competition Policy.

⁷⁰¹ Article 10(3) of the Protocol on Competition Policy.

⁷⁰² Article 13(1)-(2) of the Protocol on Competition Policy.

The Competition Authority, through a governing Board, will be responsible for directing the policy of the Authority, adjudicating on any conduct prohibited in terms of this PCP, approving, with or without conditions, or denying applications for exemptions, approving, with or without conditions, or denying a merger; and overseeing the administration of the Authority.⁷⁰³ The PCP thus, establishes a supranational competition authority with jurisdiction over the 'African market'.

In relation to the implementation of the AFCFTA's PCP, the main question, which also raises a challenge, is concerning the issue of cross-border mergers. As a general rule, a cross-border merger must be reported to, and approved by, the authorities in more than one country.⁷⁰⁴ In this respect, two scenarios are considered. First, supposing a cross-border merger involves an acquiring company headquartered in Belgium and a target firm headquartered in South Africa, the European Commission⁷⁰⁵ and the South African Competition Commission would ideally have jurisdiction over the merger transaction.⁷⁰⁶

However, because the merger involves a South African firm and will have effects in South Africa, part of the African market, what then becomes the role of the AFCFTA Competition Authority? While Article 3(2) of the PCP provides that national authorities have jurisdiction over matters falling within their respective jurisdiction, it could be argued that the PCP applies, and the African Competition Authority (ACA) will assume jurisdiction as a decision of the South African authorities may have a domino effect in relation to competition within the African market.

⁷⁰³ Article 14(1) of the Protocol on Competition Policy.

⁷⁰⁴ The countries where the acquiring firm or the target firm are headquartered, or all the countries where the cross-border merger will have an effect in.

⁷⁰⁵ European Commission "Directorate-General: Competition" (n.d.) at https://commission.europa.eu/about-european-commission/departments-and-executive-agencies/competition_en (accessed 5 January 2024).

⁷⁰⁶ With the possibility of arriving at different conclusions as well. In this regard, see the *Walmart/Massmart* merger that had effects in several SADC countries and thus needed to be notified to various competition authorities. While it was unconditionally approved in Botswana and Zambia, its approval in South Africa and Namibia was subject to conditions.

In the second scenario, supposing a merger between an acquiring firm headquartered in South Africa and a target firm headquartered in Kenya, ideally the South African Competition Commission and the Competition Authority of Kenya (CAK),⁷⁰⁷ with the possible need to involve or report to the East African Community Competition Authority (EACCA),⁷⁰⁸ would have jurisdiction over the merger. The question that arises is whether the PCP will be applicable to the transaction where there is a discrepancy between the PCP and the EACCA considering that the transaction involves national authorities in terms of Article 3(2) of the PCP.

So, while national authorities should retain jurisdiction, in accordance with compliance with the regional authority (the EACCA), due to the fact that there would be some discrepancy between the EACCA and the PCP, it could be argued that Article 3(3) of the PCP kicks in and gives the ACA jurisdiction over the matter. Lastly, it should also be asked whether national competition authorities would be willing to relinquish most of their powers to a supranational authority that may make decisions that are adverse to the countries of the national authorities which would have relinquished such power.

The scenarios discussed above, while speculative, provide examples of the challenges associated with regional and continental integration and harmonisation of laws. As noted at the beginning of this section, the emerging areas of competition enforcement discussed above pose new challenges to competition enforcement nationally and continentally. There is therefore room for further research and development of jurisprudence in these areas.

⁷⁰⁷ Competition Authority of Kenya “Mergers & Acquisitions: Overview” (n.d.) at <https://cak.go.ke/mergers/overview> (accessed 5 January 2024).

⁷⁰⁸ See East African Community Competition Authority “About East African Community Competition Authority” (n.d.) at <https://www.eacompetition.org/about/about-east-african-community-competition-authority> (accessed 5 January 2024); see Bowmans “Africa Guide – Competition 2022” (10 May 2022) at https://bowmanslaw.com/wp-content/uploads/2022/05/Competition_10.5.2022.pdf (accessed 5 January 2024) at 2, where it is noted that the EACCA became operational in 2018 but is yet to accept merger notifications.

4.5 CONCLUSION

This chapter started by discussing the nature of merger regulation, being proactive rather than reactive and, thus, preventing future abuses of market power.⁷⁰⁹ It then focussed a great deal on the discussion relating to the substantive issues regarding merger assessment and the considerations that are taken into account in deciding whether or not to allow a merger.⁷¹⁰ Such a discussion was significant as it discussed the competition and public interest tests that form the backbone of merger analysis in South Africa.⁷¹¹

Considering that South Africa already has an established and arguably, successful merger review framework, it is reasonable to speculate that the amendments to the Competition Act, inserting a national security clause in the merger regulation regime, will disrupt the status quo – but will the disruption be for the betterment of merger regulation, or will it weaken an already efficient system? That question forms the basis of the succeeding chapter, where I discuss the introduction of the national security consideration and assess its impact on the ‘traditional’ merger review system.

The chapter proceeded to identify potential challenges that competition authorities will face due to the coming to prominence of mergers in digital markets and the implementation of the AFCFTA.⁷¹² It noted that whereas digitalization is desirable, it poses challenges when it comes to merger regulation as often, the companies that own digital platforms are not based in South Africa.⁷¹³ It also noted that while regional integration and the opening up of the African market are also desirable, there may be challenges related to the enforcement of cross-border mergers.⁷¹⁴ The chapter

⁷⁰⁹ See parts 4.1 and 4.2 above.

⁷¹⁰ See part 4.3 above.

⁷¹¹ See parts 4.3.1 and 4.3.2 above.

⁷¹² See part 4.4 above.

⁷¹³ See part 4.4.1 above.

⁷¹⁴ See part 4.4.2 above.

identified gaps in the literature regarding the two developing areas and set the foundation for future research.

Against the backdrop of section 4.4 which outlined the current and lurking challenges to merger regulation, Chapter 5 seeks to provide a rigorous analysis of the insertion of section 18A into the Competition Act. The section, which aims to regulate mergers involving foreign acquiring firms, may yet add to the existing challenges identified above. It has been established in this chapter that in considering a merger, the competition authorities have to conduct a two-pronged analysis, applying the competition and public interest test.

What the insertion of section 18A threatens to do is to throw into disarray the established merger analysis process by providing a third test in respect of mergers involving a foreign acquiring firm. The following chapter thus seeks to answer several questions including the rationale for section 18A, the role of the competition authorities in a merger envisaged by the section, the process for the consideration of a merger envisaged by section 18A and the challenges that may be occasioned by insertion of section 18A.

CHAPTER 5

A CRITICAL ANALYSIS OF THE INTRODUCTION OF THE NATIONAL SECURITY VETO IN MERGER REVIEW*

5.1 INTRODUCTION

A detailed discussion of the substantive assessment of mergers had to be conducted in the preceding chapter to outline the 'traditional merger process' before the introduction of the national security veto.⁷¹⁵ The chapter discussed some of the existing and emerging challenges to effective merger control before introducing section 18A.⁷¹⁶ This was done for two reasons: First, to illustrate that the South African merger process is not without its challenges and second, to provide a foundation for a contextual analysis of the challenges the national security veto may bring.⁷¹⁷

Because section 18A involves the provision of authority to the National Executive to decide on a matter traditionally reserved for the competition authorities, the consideration of a proposed merger, as well as the nebulousness of several provisions in the section, some observers and scholars note that section 18A is open to potential abuse.⁷¹⁸ Consequently, this chapter aims to provide an in-depth analysis of section

* At the time of writing, literature on national security in merger regulation in South Africa was limited to three contributions, which this chapter will heavily rely on and constantly refer to: see Tavuyanago S "An analysis of the "National security interest" provision in terms of section 18A of the Competition Act 89 of 1998" (2021) 24 *PELJ* 1-36; Mudzamiri J & Osode PC "Reconciling the "bittersweet chemistry" between technology and corporate takeovers through reinforcing national security interests in merger control" (2021) 24 *PELJ* 1-32; Tavuyanago S & Vinti C "Reflections on the justiciability of the "national security" clause as stipulated by section 18A of the Competition Act 89 of 1998: Lessons from Russia – measures concerning traffic in transit WTO panel decision" (2023) 27 *Law Democracy and Development* 240-264.

⁷¹⁵ See part 4.3 above.

⁷¹⁶ See part 4.4 above.

⁷¹⁷ See part 4.5 above.

⁷¹⁸ Helen Suzman Foundation "Parliamentary Submission: Competition Amendment Bill, 2018" (30 August 2018) at <https://hsf.org.za/publications/hsf-briefs/parliamentary-submission->

18A, discussing its key provisions, considering dissenting points of view and identifying potential points of contention raised by some of the provisions. It further aims to assess how the amendments in terms of section 18A may alter the 'traditional' merger review process by adding national security to the tests that must be applied when considering a merger.

To provide a thorough analysis of the national security veto, chapter 5 comprises four sections, this being the first. Section 5.2 provides a background to and introduction of the national security veto through section 18A of the Competition Act. Section 5.3 constitutes a critique of section 18A. It is a paragraph-by-paragraph dissection of the section, highlighting its strengths and weaknesses. The section also aims to identify potential challenges that may arise out of the current framing of the section. Lastly, section 5.4 provides a summary of the chapter and the contribution it makes to the thesis.

[competition-amendment-bill-2018](#) (accessed 16 October 2023); Bowmans (2018); Tavuyanago (2021).

5.2 INTRODUCTION OF SECTION 18A OF THE COMPETITION ACT

This thesis has noted that in all jurisdictions that have competition or antitrust law regulation, the main aim, and in some cases, the sole aim of their legislation, is to protect and promote competition.⁷¹⁹ In our law, the purpose of the Competition Act is to promote and maintain competition in the country.⁷²⁰ In this regard, South Africa conforms to the universally accepted goal of competition law – the promotion/ protection/ enhancement/ or maintenance of competition. However, the South African Competition Act goes further than just considering the promotion and maintenance of competition by including social objectives. These include the promotion of employment, ensuring that small and medium-sized enterprises have an equitable opportunity to participate in the economy and promoting a greater spread of ownership, in particular, increasing the ownership stakes of historically disadvantaged persons.⁷²¹

The above public interest objectives form part of the broader canvas of transformation of the South African society. Mncube and Ratshisusu advance that due to the discriminatory and exclusionary policies of the apartheid regime, “post 1994, all law in South Africa is expected to contribute to economic transformation and redress the imbalances related to past racial divisions”.⁷²² The Competition Act was thus enacted to advance the aspiration of a more democratic and inclusive society. In that vein, it is apposite to classify the Act as a transformative piece of legislation. If one reflects on the Preamble of the Competition Act, which records the historical context, and the social and political motivations of the legislation, it is reasonable to conclude that economic transformation was one of, if not the greatest driving force behind the drafting of the Act.⁷²³

⁷¹⁹ See parts 2.3 and 3.2 above.

⁷²⁰ See section 2 of the Competition Act.

⁷²¹ See ss 2(1)(c), (e) and (f) of the Competition Act.

⁷²² Mncube & Ratshisusu (2023) at 74.

⁷²³ See Preamble of the Competition Act which first, recognises that apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership

Since its promulgation, the Competition Act has been amended several times to keep up with the dynamic and constantly developing social and economic needs of the South African society and facilitate economic transformation.⁷²⁴ The latest amendment to the Act came into effect on 13 February 2019 when the President of the Republic of South Africa signed the Competition Amendment Act 2018 into law.⁷²⁵ Among the motivations of the amendment were the needs:

- to promote competition and economic transformation through addressing the structures and de-concentration of markets;
- to protect and stimulate the growth of small and medium businesses and firms owned and controlled by historically disadvantaged persons while at the same time protecting and promoting employment, employment security and worker ownership; and
- to facilitate the effective participation of the National Executive within proceedings contemplated in the Act, including making provision for the National Executive's intervention in respect of mergers that affect the national security interests of the Republic.⁷²⁶

Of particular importance to this chapter is the last point above, which speaks to the intervention of the National Executive in mergers having an effect on the National Security Interests (NSI) of the Republic. To give effect to the above aim, section 18A,

and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans; then aspires to open the economy to greater ownership by a greater number of South Africans in order to provide all South Africans equal opportunity to participate fairly in the national economy and regulate the transfer of economic ownership in keeping with the public interest.

⁷²⁴ See Dingley D & Bhugwandeem E "Implications of the new policy objectives of the Competition Act" (2 June 2020) at <https://www.webberwentzel.com/News/Pages/implications-of-the-new-policy-objectives-of-the-competition-act.aspx> (accessed 13 December 2023).

⁷²⁵ Competition Amendment Act 18 of 2018 (hereinafter "Amendment Act").

⁷²⁶ See Long Title of the Amendment Act.

titled “Intervention in merger proceedings involving foreign acquiring firm” was inserted into the principal Competition Act.⁷²⁷

To summarise section 18A, it gives authority to the National Executive of the country to determine whether a proposed merger where the acquiring firm is foreign, should or should not be approved based on the level of threat to NSI that the merger poses. The section empowers the President to convene a National Security Committee (NSC) which is then responsible for conducting an assessment using the ‘national security test’ (NST), of a proposed merger involving a foreign acquiring firm. In its assessment, the NSC must consider whether the implementation of such a merger may have an adverse effect on the NSI of the country.

In terms of the Competition Act, a ‘foreign acquiring firm’ means an acquiring firm - which was incorporated, established or formed under the laws of a country other than the Republic, or whose place of effective management is outside the Republic.⁷²⁸ Regarding what constitutes NSI, the section does not definitively state or list the NSI. Rather, it provides a list of factors that must be taken into consideration when determining what constitutes national security interests.⁷²⁹ The lack of a definition of what constitutes NSI creates a possible challenge relating to the lack of legal certainty, which is fundamental to the rule of law. It also opens up the possibility of an abuse of the section, where the definition is tinkered with and adjusted on an *ad hoc* basis to suit the government of the day.⁷³⁰

⁷²⁷ Section 14 of the Amendment Act. It is noteworthy that although section 18A came into effect on 12 July 2019 through Proclamation No. 46 of 2019 in GN 42578 of 12 July 2019, at the time of writing, no mergers had been considered under the section.

⁷²⁸ See s 1(d) of the Amendment Act; see also s 1(1)(i) of the Competition Act for the definition of an acquiring firm.

⁷²⁹ Section 18A(4) of the Competition Act.

⁷³⁰ A more detailed discussion of the challenges brought forth by this and other deficiencies in the section is conducted under part 5.3 hereunder.

It is pertinent to bear in mind that the consideration of NSI in competition or investment policy is not a new phenomenon. While the consideration of NSI is novel in the South African context, other jurisdictions have been applying various forms of the NST to mergers and investments for a long time.⁷³¹

For example, the USA regulates the consideration of NSI in merger evaluation through different legislative instruments.⁷³² The USA has also researched the continued viability of analysing NSI in foreign investment, citing the possibility that key segments of defense-related industries could come under foreign control as one of the critical concerns regarding increased foreign investment in the USA.⁷³³

In Brazil, foreign investments, including investments through mergers, are subject to investigation and regulation by the National Congress and the National Defence

⁷³¹ See Kokkoris I “National security as a public interest consideration in UK merger control” (2021) 14(2) *Journal of Strategic Security* at 48, where he notes that in several jurisdictions, national security is one of the public interest considerations that is taken into account in the assessment of an acquisition or merger involving a foreign entity. In terms of procedure, the threats to national security that a transaction may entail can be considered either by the competent competition authority, along the substantive competition law-based appraisal of a merger, as in the United Kingdom (integrated model), or by another public body, such as a sectoral regulator or a government department, concurrently or subsequently to the competition proceedings as in the United States (dual model).

⁷³² See s 1702(6)(b)(4) of the Foreign Investment Risk Review Modernization Act which takes cognisance of the fact “that the national security landscape has shifted in recent years, and so has the nature of the investments that pose the greatest potential risk to national security, which warrants an appropriate modernization of the processes authorities of the Committee on Foreign Investment in the United States and of the United States export control system”; s 721 of the Defense Production Act 1950, which gives authority to the US President to block or approve mergers, acquisitions and takeovers based on national security grounds. Also see s 232 of the Trade Expansion Act of 1962, titled “Safeguarding National Security”, which allows the US President to impose import restrictions based on an investigation and affirmative determination by the Department of Commerce that certain imports threaten to impair US national security. A detailed discussion of the USA’s regime for considering NSI is had under part 6.2 below.

⁷³³ See U.S. General Accounting Office “Foreign investment: Analyzing national security concerns” (March 1990) at <https://www.gao.gov/assets/nsiad-90-94.pdf> at 2 (accessed 13 December 2023).

Council based on NSI.⁷³⁴ In Australia, the Treasury is authorised to either block or approve investment transactions, including mergers based on NSI. When making decisions on foreign investments, the Treasurer is advised by the Foreign Investment Review Board (FIRB) under the auspices of the Foreign Acquisitions and Takeovers Act of 1975.⁷³⁵

Further to the above examples, it has been noted that the consideration of NSI in competition and investment regimes has been on a steady rise over the last two decades. The United Nations Conference on Trade and Development (UNCTAD) noted in 2019 that from January 2011 to September 2019, at least 13 countries had introduced new regulatory frameworks to address foreign investment, with one of the key considerations in investment screening being NSI.⁷³⁶ The introduction of section 18A of the Competition Act was therefore not without international precedent.

⁷³⁴ See Administrative Council for Economic Defense – CADE “about us” (n.d.) at <https://www.gov.br/cade/en/access-to-information/about-us> (accessed 13 December 2023); Institutional Security Office “National Defense Council” (n.d.) at <https://www.gov.br/gsi/pt-br/composicao/colegiados-do-gsi/conselho-de-defesa-nacional/conselho-de-defesa-nacional> (accessed 13 December 2023)

⁷³⁵ See Australian Government, The Treasury “Australia’s Foreign Investment Policy” at https://foreigninvestment.gov.au/sites/foreigninvestment.gov.au/files/2023-06/AUSTRALIAS_FOREIGN_INVESTMENT_POLICY.pdf (accessed 13 December 2023); Australian Government, The Treasury “Foreign investment in Australia” (n.d.) at <https://foreigninvestment.gov.au/> (accessed 13 December 2023); Hoffman G & Williams M “Foreign direct investment regimes Australia 2024” (n.d.) at <https://iclg.com/practice-areas/foreign-direct-investment-regimes-laws-and-regulations/australia> at para 1.2 (accessed 13 December 2023). A detailed discussion of the consideration of NSI in Australia is had under part 6.3 below.

⁷³⁶ UNCTAD “National Security-related screening mechanisms for foreign investment An analysis of recent policy developments” (December 2019) at <https://investmentpolicy.unctad.org/publications/1213/investment-policy-monitor-special-issue--national-security-related-screening-mechanisms-for-foreign-investment-an-analysis-of-recent-policy-developments> (accessed 12 December 2023) at 2-4; see also OECD “Protection of “critical infrastructure” and the role of investment policies relating to national security” (May 2008) at https://www2.oecd.org/daf/inv/investment-policy/40700392.pdf_9-11 (accessed 14 December 2023); see also Kokkoris (2021) at 48-52 and the UK’s National Security and Investment Act 2021, which came into force on 4 January 2022.

While empirical data on the efficacy of screening FDI based on NSI or controlling mergers involving NSI is not conclusive,⁷³⁷ some commentators have made observations on public sentiment and investor attitudes towards the consideration of NSI.⁷³⁸ Reader for example, notes that the UK's adoption of NSI in merger regulation was heavily criticised by proponents of open investment, who believed that the consideration of NSI would ward off investments as it was likely to have an adverse impact on the predictability of outcomes within the assessment process.⁷³⁹

Reader further ruminates the question of whether an investment review regime based solely on the assessments and decision-making of politicians or government departments creates an environment that instils confidence in prospective investors.⁷⁴⁰ In pondering the above question, he proffers that perceptions of bias and inconsistent political decision-making that are well documented linger and sow trepidation in investors as the law is not certain.⁷⁴¹

Further criticism has been levelled against the inclusion of NSI in merger and or investment control concerning a lack of defined institutional roles. For example, Kokkoris notes that when it comes to consideration of NSI in UK mergers, the CMA lacks extensive expertise in national security cases.⁷⁴² Kokkoris also proffers that a

⁷³⁷ See UNCTAD (2019) at 13 where an attempt is made to quantify the value of some of the transactions screened based on NSI albeit for only three jurisdictions (USA, Taiwan and the Netherlands).

⁷³⁸ See Reader D "Extending National Security in Merger Control and Investment: A Good Deal for the UK" (2018) 14(1) *Competition Law International* 35-52.

⁷³⁹ Reader (2018) at 42.

⁷⁴⁰ Reader (2018) at 48-49.

⁷⁴¹ See Reader (2018) at 49; also see part 5.3.1 hereunder, where uncertainty regarding the definition of NSI as well as the constitution and mandate of the NSC is discussed in detail.

⁷⁴² Kokkoris (2021) at 57. The Competition and Markets Authority is the UK's equivalent of the South African Competition Commission, responsible for enforcement of the Enterprise Act 2002, see UK Government "Competition & Markets Authority" (n.d) at <https://www.gov.uk/government/organisations/competition-and-markets-authority> (accessed 12 August 2024). This thesis also discusses the institutional challenge under part 5.3 below.

decision based on public interest grounds and NSI specifically, is a political one.⁷⁴³ Considering that “no political decision is, in and of itself, predictable and perfectly transparent”,⁷⁴⁴ the inclusion of NSI poses a serious threat to legal certainty and the rule of law.⁷⁴⁵

The observations of the commentators noted above are not to paint a picture that the consideration of NSI in merger and or investments is all doom and gloom. This thesis acknowledges the sovereign right of any country to determine and protect its NSI.⁷⁴⁶ The existence and importance of this right are also reflected in the South African Constitution, which provides national security as paramount under the principles governing security services.⁷⁴⁷ However, there are several challenges to the current situation and framing of the consideration of NSI, which challenges will be discussed in detail in the ensuing sections.

5.3 CRITIQUE OF SECTION 18A OF THE COMPETITION ACT

As identified in section 5.2 above, before the introduction of section 18A, South Africa had no legal provisions for considering security issues in mergers involving foreign acquiring firms or any other sort of foreign investment under the PIA.⁷⁴⁸ The only permissible intervention by the National Executive in merger transactions was limited

⁷⁴³ Kokkoris (2021) at 57.

⁷⁴⁴ Kokkoris (2021) at 57-58.

⁷⁴⁵ Similar sentiments have been expressed by Reader (2018) at 49 and the issue is further elaborated on under part 5.3.1 below.

⁷⁴⁶ See Reader (2018) at 35 where he notes that “national security criteria are widely accepted as legitimate on the basis that they ensure additional scrutiny is directed at mergers involving firms with assets, operations or geographic locations that are in some way critical to the safety and security of citizens”.

⁷⁴⁷ See s 198 of the Constitution specifically, and Chapter 11 of the Constitution generally.

⁷⁴⁸ See Tavuyanago (2021) at 4.

to the Minister's power to make representations on any public interest ground referred to in section 12A(3) of the Competition Act.⁷⁴⁹

Section 18A therefore presents a paradigm shift as it not only provides for the consideration of non-competition or listed public interest factors but also extends the authority of the National Executive when it comes to intervention in merger proceedings. The below sub-sections provide a detailed examination of section 18A, assessing the soundness of each segment of the section as well as raising the challenges the section may still face, as it is yet to be tested.

5.3.1 Establishment and Constitution of a National Security Committee [s18A(1-2)]

The first focus of the section is that of the establishment and constitution of a National Security Committee (NSC), responsible for implementation of the section. In that regard, section 18A(1-2) provides that:

- (1) The President must constitute a Committee which must be responsible for considering in terms of this section whether the implementation of a merger involving a foreign acquiring firm may have an adverse effect on the national security interests of the Republic.
- (2) The Committee contemplated in subsection (1) must consist of such Cabinet Members and other public officials as may be determined and appointed by the President.

The establishment of the NSC in terms of section 18A(1) to implement the section bears no evidence of a questionable motive. In fact, it is consistent with a commitment to making sure that the section is administered by a dedicated office which may ensure its efficient implementation. In terms of section 18A(1), the President is mandated to elect members to the NSC. With the NSC being a creature of the Executive, it is

⁷⁴⁹ Minister of Trade, Industry and Competition, in terms of s 18(1) of the Competition Act.

understandable that the head of the National Executive is endowed with the authority to select such a committee. In terms of section 18A(2), the pool of candidates that may be elected to the NSC is restricted to members of the President's cabinet and public officials that the President may deem worthy. It is reasonable that the NSC may be constituted by members of the cabinet, as several departments may have a vested interest in a merger that has national security concerns. For example, the following departments may have an interest in a proposed merger that affects national security:

- Defence – insofar as the defence capabilities of the Republic is concerned;
- State Security Agency - insofar as the security of the country is concerned;
- Communications and Digital Technologies – insofar as a merger may relate to sensitive technologies which may threaten the security of the Republic;
- National Treasury – insofar as economic development and the stability of the economy in general may be affected by a proposed merger;
- Employment and Labour – insofar as the proposed merger's threat to job security in a particular industry is concerned;
- Justice and Constitutional Development – in respect of legislative interpretation and application of the national security clause;
- Trade, Industry and Competition – insofar as the promotion and maintenance of competition as well as economic development and participation is concerned; and
- Small Business Development – insofar as the ability of SMEs to compete and develop is concerned.⁷⁵⁰

Considering the above, the rationale for including members of the cabinet, at the President's discretion, is therefore sound. Section 18A(2) also provides for the election

⁷⁵⁰ For a detailed insight into what each department is responsible for and how it may be affected by a merger that has NSI considerations see South African Government "National Departments" (n.d.) at <https://www.gov.za/about-government/government-system/national-departments> (accessed 15 December 2023).

of members of the NSC from 'other public officials' as may be determined by the President. While it is reasonable to include public officials, those who owe a civic duty to the nation, the subsection is vague to the extent that it leaves the definition of 'public official' and criteria for appointment unresolved. Below, I discuss some of the potential shortcomings of the above sub-sections.

5.3.1.1 Objecting views

While the establishment and constitution of the NSC under section 18A(1-2) may seem benign, there may be some criticism levelled against it and several shortcomings can be identified. Below I look at some of the shortcomings of the section as well as potential challenges that may be raised when it does become effective.

5.3.1.1.1 The lack of context regarding the NSC's establishment and mandate

Section 18A(1) makes mention of the NSC considering whether a merger will have an adverse effect on the 'NSI of the Republic' however, what constitutes 'national security' is not defined at this point. The subsection poses a causality dilemma which evokes the philosophical question of the 'chicken or the egg'. What must come first, the definition of NSI or the establishment of the body delegated to consider NSI? Although an attempt to discuss what constitutes national security is made under section 18A(4) of the Act, I believe that the definition should have preceded the establishment of the NSC.

This is because, without a definition of what national security interests are, proper context is not provided as to the need for and indeed the rationale for the criteria under which members of the NSC are elected. To this end, what is the NSC's real purpose? Ostensibly, it is to assess national security interests, but what are the interests which would necessitate the establishment of the NSC? While the sequence of the subsections is not fatal to their purpose in the greater scheme of things, it would have

been appropriate to define NSI first perhaps in section 1 of the Act, which contains definitions of significant terms used in the Act.

5.3.1.1.2 The appropriateness of vesting power in the NSC

The second issue with the subsection relates to the question of whether the NSC is the most appropriate body to deal with the consideration of NSI in merger regulation. As acknowledged elsewhere in this thesis, while the Competition Act was used to address a *lacuna* in relation to the consideration of NSI in mergers and investments,⁷⁵¹ the question remains whether there was a more appropriate body or institution to consider this aspect.

In establishing the NSC, the South African legislature went against the grain of international best practices, wherein dedicated institutions are mandated with the consideration of NSI concerns in mergers and investments. This ensures specialised knowledge and skills, competence and independence. In the USA for example, the Federal Trade Commission (FTC), which is an *independent* agency of the United States government whose principal mission is the enforcement of antitrust law and the promotion of consumer protection, is responsible for investment screening including investments through mergers which may affect NSI.⁷⁵²

In Australia, the Foreign Investment Review Board (FIRB) is an *independent* dedicated statutory body specifically established to advise the Treasurer and the Government on Australia's foreign investment policy and its administration.⁷⁵³ In Brazil, the

⁷⁵¹ See Abstract and part 1.3 above.

⁷⁵² Federal Trade Commission "Bureaus and Offices" (n.d.) at <https://www.ftc.gov/about-ftc/bureaus-offices> (accessed 15 December 2023).

⁷⁵³ See Mendelsohn R & Fels A "Australia's foreign investment review board and the regulation of Chinese investment" (2014) 7(1) *China Economic Journal* at 61; Hundt D "The changing role of the FIRB and the politics of foreign investment in Australia" (2020) 55(3) *Australian Journal of Political Science* at 330; Australian Government "Foreign Investment Review Board" (n.d.) at <https://www.directory.gov.au/portfolios/treasury/department-treasury/foreign-investment-review-board> (accessed 15 December 2023).

Administrative Council for Economic Defense (CADE) is an *independent* agency reporting to the Ministry of Justice and is responsible for investigating and deciding, ultimately, on competition issues, as well as for fostering and promoting the culture of competition in Brazil.⁷⁵⁴ In the UK, the National Security and Investment Act provides for the ‘call-in’ by the Secretary of State for national security purposes of an investment, including investment through merger which may give rise to a risk to national security.⁷⁵⁵

Considering that the Competition Act already established the Competition Commission and the Competition Tribunal, which are ‘statutory bodies’ responsible for among other things, the consideration of mergers, it may have been prudent to utilise these bodies to also assess NSI. It is heeded that these bodies do not have experience in dealing with matters of national security and could potentially face challenges regarding the handling of sensitive information by their officials.

However, the setting up of a dedicated office within the Commission to specifically consider NSI could have been judicious. Alternatively, the establishment of a ‘National Security Review Board’, modelled along the lines of FIRB, to consider all forms of NSI in competition as well as other investments under the PIA would also have been a welcome development.⁷⁵⁶ As it stands, the NSC is a ‘committee’ and not an

⁷⁵⁴ Article 3 of Chapter I of Title II of Law N° 12.529/2011; see also CADE (n.d.) “Administrative Council for Economic Defense - CADE” at <https://www.gov.br/cade/en/access-to-information/about-us> (accessed 7 August 2024).

⁷⁵⁵ Section 1 of the National Security and Investment Act 2021 (c. 25); see also Burges S “The New UK National Security and Investment Merger Control Regime” (17 February 2022) at <https://www.burges-salmon.com/news-and-insight/legal-updates/the-new-uk-national-security-and-investment-merger-control-regime> (accessed 15 December 2023); Department for Business, Energy & Industrial Strategy “The National Security and Investment Act alongside regulatory requirements” (19 June 2023) at <https://www.gov.uk/government/publications/the-national-security-and-investment-act-alongside-regulatory-requirements/the-national-security-and-investment-act-alongside-regulatory-requirements> (accessed 15 December 2023).

⁷⁵⁶ While it is not the aim of this thesis to discuss NSI under the South African investment regime, it is worth noting that mergers, where their purpose is to invest in the country, constitute an ‘investment’ under section 2(1)(c) of the Protection of Investment Act 22 of 2015. It is advanced

independent statutory body, which is answerable to the President – which segues into the third challenge, the question of the independence of the NSC.

5.3.1.1.3 The Independence of the NSC

The third shortcoming of the subsection is concerning the question of the independence of the NSC. The above subsections only go as far as the establishment of the NSC, the provision of a mandate in terms of considering NSI in mergers involving foreign acquiring firms and setting the criteria by which members of the NSC are elected.⁷⁵⁷ The subsections do not offer any guidance regarding the actual process by which members are elected as well as any further particulars relating to who the ‘public officials’ refer to or what credentials they must hold.⁷⁵⁸

Mudzamiri and Osode suggest that the appointment of members to the NSC must be done through a public interview system and the appointees should be on fixed-term contracts that can be terminated only in terms of the existing employment laws.⁷⁵⁹ I would add that the pool of candidates to constitute the NSC must be as diverse as it is focused. This is to say that experts in national security,⁷⁶⁰ competition law,⁷⁶¹

that one of the main drivers of a foreign acquiring firm merging with a South African firm would be to grow its investment portfolio and advance its investment strategy. In that sense, the proposed regulation of NSI under the PIA would have been appropriate as it would provide investment screening of not only mergers involving foreign acquiring firms but greenfield investments as well. A more detailed discussion of this point is conducted in part 7.3.2 below.

⁷⁵⁷ See s18A(1) & (2).

⁷⁵⁸ See Bowmans (2018) where it was noted that because the processes and procedure to be followed by the NSC in the execution of its functions are not outlined in the [Act] and are to be determined by the President and issued as regulations to the Act, important aspects such as how the NSC is to reach decisions (e.g. by consensus or majority) and whether the President or any of the NSC members may have a deciding vote or veto [is] unknown.

⁷⁵⁹ Mudzamiri & Osode (2021) at 19.

⁷⁶⁰ Including national security analysts to provide specialised analytics, intelligence and surveillance expertise.

⁷⁶¹ Including experts in competition law and practice as well as experts in economics because the national security veto is situated in the Competition Act.

investment law⁷⁶² and constitutional law⁷⁶³ must be eligible for appointment from different segments of society including but not limited to business, government, academia and law practice.⁷⁶⁴

A further disquieting factor is that the subsections do not provide any assurance concerning the independence or autonomy of the NSC. A provision on independence would guarantee that the NSC makes its decisions free from control, influence, sway or aid of any individual or office. The uncertainty regarding the NSC's composition and its lack of provision for the guarantee of the committee's independence raises serious concerns.⁷⁶⁵ I have previously proffered the opinion that considering that the NSC is appointed by the President (of the country but also a specific political party) with no safeguards against bias, nepotism and or partisanship, it would not be irrational to predict a scenario where the NSC may be pressured into aligning with a specific political agenda in the name of 'national security interests'.⁷⁶⁶

I have also argued that to safeguard the independence of the NSC, the legislature ought to have inserted a clause assuring its independence, which clause could have followed

⁷⁶² Experts in investment law, strategy and business, considering that mergers involving foreign acquiring firms may be treated as investments under the PIA.

⁷⁶³ Constitutional law practitioners necessary to ensure that among other things, the constitution of the NSC, its mandate and the process of considering a merger contemplated by section 18A are congruent with constitutional tenets such as transparency, rule of law, just administrative action and the right to judicial review (these are discussed in detail hereunder).

⁷⁶⁴ See Mudzamiri & Osode (2021) at 20, where they suggest a slightly different approach in that an entirely different committee to the NSC must be constituted and its appointees should comprise members from the State Attorney's Office, the Office of the President, the Reserve Bank of South Africa, the National Director of Public Prosecution, the State Intelligence Office. It should include professionals from the following Departments (including Director Generals): Department of Finance (chair); Department of Science and Innovation; Department of Defence; Department of Home Affairs; Department of Trade, Industry and Competition, and it should also include academic specialists.

⁷⁶⁵ See Tavuyanago (2021) at 10.

⁷⁶⁶ Tavuyanago (2021) at 10.

the example of section 181 of the Constitution.⁷⁶⁷ While the NSC is not a Chapter 9 institution, nor does it have a similar status, the suggested approach serves to reiterate the importance of independence when it comes to public institutions, bodies and or committees.⁷⁶⁸ The omission of a clause regarding the independence of the NSC was therefore a missed opportunity to confirm its independence and allay any apprehensions that the public may have concerning its establishment and authority.

In the same breath, a specific provision ensuring the NSC's independence would have served to legitimise the idea of the NSC being an extension of the Executive. It is trite that the legitimacy of antitrust agencies' actions is inherently linked to their ability to act independently, free from external influence either from the companies they supervise or from the state.⁷⁶⁹ Thus, the assured independence of the NSC would have been welcomed as a safeguard against it being used to achieve political or business goals which are not related to competition and NSI considerations in merger evaluation.⁷⁷⁰

Without ensuring the independence of the NSC, the potential for political interference, bias or patronage is not negated. This may have an adverse effect on the attractiveness of South Africa as an investment destination because, in the absence of reassurances regarding the independence of the committee tasked with 'screening' investments through mergers, foreign investors will not be inclined to invest in an environment where

⁷⁶⁷ See s 181(2) of the Constitution, which in relation to Chapter 9 institutions reads: "These institutions are independent and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice".

⁷⁶⁸ See part 5.3.1.1.2 above where bodies responsible for the consideration of NSI in other jurisdictions are bestowed with independence (discussion on the FTC in the USA, the FIRB in Australia and the CADE in Brazil). In South Africa, sector regulatory bodies, Tribunals and Courts are also bestowed with independence. To this end, see the Competition Commission (CCSA), the Competition Tribunal (CTSA), the Competition Appeal Court (CAC), the National Consumer Commission (NCC), the National Energy Regulator of South Africa (NERSA) and the Independent Communications Authority of South Africa (ICASA) to name a few.

⁷⁶⁹ Alves S, Capiou J & Sinclair A "Principles for the independence of competition authorities" (2015) 11(1) *Competition Law International* at 13.

⁷⁷⁰ Alves, Capiou & Sinclair (2015) at 15.

economic policy can easily be tinkered with by those pursuing a specific political agenda.⁷⁷¹ It can also be argued that South African investment regulation prior to the insertion of the national security veto was already a complex labyrinth.⁷⁷² Therefore, including NSI presents another hurdle that international investors have to overcome, which may, in turn, disincentivise potential investors.

To cure the lack of mention of the NSC's independence, it has been suggested that because the NSC is constituted in a similar way, the judiciary is constituted, through direct appointment by the President, perhaps an approach similar to that used in safeguarding the independence of the judiciary could be taken.⁷⁷³ In that vein, the NSC must be imbued with 'functional independence', which like judicial independence, entails both institutional and decisional independence.⁷⁷⁴ Institutional independence

⁷⁷¹ Tavuyanago (2021) 1 at 11-12.

⁷⁷² For a detailed discussion on South Africa's investment policy and law, including challenges to same, see among others Qumba MF "Safeguarding foreign direct investment in South Africa: Does the Protection of Investment Act live up to its name?" (2018) 25(3) *South African Journal of International Affairs* 341-364; Qumba MF "South Africa's move away from international investor-state dispute: a breakthrough or bad omen for investment in the developing world?" (2019) 52(1) *De Jure Law Journal* 358-379; Gazzini T "Travelling the National Route: South Africa's Protection of Investment Act 2015" (2018) 26(2) *Journal of International and Comparative Law* 242-263; Langalanga A "Imagining South Africa's Foreign Investment Regulatory Regime in a Global Context" (May 2015) *South African Institute of International Affairs Occasional Paper* 214 5-33 at <https://saiia.org.za/wp-content/uploads/2015/04/Occasional-Paper-214.pdf> (accessed 9 August 2024).

⁷⁷³ Tavuyanago (2021) 1 at 11; see also Cameron E "Judicial independence – a substantive component?" *Advocate* (December 2010) at <https://www.gcbsa.co.za/law-journals/2010/december/2010-december-vol023-no3-pp24-29.pdf> (accessed 15 December 2023) at 24-25 where the judge discusses the difference between institutional and decisional independence.

⁷⁷⁴ Recently, there have been questions about the independence of the judiciary in light of cases such as the impeachment of Judge Hlope as well as details coming out of the Commission of Inquiry into Allegations of State Capture. See among others The Presidency Republic of South Africa "President Ramaphosa affirms removal of judges Hlope and Motata" (6 March 2024) at <https://www.thepresidency.gov.za/president-ramaphosa-affirms-removal-judges-hlophe-and-motata> (accessed 8 August 2024); Bohler-Muller N "It took 16 years but South Africa has impeached a senior judge – who is John Hlophe and what went wrong?" (04 March 2024) at <https://hsrc.ac.za/news/latest-news/it-took-16-years-but-south-africa-has-impeached-a-senior->

means that the NSC would enjoy full autonomy in considering NSI concerns, insulated from the influence of other statutory bodies, institutions and the Presidency itself. Decisional independence means that members of the NSC would be able to make their decisions on the facts of the law and the merits of each case without pressure or interference.⁷⁷⁵ Further, the NSC must be guaranteed that their decision will not be tampered with or vetoed, even by the President, under whose power the NSC is constituted.⁷⁷⁶

5.3.1.1.4 Accountability of the NSC

The fourth deficiency in the subsections establishing the NSC is one intricately linked to that of independence, accountability. Accountability refers to an assurance that an individual or organisation is evaluated on its performance or behaviour related to something for which it is responsible. Put differently, it is the requirement to give an account of how a responsibility that has been conferred or delegated to some person or institution has been carried out or fulfilled by that person or institution.⁷⁷⁷ To this end,

[judge-who-is-john-hlophe-and-what-went-wrong/](#) (accessed 8 August 2024); Kriegler J “Judge Hlophe betrayed the nation with his greed” (December 2007) *Advocate* 33-34 at https://journals.co.za/doi/pdf/10.10520/AJA10128743_484 (accessed 8 August 2024). It should be noted that this thesis does not aim to investigate the question of whether the judiciary is ‘in practice’, independent. The argument advanced by this thesis is that judicial independence is safeguarded by the Constitution, and there are mechanisms and processes in place to ensure its effectiveness. For further discussions on judicial independence see among others Siyo L & Mubangizi JC “The independence of South African Judges: A Constitutional and Legislative perspective” (2015) 18(4) *Potchefstroom Electronic Law Journal* 817-846; Malan K “Reassessing Judicial Independence and Impartiality against the backdrop of Judicial Appointments in South Africa” (2014) 17(5) *Potchefstroom Electronic Law Journal* 1965-2040; The Presidency Republic of South Africa (2024). The thesis therefore submits that before one can consider whether an institution is ‘actually’ independent or not, there must first, be provision for that independence in the statute establishing such institution or in the case of Chapter 9 institutions, the Constitution. In that sense, the legislature missed an opportunity to safeguard the independence of the NSC by omitting to insert a clause in relation thereto.

⁷⁷⁵ See s 165(2) of the Constitution.

⁷⁷⁶ See s 165(3) of the Constitution and Bowmans (2018).

⁷⁷⁷ Witthoft G “Accountability and good governance in the public sector” (2003) 22 *Auditing SA* 13-16.

the accountability of the NSC comes into focus as it is a committee that is entrusted with the task of protecting South African citizens and the South African economy where a merger involves a foreign acquiring firm.

It has been observed that section 18A(1-2) does not contain any unpretentious provisions for the committee to be accountable to the public, for whose purpose it must be constituted.⁷⁷⁸ Whereas section 18A(10) provides that the Minister must publish a notice of the NSC's decision in the Government Gazette and provide the National Assembly details of the decision,⁷⁷⁹ this is merely an *ex post facto* reporting mechanism and not an accountability obligation.⁷⁸⁰

Pertaining the accountability of the NSC, it may be argued that a system of oversight regarding its decisions already exist. It is trite that the Executive is accountable to the National Assembly.⁷⁸¹ The argument would therefore be that because the NSC is a committee of the Executive, as it is appointed by the President; the Executive in being accountable to the National Assembly, would also need to give an account of the activities and the decisions of the NSC.⁷⁸² While this argument may bear some truth, it is also common knowledge that the effectiveness of the oversight of the Executive by the National Assembly has not been without faults and criticism.⁷⁸³

⁷⁷⁸ Tavuyanago (2021) at 12.

⁷⁷⁹ Section 18A(10)(a) and (b) of the Competition Act.

⁷⁸⁰ Section 18A(10) of the Competition Act is discussed in greater detail under part 5.2.3 below.

⁷⁸¹ See s 92 of the Constitution; Parliament "Oversight and Accountability Model Asserting Parliament's Oversight role in enhancing Democracy" (n.d.) at <https://www.parliament.gov.za/storage/app/media/oversight-reports/ovac-model.pdf> (accessed 16 December 2023)

⁷⁸² See ss 92(2) and 92(3)(b) of the Constitution.

⁷⁸³ See Chirwa D & Ntliziywana P "Why the people's Parliament is failing the people" (19 September 2017) at <https://www.news.uct.ac.za/article/-2017-09-13-why-the-peoples-parliament-is-failing-the-people> (accessed 16 December 2023); Mtshali S "#StateCapture: Parliamentary committees have a case to answer" (11 June 2019) at <https://www.iol.co.za/news/politics/statecapture-parliamentary-committees-have-a-case-to-answer-says-expert-25913539> (accessed 16 December 2023); Koza N "State capture inquiry to

To ensure the accountability of the NSC, it would have been prudent for the drafters of the legislation to insert a subsection detailing reporting and accountability mechanisms in relation to the activities and decisions of the NSC, or at the very least, reasserted the authority of parliament as an oversight body. This would have bolstered the legitimacy of the NSC, as knowing that the NSC would be held to account would have allayed the fears of those who argue against its legitimacy.⁷⁸⁴

5.3.2 The definition of National Security Interests (NSI) [s18A(3-4)]

As established in the above section, section 18A starts by provisioning the establishment of NSI regarding mergers involving foreign acquiring firms, then it proceeds to provide the scope of NSI. To that end, section 18A, subsections 3 and 4 of the provide as follows:

- (3) The President must identify and publish in the Gazette a list of national security interests of the Republic, including the markets, industries, goods or services, sectors or regions in which a merger involving a foreign acquiring firm must be notified to the committee referred to in subsection (1), in terms of subsection (6).
- (4) In determining what constitutes national security interests for purposes of this Act, the President must take into account all relevant factors, including the potential impact of a merger transaction
 - (a) on the Republic's defence capabilities and interests;
 - (b) on the use or transfer of sensitive technology or knowhow outside of the Republic;
 - (c) on the security of infrastructure, including processes, systems, facilities, technologies, networks, assets and services essential to the health,

look at Parliament's oversight role" (10 June 2019) at <http://www.702.co.za/articles/351362/listen-state-capture-inquiry-to-look-at-parliament-s-oversight-role> (accessed 16 December 2023).

⁷⁸⁴ Tavuyanago (2021) at 13.

safety, security or economic wellbeing of citizens and the effective functioning of government;

- (d) on the supply of critical goods or services to citizens, or the supply of goods or services to government;
- (e) to enable foreign surveillance or espionage, or hinder current or future intelligence or law enforcement operations;
- (f) on the Republic's international interests, including foreign relationships;
- (g) to enable or facilitate the activities of illicit actors, such as terrorists, terrorist organisations or organised crime; and
- (h) on the economic and social stability of the Republic.

In light of the above, the determination of what constitutes NSI is mandated to the President, who in making that decision, may consider 'strategic sectors' in terms of section 18A(3) of the Act. As already acknowledged, the inclusion of NSI in merger and investment regulation is not a novel practice. However, section 18A introduces this principle in our law for the first time.⁷⁸⁵ The introduction of NSI is an important milestone in South African jurisprudence because the concept of 'national security' is far-reaching and has the potential to disrupt traditional approaches to both policy and law in several government departments.

National security broadly defined is understood to be the ability of a state to cater for the protection and defence of its citizenry.⁷⁸⁶ It therefore encompasses risks in several dimensions including military security, economic security, energy security, food security, physical security, environmental security, border security and cyber

⁷⁸⁵ See, for example, countries such as the USA, UK, Brazil, Australia, and some members of the EU discussed in parts 5.1 and 5.2 above.

⁷⁸⁶ See United Nations "National Security versus Global Security" (n.d) at <https://www.un.org/en/chronicle/article/national-security-versus-global-security#:~:text=National%20security%20has%20been%20described,and%20defence%20of%20its%20citizenry>. (accessed 9 August 2024).

security.⁷⁸⁷ As such, it was imperative to define what constitutes NSI to give proper context to the functioning of the NSC and the role it plays in a merger involving a foreign acquiring firm.⁷⁸⁸ However, the delineation of NSI in terms of section 18A is far from precise and creates possible challenges as discussed below.

⁷⁸⁷ See Hussain A “Elements of National Security” (January 2022) at https://www.researchgate.net/publication/358065542_Elements_of_National_Security_by_Abi_d_Hussain (accessed 9 August 2024). In consideration of some of the key elements of national security listed above, it can be argued that NSI concerns cut across the whole government. Several government departments may be directly affected by a merger involving NSI including but not limited to the Department of Defence (DoD), Department of Trade, Industry and Competition (the dtic), Department of Communications and Digital Technologies (DCDT), Department of Forestry, Fisheries and the Environment (DFFE), Department of Home Affairs (DHA), Department of Justice and Constitutional Development (DoJ&CD), Department of Small Business Development (DSBD), Government Communication and Information System (GCIS), the National Treasury and the State Security Agency (SSA). See National Government of South Africa “National Departments” (n.d) at <https://nationalgovernment.co.za/units/type/3/national-department> (accessed 9 August 2024).

⁷⁸⁸ At this juncture, it is important to note that the concept of ‘national security’, as opposed to ‘national security interests’, is not new in South Africa. However, it has previously been delineated in relation to the broader context of the National Security Strategy (NSS) of South Africa which was adopted by the Cabinet in 2013. The challenge with the NSS however is that it has been classified as being “top secret”, it is thus, not accessible to the public and has never been effectively applied. Further, the term “national security” is referred to in a plethora of legislation including the Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002, National Key Points Act 102 of 1980, Protection of Information Act 84 of 1982, Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004, Promotion of Access to Information Act 2 of 2000, National Strategic Intelligence Act 39 of 1994, National Strategic Intelligence Amendment Act 67 of 2002, Intelligence Services Oversight Act 40 of 1994, Intelligence Services Act 65 of 2002, Defence Act 42 of 2002, Defence Amendment Act 22 of 2010, General Intelligence Laws Amendment Act 11 of 2013, but is not cohesively defined in a single “National Security Act”, which would provide clarity and certainty regarding the definition and scope of national security. In this regard see Daniels P “National security strategy development: South Africa case study” (March 2019) at <https://africacenter.org/wp-content/uploads/2019/04/2019-04-NSSD-Case-Study-South-Africa-Defense-Policy-Review.pdf> (accessed 6 January 2024) at 1; Duncan J (1 March 2022) “SA’s proposed National Security Strategy — more hot air or a potential democratic opening?” (1 March 2022) at <https://www.dailymaverick.co.za/article/2022-03-01-sas-proposed-national-security-strategy-more-hot-air-or-a-potential-democratic-opening/> (accessed 6 January 2024); Van der Merwe P “President re-establishes National Security Council” (11 March 2020) at <https://www.businesslive.co.za/bd/national/2020-03-11-president-re-establishes-national-security-council/> (accessed 6 January 2024); Van Heerden JG “An evaluation of the

5.3.2.1 Objecting views

Two questions arise out of section 18A(3) and (4). First, whether the NSI is adequately defined as per the subsections and second, whether the President should be the one to decide on what constitutes NSI. Below, I address the two questions raised by looking at the shortcomings of the subsection and identifying potential challenges that may arise when the section is applied.

5.3.2.1.1 Definition of 'national security interests'

It is fundamental that any system of rules regulating a community is unambiguous.⁷⁸⁹ This ties into the rule of law, where one of the principles of the rule of law is that the law must be certain.⁷⁹⁰ A legal system must therefore provide legal certainty which guides those that are subject to the law, permits them to plan their lives with less uncertainty and protects them from arbitrary use of state power.⁷⁹¹ A major challenge posed by 18A as it relates to the definition of 'national security interests' is that it creates a chasm in the principle of legal certainty.

concept of national security as determined by the South African Constitution and its interpretation by the State Security Agency" (unpublished MA dissertation, North-West University, 2019); South African Government "South African Defence Review 2015" (n.d.) at <http://www.dod.mil.za/document/LegislationNav/Legislation/South%20African%20Defence%20Review%202015.pdf> (accessed 6 January 2024).

⁷⁸⁹ See Rijpkema P "The Rule of Law beyond thick and thin" (2013) 32(6) *Law and Philosophy* at 797-799; Kruger R "The South African Constitutional Court and the Rule of Law: The Masethla judgment, a cause for concern?" (2010) 13(3) *Potchefstroom Electronic Law Journal* 468-492.

⁷⁹⁰ See O'Regan K "Change v certainty: Precedent under the Constitution" (April 2001) *Advocate* 31-33 at https://journals.co.za/doi/pdf/10.10520/AJA10128743_188 (accessed 9 August 2024); Rijpkema (2013); Kruger (2010); Masumbe PS & Qikani S "The Rule of Law through judicial activism in South Africa" (2024) 10(2) *International Journal of Law: "Law and World"* 31-40; Tamanaha BZ *On the Rule of Law History, Politics, Theory* (2024); Rosenfeld M "The Rule of Law and the Legitimacy of Constitutional Democracy" (2001) 74(5) *Southern California Law Review* 1307-1352.

⁷⁹¹ Tavuyanago (2021) at 8; Maxeiner JR "Legal indeterminacy made in America: US legal methods and the rule of law" (2006) 41 *Valparaiso University Law Review* at 517-518.

Some scholars have argued in favour of the protection and promotion of national security interests,⁷⁹² which arguments are accepted by the author.⁷⁹³ However, the concept of legal certainty's requirement that the law must be clear, precise and unambiguous, and its legal implications foreseeable is not reflected in section 18A(3) and (4). The definition of what constitutes NSI is far from clear, precise and unambiguous. First and foremost, 'national security', which is the anchor of the section, is not defined. Tavuyanago notes that there was a great oversight in not providing a working definition of what national security is as the definition is structural to the interpretation of the section.⁷⁹⁴

National security within the international relations sphere has always been afforded a narrow (military-based) meaning relating to the security and sovereignty of a country. Lippman for example notes that, "A nation has security, when it does not have to sacrifice its legitimate interests to avoid war and is able, if challenged, to maintain them by war".⁷⁹⁵ Lasswell's interpretation of national security is also linked to the idea of a nation's sovereignty when he indicates that "the distinctive meaning of national security means freedom from foreign dictation".⁷⁹⁶

What constitutes national security has undergone a substantial transformation from the period coming out of World War II,⁷⁹⁷ when Lippman and Lasswell provided their conception, and is now broader than the traditional military-based assessment. For example, Lai notes that the nature and meaning of national security has seen a

⁷⁹² See Mudzamiri & Osode (2021) at 2, 9.

⁷⁹³ Tavuyanago (2021) at 8.

⁷⁹⁴ Tavuyanago (2021) at 7; see part 5.3.2 above in respect of the importance of defining and delineating the scope of national security; see also discussions on national security in the USA and Australia under parts 6.2.1 and 6.3.1 below respectively, where comparisons are drawn regarding the definition of national security.

⁷⁹⁵ Lippman W *US foreign policy: Shield of the republic* (1943) at 5.

⁷⁹⁶ Lasswell HD *National security and individual freedom* (1950) at 79.

⁷⁹⁷ 3 September 1939 – 2 September 1945, see Hughes TA & Royde-Smith JG "World War II" (20 December 2023) at <https://www.britannica.com/event/World-War-II> (accessed 21 December 2023).

broadening that now encompasses non-security concerns such as economic welfare/prosperity, the environment, health, gender, cultural issues, religion, energy migration and cyber-space.⁷⁹⁸ Given that the concept of national security means different things to different people,⁷⁹⁹ it was therefore imperative to give context within the Act of what national security means for South Africa or for the South African investment and merger landscape before providing a list of considerations that will feed into that definition.

To illustrate the indeterminate meaning of national security in modern discourse, the following definitions are considered. Paleri for example, defines national security as:

“[The] measurable state of the capability of a nation to overcome the multi-dimensional threats to the apparent well-being of its people and its survival as a nation-state at any given time, by balancing all instruments of state policy through governance... and is extendable to global security by variables external to it.”⁸⁰⁰

While not mentioning the safety and security of any sector or institution, Paleri’s definition draws attention to two key aspects. First, national security is the responsibility of the government and second, national security concerns comprise “multi-dimensional threats”. Regarding the first aspect, it is not disputed that the protection of national security is the government’s responsibility, which may be delegated to a specific government department. In the case of NSI in merger regulation, it seems that that responsibility has been passed to the Department of Trade, Industry and Competition,

⁷⁹⁸ Lai K “National security and FDI policy ambiguity: A commentary” (2021) 4 *Journal of International Business Policy* at 499-500.

⁷⁹⁹ See Wolfers A “National security as an ambiguous symbol” (1952) 67(4) *Political Science Quarterly* at 481.

⁸⁰⁰ Paleri P *National security: Imperatives and challenges* (2008) at 521; Paleri P *Revisiting national security: Prospecting governance for human well-being* (2022) at 51, 109-153.

which is responsible for among other things, the effective implementation of competition policy to achieve a globally competitive economy.⁸⁰¹

In respect of the second aspect, Paleri notes that national security is multi-dimensional, meaning that there may be multiple threats requiring the attention and dedication of multiple departments and agencies within the government. What the inclusion of NSI in just competition law does is limit the ability of the government to address national security concerns from a multi-focal point of view. In this regard, it makes more sense to have a separate and cohesive national security strategy that is then implemented through various departments.⁸⁰²

Cawthra defines national security as:

“[The] first and most important obligation to government. It involves not just the safety and security of the country and its citizens. It is a matter of guarding national values and interests against both internal and external dangers – threats that have the potential to undermine the security of the state, society and citizens. It must include not just freedom from undue fear of attack against their person, communities or sources of their prosperity and sovereignty, but also the preservation of political, economic and social values – respect for the rule of law, democracy, human rights, a market economy and the environment – which are central to the quality of life in a modern state.”⁸⁰³

Cawthra’s definition of national security is wider than Paleri’s and provides a list of sectors that may be considered to be key under the definition. In that sense, Cawthra’s

⁸⁰¹ See National Government of South Africa “Department of Trade, Industry and Competition (the dtic)” (n.d) at <https://nationalgovernment.co.za/units/view/46/departments-of-trade-industry-and-competition-the-dtic> (accessed 9 August 2024).

⁸⁰² See Mudzamiri & Osode (2021) at 16-17; Tavuyanago (2021) at 8.

⁸⁰³ Cawthra G "National security and the right to information: The case of South Africa" Unpublished contribution delivered at the *Southern African Consultative Conference on National Security and Right to Information Principles* (26 February 2013, Johannesburg).

definition is closer to Hussain's enumeration of the sectors covered by national security.⁸⁰⁴ The key takeaway from the above definition is that it does not limit the consideration of national security to competition or economic aspects only. It acknowledges, as does Paleri's definition, that national security is multi-faceted, thus making a centralised regulation of national security through a cohesive national security strategy more preferable.

The New Zealand Government identifies and defines national security as:

"[The] protection against –

- threats, or potential threats, to New Zealand's status as a free and democratic society from unlawful acts or foreign interference;
- imminent threats to the life and safety of New Zealanders overseas;
- threats, or potential threats, that may cause serious harm to the safety or quality of life of the New Zealand population;
- unlawful acts, or acts of foreign interference, that may cause serious damage to New Zealand's economic security or international relations;
- threats, or potential threats, that may cause serious harm to the safety of a population of another country as a result of unlawful acts by a New Zealander that are ideologically, religiously, or politically motivated; and
- threats, or potential threats, to international security."⁸⁰⁵

Lenihan summarises national security as:

"That which seeks to maintain the survival of the state and preserve its autonomy of action within the international system."⁸⁰⁶

⁸⁰⁴ See part 5.3.2 above; Hussain (2022).

⁸⁰⁵ Government of New Zealand "The Intelligence and Security Act 2017: fact Sheet No. 3" (n.d.) at https://www.dpmc.govt.nz/sites/default/files/2017-09/fact-sheet-3-defining-national-security_1.pdf (accessed 19 December 2023).

⁸⁰⁶ Lenihan (2018) at 32.

She proceeds to concede however that:

“Few states agree on the exact scope of national security in relation to cross-border mergers and acquisitions (M&A), because what it takes to survive and maintain autonomy varies from country to country depending on a number of factors, ranging from a state’s size and resources to its geography and historical context.”⁸⁰⁷

Lastly, the South African Constitution also provides that national security:

“[Must] reflect the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life. The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation.”⁸⁰⁸

It may be observed from the above definitions that a common thread that runs through the definitions of national security is the need to counter threats to the nation that would cause harm, which threats may be military, economic, or political. Thus, national security is a component of national interest, which is about what South Africa believes is best for our nation in terms of the protection and promotion of its national sovereignty and constitutional order, the well-being, safety and prosperity of its citizens, and a better Africa and world.⁸⁰⁹

While section 18A fails to define national security or national security interest, it provides a list of factors that the president may consider when determining whether

⁸⁰⁷ Lenihan (2018) at 32.

⁸⁰⁸ Section 198(a) and (b) of the Constitution.

⁸⁰⁹ See DIRCO “Framework Document of South Africa’s National Interest and advancement in a Global Environment” (n.d.) at https://www.dirco.gov.za/wp-content/uploads/2023/01/sa_national_interest.pdf at 9-13 (accessed 19 December 2023).

national security is under threat.⁸¹⁰ However, Tavuyanago posits that the list of considerations to be taken into account in terms of section 18A(4) is too broad and hardly defined.⁸¹¹ Van Dijk argues that while section 18A[(3) & (4)] provides a list to guide the President in determining what constitutes NSI, the attempt to assist may have, in fact, achieved the opposite effect by forcing the President to consider a broad concept of 'national security' which may be extended to include food security, electricity supply and even job security.⁸¹²

Van Dijk further questions the motive behind the current framing of the NSI factors and asks whether it was intentionally left ambiguous. He proffers that the ambiguity could have been the national executive's intent from the outset, to further its agenda of economic transformation and expand its ability to extract further investment out of foreign firms that have already identified investments in the country.⁸¹³

Whatever the intent of the national executive or the legislature was, the broadness of the list of considerations to be taken into account as per section 18A(4) creates the inevitability of dissonance in its interpretation and application, which in turn makes the law uncertain.⁸¹⁴ The challenge relating to the conception of what constitutes NSI was

⁸¹⁰ Section 18A(4) of the Competition Act.

⁸¹¹ Tavuyanago (2021) at 8.

⁸¹² Van Dijk J "SA poised to follow suit in utilisation of non-competition merger control to protect State security in foreign mergers" (16 August 2018) at <https://www.financialinstitutionslegalsnapshot.com/2018/08/sa-poised-to-follow-suit-in-utilisation-of-non-competition-merger-control-to-protect-state-security-in-foreign-mergers/> (accessed 18 December 2023).

⁸¹³ Van Dijk (2018).

⁸¹⁴ Tavuyanago (2021) at 8-9. It should be noted that while open lists may be used to create an opportunity and room for interpretation in future, the challenge with open lists or expansive definitions is that they open the floodgates of interpretation. See Kondo T "A Comparison with Analysis of the SADC FIP before and after Its Amendment" (2017) 20 *Potchefstroom Electronic Law Journal* at 6-9; Kondo T "Investment Law in Globalised Environment: A Proposal for a New Foreign Direct Investment Regime in Zimbabwe" (2017) at 161 unpublished LLD thesis, University of the Western Cape at <https://etd.uwc.ac.za/handle/11394/6459> (accessed 9 August 2024). Further, a closed list would have been more suited to the Competition Act if one considers the trend in the Act of providing definite and closed lists. See for example s 3 in respect of application of the Act, s 4(1)(b) in respect of cartel conduct, s 7 in respect of determining dominance and s 12A(3) in respect of public interest grounds, to name a few.

also identified and lamented by the Law Society of South Africa during public hearings in relation to the consideration of the Competition Amendment Bill, citing that more clarity was needed when it came to among other things, the definition of NSI, how the President's Committee would function and how the provisions would impact smaller firms and foreign businesses.⁸¹⁵ Unfortunately, it would seem as if those concerns fell on deaf ears as the provision within the Competition Amendment Act was passed without alteration.⁸¹⁶

It is also argued that because the factors to be considered under section 18A(4), due to their broad and imprecise nature, are open to the interpretation of the President, the Minister and the NSC. This creates a very concerning prospect as different interpretations may lead to diverse outcomes not grounded in law but rather on circumstance and discretion.⁸¹⁷ Woods also noted, with concern, that much of the content and determinations regarding section 18A(4) had been left to the President, who will only determine their full extent through publication of the details regarding the definition of NSI through regulations and or the Government Gazette.⁸¹⁸

It is disconcerting to note that section 18A(4) lacks particular detail in terms of how the President will make the determination of what constitutes NSI. While section 18A(3)

⁸¹⁵ Parliamentary Monitoring Group (PMG) "Competition Amendment Bill: public hearings day 1" (28 August 2018) at <https://pmg.org.za/committee-meeting/26941/> (accessed 9 August 2024).

⁸¹⁶ See PMG (2018) for details on the debate between Ms E Coleman as Chair of the Economic Development Committee considering the Competition Amendment Bill and Ms P Kruschke on behalf of the Law Society, where she raised particular concern over s 18A 4(c), (d), (f) and (h) of the Competition Act.

⁸¹⁷ Tavuyanago (2021) at 9.

⁸¹⁸ Bowmans (2018). It is apposite to note that the Constitution provides for the President's power to issue regulations and or further determinations. See for example, s 84(1) of the Constitution and; Constitutional Court of South Africa "The President's powers under the Constitution and Acts of Parliament" (n.d) at <https://collections.concourt.org.za/bitstream/handle/20.500.12144/2065/1998-016-0037.pdf?sequence=57&isAllowed=y> (accessed 10 August 2024). Therefore, the question is not whether such a determination will be lawful but rather whether it would be desirable. A detailed critique of the Presidential powers is conducted under part 5.3.2.1.2 below.

provides that the president may consider strategic markets, industries, goods or services, sectors or regions in coming to such a determination. The lack of detail in terms of what exactly pertaining to the markets, industries, goods or services, sectors or regions is conspicuous. The section does not provide whether the President must consult industry experts, cabinet ministers, business units or academic think tanks. While this may be left to the prerogative of the President, it would have been a welcome addition to have some detail in terms of a consultative process and identify the parties that would need to be consulted.

Consequent to the above, a law that gives power to the President to make political appointments to regulate economic policy based on a broad list of undefined criteria goes against the principle of certainty, which is a cardinal aspect of the rule of law.⁸¹⁹ It is important to note that the need for legal certainty in merger policy cannot be downplayed as the stakes are so high for the business community, antitrust agencies, for the nation's economic development and for the consumers.⁸²⁰

The lack of certainty and speculation around the determination of NSI does a great disservice to the country's investment drive as foreign investors tend to shy away from jurisdictions where the law regulating their investments is uncertain, open to multiple interpretations or can be changed on a whim.⁸²¹

⁸¹⁹ Tavuyanago (2021) at 9.

⁸²⁰ See Ntuli B "Private equity exits: Will the new Competition Commission merger guidelines stifle or encourage investment appetite?" (1 November 2023) at <https://www.werksmans.com/legal-updates-and-opinions/private-equity-exits-will-the-new-competition-commission-merger-guidelines-stifle-or-encourage-investment-appetite/#:~:text=Legal%20predictability%20and%20certainty%20play,on%20the%20proposed%20Draft%20Guidelines> (accessed 18 December 2023) where he notes that "Legal predictability and certainty play a significant role when parties decide to conclude mergers and acquisitions (which have an effect on the national economy)"; Elman P "The need for certainty and predictability in the application of the merger law" (1965) *New York University Law Review* 613.

⁸²¹ Tavuyanago (2021) at 9.

The above view was echoed by Meijer, who opined that because the considerations that may be taken into account by the NSC are extremely broad, going far beyond traditional public interest factors that have been the focus of legitimate ministerial intervention to date, section 18A is likely to create significant uncertainty and potentially a disincentive for foreign investors.⁸²² Further, considering the large number of mergers that are filed every year in South Africa,⁸²³ the economic costs involved for companies, the costs of litigation where mergers do not comply with filing regulations, the need to attract and retain foreign direct investment through mergers, and the net effect of all the costs being shifted to the consumer, it is imperative that there be precise law regulating NSI in mergers in South Africa.⁸²⁴

To illustrate the complexity and open-endedness of section 18A(4) of the Competition Act, attention is turned to Mudzamiri and Osode's article titled 'Reconciling the "Bittersweet Chemistry" between Technology and Corporate Takeovers through Reinforcing National Security Interests in Merger Control'.⁸²⁵ In the article, Mudzamiri and Osode focus on the intersection between technology mergers and the threat to national security therein. They discuss and acknowledge the benefits of enhanced technology through the unfolding of the Fourth Industrial Revolution (4IR), citing that it may well be paramount to the sustained well-being and progress of national economies.⁸²⁶

They identify that 4IR could benefit areas such as e-banking, e-commerce and virtual meetings, all of which could lead to a more efficient economy.⁸²⁷ However, they are also alive to the fact that where technology-based mergers are contemplated by a

⁸²² Meijer (2018).

⁸²³ Over 200 mergers filed in 2023, see Competition Commission of South Africa "2023 Merger activity" (n.d.) at <https://www.compcom.co.za/merger-and-acquisition-activity-update/> (accessed 18 December 2023).

⁸²⁴ Tavuyanago (2021) at 9.

⁸²⁵ Mudzamiri & Osode (2021) 1-32.

⁸²⁶ Mudzamiri & Osode (2021) at 2.

⁸²⁷ Mudzamiri & Osode (2021) at 2.

foreign acquiring firm, such transactions may be problematic from the perspective of national security interests, since the resulting entity or newly merged company may potentially use unorthodox means to gather and share sensitive data of citizens or its activities may involve espionage.⁸²⁸

In their discussion of technology-related NSI, it is not apparent whether the authors are referring to section 18A(4)(b) - the use or transfer of sensitive technology or knowhow outside of the Republic; section 18A(4)(c) - the security of infrastructure, including processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic wellbeing of citizens and the effective functioning of government; section 18A(4)(e) - the enabling of foreign surveillance or espionage, or hinder current or future intelligence or law enforcement operations or section 18A(4)(h) - the economic and social stability of the Republic.

All of the above have aspects that are linked to technological advances. However, because section 18A(4) only lists the criteria to be considered and does not offer any explanation or detail, Mudzamiri and Osode's concerns regarding technology and NSI may very well fall under any of the above listed paragraphs of subsection 4. The authors also highlight the lack of delineation and clarity relating to technology when they note that the absence of a definition of what constitutes sensitive technology potentially undermines the substance and spirit of section 18A. In that, without such a definition,

⁸²⁸ Mudzamiri & Osode (2021) at 2; see Barrington JR "CFIUS reform: FEAR and FIRRMA, an inefficient and insufficient expansion of foreign direct investment oversight" 2019 21 *Transactions: The Tennessee Journal of Business Law* 77-141, where among others, the author discusses the intricate nature of technology-based takeovers, using the *Broadcom/Qualcomm* merger (Reuters "President Trump halts Broadcom takeover of Qualcomm" (13 March 2018) at <https://www.reuters.com/article/us-qualcomm-m-a-broadcom-merger-idUSKCN1G01Q4/> (accessed 19 December 2023)) as an example of how NSI have been used to block technology mergers; see also Shields J "Smart machines and smarter policy: Foreign investment regulation national security and technology transfer in the age of artificial intelligence" (2018) 51 *John Marshall Law Review* 279-308, where the author discusses the NSI related to technology transfer in foreign investment and how the USA has updated its legislation to adapt to and curb the NSI threats.

there is a possibility that the President as a political appointee may subject affected mergers to purely populist considerations in exercising the far-reaching powers.⁸²⁹

Mudzamiri and Osode suggest that because the scope of national security is wide, some may applaud the flexibility built into the operation of the regime on the basis that the prescription of a rigid list of what constitutes national security interests may be detrimental to the efficacy and credibility of the regulatory framework.⁸³⁰ Having a wide approach may have its advantage, in that section 18A(4) provides an almost catch-all provision. However, where one aspect of NSI cuts across various paragraphs, the opposite may also be true in that there must be precise and certain provisions that one can rely on should a case arise where NSI have to be considered in a merger. To that end, the legislature should have taken greater care in creating certainty rather than providing a buffet of NSI criteria that can be chosen from and do not have the specific focus needed to deal with complex issues such as technology-related threats to NSI.

A list of considerations to be taken into account in determining whether there is a threat to NSI would create certainty if it was precisely defined or where the NSC was provided with a clear policy or guideline on what standard they should apply in reaching a decision. I believe first, a working definition of national security needs to be provided, and second, the list of factors to be taken into consideration should be narrowed down to a closed list of specific areas of strategic national interests that would trigger a review based on national security interests.

To this end, the USA provides a blueprint of how national security is to be determined, adapting, of course, to the South African context.⁸³¹ Mudzamiri and Osode also agree that a definition akin to that in the USA's FIRRMA, together with the identified

⁸²⁹ Mudzamiri & Osode (2021) at 17.

⁸³⁰ Mudzamiri & Osode (2021) at 16.

⁸³¹ See s 1703 of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), which limits the scope of national security by providing that "The term "national security" shall be construed to include those issues relating to "homeland security", including its application to critical infrastructure".

characteristics of what constitutes national security concerns could operate as a guideline to both the institutional regulators and the acquirers and, in turn, provide much-needed certainty in the applicable law.⁸³² In the same breadth, where there is a properly articulated definition and scope of NSI, the NSC will then have set parameters or predetermined terms of reference on which to operate, which would ensure that each case is decided in terms of an established policy that is applied consistently, thereby promoting legal certainty.

5.3.2.1.2 Presidential power to determine NSI

The second question raised by the provisions of section 18A(3) and (4) is whether the President should be the one determining the scope of NSI and whether he or she should have *carte blanche* in doing so. Mudzamiri and Osode argue that because section 18A has given the President powers that have a critical element of elasticity and that enable the President to capture and designate what constitutes national security interests on a case-by-case basis, this makes the procedure for scrutinising mergers and their possible outcomes highly unpredictable.⁸³³

Oxenham, Currie and Stargard also argue that the nature of section 18A is that it has the potential to adulterate competition-based merger evaluations and may yield unpredictable outcomes, conflating the roles and functions of the Competition Commission and the political executive.⁸³⁴ The determination of what constitutes NSI by the President and the delegation of power to the NSI to make decisions relating to NSI runs the risk of being politically abused.⁸³⁵ The preceding risk was also foreshadowed by Heinemann who opined that while national security criteria ostensibly serve a legitimate purpose, there is nonetheless a risk that these criteria can be abused

⁸³² Mudzamiri & Osode (2021) at 15.

⁸³³ Mudzamiri & Osode (2021) at 16.

⁸³⁴ Oxenham, Currie & Stargard (2019) at 235.

⁸³⁵ See Tavuyanago (2021) at 13.

by governments who may adopt a broader definition of the concept of 'national security' in order to pursue industrial policy goals.⁸³⁶

A pertinent example of how national security may be used to pursue a populist agenda is that of the Trump administration in the USA. In 2018, the former President of the USA utilised national security as provided for by section 232 of the Trade Expansion Act as a guise to impose tariffs on foreign steel and aluminium as well as initiate investigations into whether imports of uranium and autos posed a national security threat.⁸³⁷ The imposition of tariffs on steel products was later found to have been in contravention of global trade rules.⁸³⁸ In the WTO Panel Report, the Panel questioned the use of national security by the Trump administration and concluded the following:

“Having carefully reviewed the relevant evidence and arguments submitted in this dispute, and particularly those submitted by the United States in relation to global excess capacity, the Panel is not persuaded that the situation to which the United States refers rises to the gravity or severity of tensions on the international plane so as to constitute an "emergency in international relations" during which a Member may act under Article XXI(b)(iii).”⁸³⁹

In 2018, Trump also invoked the national security clause in the Trade Expansion Act to block the Broadcom/Qualcomm merger while the national security interest threats analysis by the Committee on Foreign Investment in the United States (CFIUS) was

⁸³⁶ Heinemann A "Government control of cross-border M&A: Legitimate regulation or protectionism?" (2012) 15(3) *Journal of International Economic Law* at 853, 862.

⁸³⁷ Thrush G "Trump's use of national security to impose tariffs faces court test" (19 December 2018) at <https://www.nytimes.com/2018/12/19/us/politics/trump-national-security-tariffs.html> (accessed 19 December 2023).

⁸³⁸ *United States – Certain Measures on Steel and Aluminium Products* WT/DS544/R, adopted on 9 December 2022; see also Sherman N & Josephs J "WTO says Trump's US steel tariffs broke global trade rules" (9 December 2022) at <https://www.bbc.com/news/business-63920063> (accessed 19 December 2023).

⁸³⁹ WT/DS544/R at para 7.148.

still ongoing.⁸⁴⁰ Regarding the Trump administration's increased reliance on national security to block mergers and investments, Lester and Zhu commented on Trump's 'growing abuse' of national security and noted that he had taken what was previously considered a narrow and exceptional remedy and broadened it to serve as a more general tool to protect domestic industries.⁸⁴¹

Tavuyanago concludes that the examples of the Trump administration's abuse of national security are evidence of how a legitimately purposed provision may be abused and used for ulterior agendas.⁸⁴² Mudzamiri and Osode also view this as confirmation that presidents could be preoccupied with populist agendas rather than policy when exercising the powers conferred on them in the merger control context, which heightens the concern regarding the danger of bequeathing unfettered powers to determine the fate of a merger to the President and executive arm of government.⁸⁴³

An example closer to home of how the executive and members of parliament are not immune to being 'captured' and pursuing an agenda not aligned with their stations is

⁸⁴⁰ See Aiello C "Trump blocks Broadcom-Qualcomm deal, citing national security concerns" (12 March 2018) at <https://www.cnbc.com/2018/03/12/trump-issues-order-prohibiting-broadcoms-bid-to-take-over-qualcomm.html> (accessed 19 December 2023); Leiter M, Schlager I & Vieira D "Broadcom's blocked acquisition of Qualcomm" (3 April 2018) at <https://corpgov.law.harvard.edu/2018/04/03/broadcoms-blocked-acquisition-of-qualcomm/> (accessed 19 December 2023); Liberto D "Why did Trump block Broadcom's bid for Qualcomm?" (25 June 2019) at <https://www.investopedia.com/news/why-did-trump-block-broadcoms-bid-qualcomm/> (accessed 19 December 2023).

⁸⁴¹ Lester S & Zhu H "Closing Pandora's box: The growing abuse of the national security rationale for restricting trade" (25 June 2019) at <https://www.cato.org/policy-analysis/closing-pandoras-box-growing-abuse-national-security-rationale-restricting-trade> (accessed 19 December 2023).

⁸⁴² Tavuyanago (2021) at 13. Emphasis is placed on the fact that this critique by no means suggests that the process of lawmaking in respect of Presidential powers to ascent to legislation, make regulations and determinations as well as appoint members of the executive should be changed. In addition to identifying the potential for abuse of such power, the thesis proposes that where possible, the risk of such abuses must be minimised through proper definition and delineation of the scope of terms such as NSI for the avoidance of any doubt and limitation on executive discretion.

⁸⁴³ Mudzamiri & Osode (2021) at 17.

the recently concluded state capture enquiry.⁸⁴⁴ State capture involves the appropriation of state institutions, organs, and functions by individuals (natural or juristic) or groups of individuals. Thus, it manifests when state institutions, potentially including the executive, state ministries, agencies, the judiciary and the legislature, regulate their business to favour private interests.⁸⁴⁵ State capture is therefore a severe form of corruption which is pervasive in that it robs the citizens of a country of their welfare as often, state resources meant for the delivery of services to the citizens are channelled outside the country or towards private interests.

In South Africa, the issue of state capture dominated public debate about the future of democratic governance in South Africa after the former Public Protector Thuli Madonsela's report entitled 'State of Capture' was released in late 2016, wherein the manner in which former President Zuma and senior government officials colluded with

⁸⁴⁴ See Lemstra M "The destructive effects of state Policy Brief capture in the Western Balkans EU enlargement undermined" (September 2020) at https://www.clingendael.org/sites/default/files/2020-10/Policy_Brief_Undermining_EU_enlargement_2020.pdf (accessed 23 December 2023) at 2, where state capture is defined as "a process in which (political) actors infiltrate state structures with the help of clientelist networks and use these state structures as a mantle to hide their corrupt actions. These political elites can exploit their control over state resources and powers for private or party political gain", and where it is advanced that state capture is a worldwide phenomenon, with the example of Serbia being investigated; see also The Concise Oxford Dictionary of Politics "state capture" (n.d.) at <https://www.oxfordreference.com/display/10.1093/oi/authority.20110810105928640> (accessed 23 December 2023), where state capture is defined as "when a small number of firms (or such entities as the military) can shape the rules of the game to its advantage through massive illicit, and non-transparent provision of private benefits to officials and politicians. Examples of such behaviour include the ability to control legislative votes, to obtain favourable executive decrees and court decisions. A relatively new concept, the main proponents being World Bank researchers, it echoes that of "crony capitalism" and covers cases where high-level corruption is pervasive."; see further Kjaer AM "state capture" (17 November 2023) at <https://www.britannica.com/topic/state-capture> (accessed 23 December 2023).

⁸⁴⁵ Chipkin I "Corruption's other scene: The politics of corruption in South Africa" in Murphy J & Jammulamadaka N (eds) *Governance, resistance and the post-colonial state: Management and state building* (2017) at 21.

a shadow network of corrupt brokers was documented.⁸⁴⁶ During President Zuma's tenure, there was alleged capturing of state-owned entities by private families, including the Guptas, through which hundreds of millions were syphoned from the South African Government.⁸⁴⁷ A Judicial Commission of Inquiry into State Capture was established to among other things, establish the following in respect of President Zuma's conduct during his tenure:

- (a) whether President Zuma improperly and in violation of the Executive Ethics Code, allowed members of the Gupta family and his son, to be involved in the process of removal and appointment of the Minister of Finance in December 2015;
- (b) whether President Zuma improperly and in violation of the Executive Ethics Code, allowed members of the Gupta family and his son, to engage or be involved in the process of removal and appointing of various members of the Cabinet;
- (c) whether President Zuma improperly and in violation of the Executive Ethics Code, allowed members of the Gupta family and his son, to be involved in the process of appointing members of Boards of Directors of SOEs;
- (d) whether President Zuma has enabled or turned a blind eye, in violation of the Executive Ethics Code, to alleged corrupt practices by the Gupta family and his son in relation to allegedly linking appointments to *quid pro quo* conditions;
- (e) whether President Zuma and other Cabinet members improperly interfered in the relationship between banks and Gupta owned companies thus giving

⁸⁴⁶ Madonsela S "Critical reflections on state capture in South Africa" (2019) 11(1) *Insight on Africa* 113 at 114-115; see also Pillay D "The Zondo Commission: A bite-sized summary" (August 2022) at <https://pari.org.za/wp-content/uploads/2022/09/PARI-Summary-The-Zondo-Commission-A-bite-sized-summary-v360.pdf> (accessed 23 December 2023).

⁸⁴⁷ Madonsela (2019) 113 at 121; see also Gottschalk K "State capture in South Africa: how the rot set in and how the project was rumbled" (8 February 2022) at <https://theconversation.com/state-capture-in-south-africa-how-the-rot-set-in-and-how-the-project-was-rumbled-176481> (accessed 23 December 2023).

preferential treatment to such companies on a matter that should have been handled by independent regulatory bodies;

- (f) whether President Zuma improperly and in violation of the Executive Ethics Code exposed himself to any situation involving the risk of conflict between his official duties and his private interest or used his position or information entrusted to him to enrich himself and or enabled businesses owned by the Gupta family and his son to be given preferential treatment in the award of state contracts, business financing and trading licences; and
- (g) whether anyone was prejudiced by the conduct of President Zuma.⁸⁴⁸

To summarise, the Commission of Inquiry into State Capture concluded that state capture had taken place in South Africa, on an ‘extensive scale’, with the finding that there were deliberate efforts to exploit or weaken key state institutions...through strategic appointments and dismissals at public entities [by the President] and a reorganisation of procurement processes.⁸⁴⁹

The crux of the findings of the Commission of Inquiry into State Capture, which is not the focus of this thesis and is therefore limited to a summary, is that government officials, from local government,⁸⁵⁰ all the way to the state security agency and the

⁸⁴⁸ South African Government “Report of the Judicial Commission of Inquiry into State Capture Part 1: Vol 1: Chapter 1 – South African Airways and its Associated Companies) (n.d.) at https://www.gov.za/sites/default/files/gcis_document/202201/judicial-commission-inquiry-state-capture-reportpart-1.pdf at para 3 (accessed 23 December 2023); see also South African Government “Report of the Judicial Commission of Inquiry into State Capture Part IV: Vol 3: The Capture of Eskom” (n.d.) at <https://www.stateofthenation.gov.za/zondo-commission-reports/Part%204%20Vol%203%20-%20Judicial%20Commission%20of%20Inquiry%20into%20State%20Capture%20Report.pdf> (accessed 23 December 2023).

⁸⁴⁹ See Pillay (2022) at 3.

⁸⁵⁰ See Martin ME & Solomon H “Understanding the phenomenon of “State Capture” in South Africa” (2016) 5(1) *Southern African Peace and Security Studies* 5(1) at 26, where the authors specifically discuss the “capture” of the Mangaung Municipality (Free State Province).

presidency,⁸⁵¹ were coopted by corrupt private businesses to create, amend and align government policies to benefit those private interests and themselves.

This is a distressing state of affairs and points to the possibility of the President and indeed the NSC falling into a similar situation where the determination of what constitutes NSI, and the consideration thereof is left to the prerogative of the President. It must be borne in mind that while the President must uphold, defend and respect the Constitution as the supreme law of the Republic and promote the unity of the nation,⁸⁵² it is not unfathomable that the President may be susceptible to their fallibilities that will see him or her pursuing their interests and not those of the Republic.

Based on the above instances of how a President can potentially abuse the powers conferred upon them in terms of section 18A of the Competition Act, it is reasonable to advance an argument that the determination of what constitutes national security is best not left in the President's hands. I suggest rather that an independent investment review committee, such as CFIUS be bestowed with the power to interpret, not determine, the ambits of national security and apply same to proposed mergers and investments. The NSC seems to be a body founded on similar principles however, for weaknesses already highlighted, it would not be in a position to be independent and may still be susceptible to a President's political agendas. If the deficiencies with regard to the independence and accountability of the NSC were cured, it could present a more palatable choice for interpreting, considering and applying national security interests in terms of section 18A(3) and (4) of the Competition Act.

Lastly, it is appropriate to ask that since section 18A is yet to come into effect, what then is the status of mergers involving foreign acquiring firms that are in the process of

⁸⁵¹ See South African Government "Report of the Judicial Commission of Inquiry into State Capture Part V: Vol 1: State Security Agency and Crime Intelligence" (n.d.) at <https://www.stateofthenation.gov.za/zondo-commission-reports/Part%205%20Vol%201%20-%20Judicial%20Commission%20of%20Inquiry%20into%20State%20Capture%20Report.pdf> (accessed 23 December 2023).

⁸⁵² See s 83(2-3) of the Constitution.

being notified and considered? Taking the interpretation of statutes into consideration, it would be appropriate to conclude that the current mergers, would not be affected by the national security clause as it is trite that the law does not have a retrospective effect and the section has not come into effect as yet.⁸⁵³ It could thus be argued that the section has therefore not fulfilled its purpose, five years on from the coming into effect of parts of the 2018 Amendment Act.

5.3.3 The procedure for the review of an NSI-related merger [s18A(5-10)]

Regarding the procedure that must be followed when notifying a merger where the acquiring firm is foreign and considering the merger, section 18A(5-10) provides the following:

- (5) The President must issue regulations governing
 - (a) the notification, processes, procedure and timeframes to be followed by the Committee referred to in subsection (1) when performing its functions under this section; and
 - (b) access to information concerning the merger, including confidential information.
- (6) A foreign acquiring firm which is required to notify the Competition Commission in terms of section 13A (1) of an intended merger must, at the time of the notification of the merger to the Competition Commission, file a notice with the Committee referred to in subsection (1) in the prescribed form and manner if the merger relates to the list of national security interests of the Republic as identified by the President in terms of subsection (3).

⁸⁵³ See *Du Plessis and Others v De Klerk and Another* (CCT8/95) [1996] ZACC 10; 1996 (3) SA 850; 1996 (5) BCLR 658 (15 May 1996) at paras 66 & 69; *Masiya v Director of Public Prosecutions Pretoria (The State) and Another* (CCT54/06) [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (CC); 2007 (2) SACR 435 (CC) (10 May 2007) at paras 48 & 55.

- (7) Within 60 days of receipt by the Committee referred to in subsection (1) of a notice in terms of subsection (6), or such further period which the President may agree to, on good cause shown, the Committee must consider and decide on whether the merger involving a foreign acquiring firm may have an adverse effect on the national security interests of the Republic identified by the President in terms of subsection (3).
- (8) The Committee referred to in subsection (1) may take into account other relevant factors, including whether the foreign acquiring firm is a firm controlled by a foreign government.
- (9) During its consideration of a merger in terms of this section, the Committee may consult and seek the advice of the Competition Commission or any other relevant regulatory authority or public institution.
- (10) The Minister must, within 30 days of the decision contemplated in subsection (7) (a) publish a notice in the Gazette of the decision to permit, permit with conditions or prohibit the implementation of a merger; and (b) inform the National Assembly, in appropriate detail, of the decision.

While the subsections may seem straightforward in provisioning the consideration of a merger which has an effect on NSI, four possible issues may arise out of the application of section 18A(5-10). These relate to the issuing of regulations by the President, the timeframes for consideration of a proposed merger and the role of the competition authorities in that process, the constitutionality of section 18A(10) insofar as it relates to the accountability of the NSC and the lack of a review mechanism for parties that may disagree with the NSC's determination. The shortcomings are discussed in greater detail below.

5.3.3.1 Objecting views

As highlighted in the preceding paragraph, the current framing of the subsections that regulate the merger review process where there is a foreign acquiring firm is far from

perfect. There are four identified challenges regarding section 18A(5-10), which I will discuss separately.

5.3.3.1.1 Publication of Regulations by the President [section 18A(5)]

Section 18A(5) stipulates that the President must issue regulations governing the notification, processes, procedure and timeframes to be followed by the NSC when performing its functions and access to information concerning the merger, including confidential information.⁸⁵⁴ This subsection is problematic for three reasons. First, the authority bestowed on the President is unfettered. It appears that again, the President is provided with unchecked discretion when it comes to the issuing of regulations.

This begs the question of whether the President must consult the NSC or the competition authorities before publishing the regulations. This is unclear as the subsection only goes as far as giving the President authority to issue said regulations. The lack of clarity feeds into the uncertainty of the law, which is the antithesis of the rule of law.⁸⁵⁵ As discussed at length above, there are several criticisms levelled at conferring unconstrained power on the executive as such power may be abused. The provision therefore that the President must issue regulations is a fundamental deficiency on the part of the legislature.

In summary, I agree with Mudzamiri and Osode who proffer that tasking the President with identifying and publishing a list of national security interests in the Gazette from time to time [as well as issuing regulations on procedures and access to information] appears to be at odds with the requirement that the law must be certain, since there is

⁸⁵⁴ Section 18A(5) of the Competition Act.

⁸⁵⁵ Cognisance is taken of the fact that the President, in making any determinations, promulgations or regulations typically consults with the relevant ministers and government departments as the determinations or regulations are usually drafted within the framework of specific legislation. See s 85(2) of the Constitution in this regard. The lack of clarity referred to is specifically to the failure of the legislature to take this opportunity to spell out unambiguously the roles, if any, of the NSC and DTIC in this process.

a possibility that the President, having sole discretion in the matter, might expand or shrink these national security interests on a case-by-case basis.⁸⁵⁶

The second problem with subsection (5) is that it creates confusion regarding the source of law when it comes to the review of a merger where the acquiring firm is foreign. This is because of the potential overlap of powers and authority in terms of section 18A generally and section 18A(5) specifically. To elaborate, section 18A was enacted to provide regulation of mergers involving foreign acquiring firms, to this end, it already guides parties and authorities responsible for the review of such mergers through specific subsections.

For instance, when it comes to the notification procedure regarding a proposed merger where the acquiring firm is foreign, section 18A(6) provides the notification procedure that must be followed by the merging parties. When it comes to the processes, procedures and timelines for consideration of a proposed merger, section 18A(6-14) provides details on what must happen, when and by whom it must be done.

The question therefore arises, why give the President power to issue regulations on what is already regulated by the section? The above question segues into further questions. For example, what is the effect of the regulations? Do they override provisions in section 18A where there is a conflict? Can the President change the notification, processes, procedures and timelines provided in section 18A through these regulations? If so, then the problem of concentration and potential abuse of the power bestowed by section 18A come back to the fore. Where the President can use subsection (5) to promote a populist agenda.

The third problem relates to paragraph (b) of subsection (5), which provides that the President must issue regulations to govern access to information concerning the merger, including confidential information. The paragraph is vague and fuels the uncertainty that peppers the entire section 18A. First, the paragraph refers to access

⁸⁵⁶ See Mudzamiri & Osode (2021) at 19.

to information including confidential information however, no guidance is provided as to what that information may be. Whereas the paragraph speaks to ‘information concerning the merger’, this could be anything including the nature of NSI affected by the merger, the names of the parties, their financial information, the details of the parties’ officials and details of the ultimate beneficial owners of the companies that are party to the merger, plus their personal information.

The lack of detail in the paragraphs again leaves a lot to interpretation, which affects the principle of certainty, which point I will not belabour. Secondly, the paragraph does not provide any clarity on who may request access to information and from whom such information may be requested. In that vein, is the paragraph meant to provide public access to information on a merger in a similar way to the application of the Promotion of Access to Information Act?⁸⁵⁷ At least the PAIA identifies who may request access to information and from whom such access may be requested.⁸⁵⁸ While all the questions raised above may be answered in due course when the relevant regulations are published, the current reading of the subsection does little to create or promote confidence in those contemplating mergers that fall under the purview of section 18A.

5.3.3.1.2 Procedures, timeframes and the role of the competition authorities [s18A(6)-(9)]

In terms of section 18A(6), a foreign acquiring firm which is required to notify the Commission in terms of section 13A(1) of the Competition Act of an intended merger must, at the time of the notification of the merger to the Commission, file a notice with the NSC in the prescribed form and manner if the merger relates to the list of NSI identified by the President.⁸⁵⁹ Subsection (6) envisages a dual notification procedure where the Competition Commission and the NSC are concurrently notified of a

⁸⁵⁷ Promotion of Access to Information Act 2 of 2000 (“PAIA”).

⁸⁵⁸ See Preamble, ss 1, 9 and 11 of the PAIA.

⁸⁵⁹ Section 18A(6) of the Competition Act.

proposed merger. From a plain reading of section 18A(6), it appears as though once notified, the Commission and the NSC may proceed to concurrently review the merger based on their specific mandates.

However, it has been previously advanced that a contextual approach should be favoured in determining the chronology of events relating to the consideration of a merger that falls under the ambit of section 18A.⁸⁶⁰ Reading section 18A(6) and section 12A holistically, in line with the requirements of efficiency in public administration as required by section 195(1)(b) of the Constitution, suggests that the notice to the NSC must stay the proceeding of the Commission until a decision has been made by the NSC.⁸⁶¹

The above interpretation is supported by provisions of the Act which preclude the competition authorities from considering a merger where the parties failed to notify the NSC or where the Minister has published a notice in the Gazette prohibiting the implementation of the merger on national security grounds,⁸⁶² implying that the NSC assessment must take place first. The above lack of clarity regarding the chronology of merger assessment and the status of the competition authorities does not bode well for the principle of certainty. A clearer provision outlining the sequence of events in the consideration of a merger that has NSI interests is therefore needed.

Section 18A(7) which provides the timeline for consideration of NSI by the NSC stipulates that the NSC must consider and decide on whether the merger involving a foreign acquiring firm may have an adverse effect on the national security interests of the Republic identified by the President within 60 days of receipt. The section provides further that the 60-day period may be extended by the President, on good cause

⁸⁶⁰ Tavuyanago & Vinti (2023) at 247.

⁸⁶¹ Tavuyanago & Vinti (2023) at 247.

⁸⁶² Section 18A(11-12) of the Competition Act.

shown.⁸⁶³ On first reading, the subsection seems benign as it follows the example of the consideration of mergers by the competition authorities.

For instance, in terms of a small merger, the Commission must make a decision within 20 business days, which period may be extended by a single period of no more than 40 business days.⁸⁶⁴ In terms of an intermediate merger, the Commission must also make a decision within 20 business days, which may be extended by a single period of no more than 40 business days.⁸⁶⁵ In respect of large mergers, the Commission must forward a recommendation to the Tribunal and the Minister within 40 business days of receiving notification of the merger.⁸⁶⁶ The Tribunal may extend the period for making a recommendation but may not grant an extension of more than 15 business days at a time.⁸⁶⁷

The 60-day period provided for by section 18A(7) therefore does not seem to be out of the norm. However, concerns have been raised that the period raises the possibility of the excessive extension of the merger review period which would result in unpredictable outcomes.⁸⁶⁸ I agree with this view because if the above premise, that the NSC consideration should stay the competition authorities' consideration of a merger is accepted, then at the very least, a merger would take 80 business days to consider (60 days for NSC and 20 days for the Commission).

If the permissible extensions are taken into consideration, a merger could take anywhere between 120 business days and an indefinite period. I use the term indefinite because in terms of section 18A(7), the President may agree to an extension however, unlike sections 13(4), 14(1) and 14A(2) of the Competition Act, section 18A(7) does not provide a period of extension that the President may agree to. The subsection fails to

⁸⁶³ Section 18A(7) of the Competition Act.

⁸⁶⁴ Sections 13(5) and 13(5)(a) of the Competition Act.

⁸⁶⁵ Sections 14(1) and 14(1)(a) of the Competition Act.

⁸⁶⁶ Section 14A(b) of the Competition Act.

⁸⁶⁷ Section 14A(2) of the Competition Act.

⁸⁶⁸ Oxenham, Currie & Stargard (2019) at 235.

provide certainty as it again, leaves the determination of the extension to the President's discretion.

To remedy the challenge relating to the time periods, Mudzamiri and Osode suggest that the competition authorities' consideration of a merger must run concurrently with that of the [NSC].⁸⁶⁹ I would suggest the same, with the caveat that once the competition authorities' assessment is done, then all the authorities have to do is wait for the NSC decision. Thus, if the authorities conclude their assessment before the NSC, they will have to hold the implementation of their decision in abeyance until an NSC decision is made.⁸⁷⁰

Further, I would suggest that the period by which the President can extend the consideration of NSI by the NSC be determined or determinable to comply with the principle of certainty. To this end, an amendment to section 18A(7) is therefore suggested, to the effect that the prerogative of the President to extend the consideration period be determined and that it be limited to a maximum of two extensions.⁸⁷¹

When considering the NSI, the NSC may take into account other relevant factors, including whether the foreign acquiring firm is a firm controlled by a foreign government.⁸⁷² This subsection seems redundant to say the least. Section 18A(4) provides a list of factors that must be considered by the NSC when determining whether a merger involving a foreign acquiring firm may have any adverse effects on the

⁸⁶⁹ Mudzamiri & Osode (2021) at 21.

⁸⁷⁰ This is because while the competition authorities may find, in their application of the competition and public interest tests, that the merger should be approved (with or without conditions), the NSC may find that the merger poses a threat to NSI and should be prohibited (or subject to NSI conditions).

⁸⁷¹ What is considered a reasonable extension may be up for debate however, guidelines may be sought from the current merger regime and international practices. The Competition Tribunal for example is allowed to extend the decision period by no more than 15 days at a time in respect of a large merger (s 14A(2) of the Competition Act). In the USA, a once-off 15-day extension is allowed (see part 6.4.1.3 below) and in Australia, a once-off 90-day extension is provided (see part 6.4.2.3 below). It is suggested therefore that a 30-day extension (either once-off or in two permissible extensions of 15 days) is reasonable.

⁸⁷² Section 18A(8) of the Competition Act.

national security of the Republic. To provide that the NSC may consider 'any other factors it deems fit' points to the lack of clarity that was discussed under the objecting views regarding section 18A(4).⁸⁷³ What section 18A(8) is, is essentially an extension of section 18A(4). This is because it supplements the factors that may be taken into consideration when determining the threat to NSI. Why not include it under section 18A(4)?

The effect of section 18A(8) is that it assigns power to the NSC to go beyond the factors determined by the President in terms of section 18A(4) as it gives the NSC the prerogative to add 'any other relevant factors'. The subsection does not comply with the principle of certainty as discussed in above sections as it leaves the determination of a national security threat to the NSC, which may change the criteria on a whim. This unrestricted discretion, as discussed above, leaves room for the potential abuse of the section by the NSC and potentially, the President, as the considerations are malleable and can be tailored to a specific merger transaction. I suggest that the entire subsection (8) be removed from the section because it serves no legitimate purpose as the factors for NSI consideration are already provided for under section 18A(4), albeit poorly.

Section 18A(9) of the Act provides that during its consideration of a merger in terms of this section, the NSC may consult and seek the advice of the Competition Commission or any other relevant regulatory authority or public institution.⁸⁷⁴ It is paramount to note that the role of the competition authorities with regard to merger regulation is to ensure fair competition through the consideration of economic efficiency as well as public interest factors.

The competition authorities therefore always have a vested interest in any merger transaction that takes place. Coupled with the skills and experience of the officials of both the Commission and the Tribunal, it should be obligatory that they be consulted insofar as the potential effects of the NSC's decision(s) on competition are concerned.

⁸⁷³ See part 5.3.2.1 above.

⁸⁷⁴ Section 18A(9) of the Competition Act.

However, section 18A(9) makes it optional for the authorities to be consulted and thus a decision may be made without any input from the authorities.⁸⁷⁵

While it is accepted that the consideration of national security may comprise sensitive information not meant for the competition authorities' consumption,⁸⁷⁶ and that competition authorities may have no value to add in respect of national security considerations,⁸⁷⁷ I am still of the opinion that the competition authorities would have plenty to offer in respect of the competition and public interest aspects of a merger transaction. As the NSC would comprise national security experts, the Commission and Tribunal comprise of competition law and economics experts, and their views on proposed mergers that touch on NSI should be legitimate and considered by the NSC. The competition authorities therefore have a role to play in the consideration of a merger relating to NSI and should not be relegated to becoming informees of the NSC's decision without actively participating in same.

5.3.3.1.3 Implementation of the NSC's decision [section 18A(10)]

Section 18A(10) provides that the Minister must, within 30 days of the decision contemplated in subsection (7), publish a notice in the Gazette of the decision to permit, permit with conditions or prohibit the implementation of a merger,⁸⁷⁸ and inform the

⁸⁷⁵ See Mudzamiri & Osode (2021) at 18, where they suggest that where different verdicts are reached by the competition authorities and the [NSC], the [NSC's] decision should prevail. However, the competition authorities must be allowed to consult with the [NSC] to discuss whether the merger could be accepted subject to conditions in circumstances where it has potential economic benefits sharply contrasts with what s 18A(9) of the Competition Act requires.

⁸⁷⁶ Mudzamiri & Osode (2021) at 21.

⁸⁷⁷ Oxenham, Currie & Stargard (2019) at 235; see also African Antitrust & Competition Law News and Analysis "Emerging Antitrust: One size doesn't fit all?" (31 October 2018) at <https://africanantitrust.com/2018/10/31/emerging-antitrust-one-size-doesnt-fit-all/> (accessed 20 December 2023), where the erstwhile Commissioner of the Competition Commission Mr. Tembinkosi Bonakele opined that the law (s 18A) had possibly too much ambition and that he was unsure about what assistance the Commission could be to the NSC.

⁸⁷⁸ Section 18A(10)(a) of the Competition Act.

National Assembly, in appropriate detail, of the decision.⁸⁷⁹ It is noteworthy that the communication of the decision of the NSC comes from the Minister and not the NSC itself. This creates its own confusion as the NSC is established by and answerable to the President and not to the Minister. Subsection (10) however raises two fundamental challenges with regard to the Minister's role as well as the lack of a review mechanism for a decision of the NSC, Below I discuss the two problems with section 18A(10) of the Competition Act.

(i) *Constitutionality of section 18A(10)*

The provision that the Minister must inform the National Assembly of the decision of the NSC as per section 18A(10)(b) has been criticised to the point of being labelled unconstitutional.⁸⁸⁰ This is because it reduces the constitutional power of parliament from that of a concurrent authority with the national executive over all national security decisions,⁸⁸¹ and an oversight body regarding the Executive, to that of an entity merely to be 'informed' of the appropriate details of the NSC's decisions.

Section 18A(10)(b) thus has the effect of undermining parliament's oversight function in respect of the exercise of the executive's authority as provided for in section 55(2)(b) read with section 198(d) of the Constitution.⁸⁸² Tavuyanago and Vinti lament the current framing of section 18A(10)(b) and posit that the parliamentary oversight envisaged by section 18A(10)(b) is so diluted that it provides untrammelled power to the NSC when it comes to the consideration of NSI.⁸⁸³ This provision of unchecked power creates, in our opinion, a constitutional challenge that may be and should be raised when the section eventually becomes effective and an adverse decision is made by the NSC.

⁸⁷⁹ Section 18A(10)(b) of the Competition Act.

⁸⁸⁰ Tavuyanago & Vinti (2023) at 248.

⁸⁸¹ See s 198(d) of the Constitution.

⁸⁸² *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para 129.

⁸⁸³ Tavuyanago & Vinti (2023) at 249.

(ii) *Justiciability of the NSC's decision(s)*

The second problem regarding section 18A(10) is concerning the justiciability of the NSC's decision(s). It is noted with concern that the subsection provides for the publishing of the NSC's decision in the Gazette and informing the National Assembly, in appropriate detail of the decision of the NSC. The subsection jumps from the preceding subsection (9), where the NSC makes a decision (in consultation or not with the competition authorities) to making public the decision of the NSC.

No mention is made of a procedure where the merging parties and indeed any interested parties may make representations to the NSC or challenge the decision of the NSC. To this end, no avenue is provided to an aggrieved party to challenge or contest a decision made by the NSC.⁸⁸⁴ Wood observes that the entire section 18A does not make any provision for parties' recourse, should they disagree with the outcome of the decision of the NSC. She concludes by opining that "in light of the framework established, it is likely that parties' recourse may lie outside the jurisdiction of the competition authorities".⁸⁸⁵

Tavuyanago and Vinti proffer that the absence of any provision of recourse in the subsections establishing and mandating the NSC could be construed as giving the NSC unfettered and non-justiciable power.⁸⁸⁶ Justiciability refers to whether an issue may be adjudicated by a court or tribunal of competent jurisdiction. Put differently, it is a concept that concerns the limitations on legal issues over which a competent court or tribunal can exercise its judicial authority. If a court or tribunal can adjudicate on a matter, it is justiciable. In that light, the lack of mention of recourse in the form of review or appeal of a decision of the NSC as per sections 18A(1-2) and 18A(10) of the Competition Act brings to the fore the question of whether such a decision is justiciable.

⁸⁸⁴ Tavuyanago (2021) at 13.

⁸⁸⁵ Bowmans (2018).

⁸⁸⁶ Tavuyanago & Vinti (2023) at 251.

It is common cause that when it comes to decisions of the competition authorities (Commission, Tribunal and Competition Appeal Court) regarding merger transactions, those decisions are justiciable.⁸⁸⁷ The omission of a justiciability clause in the subsections establishing and mandating as well as provisioning the publishing of the NSC's decision is therefore concerning. Tavuyanago and Vinti argue that while section 18A in its entirety makes no provision for the review or appeal of an NSC decision, which may be construed as being non-justiciable, such a decision is actually justiciable based on three grounds.

(a) *The right of judicial review*

At common law, it was accepted that no legislative provision could oust the jurisdiction of the courts.⁸⁸⁸ This common law principle has been subsumed by the right to judicial review, which provides the courts with the right to test all legislation.⁸⁸⁹ It is argued that because the question of NSI considerations in merger review and by implication, the constitution and authority of the NSC in terms of section 18A(1-2) and the decision and notification of decision process in terms of section 18A(9 - 10), raises a constitutional issue as envisaged by section 167(3)(b)(i) of the Constitution, and an arguable point of law of general public importance, as provided by section 167(3)(b)(ii) of the

⁸⁸⁷ Munyai P “Claims for damages arising from conduct prohibited under the Competition Act 1998” (2017) *De Jure* at 35.

⁸⁸⁸ See Du Plessis LM *Re-interpretation of statutes* Durban: LexisNexis (2002) at 169; *R v Pashda* [1923] AD 281 at 304; *De Wet v Deetlefs* [1928] AD 286 at 290.

⁸⁸⁹ See s 172(1) of the Constitution; s 33 of the Constitution; Tavuyanago & Vinti (2023) at 251; see also Du Plessis (2002) at 172; *Johannesburg Consolidated Investment Co. v Johannesburg Town Council* [1903] TS 111 at 116; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 at para 40; Mayat MA “Judicial review: A fertile field of contention” (2019) 6(1) *Journal of Law, Society and Development* 6(1) 1-21; Lenta P “Democracy, rights disagreements and judicial review” (2004) 20(1) *South African Journal on Human Rights* 1-31.

Constitution, the Constitutional Court would have jurisdiction to hear matters stemming from section 18A.⁸⁹⁰

Apart from section 18A being a competition subject that raises constitutional issues, the question of national security itself is also a constitutional matter.⁸⁹¹ National security in terms of the Constitution must be pursued in compliance with the law,⁸⁹² as such, it must be open to testing before a competent court. Additionally, the construal and application of legislation mandated by the Constitution is a constitutional matter.⁸⁹³ The Competition Act is an example of such legislation as it is a transformational piece of legislation promulgated in pursuance of the right to equality as per section 9 of the Constitution.⁸⁹⁴

Consequently, the interpretation and application of section 18A is a constitutional matter as it raises a constitutional issue and an arguable point of law of general public importance in terms of section 167 of the Constitution, it relates to national security which is a constitutional issue in terms of section 198 of the Constitution, and forms

⁸⁹⁰ Tavuyanago & Vinti (2023) at 251-252; see *Competition Commission of South Africa v Media 24 (Pty) Limited* 2019 (5) SA 598 (CC) at para 35, where the court found that it could hear competition cases which raise arguable points of law of general public importance.

⁸⁹¹ Section 198 of the Constitution; see also *AB and Another v Pridwin Preparatory School and Others* 2020 (5) SA 327 at para 47, where the Constitutional Court employed a similar approach and elaborated on what constitutes a constitutional matter – which then gives the Court the jurisdiction to hear such matters. It can also be argued that national security is a constitutional matter because it constitutes the national interest, which the Constitution provides protection for and advancement of (see s 198 of the Constitution; s 199 read with paragraph 4 of Annexure D of the Constitution; DIRCO (n.d) at 10; see also part 6.4.3 below which discusses national security as a component of national interest in Australia).

⁸⁹² Section 198(c) of the Constitution.

⁸⁹³ *Normandien Farms (Pt y) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Limited* 2020 (6) BCLR 748 (CC) at para 38; *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC) at para 23; *National Education Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC) at para 14.

⁸⁹⁴ Preamble to the Competition Act; *Competition Commission v Loungefoam (Pty) Ltd* 2012 (9) BCLR 907 (CC) at para 16.

part of the Competition Act, which is legislation mandated by the Constitution thus making a constitutional issue.

In light of the above and considering the direct access route to the Constitutional Court provided for by section 167(6) of the Constitution, it is apt to conclude that a decision of the NSC in terms of section 18A of the Competition Act is justiciable and the Constitutional Court would have jurisdiction to hear such a matter.

(b) The rule of law

The rule of law is one of the founding values of the Republic of South Africa.⁸⁹⁵ Put in simple terms, it provides that the Constitution is the supreme law and that no one is above the law. The rule of law contains seven important principles, to wit:

- that Government action must be based on law;
- that the law must be clear;
- that the law must be accessible;
- that human rights must be respected;
- that everyone is equal before the law;
- that courts must be independent and impartial; and
- that laws must be made through clear and transparent procedures, by legitimate, democratic bodies.⁸⁹⁶

In light of the above, legal certainty or the requirement that the law must be clear is therefore a function of the rule of law.⁸⁹⁷ Further, the demand that the law must be 'certain, clear and stable' also forms part of the principle of legality, which a fundamental

⁸⁹⁵ Section 1(c) of the Constitution.

⁸⁹⁶ Civics Academy "What is the Rule of Law?" (n.d.) at <https://civicsacademy.co.za/rule-of-law/> (accessed 17 December 2023).

⁸⁹⁷ Tavuyanago & Vinti (2023) at 253; see *Beadica 231 CC v Trustees for the time being of the Oregon Trust* 2020 (5) SA 247 (17 June 2020) at para 81; *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at para 108.

facet of the rule of law.⁸⁹⁸ In that vein, legislation is supposed to be clear, certain and give fair warning of its effect and permit individuals to rely on its meaning until explicitly changed.⁸⁹⁹

As it currently reads, and with regard to its justiciability, section 18A(1) is not susceptible to this immutable requirement of the law since it is uncertain in that it does not provide any detail regarding the recourse available to an aggrieved party where an adverse decision has been made by the NSC. Tavuyanago and Vinti also submit that judicial review, as discussed above, is indispensable to providing legal certainty since it turns on judicial precedent and invariably brings section 18A of the Competition Act within the confines of the law.⁹⁰⁰ To that end, section 18A of the Competition Act would be justiciable based on the need for legal certainty through judicial review, which in turn would advance the rule of law.

If on the one hand, it is accepted that a decision of the NSC constitutes an executive decision, such a decision would need to comply with the principle of rationality as part of the principle of legality, which forms part of the rule of law.⁹⁰¹ Rationality refers to the fact that a decision or exercise of specific power must be based on reason, meaning that there must be a logical link between the power being exercised and the decision being made.⁹⁰² Regarding the link between rationality and justiciability, the

⁸⁹⁸ Tavuyanago & Vinti (2023) at 253-254; see *Veldman v Director of Public Prosecutions (Witwatersrand Local Division)* 2007 (3) SA 210 (CC) at para 26.

⁸⁹⁹ *Veldman v Director of Public Prosecutions* at para 26.

⁹⁰⁰ Tavuyanago & Vinti (2023) at 254; *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] 3 All SA 1 (SCA) at para 36.

⁹⁰¹ Preamble to the Competition Amendment Act stipulates that s 18A seeks to ensure the national executive's intervention in respect of mergers that affect the national security interests of the Republic; Tavuyanago & Vinti (2023) at 254; *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at paras 56–69; *The National Treasury v Kubukeli* 2016 (2) SA 507 at para 19; Du Plessis (2002) at 172.

⁹⁰² Tavuyanago & Vinti (2023) at 255; see *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) at para 65; Murcott M “Procedural fairness as a component of legality: Is a reconciliation between Albutt and Masetlha possible?” (2013) 130(2) *South African Law Journal* at 260, 267–268.

Constitutional Court has ruled that rationality and bad faith are examples of grounds (which is not a closed list) on which a court may consent to the idea that a particular issue is justiciable.⁹⁰³ The decisions of the NSC must therefore be made in good faith and satisfy the rationality test.

If, on the other hand, it is argued and accepted that a decision of the NSC is not an executive decision but administrative action, it would still be subject to the rule of law under section 6 of the Promotion of Administrative Justice Act,⁹⁰⁴ which provides for the judicial review of administrative action.⁹⁰⁵ Administrative action means any decision taken, or failure to take a decision by an organ of state or any person who exercises a public power or function in terms of the Constitution or provincial constitution, or exercises power or performs a public function in terms of any legislation or – which adversely affects the rights or legitimate expectations of any person and which has a direct and external legal effect.⁹⁰⁶ Due to the fact that the NSC would be taking a decision that constitutes the exercise of public power in terms of the Competition Act, its decisions could be construed to constitute administrative action.

In light of the above, it is evident that the review of the exercise of public power can either be through the legality principle – which dictates that such decision must be rational, or through the right to just administrative action – as provided for under section 33 of the Constitution and brought to life through section 6 of PAJA.⁹⁰⁷ Regardless of the classification of the NSC's decision, either as executive or administrative, such a decision would still be subject to the rule of law and thus be justiciable.

⁹⁰³ Tavuyanago & Vinti (2023) at 255; see *Kaunda v President of the Republic of South Africa* 2004 (10) BCLR 1009 (CC); 2005 (4) SA 235 (CC) at para 80.

⁹⁰⁴ Act 3 of 2000 (“PAJA”).

⁹⁰⁵ Tavuyanago & Vinti (2023) at 255.

⁹⁰⁶ Section 1 of PAJA read with s 33 of the Constitution, which provides the right to just administrative action.

⁹⁰⁷ See *Altron TMT Holdings Proprietary Limited v Minister of Trade and Industry* (2019/46376) [2020] ZAGPJHC 162 (8 July 2020) at para 17; *Minister of Home Affairs v Public Protector of the Republic of South Africa* 2018 (3) SA 380 (SCA) at para 38.

(c) *Application of International jurisprudence*

Tavuyanago and Vinti identified the challenge of section 18A(10) not providing a review mechanism and contended that since the consideration of NSI was novel to South Africa, we might have to look to international jurisprudence in an attempt to resolve the matter of review or justiciability of a decision of the NSC.⁹⁰⁸

To this end, the jurisprudence of the World Trade Organization (WTO) is relevant as competition law is a constitutional matter and has its genesis in a superordinate founding value and right in the Bill of Rights of the Constitution, meaning that the interpretation of that right must consider international law and may consider foreign law.⁹⁰⁹ The pursuance of national security must also comply with the law, including international law,⁹¹⁰ which makes turning to WTO jurisprudence valid.

Furthermore, South Africa is one of the founding members of the WTO and must align its legislation with its obligations under the General Agreement on Tariffs and Trade (GATT). This makes the consideration of WTO jurisprudence sound.⁹¹¹ It is also apparent that there is a significant textual correlation between section 18A of the Competition Act and Article XXI of the GATT, which is titled 'Security Exceptions', the correlation thus makes reliance on WTO jurisprudence cogent.⁹¹²

Article XXI(b) of the GATT is of particular import as it regulates 'essential security interests', while section 18A regulates 'national security interests'. The NSI that must be considered by the NSC may qualify as essential security interests, as section 18A

⁹⁰⁸ Tavuyanago & Vinti (2023).

⁹⁰⁹ Tavuyanago & Vinti (2023) at 256; s 39(2)(b) of the Constitution; *Media 24 (Pty) Limited* (2019) at para 31.

⁹¹⁰ See s 198(c) of the Constitution.

⁹¹¹ See *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2012] 4 SA 618 (CC) at para 2; *Association of Meat Importers v ITAC* (769, 770, 771/12) 2014 (4) BCLR 439 (SCA) at para 10; *Progress Office Machines v SARS* 2008 (2) SA 13 (SCA) at paras 5-6.

⁹¹² Tavuyanago & Vinti (2023) at 256.

seeks to regulate among other things the Republic's defence capability and interests, the use of sensitive technology, espionage, terrorism, the supply of critical goods, and socio-economic stability. Section 18A(4) of the Competition Act is in line with Article XXI of the GATT which provides that the GATT must not be construed to prohibit any GATT contracting party from implementing measures that it considers necessary for the protection of its essential security interests.⁹¹³

Gleaning from the above provisions of the Competition Act and the GATT, it can be concluded that they both contain 'national security vetoes'. This makes the consideration of WTO jurisprudence in relation to national security even more pertinent when it comes to the interpretation of the justiciability of the South African national security veto. To that end, the below discussion of a WTO panel decision relating to the national security clause will be substantial when it comes to determining whether section 18A is justiciable or not.

Russia – Measures Concerning Traffic in Transit WT/DS512/7 (adopted on 26 April 2019)

On 14 September 2016, Ukraine requested consultations with the Russian Federation pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII of the GATT with respect to alleged multiple restrictions on traffic in transit from Ukraine through the Russian Federation to third countries.⁹¹⁴ Consultations were held on 10 November 2016 between Ukraine and Russia, but they failed to resolve the dispute.⁹¹⁵ On 9 February 2017, Ukraine requested the establishment of a panel pursuant to Article 4.7 and Article 6 of the DSU, and Article XXIII of the GATT with standard terms of reference. At its meeting on 21

⁹¹³ Article XXI(b) of the GATT.

⁹¹⁴ *Russia – Measures Concerning Traffic in Transit* at para 1.1.

⁹¹⁵ *Russia – Measures Concerning Traffic in Transit* at para 1.2.

March 2017, the Dispute Settlement Body (DSB) established a panel pursuant to Ukraine's request in document WT/DS512/3, in accordance with Article 6 of the DSU.⁹¹⁶

The gist of Ukraine's complaint was that Russian bans and restrictions on traffic in transit by road and rail, from Ukraine, across Russia and destined for Kazakhstan and the Kyrgyz Republic, as well as to the alleged *de facto* extension of these bans and restrictions to Ukrainian traffic in transit destined for Mongolia, Tajikistan, Turkmenistan and Uzbekistan were inconsistent with Russia's obligations under Article V (freedom of transit), Article X (publication and administration of trade regulations) and with related commitments in Russia's Accession Protocol.⁹¹⁷

Russia asserted that the measures taken were among those that Russia considers necessary for the protection of its *essential security interests*, which it took, "[i]n response to the emergency in international relations that occurred in 2014 that presented threats to the Russian Federation's essential security interests". Russia thereby invoked the provisions of Article XXI(b)(iii) of the GATT, arguing that, as a result, the Panel lacked jurisdiction to further address the matter.⁹¹⁸

The question that faced the panel regarding Russia's defence was whether Article XXI(b)(iii) of the GATT was justiciable. In other words, whether the Panel had the jurisdiction to review Russia's invocation of Article XXI(b)(iii) of the GATT.⁹¹⁹ According to Russia, the use of Article XXI(b)(iii) by a member meant that its conduct was immune from scrutiny by a WTO dispute settlement and fell outside the jurisdiction of a WTO dispute settlement panel, Article XXI(b)(iii) was therefore 'self-judging'.⁹²⁰

In response to Russia's invocation of Article XXI(b)(iii) of the GATT, the Panel held that international adjudicative tribunals, including WTO dispute settlement panels, possess

⁹¹⁶ *Russia – Measures Concerning Traffic in Transit* at para 1.3.

⁹¹⁷ *Russia – Measures Concerning Traffic in Transit* at para 7.2.

⁹¹⁸ *Russia – Measures Concerning Traffic in Transit* at para 7.4.

⁹¹⁹ *Russia – Measures Concerning Traffic in Transit* at para 7.25.

⁹²⁰ *Russia – Measures Concerning Traffic in Transit* at paras 7.26 and 7.57.

inherent jurisdiction derived from the exercise of their adjudicative function.⁹²¹ The Panel reasoned that part of the inherent jurisdiction was the power to determine all matters arising in relation to the exercise of their own substantive jurisdiction.⁹²² The Panel highlighted that the general object and purpose of the WTO Agreement, as well as of the GATT, was to promote the security and predictability of the reciprocal and mutually advantageous arrangements and the substantial reduction of tariffs and other trade barriers.

Thus, to interpret Article XXI as an outright potestative condition, subjecting the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that Member would be entirely contrary to the security and predictability of the multilateral trading system established by the GATT 1994 and the WTO Agreements.⁹²³ In light of the above reasoning, the Panel found that Article XXI(b)(iii) was not 'self-judging' as raised by Russia.⁹²⁴ Accordingly, Russia's argument that the Panel lacked jurisdiction to review Russia's invocation of Article XXI(b)(iii) was rejected.⁹²⁵

While Tavuyanago and Vinti have noted previously that the WTO conflated the issues of jurisdiction and justiciability,⁹²⁶ which conflation is not fatal to the lesson at hand – that the 'national security defence' cannot be raised to escape justiciability of a decision of the NSC. The WTO panel in its finding saw the matter of justiciability as arising from the principles of legal certainty and integrity and, by extension, the rule of law, in that the legal system could not be subjugated to the arbitrary will of a person or body.⁹²⁷

⁹²¹ *Russia – Measures Concerning Traffic in Transit* at para 7.53.

⁹²² *Russia – Measures Concerning Traffic in Transit* at para 7.53.

⁹²³ *Russia – Measures Concerning Traffic in Transit* at para 7.79.

⁹²⁴ *Russia – Measures Concerning Traffic in Transit* at para 7.102.

⁹²⁵ *Russia – Measures Concerning Traffic in Transit* at para 7.103.

⁹²⁶ Tavuyanago & Vinti (2023) 240 at 258.

⁹²⁷ *Russia – Measures Concerning Traffic in Transit* at para 7.79.

Thus, the Panel saw no decision as being outside of the reach of the law, thereby endorsing the principle of rule of law.⁹²⁸

Based on the findings of the WTO panel in *Russia – Measures Concerning Traffic in Transit* relating to inherent jurisdiction, it can be argued that this is a principle that also forms part of our law. Inherent jurisdiction is bestowed by the Constitution on the High Court, the Supreme Court of Appeal and the Constitutional Court.⁹²⁹ The inherent jurisdiction of the above courts is only invoked where there is a need to address a lacuna which, in the absence of judicial intervention, would result in injustice'.⁹³⁰ Tavuyanago and Vinti conclude that section 18A of the Competition Act falls within the ambit of the scope of inherent jurisdiction contemplated by the court in *Standard Bank* as section 18A does not provide for judicial review of an NSC decision, thus creating a 'lacuna that would result in injustice'.⁹³¹

Utilising the lessons from *Russia – Measures Concerning Traffic in Transit* and coalescing the principles of the rule of law, legality, legal certainty, security and predictability of the multilateral trading system, the inherent jurisdiction of the courts in South Africa, and the constitutionally provisioned right to judicial review, I would argue that a decision of the NSC regarding a merger where the acquiring firm is foreign is justiciable.

5.3.4 The role of the competition authorities in an NSI merger [s18A(11-14)]

Section 18A(11-14) provides some guidance, albeit incompletely, on how the competition authorities and the NSC are to interact. Section 18A(11-14) provides the following:

⁹²⁸ Tavuyanago & Vinti (2023) at 258.

⁹²⁹ See ss 167(3), 168(3) and 169(1) of the Constitution.

⁹³⁰ *Standard Bank of SA Ltd & Others v Thobejane and Others; Standard Bank of SA Ltd v Gqirana NO and Another 2021* (6) SA 403 (SCA) (25 June 2021) at para 53.

⁹³¹ Tavuyanago & Vinti (2023) at 259.

- (11) The Competition Commission may not consider a merger in terms of section 12A, and the Competition Tribunal may not consider a merger in terms of section 16(2) if the foreign acquiring firm failed to notify the Committee in terms of subsection (6).
- (12) The Competition Commission may not make a decision in terms of section 13(5)(b) or 14(1)(b), and the Competition Tribunal may not make an order in terms of section 16(2), where the Minister has published a notice in the Gazette prohibiting the implementation of the merger on national security grounds.
- (13) (a) The Committee may revoke its approval of the merger or, in respect of a conditional approval, make any appropriate decision regarding any condition relating to the merger, if
- (i) the approval was based on incorrect information for which a party to the merger is responsible;
 - (ii) the approval was obtained by deceit; or
 - (iii) a firm concerned has breached an obligation attached to the approval.
- Competition Commission South Africa.
- (b) If the Committee revokes its permission in terms of paragraph (a), the Competition Commission's or Competition Tribunal's approval or conditional approval of the merger is deemed to be revoked.
- (c) Unless the Committee determines otherwise, the Competition Commission's or Competition Tribunal's approval or conditional approval of a merger involving a foreign acquiring firm is deemed to be revoked if the foreign acquiring firm failed to notify the Committee in terms of subsection (6).
- (14) The Competition Tribunal may impose an administrative penalty, in accordance with the provisions of section 59 (3), on the parties to a merger involving a foreign acquiring firm for any contravention contemplated in section 59 (1) (d), read with the changes required by the context.

As discussed at length in Chapters 3 and 4 above, before the 2019 amendment to the Competition Act, the competition authorities (Commission and Tribunal) were solely responsible for the consideration of mergers.⁹³² However, due to the insertion of section 18A into the principal Act, the NSC must now consider whether a proposed merger where the acquiring firm is foreign may have any adverse effects on the NSI of the country. The addition of section 18A therefore consequently adds an extra dimension to the South African merger regulation framework.

The insertion of section 18A raises the question of what role the competition authorities have in a merger that triggers an NSI assessment. It is understood from above, from a contextual reading at least, that the NSC overrides the competition authorities when it comes to mergers involving foreign acquiring firms as the competition authorities are precluded from determining a merger involving a foreign acquiring firm until the NSC has completed the NSI assessment. This creates several challenges, as discussed in detail hereunder.

5.3.4.1 Objecting views

The establishment of the NSC and its mandate seem to take over the competition authorities' roles insofar as a merger involving a foreign acquiring firm is concerned. Some have even gone as far as alleging that an adverse decision by the NSC 'usurps the power of the competition authorities to adopt any decision'.⁹³³ Section 18A(11) provides that the Commission or the Tribunal may not consider a merger if a foreign acquiring firm, which is supposed to be subjected to an NSI assessment fails to notify

⁹³² See parts 3.3.4, 3.3.5 and 4.2 above.

⁹³³ Kennedy-Good *et al* (2020) "COVID-19 crisis inspires global tightening of Foreign Investment Screening" at <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/knowledge-pdfs/global-rules-on-foreign-direct-investment/global-rules-on-foreign-direct-investment---south-africa.pdf> (accessed 21 December 2023).

the NSC in terms of subsection (6). Subsection (11) therefore has to be read with subsection (6) which provides for a 'dual notification' requirement.⁹³⁴

Subsection (11) confirms that the competition authorities still have a role to play within the traditional merger assessment. Indeed, the NSC is only mandated to consider NSI factors relating to a proposed merger, but the traditional competition and public interest assessment must be conducted by the competent authorities, the Commission, and the Tribunal. The only challenge regarding subsection (11) is regarding the chronology of events in a merger consideration; where parties fail to notify the NSC, an assessment by the competition authorities is 'completely prohibited' until such a time as the NSC has been properly notified. Merging parties will therefore have to seek proper guidance and legal advice regarding the notification procedure in respect of a merger where the acquiring firm is foreign. It is hoped that the regulations envisaged by subsection (5) will assist in this regard and not serve to further lengthen or obscure the process.

In terms of section 18A(12), the Commission or Tribunal may not make a decision where the Minister has published a notice in the Gazette prohibiting the implementation of a merger on NSI grounds.⁹³⁵ The framing of subsection (12) supports the earlier assertion that while section 18A(6) may provide for a dual notification procedure, the authority of the NSC transcends that of the competition authorities and the competition authorities must wait for the NSC to conduct and complete the NSI assessment first before conducting the competition and public interest assessments. Section 18A(12) therefore has the effect of automatically ousting the jurisdiction of the competition authorities and completely blocking any consideration of the merger's potential effect on competition or public interest.

At this juncture, it is important to rehash the value of the competition authorities' work in respect of merger assessment. To that end, the authorities' role regarding merger

⁹³⁴ Section 18A(6) of the Competition Act.

⁹³⁵ That is a decision to unconditionally approve, conditionally approve or prohibit implementation of a merger after consideration in terms of s 12A of the Competition Act.

regulation is to ensure fair competition, through the consideration of economic efficiency as well as public interest factors. In that sense, fair competition and augmentation of public interest factors cascades down to consumer welfare, where consumers have quality goods and services and a wider product choice at fair prices. Where the jurisdiction of the competition authorities is automatically ousted through application of section 18A(12), the mandate of the competition authorities (protecting and promoting competition) cannot be exercised. This position is untenable as it defeats the purpose of the Competition Act altogether.⁹³⁶

While section 18A(9) provides that during its consideration of a merger, the NSC may consult and seek the advice of the Commission or any other relevant regulatory authority. However, such consultation is optional.⁹³⁷ Thus, the NSC can make a decision affecting the powers of the competition authorities without actually consulting the authorities.

Tavuyanago has also argued that the lack of a review mechanism regarding a decision of the NSC makes the ousting of the jurisdiction of the competition authorities final, and neither the Commission nor the Tribunal can challenge such decision based on competition or public interest grounds.⁹³⁸ Such finality regarding the ouster of the competition authorities' powers may well be repulsive to would-be investors as one of the safeguards to their investments (competition authorities' mandate and power to promote competition and ensure the contestability of markets) can be ousted without review by the NSC.

A further criticism regarding the lack of a review mechanism has also been raised by Van Dijk, who argues that in its current format, the provision is unlikely to pass

⁹³⁶ Section 2(1) of the Competition Act, which provides that the purpose of the Act is to "promote and maintain competition in the Republic".

⁹³⁷ Emphasis is placed on the use of the word may and not must (which would have created a positive obligation to consult). Thus, the NSC again has discretion and consultation with the Commission, or any other regulatory body is the prerogative of the NSC.

⁹³⁸ Tavuyanago (2021) at 15.

constitutional muster as it does not provide for participation in the process by the merging parties and does not allow for an appeal of an adverse decision.⁹³⁹ Tavuyanago and Vinti have also addressed this challenge and advanced reasons why section 18A generally should be construed as being justiciable.

However, even if it were confirmed that the section is justiciable and the courts have the right to review a decision of the NSC, I am of the opinion that because such a decision would be *ex post facto* a proposed merger, it would not cure the deficiency in section 18A(12). It would also take a considerable effort and financial commitment from an aggrieved party against whom an adverse decision of the NSC has been made to contest section 18A(12) within the judicial system. Consequently, I suggest that legislative intervention is needed to remedy the lack of a peremptory provision to either consult or consider representations from interested parties, including the competition authorities.⁹⁴⁰

In contemplating such legislative intervention, consideration has to be given to Mudzamiri and Osode's suggestion of a two-stage inquiry into national security. They theorise that the [NSC] in the first stage ought to determine whether any serious national security threats are posed by a particular takeover. If the answer is in the affirmative, then the [NSC] will require the acquirer [and the competition authorities] to make submissions on the reasons why the takeover should be approved.⁹⁴¹ Amending the Competition Act to provide for such a two-stage inquiry would provide certainty concerning the process through which mergers involving a foreign acquiring firm are to be considered.

It would also serve to promote the legitimacy of the decisions of the NSC because of the application of the *audi alteram partem* principle, where the NSC would provide the

⁹³⁹ Van Dijk (2018).

⁹⁴⁰ Through an amendment to s 18A(12) together with other sections that have been the subject of this critique.

⁹⁴¹ Mudzamiri & Osode (2021) at 20.

merging parties as well as the competition authorities an opportunity to make representations on why the merger must be approved, before making a final determination on the merger. I think it also would have been judicious to provide a statutory remedy embedded within the Act to provide parties with recourse after the NSC makes an adverse decision. Again, while it has been argued that even without such a provision, a decision of the NSC would still be susceptible to judicial review,⁹⁴² a specific provision within the section would serve to forewarn merging parties and also provide them with a more efficient and cost-effective form of recourse.

In terms of section 18A(13)(a), the NSC may revoke its approval of the merger or, in respect of a conditional approval or make any appropriate decision regarding any condition relating to the merger where approval was based on incorrect information for which a party to the merger was responsible, approval was obtained through deceit or where a party to the merger has breached a condition or obligation attached to approval of the merger. Section 18A(13)(b) proceeds to mention that where the NSC revokes its permission, the Commission or Tribunal's approval or conditional approval of the merger is deemed revoked. Section 18A(13)(c) is meant to be read with subsection (6), and provides that unless the NSC determines otherwise, the Commission or Tribunal's approval or conditional approval of a merger is deemed revoked where the foreign acquiring firm failed to notify the NSC of the merger.

There seems to be no glaring problems with this provision. In fact, it mimics provisions within the Act which empower the competition authorities to revoke their own decisions, on similar grounds.⁹⁴³ The power to revoke a decision is not inconsistent with any law and it may well serve to ensure that parties to a merger are truthful in their filing and submissions and abide by conditions or obligations imposed as the approval or conditional approval of a merger can always be revoked. Paragraph (c), which deems

⁹⁴² Tavuyanago & Vinti (2023) at 251-254.

⁹⁴³ Section 15(1) of the Competition Act, which empowers the Commission to revoke its own approval or conditional approval of a merger, and s 16(3) of the Competition Act, which empowers the Tribunal to revoke its own decision.

a decision of the Commission or Tribunal revoked where the acquiring firm failed to notify the NSC may raise a few eyebrows. However, if it is accepted that the NSC's consideration of NSI stays the Commission or Tribunal's authority to complete a merger assessment, then paragraph (c) is in line with the law as the competition authorities would have acted *ultra vires*.

Lastly, with regard to the processes of notification and consideration of a merger contemplated by the section, section 18A(14) provides that the Tribunal may impose an administrative penalty, in accordance with the provisions of section 59(3), on the parties to a merger involving a foreign acquiring firm for any contravention contemplated in section 59 (1) (d), read with the changes required by the context. While there are no specific challenges with regard to the subsection, one is left wondering why the words 'read with the changes required by the context' were used instead of the legislature being specific. To that end, section 59(1)(d) of the Competition Act should be amended to include a sub-paragraph (v) reading as follows:

- (v) "proceeded to implement the merger without the approval of the National Security Committee or proceeded to implement the merger in a manner contrary to a condition for the approval of that merger imposed by the National Security Committee as provided for by section 18A(13) and (14)".

Such a provision would make clear reference to why an administrative fine is being imposed, which in turn would promote the principle of certainty and legality as discussed at length above. Be that as it may, there is nothing fundamentally wrong with the subsection itself.

5.3.5 The delegation of Presidential power in terms of section 18A [s18A(15)]

In terms of section 18A(15) of the Competition Act, the President may delegate any power or function conferred on him or her under subsection (3) or (4) to any Cabinet

Member. The power or function referred to relates to the identification and publishing of a list of NSIs,⁹⁴⁴ and determining what constitutes NSI considering the various factors listed by the Act.⁹⁴⁵

At first glance, subsection (15) appears to be problematic in that it seems to enable the President to 'abdicate' his or her responsibilities regarding the determination of NSI to a Cabinet Member. However, considering that the executive authority is vested in the President,⁹⁴⁶ and that as head of the executive, the President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them,⁹⁴⁷ the Minister to whom the President's powers in terms of section 18A(3) and (4) are assigned will be discharging those duties on behalf of the President and not in his stead.

To put the above differently, the Minister's mandate will be given by the President and such Minister will have to report and account to the President on their exercise of the function mandated to them by section 18A(15). The Minister, therefore, will not have any authority to act independently and must execute their mandate in line with the President's instruction. Be that as it may, the limit on the Minister's powers does little to assuage the concerns regarding the unfettered power given to the President. Whether it is the President or a Minister acting on behalf of the President, the concerns raised in section 5.2.2 above persist.

5.3.5.1 Objecting views

The delegation of power by the President to a Minister in terms of section 18A(15) raises the question of accountability already discussed in section 5.3.1 above. While section 18A does not provide any accountability mechanism with respect to the exercise of the power given to the President in terms of section 18A(1-4), decisions of

⁹⁴⁴ Section 18A(3) of the Competition Act.

⁹⁴⁵ Section 18A(4) of the Competition Act.

⁹⁴⁶ Section 85 of the Constitution.

⁹⁴⁷ Section 91(2) of the Constitution.

the NSC in terms of section 18A(8-10) or the delegated power of a Minister in terms of section 18A(15), it has already been established in 5.3.1 that members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.⁹⁴⁸

The exercise of the power granted to a Minister in terms of section 18A(15) would thus be subject to the accountability principle. Given that the Constitution unequivocally provides for the accountability of the executive, and that all legislation must comply with the Constitution and promote its spirit,⁹⁴⁹ it is baffling why the legislature failed to specifically provide a section or subsection reiterating the accountability principle relating to all decisions made in terms of section 18A.

5.4 CONCLUSION

This chapter comprised a critical analysis of section 18A of the Competition Act. It dissected the section by providing an in-depth critique of each subsection contained in section 18A. It found that while national security is paramount to the citizens of each country and ought to be protected and promoted at all costs, the section falls short of providing an adequate contrivance for the advancement and promotion of national security in merger regulation.⁹⁵⁰

The chapter found that the concept of national security, in the context of merger regulation, is not appropriately defined. While a list of factors to be considered in a merger involving a foreign acquiring firm is provided in section 18A(4), the list is too

⁹⁴⁸ Section 92(2) of the Constitution.

⁹⁴⁹ Section 39(2) of the Constitution; see also Moosa F “Understanding the “Spirit, purport and objects” of South Africa’s Bill of Rights” (2018) 4(1) *Journal of Forensic, Legal & Investigative Sciences* at 4; Du Plessis L “The status and the role of legislation in South Africa as a Constitutional Democracy: Some exploratory observations” (2011) 14(4) *Potchefstroom Electronic Law Journal* at 95-97.

⁹⁵⁰ See part 5.2 above.

broad and uncertain.⁹⁵¹ It was observed that the constitution of the NSC by the President, the interpretation of the factors to be considered in terms of section 18A(4) and the determination of whether a threat to national security interests exists are left to the NSC and the power of the President to delegate any power or function to any Minister in terms of section 18A(15) make the potential for abuse of the provision due to lack of certainty and accountability not only possible but probable.⁹⁵² This lack of certainty and accountability may foster corruption, which has been a scourge that has plagued South Africa since democracy.⁹⁵³

The chapter further noted that section 18A does not provide a review mechanism for any decision(s) of the NSC.⁹⁵⁴ This is inconsistent with any constitutional democracy. Even though it has been argued that the rule of law encompassing the principles of legality and certainty points to the possibility that section 18A is justiciable and thus subject to judicial review, it does not assist that, five years from the date of the amendment, the section is yet to be tested as it has not come into effect as yet.

The chapter also noted that the processes and timeframes for consideration of a merger involving a foreign acquiring firm are far from clear. Section 18A(6), in particular, provides for a dual notification procedure, where a merger contemplated by section 18A must be notified to the competition authorities and the NSC simultaneously. This implies, on a plain reading, that these bodies have equal if not concurrent jurisdiction to consider, on the one hand, the effect of a proposed merger on competition and public interest, and on the other hand, the potential threat to national security.

However, on further reading, it appears that the NSC's powers outweigh those of the competition authorities as the authorities are precluded from determining a merger

⁹⁵¹ See part 5.3.2 above.

⁹⁵² See parts 5.3.1 and 5.3.5 above.

⁹⁵³ Pillay S "Corruption – the challenge to good governance: A South African perspective" (2004) 17(7) *The International Journal of Public Sector Management* 586.

⁹⁵⁴ See part 5.3.3 above.

where either the acquiring firm failed to notify the NSC or the NSC has made an adverse decision based on the level of threat to the national security of the Republic.⁹⁵⁵

Overall, the value of this chapter is that it has highlighted the shortcomings of section 18A and identified some challenges that the section may face once it is applied to a merger involving a foreign acquiring firm. While some solutions to remedy the defective subsections and paragraphs were suggested, section 18A is novel to the South African legal system and is yet to be tested. In that vein, it is therefore prudent to look to international and or foreign law and assess how national security has been treated regarding investment and competition law.

Consequently, the next chapter comprises a critical comparative analysis, where the consideration and regulation of NSI in mergers in the USA and Australia are assessed. The comparative analysis seeks to identify what has worked for these two jurisdictions to find solutions to the challenges identified in this chapter as well as lessons that may enhance the efficacy of the merger review process where there are proposed mergers that may raise NSI concerns.

⁹⁵⁵ See part 5.3.4 above.

CHAPTER 6

A COMPARATIVE ANALYSIS OF THE CONSIDERATION OF NATIONAL SECURITY IN THE COMPETITION AND INVESTMENT REGIMES OF THE USA AND AUSTRALIA*

6.1 INTRODUCTION

The preceding chapter comprised an in-depth analysis of the introduction of the 'national security clause' into the Competition Act.⁹⁵⁶ In terms of the clause, the President of the Republic is empowered to constitute an NSC to consider whether a proposed merger involving a foreign acquiring firm may have any adverse effects on the NSI of the country.⁹⁵⁷

The chapter recorded that while the consideration of national security interests was novel in South Africa, it was not a new phenomenon and other jurisdictions had been applying various forms of the national security test to mergers and investments for a long time.⁹⁵⁸ It is therefore accepted that States reserve the right under international law to block foreign investments on national security grounds, which right is part of customary international law and is frequently enforced through various international agreements and bilateral investment treaties.⁹⁵⁹ With that in mind, the chapter then provided a critique of section 18A, identifying its shortcomings and forecasting challenges that may be raised against it.⁹⁶⁰

* While this thesis is focused on section 18A of the Competition Act, which relates to national security interests in competition law, the jurisdictions chosen for the comparative analysis have review or screening mechanisms that relate to both competition and investment law. Reference will therefore be made to competition and or investment regimes but the lessons drawn from the chapter will be imported into the competition regime of South Africa.

⁹⁵⁶ Section 18A of the Competition Act.

⁹⁵⁷ Section 18A(1) of the Competition Act.

⁹⁵⁸ Kokkoris (2021); UNCTAD (2019); OECD (2008); part 5.2 above.

⁹⁵⁹ Lenihan (2018) at 32.

⁹⁶⁰ See part 5.3 above.

Because the consideration of NSI in merger regulation is novel in South Africa, and the section in the Competition Act relating to NSI has not yet been tested, it is prudent to consider the treatment of NSI in other jurisdictions in a bid to gauge South Africa's compliance with international best practices as well as anticipate potential solutions to the projected challenges raised in Chapter 5. To that end, this chapter assesses two jurisdictions, the USA and Australia, countries that provide for NSI consideration in mergers and investments, in a bid to draw lessons for South Africa.

The chapter comprises five sections, with the introduction being the first. Section 6.2 provides an overview of the American screening regime, reflecting on the scope of national security, the responsible body for consideration of national security and the process of consideration of a merger that has NSI concerns. Section 6.3 discusses the Australian position on NSI in mergers and investments. It also provides an overview of the scope of NSI, responsible authorities as well as the procedure followed in assessing a merger that has NSI concerns.

Section 6.4 considers the lessons that South Africa may take from the USA and Australian regimes. It seeks to answer some of the challenges raised in chapter 5 by looking at how the USA and Australian systems differ from the South African regulation and whether any of the mechanisms employed in those jurisdictions can be imported into the South African regime. Section 6.5 provides a summary of the chapter's key findings and concludes the chapter.

6.2 NATIONAL SECURITY INTERESTS CONSIDERATION IN THE USA

When considering the assessment of NSI in merger and investment regulation, it is appropriate to pay attention to the USA for several reasons. First, it is accepted that the USA is the birth of modern antitrust and competition law through the promulgation of the Sherman Act.⁹⁶¹ The USA, therefore, has a lengthy record of antitrust enforcement, including the consideration of NSI in mergers and investments.⁹⁶²

Second, it has been argued that the American regime of considering NSI in mergers and investment is “arguably among the most transparent and institutionalized in the world, and has been written about the most from theoretical, legal, and informational perspectives”.⁹⁶³ The ‘transparency’ of the US system may, therefore, be of value when contemplating how the South African system can be improved.

Lastly, from a literature review point of view, much has been written about the US system, with proponents and antagonists providing critical analyses of the system.⁹⁶⁴

⁹⁶¹ Sherman Antitrust Act 1890 15 U.S.C §§ 1-38; see Peritz RJR *Competition Policy in America: History, Rhetoric, Law* (1996) at 13-15; Munyai (2016) at 25-38; Tavuyanago (2021) at 16-17; see also 2.4.1 above.

⁹⁶² See Li J “Investing near the National Security Black Hole” 2017 14(1) *Berkeley Business Law Journal* at 3, where the Trading with the Enemy Act of 1917 is identified as the first law providing the President of the USA power to use national security/emergency to block foreign investment.

⁹⁶³ Lenihan (2018) at 34.

⁹⁶⁴ See for example Li (2017); Duan C “Of monopolies and monocultures: The intersection of patents and national security” (2020) 36(4) *Santa Clara High Technology Law Journal* 369-406, where national security interest in Artificial Intelligence, Telecommunications and Cybersecurity are discussed at length; Li X “National security review in foreign investments: A comparative and critical assessment on China and U.S. laws and practices” (2016) 13(1) *Berkeley Business Law Journal* 13(1) 255-311, where a comparative analysis between the national security regimes of the USA and China is conducted; Josselyn AS “National security at all costs: Why the CFIUS review process may have overreached its purpose” (2014) 20(5) *George Mason Law Review* 20(5) 1347-1380, where a critique of the USA national security review mechanism is conducted; Bush N “SinoCFIUS: Same wall, same guards, new watchtower” (2012) 8(1) *Competition Law International* at 45-46, where it is argued that national security interests run the risk of being viewed as an instrument of industrial policy and may deter foreign investments in the USA and China; Saha S “CFIUS now made in China: Dueling national security review frameworks as a countermeasure to economic espionage in the age of globalization” (2012)

There is, therefore a myriad of literature on the US system that is not readily available for other jurisdictions, which makes it a case worth studying.

In the ensuing subsections, I discuss the consideration of NSI in the USA by specifically focussing on four questions; what is the definition of national security? Who is responsible for considering NSI in mergers and investments? What is the process followed in an NSI assessment? And, are there any safeguards for the accountability of decision-makers? In answering these questions, it is hoped that solutions to some of the challenges raised in Chapter 5 may be found.

33(1) *Northwestern Journal of International Law & Business* 199-236, where it is argued that national security has been “weaponised” as industrial policy against Chinese interests and there are fears that congressional involvement may potentially lead to the politicization of foreign investment; Goldstein KB “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” (2011) 3(2) *Tsinghua China Law Review* 215-256, where a comparative analysis of the treatment of NSI in cross-border mergers is conducted; Hemphill TA “The “New Protectionism”: Industrial policy barriers to cross-border mergers and acquisitions” (2010) 14(2) *Competition and Change* at 138, where national security criteria in cross-border mergers have been argued to represent protectionism; Hui KY “National Security Review of Foreign Mergers and Acquisitions of Domestic Companies in China and the United States” (2009) *Cornell Law School Inter-University Graduate Student Conference Papers*. Paper 34 1-23, where a comparative analysis between US and Chinese treatment of national security is conducted, arguing that the consideration of national security in foreign investment is not protectionist; Travalini JR “Foreign Direct Investment in the United States: Achieving a Balance Between National Economy Benefits and National Security Interests” (2009) *Northwestern Journal of International Law and Business* 29(3) 779-800, where the need to balance the competing interests of protecting national security and opening the country up for investments is reiterated through an analyses of seminal cases in the USA; Georgiev GS “The reformed CFIUS regulatory framework: mediating between continued openness to foreign investment and national security” (2008) 25(1) *Yale Journal on Regulation* 125-134, where the need to balance the competing interests of being open to investments and protecting national security is discussed; Byrne MR “Protecting national security and promoting foreign investment: Maintaining the Exon-Florio balance” (2006) 67(4) *Ohio State Law Journal* 849-910, where several case studies are conducted to demonstrate the development of national security consideration in mergers involving a foreign acquiring entity; Lacey KA, George BC & George R “International telecommunications mergers: U.S. national security threats inherent in foreign government ownership of controlling interests” (2002) 4 *Tulane Journal of Technology and Intellectual Property* 29-58, where the authors analyse the use of national security in international telecommunication mergers.

6.2.1 'National security' in the context of mergers and investments in the USA

It has been observed elsewhere in this thesis that there is no universal definition of 'national security' within the global community.⁹⁶⁵ This is because what a country considers essential for its security differs depending on several factors including a country's size, resources, geography, historical context and political alignment(s).⁹⁶⁶

Due to the above factors, it also seems that the concept of national security is not cast in stone. It evolves depending on developments affecting a country's resources, politics and other external factors such as the development and emergence of global powerhouses. As such, it has been advanced by Lenihan that,

"[M]ost states are unwilling to explicitly define their understanding of the term 'national security' in relation to this type of foreign investment, in order to maintain the flexibility needed to respond to the evolving and context-dependent nature of the threats such transactions might pose."⁹⁶⁷

The USA, like South Africa, does not specifically define national security or NSI for merger regulation or investment screening. It, like many other countries, provides a list of the factors that may have an effect on the national security of the country. However, the striking difference with the South African approach is that the USA provides an expansive and determined list of national security factors to be considered in a merger or investment involving a foreign entity. This is done through various pieces of legislation that provide a working formulation or as Goldstein puts it "a functional legal

⁹⁶⁵ See 5.3.2 above.

⁹⁶⁶ See 5.3.2 above.

⁹⁶⁷ Lenihan (2018) at 33.

definition”⁹⁶⁸ of the wide concept of NSI with specific reference to the context and the area of the law the legislation regulates.⁹⁶⁹

For example, in the late '70s to '80s when the Committee on Foreign Investment in the United States (CFIUS) was established, national security was understood to refer to the potential effect on defence activity, with assessments focused on the threat posed by foreign investors, the vulnerability of the US business and the consequences for national security.⁹⁷⁰ However, the concept has since evolved and especially in the last decade, has been widened to include everything from defence and critical infrastructure to artificial intelligence, communications and advanced technology sectors, healthcare, nanotechnology, the media, healthcare, food security and water.⁹⁷¹

The national security factors which must be considered when assessing whether a merger involving a foreign entity poses a risk to the national security interests of the country are outlined in the Defence Production Act of 1950 (DPA),⁹⁷² as amended and supplemented by the Trade Expansion Act of 1962 (TEA),⁹⁷³ the Foreign Investment and National Security Act of 2007 (FINSIA)⁹⁷⁴ and more recently by the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA).⁹⁷⁵ In terms of the above laws, the 12 factors that must be taken into account when considering a merger’s effect on national security are:

⁹⁶⁸ Goldstein (2011) at 224.

⁹⁶⁹ See OECD “Investment policies related to national security: A survey of country practices” (14 June 2016) at https://www.oecd-ilibrary.org/investment-policies-related-to-national-security_5jlwrrf038nx.pdf (accessed 28 December 2023) at 72.

⁹⁷⁰ See s 702 of the Defense Production Act.

⁹⁷¹ Xueref-Poviac E *et al.* “The evolving concept of National Security” (6 December 2022) at <https://globalcompetitionreview.com/guide/foreign-direct-investment-regulation-guide/second-edition/article/the-evolving-concept-of-national-security> (accessed 28 December 2023).

⁹⁷² See s 721 of the Defense Production Act.

⁹⁷³ See s 232 of the Trade Expansion Act.

⁹⁷⁴ See s 2(4)-(7) of the Foreign Investment and National Security Act.

⁹⁷⁵ See s 1703 of the Foreign Investment Risk Review Modernization Act; Reville T “Rice paddies on the White House lawn: CFIUS & the foreign control requirement” (2020) 10(1) *Columbia Journal of Race and Law* at 136.

- domestic production needed for projected national defense requirements;
- the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services;
- the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security;
- the potential effects of the transactions on the sales of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical and biological weapons; and transactions identified by the Secretary of Defense as “posing a regional military threat” to the interests of the United States;
- the potential effects of the transaction on U.S. technological leadership in areas affecting U.S. national security;
- whether the transaction has a security-related impact on critical infrastructure in the United States;
- the potential effects on United States critical infrastructure, including major energy assets;
- potential effects on United States critical technologies;
- whether the transaction is a foreign government-controlled transaction;
- in cases involving a government-controlled transaction, a review of (A) the adherence of the foreign country to non-proliferation control regimes, (B) the foreign country’s record on cooperating in counter-terrorism efforts, (C) the potential for transshipment or diversion of technologies with military applications
- the long-term projection of United States requirements for sources of energy and other critical resources and materials; and

- such other factors as the President or the Committee may determine to be appropriate, generally or in connection with a specific review or investigation.⁹⁷⁶

Over and above the 12 factors, FIRRMA offered six new elements that CFIUS and the President ‘may’ consider as part of their deliberations through a sense of Congress provision.⁹⁷⁷ While CFIUS has been directed previously by the Treasury to focus its activities primarily on investments that had an impact on U.S. national defense security, the additional six factors, incorporate economic considerations into the CFIUS review process and refocuses CFIUS’s reviews and investigations on considering the broader rubric of economic security.⁹⁷⁸ The six factors that were added by FIRRMA are:

- whether a transaction involves a country of special concern that has a demonstrated or declared strategic goal of acquiring a type of critical technology or critical infrastructure that would affect United States leadership in areas related to national security;
- the potential national security-related effects of the cumulative control of, or pattern of recent transactions involving, any one type of critical infrastructure, energy asset, critical material, or critical technology by a foreign government or foreign person;

⁹⁷⁶ See Lenihan (2018) at 34; s 721(4)-(7) of the Defense Production Act; s 232(c) of the Trade Expansion Act; s 2(a)(3)-(7) of the Foreign Investment and National Security Act; s 1703 of the Foreign Investment Risk Review Modernization Act; see also Moran TH “Foreign acquisitions and national security: What are genuine threats? What are implausible worries?” in Drabek Z and Mavroidis PC (eds) *Regulation of foreign investment: Challenges to international harmonization* (2013) at 371-382, where the author categorizes the different threats to national security. The above-listed factors to be considered in an NSI assessment would fall into the suggested categories.

⁹⁷⁷ Section 1702 of FIRRMA.

⁹⁷⁸ CSR Report RL33388 “The Committee on Foreign Investment in the United States (CFIUS)” (26 February 2020) at 30.

- whether any foreign person engaging in a covered transaction with a United States business has a history of complying with United States laws and regulations;
- control of United States industries and commercial activity by foreign persons as it affects the capability and capacity of the United States to meet the requirements of national security, including the availability of human resources, products, technology, materials, and other supplies and services, and in considering “the availability of human resources,” should construe that term to include potential losses of such availability resulting from reductions in the employment of United States persons whose knowledge or skills are critical to national security, including the continued production in the United States of items that are likely to be acquired by the Department of Defense or other Federal departments or agencies for the advancement of the national security of the United States;
- the extent to which a covered transaction is likely to expose, either directly or indirectly, personally identifiable information, genetic information, or other sensitive data of United States citizens to access by a foreign government or foreign person that may exploit that information in a manner that threatens national security; and
- whether a covered transaction is likely to have the effect of exacerbating or creating new cybersecurity vulnerabilities in the United States or is likely to result in a foreign government gaining a significant new capability to engage in malicious cyber-enabled activities against the United States, including such activities designed to affect the outcome of any election for Federal office.⁹⁷⁹

⁹⁷⁹ Section 1702(c)(1-6) of the FIRRMA.

FIRRMA is an illustration of the constantly evolving nature and importance of national security.⁹⁸⁰ It has expanded the jurisdiction of the CFIUS to covered transactions which relate to critical infrastructure, critical technologies, and the sensitive personal data of US citizens.⁹⁸¹ FIRRMA includes a programme dedicated to the review of foreign investments, including non-controlling investments in critical technology entities, making it mandatory to notify any transaction that falls into the enumerated 27 industries considered as critical technology.⁹⁸² The Act also provides for special

⁹⁸⁰ Some of the key aims of promulgating FIRRMA were to (a) Broaden CFIUS' role by including for review certain real estate transactions in close proximity to a military installation or U.S. government facility or property of national security sensitivities; joint ventures ; any nonpassive investment in U.S. businesses involved in critical technology or critical infrastructure; any change in foreign investor rights regarding a U.S. business; transactions in which a foreign government has a direct or indirect substantial interest; and any transaction or arrangement designed to evade CFIUS regulations, (b) Allow for CFIUS to discriminate among foreign investors by country of origin in reviewing investment transactions by labelling some countries as being a country of special concern—one that poses a “significant threat to the national security interests of the United States”, or a country that is subject to export restrictions, is a state-sponsor of terrorism, or is subject to an arms embargo, (c) Provide for additional factors for consideration that CFIUS and the President can use to determine if a transaction threatens to impair U.S. national security. See CSR (3 July 2018) “Foreign Investment Risk Review Modernization Act (FIRRMA)” at <https://crsreports.congress.gov/product/pdf/IN/IN10924/4> (accessed 29 December 2023); U.S. Department of the Treasury “Summary of the Foreign Investment Risk Review Modernization Act of 2018” (n.d.) at <https://home.treasury.gov/system/files/206/Summary-of-FIRRMA.pdf> (accessed 30 December 2023); U.S. Department of the Treasury “Fact Sheet: Final CFIUS Regulations Implementing FIRRMA” (13 January 2020) at <https://home.treasury.gov/system/files/206/Final-FIRRMA-Regulations-FACT-SHEET.pdf> (accessed 30 December 2023).

⁹⁸¹ Mudzamiri & Osode (2021) at 8; s 1703 of FIRRMA.

⁹⁸² The list includes among other things: Aircraft Manufacturing; Electronic Computer Manufacturing; Guided Missile and Space Vehicle Propulsion Unit and Propulsion Unit Parts Manufacturing; Optical Instrument and Lens Manufacturing; Petrochemical Manufacturing; Research and Development in Nanotechnology; and Turbine and Turbine Generator Set Units Manufacturing. See CSR (2020) at 16; Weiss P “CFIUS adopts pilot program that imposes mandatory filing requirement for foreign acquisitions and investments involving critical technology in certain industry sectors” (26 October 2018) at <https://www.paulweiss.com/practices/transactional/mergers-acquisitions/publications/cfius-adopts-pilot-program-that-imposes-mandatory-filing-requirement?id=27722> (accessed 28 December 2023).

attention to be given to transactions that fall into an enumerated list of 28 areas considered as critical infrastructure.⁹⁸³

Regarding sensitive personal data, a list of 10 categories of data that is capable of being collected by businesses is protected.⁹⁸⁴ While the list of national security is not a closed list, it is comprehensive in that it covers an array of factors, and those factors are further defined and delineated. For instance, whereas critical technology and critical infrastructure are just some of the factors to be considered under the national security assessment, the US legislation then goes further and outlines what industries may be considered as ‘critical technology’ providing a list of 27 industries under which a transaction may fall into and what constitutes ‘critical infrastructure’ by providing a list of 28 areas under which a transaction may fall into.⁹⁸⁵

The above listing and identifying of national security interests is commendable as it gives extensive insight into what would trigger an NSI assessment for foreign entities intending on entering the US market. As Lenihan puts it, “one of the reasons the US list is so useful and instructive for understanding the common concerns states may have is that it is rare for states to provide such a rich and detailed set of examples”.⁹⁸⁶ Unfortunately, other countries, including South Africa, offer more limited examples of what constitutes NSI, that are not firmly established and therefore open to interpretation, which in turn has a detrimental effect on the principle of certainty.

⁹⁸³ The list includes among other things: Internet protocol or telecommunications service; Submarine cable systems; Satellite or satellite systems servicing the /Department of Defense; Any industrial resource manufactured pursuant to a “DX” priority rated contract; Any facility that manufactures certain specialty metals, chemical weapons, carbon. alloy and steel plates, and other specified materials; Electric energy storage systems; Certain financial market exchanges; Certain airports, maritime ports or strategic rail control systems ; and any industrial control system utilized by public water systems or treatment works. See CSR (2020) at 16.

⁹⁸⁴ The list includes among others: Genetic information; Financial data; Geolocation; and Health information. See CSR (2020) at 18-19.

⁹⁸⁵ CSR (2020) at 16; Weiss (2018).

⁹⁸⁶ Lenihan (2018) at 37.

It is also worth noting that while the President of the United States and CFIUS may 'add onto' the list of factors considered as NSI, there are comprehensively listed factors in legislation that are predetermined and must be considered.⁹⁸⁷ The determination of what constitutes NSI is thus not left open to the prerogative of the President, and whatever factors the President may want to add to the list, must be concomitant with the already provided and determined factors, and must be done in consultation with the CFIUS.

This position differs greatly with the South African situation, where a list is provided by section 18A(4) of the Competition Act, which the President may use to determine what constitutes NSI. The South African model leaves the determination of what constitutes NSI to the President, as opposed to the US model, which lists factors and provides for Presidential prerogative to add-on to the list. While the difference may seem negligible, it has a colossal impact on the principle of certainty. In the US system, an aspiring investor knows what factors to consider prior to concluding a transaction because the list of factors is determined and listed in legislation. On the other hand, an aspiring South African investor is left in the lurch regarding what factors constitute national security because the factors are undetermined and such determination is under the President's discretion.

6.2.2 Responsible body for consideration of NSI in mergers

When it comes to the consideration of NSI in merger review, the USA has separate and distinct systems requiring mergers to be notified to one set of regulators who monitor antitrust concerns and to another set of regulators responsible for national security

⁹⁸⁷ See for example Federal Register 87(181): Executive Order 14083 of September 15, 2022 "Ensuring robust consideration of evolving national security risks by the Committee on Foreign Investment in the United States" (20 September 2022) at <https://www.govinfo.gov/content/pkg/FR-2022-09-20/pdf/2022-20450.pdf> (accessed 31 December 2023), where the President of the United States, President Joe Biden provided elaboration on existing statutory actors and additional factors to be considered by the CFIUS.

review.⁹⁸⁸ In the first system, focussing on purely antitrust concerns, the first regulator responsible for the monitoring of antitrust concerns is the Department of Justice (DOJ), through its Antitrust Division.⁹⁸⁹ The DOJ is part of the executive branch of government and reviews mergers primarily under the authority of section 7 of the Clayton Act.⁹⁹⁰

The second regulator responsible for the monitoring and consideration of antitrust concerns in mergers is the Federal Trade Commission (FTC), through its Bureau of Competition.⁹⁹¹ The FTC is an independent agency akin to the South African Competition Commission, and it derives its existence and mandate from section 7A of the Clayton Act as amended by the Hart-Scott-Rodino Amendments.⁹⁹² The two regulators work together and in cooperation by providing guidance to businesses on complying with antitrust laws through the publication of merger guidelines and additional policy statements.⁹⁹³

The second system within the merger review regime of the USA relates to the consideration of transnational mergers, that have a potential effect on national security interests. Within this system, the body responsible for the consideration of NSI is the CFIUS.⁹⁹⁴ CFIUS is an independent federal interagency body chaired by the Secretary of the Treasury and comprised of nine cabinet members, two *ex officio* members, and

⁹⁸⁸ Goldstein (2011) at 220.

⁹⁸⁹ U.S. Department of Justice “Antitrust Division” at <https://www.justice.gov/atr/about-division> (accessed 28 December 2023)

⁹⁹⁰ Goldstein (2011) at 221; Clayton Antitrust Act of 1914 15 U.S.C § 12-27.

⁹⁹¹ FTC “Merger Review” (n.d.) at <https://www.ftc.gov/enforcement/merger-review> (accessed 28 December 2023).

⁹⁹² Hart-Scott-Rodino Antitrust Improvements Act of 1976 15 U.S.C § 18a.

⁹⁹³ FTC “Merger Review”.

⁹⁹⁴ U.S. Department of The Treasury “CFIUS Overview” (n.d.) at <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-overview> (accessed 28 December 2023); U.S. Department of The Treasury “CFIUS Laws and Guidance” (n.d.) at <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-laws-and-guidance> (accessed 28 December 2023); Congressional Research Service (CRS) (26 February 2020) “The Committee on Foreign Investment in the United States (CFIUS)” available at <https://crsreports.congress.gov/product/pdf/RL/RL33388> (accessed 28 December 2023).

other members as appointed by the President, that assists the President in reviewing the national security aspects of foreign direct investment in the U.S. economy.⁹⁹⁵

The committee operates pursuant to section 721 of the Defense Production Act and was established in 1975 through Executive Order 11858 by President Ford.⁹⁹⁶ Regarding the consideration of NSI, the CFIUS has virtually unlimited jurisdiction to review foreign investments and foreign transactions that may have an adverse effect on U.S. national security interests.⁹⁹⁷ As put by Arasasingham and DiPippo, “the committee’s work forms the basis for a key tool of U.S. economic statecraft: inbound investment screening. By reviewing, assessing, and controlling the flow of foreign investment into industries significant to U.S. national security.”⁹⁹⁸ The CFIUS therefore has a similar mandate to the newly established NSC in South Africa, in that it is responsible for considering NSI in investments, including mergers and acquisitions.

It is worth taking note that the committee is inter-agency and consists of nine Cabinet members which are the Secretaries of Treasury, Homeland Security, Justice, Commerce, Defence, State, Energy, the United States Trade Representative and the Director of Science and Technology Policy; it also consists of the Attorney General and two *ex officio* members (the Secretary of Labor and the Director of National Intelligence).⁹⁹⁹ There are also five executive office members elected to ‘observe, participate in and report to the President: the Director of the Office of Management and Budget; the Chairman of the Council of Economic Advisors; the Assistant to the President for National Security Affairs; the Assistant to the President for Economic

⁹⁹⁵ CRS (2020).

⁹⁹⁶ See Tavuyanago (2021) at 17; Josselyn (2014) at 1351; Georgiev (2008) at 126.

⁹⁹⁷ Oberheiden “The ultimate guide to CFIUS compliance” (n.d.) at <https://federal-lawyer.com/national-security/cfius/compliance/> (accessed 30 December 2023).

⁹⁹⁸ Arasasingham A & DiPippo G “Evaluating CFIUS in 2021” (9 August 2022) at <https://www.csis.org/analysis/evaluating-cfius-2021> (accessed 30 December 2023).

⁹⁹⁹ CSR (2020) at 23-24.

Policy; and the Assistant to the President for Homeland Security and Counterterrorism.¹⁰⁰⁰

The appointment of the members of these departments is apposite as a merger involving a foreign entity has the potential of having an impact on any or all of these strategic departments. It has also been noted that CFIUS' composition and structure [comprising on the one hand of Secretaries of Defense, Homeland Security and National Intelligence and on the other, Secretaries of Treasury, Commerce, the Trade Representative and the Assistant to the President for Economic Policy] reflects its stated objective of balancing national security and open investment policy.¹⁰⁰¹ The specificity regarding the appointment of members to the committee bodes well for the principle of certainty as it explicitly identifies the members that constitute it.

The same cannot be said about the South African system which merely provides that the President must appoint the NSC consisting of such cabinet members and other public officials as may be determined and appointed by the President.¹⁰⁰² The South African system lacks the particularity of the US system because it leaves appointment of members to the NSC to the discretion of the President. In that vein, the American system provides an example of how the NSC should be constituted in that there must be permanent offices that form part of the NSC supplemented by members of the public who may be specialists in law, economics, politics, governance and national security.

6.2.3 The process of considering NSI in Mergers

The process of considering whether a merger or investment transaction has any effects on the NSI of the USA comprises a 3-stage process. The first stage is prior to a formal filing or unilateral investigation and termed the 'informal stage'. The second stage

¹⁰⁰⁰ CSR (2020) at 24.

¹⁰⁰¹ See Tipler CM "Defining "National Security": Resolving ambiguity in the CFIUS regulations" (2014) 35(4) *University of Pennsylvania Journal of International Law* at 1232-1233.

¹⁰⁰² Section 18A(2) of the Competition Act.

involves a review of a transaction to determine whether there are any threats to the national security of the USA. The last stage, which only follows where it has been determined in the second stage that a proposed transaction may have an impact on the national security interests of the country, comprises an investigation into the potential threat(s) and a determination of whether the transaction must be allowed or blocked. Below I discuss the process in detail.

6.2.3.1 Informal stage

Before the institution of a formal review of NSI concerns in a merger or investment transaction, the CFIUS provides for an informal stage where parties to a transaction can consult the CFIUS and have members of the CFIUS conduct an unofficial review of a proposed transaction.¹⁰⁰³ The informal stage provides benefits for both the CFIUS and the parties to a proposed transaction. For the CFIUS, it allows staff to identify potential issues before the formal review with as much time as they deem necessary to review a transaction without facing the time constraints that arise under the formal CFIUS review process. For the parties, it allows them an opportunity to work on the potential national security risks before formally filing and thus avoid risking a potentially negative outcome of the formal review.¹⁰⁰⁴

The informal stage is an innovative way to promote compliance with the CFIUS review process while also benefiting potential investors at the same time by providing them the proverbial 'second bite at the cherry' in respect of the CFIUS review. The key factor that may draw-in investors is that the informal period allows for a 'review' to actually occur and an opportunity to remedy any NSI concerns *sotto voce* and without the risk of any negative findings. This has been praised by some firms as there is a belief that

¹⁰⁰³ CSR (2020) at 14-15.

¹⁰⁰⁴ CSR (2020) at 14-15; U.S. Department of the Treasury "Treasury releases final regulations to reform national security reviews for certain foreign investments and other transactions in the United States" (13 January 2020) at <https://home.treasury.gov/news/press-releases/sm872> (accessed 30 December 2023).

a negative CFIUS review outcome can potentially affect a firm's stock price and market share due to 'bad publicity' in the public's eyes.¹⁰⁰⁵ It is also in line with the 'mitigation, tracking and post consummation' process provided for by the Defense Production Act to ensure a seamless review of national security interests in a transaction involving a foreign entity.¹⁰⁰⁶

6.2.3.2 Formal stage – National Security Review

The formal review of a transaction that potentially has NSI can be instituted in one of two ways. Either through voluntary notification or through unilateral review which is instituted by the president or CFIUS.¹⁰⁰⁷

The first procedure, which the CFIUS notification process largely remains, is voluntary. Any party or parties to any covered transaction may initiate a review of the transaction by submitting a written notice of the transaction to the Chairperson of the Committee.¹⁰⁰⁸ CFIUS must then provide comments on a draft or formal written notice or accept a formal written notice not later than the date that is 10 business days after the date of submission of the draft or formal written notice.¹⁰⁰⁹ In the comments, the CFIUS must notify the parties whether a review will not be conducted, in which case the parties will receive a 'safe harbor' letter which limits CFIUS from subsequently initiating a review of a transaction except in certain limited circumstances.¹⁰¹⁰

¹⁰⁰⁵ CSR (2020) at 15.

¹⁰⁰⁶ See Tavuyanago (2021) at 17-18; s 721(l) of the Defense Production Act.

¹⁰⁰⁷ Josselyn (2014) at 1355-1356.

¹⁰⁰⁸ Section 721(b)(1)(C)(I) of the Defense Production Act.

¹⁰⁰⁹ Section 721(b)(1)(C)(II)(aa) of the Defense Production Act.

¹⁰¹⁰ The 45-day period was increased from 30 days by the FIRREA. See CSR (2020) at 22; U.S. Department of the Treasury "CFIUS Overview: Declarations" (n.d.) at <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-overview> (accessed 30 December 2023).

Alternatively, CFIUS must advise the parties in writing of an impending review, which is subject to a 45-day period.¹⁰¹¹

The second procedure of instituting a formal review is the ‘unilateral initiation of review’ under which the President or the CFIUS may initiate a review of a covered transaction.¹⁰¹² Such a unilateral review may include any new covered transaction,¹⁰¹³ or a re-review of a prior case where any party to the transaction submitted false or misleading material information to the Committee in connection with the Committee’s consideration of the transaction or omitted material information, including material documents, from information submitted to the Committee.¹⁰¹⁴

Whether parties voluntarily notify CFIUS of their transaction or whether an assessment is initiated by the President or by CFIUS, a formal review of the transaction must take place. The review is a mechanism to assess the presence of threats to NSI before carrying out a thorough investigation into whether a transaction must be allowed. During the review, CFIUS considers the factors affecting NSI provided for in FINSA and augmented by the six new factors in FIRRMA, to determine whether there are any threats to the national security of the country which may warrant further investigation.¹⁰¹⁵

It is also pertinent to note that during the 45-day review period, the Director of National Intelligence (DNI), an *ex officio* member of CFIUS, is required to carry out a thorough analysis of any threat to the national security of the United States of any merger, acquisition, or takeover.¹⁰¹⁶ This analysis is required to be completed within 30 days, as increased by FIRRMA from 20 days, of the receipt of a notification by CFIUS. In the

¹⁰¹¹ U.S. Department of the Treasury “CFIUS Overview: Notice Timetable” (n.d.) at <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-overview> (accessed 30 December 2023).

¹⁰¹² Section 721(b)(1)(D) of the Defense Production Act.

¹⁰¹³ Section 721(b)(1)(D)(i) of the Defense Production Act.

¹⁰¹⁴ Section 721(b)(1)(D)(ii) of the Defense Production Act

¹⁰¹⁵ Section 721(b)(2) of the Defense Production Act; CSR (2020) at 22.

¹⁰¹⁶ Section 1712(1)(A)(i) of the FIRRMA.

analysis, the Director of National Intelligence is required to seek and incorporate the views of ‘all affected or appropriate’ intelligence agencies with respect to the transaction.¹⁰¹⁷ While this requirement may seem wearying, it guarantees that those with the relevant expertise (intelligence agencies) are consulted, and their views are incorporated into an NSI assessment. Where CFIUS concludes that there are no national security concerns which warrant a further investigation, the review is terminated. However, where potential threats to national security are identified during the review, a formal investigation into the threats has to be undertaken.

6.2.3.3 Formal stage – National Security Investigation

A formal national security investigation, which must take no more than 45 days from notification,¹⁰¹⁸ must be conducted where any one of three conditions exists. The conditions are:

- (a) where CFIUS determines that the transaction threatens to impair the national security of the United States and that the threat has not been mitigated during or prior to a review of the transaction;
- (b) where the foreign person is controlled by a foreign government; or
- (c) where the transaction would result in control of any critical infrastructure of or within the United States by or on behalf of any foreign person, and that such impairment to national security has not been mitigated by assurances provided or renewed with the approval of the Committee.¹⁰¹⁹

During the 45-day investigation period, the CFIUS must determine the specific effects the transaction would have on the national security of the United States and take any

¹⁰¹⁷ Section 1712(1)(A)(ii) of the FIRRMA

¹⁰¹⁸ Section 721(b)(2)(C)(i) of the Defense Production Act. The 45-day period may, in extraordinary circumstances, be extended for one 15-day period; CSR (2020) at 22; U.S. Department of the Treasury “CFIUS Overview: Notice Timetable”.

¹⁰¹⁹ Section 721(b)(2)(B)(I-III) of the Defense Production Act; CSR (2020) at 22.

necessary actions to protect national security.¹⁰²⁰ The ‘necessary actions’ that the CFIUS may take include negotiating, imposing and enforcing mitigation agreements (restructuring or modifying the transaction) or conditions on the parties involved in a transaction in order to protect national security.¹⁰²¹

It is also apt to note that during the investigation, the Director of National Intelligence is also empowered to independently carry out a thorough analysis of any threat to the national security of the United States posed by any covered transaction, which includes the identification of any recognised gaps in the collection of intelligence relevant to the analysis and taking into account the views of all affected or appropriate agencies of the intelligence community with respect to the transaction.¹⁰²²

At the conclusion of the investigation or 45-day review period, the CFIUS can offer no recommendation (unconditionally approve), approve a mitigation agreement, or it can recommend to the President that they suspend or prohibit the investment.¹⁰²³ Once provided with a report and recommendation of the CFIUS, the President has 15 days within which to make a decision on the covered transaction.¹⁰²⁴ The President, however, is under no obligation to follow the recommendation of the CFIUS to suspend or prohibit an investment.

Before making a final decision, the President must consider; (a) whether there is credible evidence that a foreign transaction will impair national security; and (b) whether other laws are inadequate or inappropriate to protect national security,¹⁰²⁵ after which the President is granted authority to take ‘such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that

¹⁰²⁰ Section 721(b)(2)(A) of the Defense Production Act.

¹⁰²¹ Section 721(b)(5) of the Defense Production Act.

¹⁰²² Section 721(b)(4) of the Defense Production Act.

¹⁰²³ Section 721(b)(6) of the Defense Production Act; CSR (2020) at 22.

¹⁰²⁴ Section 721(d)(2) of the Defense Production Act; see U.S. Department of the Treasury “CFIUS Overview: Notice Timetable”.

¹⁰²⁵ Section 721(d)(4)(A) and (B) of the Defense Production Act.

threatens to impair the national security of the United States'.¹⁰²⁶ It has been advanced that section 721(d)(1) of the Defense Production Act grants the President 'almost unlimited authority' in terms of deciding on protecting the national security of the USA.¹⁰²⁷

The authority given to the President to 'do whatever it takes' to protect national security raises a concern that is also apparent in the South African regime. The evident questions being whether a decision made by the President, on the recommendation of the CFIUS to block a merger or investment based on national security interests can be challenged and whether the CFIUS is held to account. The below section provides an insight into the justiciability of a decision of the CFIUS and the President and the oversight mechanism available to hold CFIUS to account, with the aim of drawing potential lessons for South Africa.

6.2.4 Safeguards for Accountability

Accountability, as a form of liability "is understood as the obligation of the holder of the trust to provide accountability, presenting and reporting all activities that are his responsibility to the party who provides the trust has the authority to hold such accountability".¹⁰²⁸ Accountability is a key component of legitimacy, whether it be government or institutional legitimacy.¹⁰²⁹ In instances where specific powers are entrusted to an institution, such as the CFIUS or the President in respect of NSI

¹⁰²⁶ Section 721(d)(1) of the Defense Production Act.

¹⁰²⁷ CSR (2020) at 23.

¹⁰²⁸ Khotami IP "The Concept of Accountability in Good Governance" (2017) 163 *Advances in Social Science, Education and Humanities Research* at 30; Gberebie DE, Oyeyemi AI & Excellence-Oluye NO "The Challenges of Good Governance, Accountability of Governmental Agencies and Development in Nigeria" (2014) 6(2) *Acta Universitatis Danubius* at 83.

¹⁰²⁹ Khotami (2017) at 32; Roper J & Schoenberger-Orgad M "State-Owned Enterprises: Issues of Accountability and Legitimacy" (2011) 25(4) *Management Communication Quarterly* 693-709; Peters BG & Pierre J "Governance, Accountability and Democratic Legitimacy" in Benz A & Papadopoulos I *Governance and Democracy Comparing national, European and international experiences* (2006) at 29-43.

screening, there must be a mechanism to measure the performance and interrogate their decisions. In the above regard, the American system of NSI consideration provides two avenues to ensure the accountability of those entrusted with the authority to consider NSI in mergers and investments. The below paragraphs discuss these two avenues, judicial review and congressional oversight.

6.2.4.1 Justiciability of the CFIUS/ Presidential Decision

From the onset, it is appropriate to note that the decisions of the President of the United States, as the head of state and made in pursuance of his/her executive authority in line with the separation of powers doctrine, are non-justiciable.¹⁰³⁰ Regarding decisions based on a potential national security threat in covered transactions under the auspices of the DPA, FINSA and FIRRMA, the President's decision to suspend or prohibit a covered transaction is also not subject to judicial review.¹⁰³¹ However, to protect the constitutional rights of parties involved in a covered transaction, the process by which a recommendation to the President is made is subject to judicial review.¹⁰³² In essence, this means that the decision of the CFIUS and the process by which the CFIUS arrives at that decision is justiciable.

The justiciability of a decision of the CFIUS was definitively confirmed by the United States Court of Appeals for the District of Columbia in *Ralls v CFIUS et al.*¹⁰³³ The case is discussed in detail hereunder.

¹⁰³⁰ See Article II of the Constitution of the United States.

¹⁰³¹ Section 721(e)(1) of the Defense Production Act.

¹⁰³² Section 1715 of the FIRRMA; CSR (2020) at 23.

¹⁰³³ *Ralls Corporation, Appellant v Committee on Foreign Investments in the United States, Appellees* [United States Court of Appeals, District of Columbia Circuit] No. 13-5315 (15 July 2014) ("*Ralls v CFIUS et al.*")

6.2.4.1.1 *Ralls Corporation, Appellant v Committee on Foreign Investments in the United States, Appellees* [United States Court of Appeals, District of Columbia Circuit] No. 13-5315

In the above case, Ralls, an American company incorporated in Delaware and owned by two Chinese nationals, with the owners also being the CFO and Vice-President of a Chinese manufacturing company, was accused of ‘identifying U.S. opportunities for the construction of wind farms in which the wind turbines of Sany Electric, its affiliate, can be used and their quality and reliability demonstrated to the U.S. wind industry in comparison to competitor products’.¹⁰³⁴ In March 2012, Ralls purchased four wind farms which were American-owned limited liability companies and filed a notice with CFIUS regarding the acquisition. CFIUS conducted a national security review and found that the acquisition posed a national security threat and on 28 September 2012, the then US President, President Barack Obama issued an order blocking the transaction and ordering Ralls to:

- (a) divest itself of all interests in the Project Companies, their assets and their operations within ninety days of the Order;
- (b) remove all items from the project sites “stockpiled, stored, deposited, installed, or affixed thereon”;
- (c) cease access to the project sites;
- (d) refrain from selling, transferring or facilitating the sale or transfer of “any items made or otherwise produced by the Sany Group to any third party for use or installation at the project sites”; and
- (e) adhere to restrictions on the sale of the Project Companies and their assets to third parties.¹⁰³⁵

¹⁰³⁴ *Ralls v CFIUS et al* at para IB p7.

¹⁰³⁵ *Ralls v CFIUS et al* at para IB p11.

Ralls challenged President Obama's decision in the Court of Appeals for the District of Columbia after an initial challenge in the district court had been dismissed.

To summarise, the court found that the statutory bar to judicial review of the President's decision in terms of section 721(e) of the Defense Production Act did not preclude its consideration of a procedural due process claim,¹⁰³⁶ nor did the history of the statute provide clear and convincing evidence that Congress intended to preclude judicial review of Ralls' procedural due process challenge to the Presidential Order.¹⁰³⁷

The court further reasoned that while a reading of section 721(e) of the DPA provided that courts are barred from reviewing final action[s] the President takes to suspend or prohibit any covered transaction that threatens to impair the national security of the country, it did not, however, refer to the reviewability of a constitutional claim challenging the process preceding such presidential action.¹⁰³⁸

The *Appellees* argued that Ralls' due process challenge to the Presidential Order raised a non-justiciable political question as provided by the separation of powers doctrine and thus 'excluded from judicial review, those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch'.¹⁰³⁹ This claim was similar to one of the challenges that I identified in chapter five, regarding the justiciability of the national security clause in terms of section 18A of the Competition Act.

However, in addressing the issue of 'non-justiciable political question', the court made the distinction between a justiciable legal challenge and a non-justiciable political question concerning decisions of the Secretary of State in relation to Foreign Terrorist Organizations as previously decided in *People's Mojahedin Organization of Iran v.*

¹⁰³⁶ *Ralls v CFIUS et al* at para IIA p16.

¹⁰³⁷ *Ralls v CFIUS et al* at para IIA p20.

¹⁰³⁸ *Ralls v CFIUS et al* at para IIA p21.

¹⁰³⁹ *Ralls v CFIUS et al* at para IIB p23.

Department of State.¹⁰⁴⁰ The court found that Ralls' due process claim did not encroach on the prerogative of the political branches, did not require the exercise of non-judicial discretion and was susceptible to judicially manageable standards considering that interpreting the provisions of the Constitution was the role the framers entrusted to the judiciary.¹⁰⁴¹

The court found that the gravamen of Ralls' challenge to the Presidential Order, that the President deprived it of its constitutionally protected property interests in the Project Companies and their assets without due process of law, was justiciable.¹⁰⁴² The court thus, remanded the matter to the district court with instructions that Ralls be provided the requisite process and unclassified evidence on which the President relied and an opportunity to respond thereto.¹⁰⁴³

It is observed from the above case discussion that while Presidential powers in terms of the exercise of his/her executive authority remain non-justiciable in the USA, the reasoning behind a decision to block or prohibit a merger or investment based on national security and thus, the CFIUS review process is justiciable and is subject to judicial review. The US position is of particular importance when it comes to the South African situation regarding the national security clause. It has been argued in the preceding chapter that the decision of the NSC and the President in terms of section 18A could be construed as non-justiciable. While reasons for why such a decision is justiciable have been advanced, the decision in *Ralls v CFIUS et al* is paramount as it lends credence to the assertions that a decision of the NSC or the President must be subject to judicial review.

¹⁰⁴⁰ *People's Mojahedin Organization of Iran v. Department of State*, 182 F.3d 17 (D.C. Cir. 1999); *Ralls v CFIUS et al* at para IIB p25.

¹⁰⁴¹ *Ralls v CFIUS et al* at para IIB p27.

¹⁰⁴² *Ralls v CFIUS et al* at para IIC p28.

¹⁰⁴³ *Ralls v CFIUS et al* at para IIIB p47.

6.2.4.2 Congressional Oversight of the CFIUS' Decisions

Over and above a decision of the President, based on reasons provided by the CFIUS being justiciable, US legislation provides an accountability mechanism that is missing in the South African regime. In terms of the Defense Production Act, the chairperson of the CFIUS must submit a report to Congress before July 31 of each year on all of the reviews and investigations of covered transactions completed during the 12-month period covered by the report.¹⁰⁴⁴ The report must contain among other things:

- a list of all notices filed and all reviews or investigations of covered transactions completed during the period;
- a description of the outcome of each review or investigation, including whether an agreement was entered into or condition was imposed;
- basic information on each party to each such transaction;
- the nature of the business activities or products of the United States business with which the transaction was entered into or intended to be entered into;
- the types of security arrangements and conditions the Committee has used to mitigate national security concerns about a transaction, including a discussion of the methods that the Committee and any lead agency are using to determine compliance with such arrangements or conditions;
- a detailed discussion of all perceived adverse effects of covered transactions on the national security or critical infrastructure of the United States that the Committee will take into account in its deliberations during the period before delivery of the next report;
- the methods used by the Committee to identify non-notified and non-declared transactions;
- the number of transactions identified through the process established under that subsection during the reporting period; and

¹⁰⁴⁴ Section 721(m)(1-2) of the Defense Production Act.

- the number of such transactions flagged for further review.¹⁰⁴⁵

This oversight function of Congress on the CFIUS was increased by the FINSA from one report a year to an obligation on the CFIUS to provide, upon request from any Member of Congress, briefings on a covered transaction for which all action has concluded, or on compliance with a mitigation agreement or condition imposed with respect to such transaction, on a classified basis, if deemed necessary by the sensitivity of the information.¹⁰⁴⁶

FINSA further augmented Congress' oversight by mandating that the President and such agencies as the President shall designate must include in the annual report: (a) an evaluation of whether there is credible evidence of a coordinated strategy by one or more countries or companies to acquire United States companies involved in research, development, or production of critical technologies for which the United States is a leading producer; and (b) an evaluation of whether there are industrial espionage activities directed or directly assisted by foreign governments against private United States companies aimed at obtaining commercial secrets related to critical technologies.¹⁰⁴⁷

The FIRRMA also buttressed the oversight function of Congress by providing for congressional access to a classified briefing on the CFIUS' recommendation to the President. Further, an unclassified version of the report (to Congress), as appropriate, and consistent with safeguarding national security and privacy, is to be made available to the public.¹⁰⁴⁸ Lastly, FIRRMA also increased congressional oversight regarding Chinese investments by mandating that not later than two years after enactment of FIRRMA, and every two years thereafter through 2026, the Secretary of Commerce is required to submit to Congress and CFIUS a report on foreign direct investment

¹⁰⁴⁵ Section 721(m)(1-2) of the Defense Production Act.

¹⁰⁴⁶ Section 7(a)(1) of the FINSA.

¹⁰⁴⁷ See s 7(b)(3)(A) of the FINSA.

¹⁰⁴⁸ See s (a)(4) of the FIRRMA.

transactions made by entities of the People's Republic of China in the United States.¹⁰⁴⁹ Such report on foreign direct investment transactions from China is to include among others:

- the total foreign direct investment from the People's Republic of China in the United States, including total direct investment disaggregated by ultimate beneficial owner;
- a breakdown of investments from the People's Republic of China in the United States by value using values between less than \$50,000,000 and equal to or exceeding \$5,000,000,000;
- A breakdown of investments from the People's Republic of China in the United States by investment type in the form of businesses established and businesses acquired;
- a list of companies incorporated in the United States purchased through government investment by the People's Republic of China;
- an analysis of patterns in the investments relating to Chinese investments; and
- an identification of any limitations on the ability of the Secretary of Commerce to collect comprehensive information that is reasonably and lawfully available about foreign investment in the United States from the People's Republic of China on a timeline necessary to complete reports every 2 years.¹⁰⁵⁰

While some have argued that the increased congressional oversight might actually be detrimental to foreign investment in the US because Congress has previously used political pressure to delay and prevent unpopular foreign investors' deals to further protectionist concerns,¹⁰⁵¹ I am of the view that the above provisions and adaption of

¹⁰⁴⁹ Section 1719(b)(1) of the FIRRMA.

¹⁰⁵⁰ See s 1719(b)(2) of the FIRRMA.

¹⁰⁵¹ See Gavioli MGM "National security or xenophobia: The impact of the Foreign Investment and National Security Act ("FINSA") in foreign investment in the U.S." (2011) 2(1) *The William Mitchell Law Raza Journal* at 29.

congressional oversight are highly commendable as they ensure that the CFIUS is held to account for the authority vested in it. Due to the number of reports and the impromptu nature of requests for briefings on a transaction by any member of Congress, the CFIUS must tread a very fine thread regarding executing its mandate. While the USA provides for congressional oversight over the decisions of the CFIUS and the President, President Trump has often violated the US Congress' call to account.¹⁰⁵² This, however, should not be construed to mean that there is no oversight or accountability mechanism; rather, that President Trump, as some have termed, is a 'Rogue President'.¹⁰⁵³ The congressional oversight through regular reporting and spontaneous requests for briefings ensures that CFIUS in executing its directive, cannot be used as a tool for industrial or political machinations that fall outside the scope of its mandate.

6.3 NATIONAL SECURITY INTERESTS CONSIDERATION IN AUSTRALIA

Australia is one of the countries that has a strong foreign investment screening mechanism, as identified by the OECD.¹⁰⁵⁴ That alone would warrant reliance on Australia as a comparator. However, there are other reasons why it is pertinent to use a study of Australia to develop the South African regulation of national security in mergers.

First, South Africa and Australia have a long-established diplomatic and trade relationship dating back to 1947, with existing Bilateral Agreements between the two

¹⁰⁵² Lincicome S and Manak I (2021) "Protectionism or National Security? The Use and Abuse of Section 232" at <https://www.cato.org/policy-analysis/protectionism-or-national-security-use-abuse-section-232> (accessed 1 February 2025); Lester and Zhu (2019).

¹⁰⁵³ Dickinson LT "Protecting the U.S. National Security State from a Rogue President" (2025) 16(1) *Harvard National Security Journal* 1-73.

¹⁰⁵⁴ OECD (April 2023) "Freedom of Investment Process: Investment policy developments in 61 economies between 16 October 2021 and 15 March 2023" at <https://www.oecd.org/daf/inv/investment-policy/Investment-policy-monitoring-April-2023.pdf> (accessed 31 December 2023) at 17-18.

countries.¹⁰⁵⁵ Secondly, as trading partners, South Africa makes up for more than a third of total merchandise goods trade between Africa and Australia,¹⁰⁵⁶ with South Africa being Australia's largest export market in Africa with a two-way trade in goods and services totalling AUD 3.141 billion in 2021.¹⁰⁵⁷ South Africa is also Australia's most significant investment partner in Africa, with bilateral investment valued at AUD 15.2 billion in 2021.¹⁰⁵⁸ With such a strong mutual trading and investment relationship, it is appropriate to seek a harmonisation or at least alignment of trade and investment policies to ensure continued and growing relations. A study of the Australian merger and investment regime is therefore sound as it may provide lessons for its South African counterpart.

Thirdly, Australia's regime for merger consideration is similar to the South African one, where competition authorities are mandated to consider proposed mergers and their impact on competition. In the Australian system, the Australian Competition and Consumer Commission (ACCC) plays a similar role to the South African Competition Commission and is mandated by comparable legislation.¹⁰⁵⁹ However, when it comes to the consideration of mergers that potentially have an adverse effect on the national

¹⁰⁵⁵ See DIRCO "Bilateral Relations: Australia" (n.d.) at <https://www.dirco.gov.za/bilateral-relations/> (accessed 31 December 2023).

¹⁰⁵⁶ Australian Government, Department of Foreign Affairs and Trade "Australia – South Africa Bilateral Economic Relationship" (September 2020) at <https://southafrica.embassy.gov.au/files/pret/Australia%20South%20Africa%20bilateral%20economic%20relationship%20Sep20%20AUD.pdf#:~:text=Trade%20in%20services%20between%20South%20Africa%20and%20Australia,Africa%20the%2026th%20top%20trading%20nation%20for%20Australia>. (accessed 31 December 2023).

¹⁰⁵⁷ Australian Government, Department of Foreign Affairs and Trade "Countries, economies and regions: South Africa" (n.d.) at <https://www.dfat.gov.au/geo/south-africa> (accessed 31 December 2023).

¹⁰⁵⁸ Australian Government, Department of Foreign Affairs and Trade (n.d.) "Countries, economies and regions: South Africa".

¹⁰⁵⁹ See ACCC "About us" (n.d.) at <https://www.accc.gov.au/about-us> (accessed 31 December 2023); ss 50 and 50A of the Competition and Consumer Act 2010; Part 2 of the Foreign Acquisitions and Takeovers Act 92 of 1975.

security of the country, both Australia and South Africa have separate committees that conduct national security screening.¹⁰⁶⁰

These similarities make an analysis of the Australian regime pertinent as any successes can easily be transplanted to the South African regime. Lastly, because of the history of the two countries, being two groups of colonies, and later dominions, in the British Empire and still being members of the Commonwealth, with the exception of New Zealand, South Africa has been the dominion and former dominion with which Australia has had most interaction.¹⁰⁶¹ Given the history, similarities in legislation and trade relationship between the two countries, a comparative analysis of their merger regulation regimes with respect to national security is rational.

In the below subsections, I follow a similar path as with the discussion on the USA and discuss the consideration of NSI in Australia by particularly focussing on the same four questions: what is the definition of national security? Who is responsible for considering NSI in mergers and investments? What is the process followed in an NSI assessment? And are there any safeguards for the accountability of decision-makers?

6.3.1 ‘National security’ in the context of mergers and investments in Australia

Australia, like many other jurisdictions, welcomes foreign investment, including investments through mergers and acquisitions, which foreign investment, it realises plays a crucial role in the Australian economy. However, Australia is also not oblivious

¹⁰⁶⁰ Australian Government, Productivity Commission “Foreign Investment in Australia: Productivity Commission Research Paper” (June 2020) at <https://www.pc.gov.au/research/completed/foreign-investment/foreign-investment.pdf> (accessed 31 December 2023); Australian Government, The Treasury “Foreign investment in Australia: Foreign Investment Review Board” (n.d.) at <https://foreigninvestment.gov.au/investing-in-australia/about-us/firb> (accessed 31 December 2023).

¹⁰⁶¹ See Davidson J “‘Same difference’: Australia and South Africa” (2006) 95(387) *The Round Table* at 693; The Commonwealth “Member countries” (n.d.) at <https://thecommonwealth.org/our-member-countries> (accessed 31 December 2023).

to the fact that while foreign investment provides significant benefits, there is a need to mitigate the risk where individual investments may be contrary to Australia's national [security] interest.¹⁰⁶² It is important to note that at the onset of regulation of mergers and investments, Australia did not specifically use the term 'national security interests', but rather referred to 'national interest'.¹⁰⁶³

As with the examples of South Africa and the USA, the concept of 'national interest' in Australia is not narrowly defined, rather, as posited by Sawyer and Johnson, it was deliberately undefined in order to allow discretion and flexibility to allow the rejection of mergers deemed to be contrary to the national interest.¹⁰⁶⁴ It seems that there was a deliberate effort by the drafters of the Australian legislation regulating mergers and foreign investments to use the term national interest as opposed to national security. As Bath notes, "the national interest test in Australia is ostensibly wider than national security, as it incorporates within it the concept of national security in the sense of defence-related issues".¹⁰⁶⁵

To this end, the wide concept of national interest encompasses "the security and prosperity of Australia and Australians".¹⁰⁶⁶ The Foreign Acquisitions Review Board has also attempted to define the parameters of national interest, citing that it encompasses a range of factors, which include national security, competition, other Australian

¹⁰⁶² Australian Government, The Treasury "Evaluation of the 2021 foreign investment reforms: Final report" (10 December 2021) at <https://treasury.gov.au/sites/default/files/2022-02/p2022-244363.pdf> (accessed 31 December 2023) at 5.

¹⁰⁶³ Sawyer K & Johnson J "Does the national interest matter? A case study of a cross-border merger" (2007) 4(4) *Corporate Ownership and Control* at 345.

¹⁰⁶⁴ Sawyer & Johnson (2007) at 345; see also Ghori U "Defining Australian national interest in regulating foreign investments" in Farrar J, Hiscock M & Lo VI (eds) *Australia's trade, investment and security in the Asian century* Hong Kong: World Scientific Publishing (2015) at 135, where the author also acknowledges that the definition of "national interest" has been deliberately kept vague.

¹⁰⁶⁵ Bath V "Foreign investment, the national interest and national security - Foreign direct investment in Australia and China" (2012) 34(1) *Sydney Law Review* at 6.

¹⁰⁶⁶ Australian Government "Advancing National Interest: Australia's Foreign and Trade White Paper" (2003) at <https://apo.org.au/sites/default/files/resource-files/2003-02/apo-nid74888.pdf> (accessed 31 December 2023) at vii, xx; Bath (2012) 5 at 12.

government policies, the impact on the economy and the community and the character of the investor.¹⁰⁶⁷

However, lately there have been significant reforms to Australian legislation, with a specific focus on national security as a separate test to the traditional national interest test in regard to mergers and investments.¹⁰⁶⁸ National security is not specifically defined and a functional definition can be found in the ‘Foreign Investment in Australia: Productivity Commission Research Paper’, which provides that “National security — the safety of a country from war, espionage, serious and organised crime, biosecurity threats, terrorism and cyber-attacks — is the most important function of government.”¹⁰⁶⁹ The functional definition draws on Moran’s categorisation of national security threats into three groupings *viz*:

- Dependency on foreign-controlled suppliers, creating opportunities for the supplier to delay, deny, or place conditions on the provision of crucial goods or services;
- The transfer or leakage of sensitive national security technology or expertise to a foreign-controlled entity; and

¹⁰⁶⁷ Voon T & Merriman D “Is Australia’s Foreign Investment Screening Policy consistent with international investment law?” (2022) 23 *Melbourne Journal of International Law* at 3.

¹⁰⁶⁸ See Voon & Merriman (2022) at 2; Australian Government, Productivity Committee (2020) “Foreign Investment in Australia” at 9-10, where it is recorded that “In June 2020, the Australian Government announced that it would be creating a new “national security” test for investments that raise national security concerns and which fall below existing monetary thresholds” at 16; Australian Government, The Treasury “Evaluation of the 2021 foreign investment reforms at 16; Henderson R “Australia adds national security test to foreign investment rules” (5 June 2020) at <https://www.ft.com/content/f3a1833a-493a-43a8-babb-f2ff3dbc4cc1> (accessed 31 December 2023); PWC Australia “New foreign investment laws in place from 1 January 2021” (10 December 2020) at <https://www.pwc.com.au/legal/publications/new-foreign-investment-laws.html> (accessed 31 December 2023).

¹⁰⁶⁹ Australian Government, Productivity Committee (2020) “Foreign Investment in Australia: Productivity Commission Research Paper” at 64.

- The creation of an additional channel for infiltration, espionage or sabotage by a foreign power.¹⁰⁷⁰

The Australian Government also issues guidance notes for foreign investors on investment in Australia,¹⁰⁷¹ with one of the guidance notes relating to national security.¹⁰⁷² The guidance note on national security acknowledges the importance of foreign investment but is also alive to the fact that “foreign investment carries risks related to the potential access and control investors may obtain over organisations and assets and when used as a vector for malign activities, foreign investment can harm national security”.¹⁰⁷³

To effectively assess national security concerns in investments, including mergers, reforms in 2021 introduced two new classes of actions: notifiable national security actions and reviewable national security actions.¹⁰⁷⁴ The actions were introduced to provide the Government with greater visibility and powers over foreign investments that may raise national security concerns but are below the monetary and control thresholds that trigger the national interest test. Therefore, proposed investments that satisfy the above criteria are screened under a narrower national security test.¹⁰⁷⁵

Under the reforms, national security interest relates to transactions that are taken or proposed to be taken by a foreign person where they intend to:

¹⁰⁷⁰ Australian Government, Productivity Committee (2020) “Foreign Investment in Australia: Productivity Commission Research Paper” at 65-66.

¹⁰⁷¹ Australian Government, The Treasury “Foreign investment in Australia”.

¹⁰⁷² Australian Government, The Treasury (2023) “Guidance Note 8: National Security” https://foreigninvestment.gov.au/sites/foreigninvestment.gov.au/files/2023-07/guidance_note_8_national_security.pdf (accessed 1 January 2024).

¹⁰⁷³ Australian Government, The Treasury (2023) “Guidance Note 8: National Security” at 1.

¹⁰⁷⁴ Australian Government, The Treasury (2021) “Evaluation of the 2021 foreign investment reforms Final report” at 16.

¹⁰⁷⁵ Australian Government, The Treasury (2021) “Evaluation of the 2021 foreign investment reforms Final report” at 16.

- to start a national security business;
- to acquire a direct interest in a national security business;
- to acquire a direct interest in an entity that carries on a national security business;
- to acquire an interest in Australian land that, at the time of acquisition, is national security land; or
- to acquire a legal or equitable interest in an exploration tenement in respect of Australian land that, at the time of acquisition, is national security land.¹⁰⁷⁶

The above factors to be considered under the national security test are further defined to provide greater clarity for foreign investors. A national security business is a business that is carried on wholly or in part within Australia and it:

- is a responsible entity (within the meaning of the Security of Critical Infrastructure Act)¹⁰⁷⁷ for an asset;
- is an entity that is a direct interest holder in relation to a critical infrastructure asset (within the meaning of those terms in the SOCI Act)¹⁰⁷⁸;
- is a carrier or nominated carriage service provider to which the Telecommunications Act¹⁰⁷⁹ applies;

¹⁰⁷⁶ See Australian Government, The Treasury (2021) “Evaluation of the 2021 foreign investment reforms Final report” at 16; Australian Government, The Treasury (2023) “Australia’s Foreign Investment Policy” at 11; Australian Government, The Treasury (2023) “Guidance Note 8: National Security” at 3; Foreign Investment Review Board (4 April 2021) “Foreign Investment Review Board Annual Report 2020-21” at 62.

¹⁰⁷⁷ Security of Critical Infrastructure Act 29 of 2018 (“SOCI Act”).

¹⁰⁷⁸ In terms of s 5 of the SOCI Act, as amended by the Security Legislation Amendment (Critical Infrastructure) Act 124 of 2021 and the Security Legislation Amendment (Critical Infrastructure Protection) Act 33 of 2022, the term “critical infrastructure asset” is understood to include assets such as a critical telecommunications asset, broadcasting asset, data storage asset, financial market infrastructure asset, energy market operator asset, hospital, education asset, public transport asset, and defence industry asset (which are all defined in terms of the SOCI Act).

¹⁰⁷⁹ Telecommunications Act 47 of 1997.

- develops, manufactures or supplies critical goods or critical technology that are, or are intended to be, for a military use, or an intelligence use, by defence and intelligence personnel, the defence force of another country, or a foreign intelligence agency;
- provides, or intends to provide, critical services to defence and intelligence personnel, the defence force of another country, or a foreign intelligence agency;
- stores or has access to information that has a security classification;
- stores or maintains personal information of defence and intelligence personnel collected by the Australian Defence Force, the Defence Department or an agency in the national intelligence community which, if accessed, could compromise Australia's national security;
- collects, as part of an arrangement with the Australian Defence Force, the Defence Department or an agency in the national intelligence community, personal information on defence and intelligence personnel which, if disclosed, could compromise Australia's national security;
- stores, maintains or has access to personal information on defence and intelligence personnel that has been collected as part of an arrangement with the Australian Defence Force, the Defence Department or an agency within the national intelligence community, which, if disclosed, could compromise Australia's national security.¹⁰⁸⁰

National security land is defined as:

- defence premises (within the meaning of the Defence Act)¹⁰⁸¹; or

¹⁰⁸⁰ Foreign Investment Review Board (2021) at 62.

¹⁰⁸¹ See s 71A (1) of the Defence Act 20 of 1903, where defence premises means “an area of land or any other place (whether or not it is enclosed or built on), a building or other structure, or a prohibited area within the meaning of Defence, in Australia and is owned or occupied by the Commonwealth for use by the Defence Force or the Department.”

- land in which the Commonwealth, as represented by an agency in the national intelligence community, has an interest that:
 - is publicly known; or
 - could be known upon the making of reasonable inquiries.¹⁰⁸²

The above definitions of what constitutes a national security business and national security land offer a better understanding of what would constitute national security interests. This bodes well for the principle of legal certainty, which is a fundamental tenet that investors look for when considering making a foreign investment. The Australian consideration of national security is also separate from the consideration of national interest, which the Government makes a point to distinguish.¹⁰⁸³

Investors are therefore provided with sufficient information with which to make an informed decision about whether their intended investment will trigger any of the two tests. I believe that while national security is not defined, as in many other countries, Australia does well in providing a concise list of factors to be considered under the national security test, which factors are further elaborated on by providing decisive definitions and examples of the factors. Instead of muddying the waters by providing an expansive and open-ended list of factors that fall within the ambit of national security, Australia only lists five factors – relating to two national security concerns (national security business and national security land).

The above, coupled with accompanying definitions of national security business and national security land, creates a clear distinction between matters that are of national security and those of national interest, which is broader and open to a wider interpretation. The South African position it seems, fails to make this distinction and it can be argued that some of the factors listed in section 18A(4) of the Competition Act relate to national interest rather than national security. The South African legislators

¹⁰⁸² Foreign Investment Review Board (2021) at 62.

¹⁰⁸³ Australian Government, The Treasury (2023) “Australia’s Foreign Investment Policy” at 8-11.

therefore missed an opportunity to make the above distinction and in doing so, conflated national security and national interest.

6.3.2 Responsible body for consideration of NSI in mergers

The review of mergers in Australia takes place under the auspices of the Competition and Consumer Act (CCA)¹⁰⁸⁴ and the Foreign Acquisitions and Takeovers Act (FATA).¹⁰⁸⁵ Under the CCA, the Australian Competition and Consumer Commission (ACCC) is responsible for the review of mergers to determine whether they are likely to substantially lessen competition in breach of the law.¹⁰⁸⁶ However, a merger involving a foreign person, who seeks to acquire control of an Australian entity and thus intends on concluding a 'significant action' is reviewed under the auspices of the FATA by the Foreign Acquisitions Review Board (FIRB).¹⁰⁸⁷

Under the FATA, the Treasurer is empowered with the authority to block an investment, including an investment through a merger, based on the level of threat of such investment to the national security of Australia.¹⁰⁸⁸ The Foreign Investment Reform Act also inserted a new section 66A into FATA which provides for 'national security review actions'. In terms of the section, the Treasurer may review a reviewable national security action¹⁰⁸⁹ or a significant action that is not a notifiable action or notifiable

¹⁰⁸⁴ Competition and Consumer Act of 2010 No. 51 of 1974.

¹⁰⁸⁵ Foreign Acquisitions and Takeovers Act 92 of 1975.

¹⁰⁸⁶ ACCC "About mergers" (n.d.) at <https://www.accc.gov.au/business/mergers/about-mergers> (accessed 31 December 2023).

¹⁰⁸⁷ See Foreign Investment Review Board (4 April 2021) at 1-10; Australian Government (n.d.) "Foreign Investment Review Board"; Australian Government, The Treasury "Foreign investment in Australia".

¹⁰⁸⁸ See s 3 of the FATA as amended by Schedule 1 of the Foreign Investment Reform (Protecting Australia's National Security) Act 114 of 2020; see also ss 66 and 67 of FATA in relation to the powers of the treasurer.

¹⁰⁸⁹ Sections 55D, 55E and 55F of the FATA

national security action, if the Treasurer considers that the action may pose a national security concern.¹⁰⁹⁰

Such a review based on national security grounds may be instituted up to 10 years after the investment or merger.¹⁰⁹¹ Under the new reforms, the Treasurer may also, as a 'last resort',¹⁰⁹² conduct a national security review to deal with national security risks arising out of an action, including previously considered actions.¹⁰⁹³ After conducting the national security review, the Treasurer may impose various conditions on the investment, prohibit the transaction or order divestment.¹⁰⁹⁴

In executing its mandate relating to the review of investments under FATA, the office of the Treasurer is assisted by the Foreign Acquisitions Review Board (FIRB). The FIRB is a non-statutory body established in 1976 to advise the Treasurer and the Government on foreign investment matters. As far as the screening of an investment or a merger (including on national security grounds) is concerned, the Board's functions are advisory only and it does not make any decisions. The responsibility for making decisions on foreign investment policy and investment proposals rest solely with the Treasurer.¹⁰⁹⁵ The FIRB's functions also include fostering an awareness, both in Australia and abroad, of the Government's foreign investment policy and providing

¹⁰⁹⁰ Section 66A(1) of the FATA.

¹⁰⁹¹ Section 66A(2) of the FATA; see also Voon & Merriman (2022) 1 at 3.

¹⁰⁹² See s 66 of the FATA; Schedule 1, Division 3 of the Foreign Investment Reform (Protecting Australia's National Security) Act; Schedule 1, Part 3 of the Foreign Investment Reform (Protecting Australia's National Security) Act.

¹⁰⁹³ This may include among others: actions where no objection notification had been previously given, where an interim order was made in relation to the action but the Treasurer did not make a final order, and where parties to the transaction made false or misleading statements or omitted a matter that was material, where the business structure or organisation of the person has changed, or where the circumstances in the market in which the action was taken have materially changed. See s 79A(1)(a)-(b) of the FATA.

¹⁰⁹⁴ Schedule 1, Part 3, Item 234 of the the Foreign Investment Reform (Protecting Australia's National Security) Act.

¹⁰⁹⁵ Foreign Investment Review Board (2021) at 1.

guidance, where necessary, to foreign investors so that their proposals conform with the policy.¹⁰⁹⁶ To this end, the FIRB's responsibilities can be summarised as:

- examining proposed investments that are subject to the foreign investment framework, which encompasses the FATA and supporting legislation and regulations;
- making recommendations to the Treasurer and other Treasury portfolio ministers on the national interest implications of these proposals;
- advising the Treasurer on the operation of the framework and the Act;
- fostering an awareness and understanding, both in Australia and abroad, of Australia's foreign investment policy and the Act; and
- providing guidance to foreign persons and their representatives or agents on the framework and the Act.¹⁰⁹⁷

The FIRB currently comprises six members, of which only one person is a full-time executive member and the other five are part-time members.¹⁰⁹⁸ In relation to the appointment of board members, the FIRB states that the Government seeks to attract members to the Board with deep knowledge and experience in a range of sectors to actively contribute to the Board's responsibilities. Further, strong probity procedures

¹⁰⁹⁶ See Tavuyanago (2021) at 20-21; Australian Government, The Treasury "Making Transparency Transparent: An Australian Assessment - Chapter 3: Foreign Direct Investment Policy" (1 March 1999) at <https://treasury.gov.au/publication/making-transparency-transparent-an-australian-assessment/chapter-3-foreign-direct-investment-policy> (accessed 1 January 2024).

¹⁰⁹⁷ Foreign Investment Review Board (2021) at 1-2.

¹⁰⁹⁸ See Australian Government, The Treasury (n.d.) "Foreign investment in Australia: Foreign Investment Review Board", where it is also noted that the position of Executive Member is held by the First Assistant Secretary of Treasury's Foreign Investment Division, who is the link between the Board and the Division, which administers Australia's foreign investment regulatory framework and supports the Board's work.

are in place to ensure that any conflicts of interest that may occur are managed appropriately.¹⁰⁹⁹

It is refreshing to note that when it comes to the appointment of the Board, such selection is made on merit relating to expertise in a particular field, rather than partisanship. This aligns with some of the suggestions made in the preceding chapter regarding the appointment of members to the NSC, where it was posited, that members should be captains of industry rather than political appointees of the President.

While some commentators in Australia have argued that national security decisions should be made by the National Security Committee of Cabinet, rather than the Treasurer, it is appropriate to acknowledge that while the risks associated with foreign investment are mostly not economic, the benefits are, which is a strong reason to retain the Treasurer as decision maker.¹¹⁰⁰ Furthermore, I have advanced elsewhere that the decision to empower the Treasury with authority to review all investments, including investments through merger is sound policy as the decision of the Treasurer is made on a purely economic basis, taking the best interests of the economy into account, rather than being clouded by other political or populist agenda.¹¹⁰¹

It is also significant that the Treasurer does not make a decision based on national security by 'thumb-sucking' reasons, rather, they must exercise this power having regard to advice from an agency in the national intelligence community and the FIRB.¹¹⁰² So while the decision lies with the Treasurer, such a decision must be based

¹⁰⁹⁹ Foreign Investment Review Board (2021) at 1.

¹¹⁰⁰ See Australian Government, Productivity Commission (2020) at 19.

¹¹⁰¹ Tavuyanago (2021) at 21. This should not be taken to say that competition law is not political, or it should not consider other social objectives outside the efficiency goals. Rather, the support of a purely economic analysis of mergers or investments involving NSI is limited to the consideration of NSI. Where a merger that has NSI concerns is proposed, the normal competition and public interest tests must still be conducted thus ensuring that the competition authorities' role regarding merger control is not usurped.

¹¹⁰² Section 79A(2) of the FATA.

on a factual analysis of each case, which is done by the agencies advising the Treasurer.

Lastly, the Treasurer forms part of the Executive,¹¹⁰³ which in turn is accountable to Parliament, in accordance with the doctrine of separation of powers.¹¹⁰⁴ The Treasurer must also provide Parliament with a report, which must consider whether the right balance is struck between welcoming foreign investment and protecting Australia's national interests, within 15 sitting days of each House of Parliament after the report is given to the Treasurer (by the secretary of the treasury).¹¹⁰⁵

There is therefore an accountability mechanism available to hold the Treasurer to account regarding their decisions relating to the national security review of certain investments. Apprehensions that the Treasurer may abuse their power in considering national security concerns in investments and mergers are therefore assuaged as the relevant legislation provides determined parameters within which such a power must be exercised, and the Australian Constitution provides an accountability mechanism in respect of the Treasurer's decisions.

¹¹⁰³ See Parliament of Australia "Current Ministry List" (1 June 2022) at https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Parliamentary_Handbook/Current_Ministry_List (accessed 1 January 2024); Parliament of Australia "Chapter 4: The executive government" (n.d.) at https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/hamer/cha_p04 (accessed 1 January 2024).

¹¹⁰⁴ See s 52 of The Australian Constitution; Meade AJ "Accountability of the Executive Branch of Australian Government: The Courts' Oversight of Officers of the Commonwealth" (unpublished PhD thesis, RMIT University, 2021) at 32-37.

¹¹⁰⁵ See s 4(3-4) of the Foreign Investment Reform Act.

6.3.3 The process of considering NSI in mergers

Merger regulation in Australia is mandated to the ACCC, which has the role of enforcing section 50 of the CCA.¹¹⁰⁶ The process of the review of a merger in Australia may commence with the ‘informal merger review process’.¹¹⁰⁷ The informal merger review is a process that allows merger parties to seek the ACCC’s view on whether a proposed merger is likely to lessen competition in the market.¹¹⁰⁸

Whereas it is not sanctioned by any legislation, the informal merger review has developed through practice and seeks to provide a pre-notification indication of whether a merger may be anticompetitive, thus allowing the merging parties to address any concerns raised by the ACCC.¹¹⁰⁹ Since the informal merger review process is not provided for by law, it is not compulsory for parties to go through this step. However, the ACCC encourages merging parties to go through the informal merger review process, especially if the products of the merger parties are either substitutes or complements or the merged firm will have a post-merger market share of greater than 20 per cent in the relevant market(s).¹¹¹⁰ After conducting an informal merger review,

¹¹⁰⁶ The section is titled “Prohibition of acquisitions that would result in a substantial lessening of competition” and prohibits the acquisition of shares in the capital of a body corporate (equivalent of “acquisition of control” in South Africa under s 12 of the Competition Act) if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market. The ACCC’s role in respect of the consideration of mergers is like that of the South African Competition Commission.

¹¹⁰⁷ ACCC “Informal merger reviews” (n.d.) at <https://www.accc.gov.au/business/mergers/informal-merger-reviews> (accessed 2 January 2024); ACCC “Informal Merger Review Guidelines” (September 2013) at https://www.accc.gov.au/system/files/D17-156292%20Informal%20Merger%20Review%20Process%20Guidelines%20-%20updated%20November%202017_0.PDF (accessed 2 January 2024).

¹¹⁰⁸ The informal review is free of charge and can be instituted either by the parties to a merger or by the ACCC in response to a complaint, information received from overseas regulators or its own monitoring activities.

¹¹⁰⁹ ACCC (2013) at 6.

¹¹¹⁰ ACCC (2013) at 7-8.

the ACCC may decide not to oppose a merger without any caveats, not oppose a merger subject to acceptance of section 87B undertakings or oppose the merger.¹¹¹¹

The formal merger review process in Australia is voluntary, subject to thresholds for compulsory notification to the ACCC however, parties to mergers are encouraged to apply for authorisation of the ACCC as it provides parties with statutory protection from legal action under section 50 of the Competition and Consumer Act.¹¹¹² Once parties decide to apply for authorisation and have lodged a valid application with the ACCC, the ACCC will conduct market enquiries (inviting interested parties to lodge written or oral submissions commenting on the application), engage with the applicant and issue a written determination granting such authorisation as it considers appropriate or dismissing the application.¹¹¹³

In considering whether or not to grant merger authorisation, the ACCC must conduct the authorisation test. In terms of the test, the ACCC may grant authorisation if it is satisfied that the proposed acquisition would not have the effect, or would not be likely to have the effect, of substantially lessening competition, or the proposed acquisition would result, or be likely to result, in a benefit to the public, and that benefit would outweigh the detriment to the public that would result, or be likely to result, from the proposed acquisition.¹¹¹⁴ The first leg of the test is considering whether a merger is likely to substantially lessen competition, in which the ACCC must take the following factors into consideration:

¹¹¹¹ ACCC (2013) at 18, 20-22; see s 87B of the Competition and Consumer Act, which relates to enforcement undertakings made by any persons to remedy a concern raised by the ACCC in relation to any matter that the Commission has power or function over, including mergers and acquisitions.

¹¹¹² ACCC “Merger authorisations” (n.d.) at <https://www.accc.gov.au/business/mergers/merger-authorisations> (accessed 2 January 2024); ACCC “Merger Authorisation Guidelines” (October 2018) at <https://www.accc.gov.au/system/files/Merger%20Authorisation%20Guidelines%20-%20October%202018.pdf> (accessed 2 January 2024) 6.

¹¹¹³ ACCC (2018) at 15; ACCC (n.d.) “Merger authorisations”.

¹¹¹⁴ Section 90(7) of the Competition and Consumer Act. This provision is a mirror of s 12A(1) of the Competition Act, which provides for an assessment of competition and public benefit factors.

- the actual and potential level of import competition in the market;
- the height of barriers to entry to the market;
- the level of concentration in the market;
- the degree of countervailing power in the market;
- the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
- the extent to which substitutes are available in the market or are likely to be available in the market;
- the dynamic characteristics of the market, including growth, innovation and product differentiation;
- the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;
- the nature and extent of vertical integration in the market.¹¹¹⁵

It is observed that the above list of considerations, which is not exhaustive, is similar to the list that the South African Competition Commission must also consider when assessing the impact of a proposed merger on competition grounds.¹¹¹⁶

In the second leg, the ACCC must consider the public benefits or detriments of a proposed merger.¹¹¹⁷ While the term ‘public benefit’ is not defined by the CCA, it is understood to mean “anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements, the achievement

¹¹¹⁵ Section 50(3) of the Competition and Consumer Act.

¹¹¹⁶ See s 12A(2) of the Competition Act.

¹¹¹⁷ It is observed that while the Competition and Consumer Act does not refer to the “public interest test”, the consideration of public benefit or detriment is akin to the consideration of whether a merger may or may not be justified based on substantial public interest grounds in terms of s 12A(2), read with s 12A(3) of the Competition Act.

of the economic goals of efficiency and progress”.¹¹¹⁸ In considering whether there is a public benefit arising out of a proposed merger, the ACCC keeps the object of the CCA at the forefront, to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.¹¹¹⁹ The ACCC will thus consider among other things, the following factors:

- whether the anticipated benefit is transaction specific;
- who the benefit accrues to and how widely it is shared in the community;
- whether the benefit is ongoing or a one-off;
- how the benefit will arise;
- when the benefit is likely to arise;
- the likelihood that the benefit will be realised; and
- the magnitude of the benefit.¹¹²⁰

The term ‘public detriment’ is also not defined by the CCA, but in terms of the *7-eleven* judgment, is understood to mean “any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency”.¹¹²¹ The ACCC will therefore take into account all likely public detriments that may arise from a merger and weigh them against the public benefits to determine the greater of the two. Subsequent to a resolution of the public benefits/ public detriment balance, the ACCC must then again balance that with the impact of the merger on competition, to come to a determination of whether the proposed merger can be authorised. The merger

¹¹¹⁸ ACCC (2018) at 33; see further *7-Eleven Stores Pty Ltd* (1994) ATPR 41-357; *Queensland Co-operative Milling Association* (1976) 8 ALR 481 in respect of the Competition Tribunal’s formulation of “public benefit”.

¹¹¹⁹ See s 2 of the Competition and Consumer Act; ACCC (2018) at 33.

¹¹²⁰ ACCC (2018) at 33.

¹¹²¹ *7-Eleven Stores Pty Ltd* (1994) ATPR 41-357; ACCC (2018) at 35.

guidelines make it clear that the competition assessment remains at the forefront of a merger evaluation and that the consideration of public interest is ancillary.¹¹²²

As stated above, based on the outcome of the authorisation test, the ACCC may make a determination to authorise the transaction, authorise the transaction subject to conditions (including a condition that a person comply with a section 87B undertaking),¹¹²³ or refuse to grant authorisation of the transaction. The ACCC must consider the authorisation tests and decide within 90 calendar days of receiving a valid application from the merger parties. If no decision is made within the stipulated timeframe and the parties did not provide prior written consent for the Commission to take longer than the specified period for a determination, the ACCC is deemed to have refused to grant the merger authorisation.¹¹²⁴

Where a party to a merger is aggrieved by the findings of the ACCC, they have two avenues available for recourse. They may apply for review by the Tribunal,¹¹²⁵ which will make its own findings of fact and reach its own conclusions, ultimately making an order to affirm, vary or set aside a decision of the ACCC.¹¹²⁶ Alternatively, a person can apply for judicial review of the decision by the Federal Court on a question of law.¹¹²⁷ It is important to take cognizance of the fact that judicial review is concerned only with the legality of the decision and not the merits of the case, where a party wishes to review the merits of the case, they must therefore apply for review to the Tribunal.¹¹²⁸

It is evident from the above discussion pertaining to the process of merger review that the ACCC does not have the mandate to consider national security interests in merger regulation. National security does not feature in the CCA as one of the factors that the

¹¹²² See ACCC (2013) at 18-19.

¹¹²³ Section 88(3)-(4) of the Competition and Consumer Act.

¹¹²⁴ Section 10(B) read with s 12 of the Competition and Consumer Act; ACCC (2018) at 15-16.

¹¹²⁵ Section 101(1) of the Competition and Consumer Act.

¹¹²⁶ Section 102(1AB) of the Competition and Consumer Act.

¹¹²⁷ Under the auspices of s 6 of the Administrative Decisions (Judicial Review) Act 59 of 1977 or s 39B of the Judiciary Act 6 of 1903; ACCC (2018) at 41.

¹¹²⁸ ACCC (2018) at 44.

ACCC must consider when determining whether to grant merger authorisation. It is important to point out that this is the instant at which the Australian and South African regimes diverge. Whereas national security does not fall under the purview of competition legislation in Australia, in South Africa, the 2019 amendments to the Competition Act inserted a 'national security' clause in the Competition Act.

Where a proposed merger is one involving a foreign investor and thus potentially poses a national security risk to Australia, its consideration falls within the ambit of the powers of the Treasurer to screen foreign investments, assisted by the FIRB and under the auspices of the FATA. While the FIRB is primarily responsible for investment screening and merger regulation is mandated to the ACCC, it is pertinent to note that in terms of the FATA, an 'investment' may be concluded by way of a merger or acquisition of interest thus, the FATA also applies to mergers.¹¹²⁹

Foreign investors are required to notify the Treasurer of their intended investment through a merger to enable the Treasurer to conduct the national security test. Once a complete notification has been filed, the Treasurer has 30 days to consider an application and make a decision.¹¹³⁰ The decision period may be extended by an initial 90 days by notifying the investor in writing and another 90 days by publishing an interim order. An investor must be notified of the decision of the Treasurer within 10 days of it being made.¹¹³¹

Within the decision period granted to the Treasurer, the Treasurer will seek input from the FIRB, which assesses the application and makes a recommendation to the Treasurer. The FIRB will consult the ACCC in two instances: first, as part of the broader national interest test, because the impact of a transaction on competition is a relevant factor when considering the national interest; and second, where the FIRB is considering a merger that has national security implications (as this falls outside the

¹¹²⁹ See s 4, 19A and 20 of the FATA; see also Australian Government, The Treasury (June 2020) at 24-25

¹¹³⁰ Australian Government, The Treasury (2023) "Australia's Foreign Investment Policy" at 11.

¹¹³¹ Australian Government, The Treasury (2023) "Australia's Foreign Investment Policy" at 12.

traditional merger review done by the ACCC).¹¹³² When the FIRB refers a matter to the ACCC for comment, the ACCC provides the FIRB with advice on the ACCC's section 50 assessment, which will be taken into consideration by the FIRB in making its recommendation to the Treasurer.¹¹³³ There is thus a more defined and clearer role for the competition authorities in Australia as the FIRB must consult with the ACCC.

6.3.4 Safeguards for Accountability

It is germane to note that a decision of the Treasurer relating to the exercise of their power in respect of mergers that have an NSI component is reviewable by the Administrative Appeals Tribunal (AAT).¹¹³⁴ A person who has been given notice by the Treasurer to the effect that a national security risk exists in their proposed merger may make an application to the AAT for the review of a decision of the Treasurer made under section 79A.¹¹³⁵ With a further proviso that any moment after the AAT has made findings in relation to a review application, the applicant may apply again to the AAT to review its own decision on the ground that the applicant has fresh evidence of material significance that was not available at the time of the previous review.¹¹³⁶

Where a person applies for a review of the Treasurer's decision, the Treasurer must, within 30 days of receiving a notice of such application, lodge a copy of the notice given to the person under subsection 79B(1) of FATA and a copy of the whole unredacted notice (that is a notice provided to a merger party informing them that the merger has

¹¹³² See Australian Government, The Treasury (June 2023) "Australia's Foreign Investment Policy" at 8; Australian Government, The Treasury (n.d.) "Foreign investment in Australia".

¹¹³³ See ACCC (2013) at 9.

¹¹³⁴ The AAT was established by s 5 of the Administrative Appeals Tribunal Act 53 of 1975 (AATA) and conducts independent merits review of administrative decisions made under Commonwealth laws. It reviews decisions made by Australian Government ministers, departments and agencies and, in limited circumstances, decisions made by state government and non-government bodies. See Administrative Appeals Tribunal "About the AAT" (n.d.) at <https://www.aat.gov.au/about-the-aat> (accessed 2 January 2024).

¹¹³⁵ Section 130A(1)-(2) of the FATA.

¹¹³⁶ Section 130A(3)-(4) of the FATA.

NSI risks).¹¹³⁷ The application for review to the AAT does not automatically stay the decision of the Treasurer however, on application and good cause shown, the AAT may suspend the force of the decision pending the review.¹¹³⁸

In terms of the AATA, the AAT may exercise all the powers and discretions that are conferred by any relevant enactment and make a decision in writing: (a) affirming the decision under review; (b) varying the decision under review; or (c) setting aside the decision under review and (i) making a decision in substitution for the decision so set aside or (ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the AAT.¹¹³⁹

The decision of the AAT may state the Tribunal's opinion as to the correctness of, or justification for, any opinion, advice or information contained in the decision and the findings must be given to the parties.¹¹⁴⁰ Where the AAT has made adverse findings against the Treasurer upon a review of the Treasurer's decision, the Treasurer must not exercise their powers under the FATA in respect of the action concerned that is not in accordance with those findings except on the basis of matters or material changes occurring after the review or matters of which evidence was not available at the time of the review.¹¹⁴¹ Based off the above provisions of the FATA, it is encouraging to note that the decision(s) of the Treasurer in respect of national security is justiciable and the body with competent jurisdiction to hear appeals is the Administrative Appeals Tribunal.

The provision of a route to recourse for a merger party that may be aggrieved by the Treasurer's finding reinforces the principles of accountability, legal certainty and the rule of law. It is also noted that whereas the Treasurer is not subject to the review or scrutiny of competition or investment bodies, they are not immune from being held accountable. Because the Treasurer is a member of the Cabinet and exercises public

¹¹³⁷ Section 130D of the FATA.

¹¹³⁸ Section 41(1)-(2) of the AATA.

¹¹³⁹ Section 43(1) of the AATA.

¹¹⁴⁰ Section 130K of the FATA.

¹¹⁴¹ Section 130L of the FATA.

power, which constitutes administrative action, it is apposite that the AAT has the jurisdiction to review the decisions of the Treasurer. The lack of an accountability mechanism, or a provision ensuring the justiciability of a decision of the NSC in South Africa was one of the challenges raised in chapter five. In that vein, the Australian model allowing for review of the Treasurer's decision(s) is therefore of cardinal importance.

In summary, it is beyond question that the decision whether to approve or prohibit a merger based on NSI rests with the Treasurer. Such a decision must be made in consultation with and on the advice of the FIRB. The FIRB in conducting its investigation, will consult with and seek guidance from the ACCC. Reaching a decision on whether to approve a merger based on NSI is therefore multi-agency consultative process. The Australian process differs markedly from the one in South Africa where the mandate to consider NSI is given to the NSC, which in making its decision, may or may not consult competition authorities.¹¹⁴²

The FIRB in Australia creates a buffer in the consideration of NSI in mergers as it is an independent body comprised of industry-leading experts that consider only matters relevant to their inquiry into a potential national security threat. This ensures that the decision of the Treasurer is based on sound advice based on facts and not conjecture or political agenda. While the recommendation of the FIRB is not binding on the Treasurer, they have to pay deference to the expertise of the board.

Further, and because of the accountability mechanisms in place, those of the Treasurer having to provide a report to Parliament and their decision being open to review by the AAT, it is unlikely that the Treasurer will make a decision that is contrary to the advice of the FIRB without sound justification, otherwise they will have to face Parliament and explicate the rationale behind disregarding the FIRB's advice. It would perhaps serve the South African regime to consider establishing a board of experts similar to the FIRB to assist the NSC in making its decisions concerning NSI threats emanating from mergers involving foreign acquiring firms.

¹¹⁴² See s 18A(9) of the Competition Act.

6.4 LESSONS FOR SOUTH AFRICA

From the onset, it must be borne in mind that the reliance on the USA and Australia to draw lessons is not to say that these countries are the paragon of national security regulation. However, because the national security test is novel to South Africa, and in light of the shortcomings and potential challenges identified in the critical analysis of the national security clause, it is prudent to look to the jurisdictions discussed and potentially learn from their successes and, indeed, their challenges.

Chapter 5 of the thesis established that the national security clause, as it reads, is far from perfect and has several shortcomings,¹¹⁴³ which may be addressed by drawing lessons from the US and Australian regimes.

The purpose of this section is, therefore, to outline the key takeaways from the US and Australian systems of national security consideration. It will sift through the takeaways to determine those that are relevant to the South African context and are reasonably practicable for transplantation to the South African system. The below subsections will look at a summary of the key findings regarding the US and Australian models of assessing national security before a summary of the chapter is provided.

¹¹⁴³ See part 5.3 above.

6.4.1 Key takeaways from the USA screening regime

6.4.1.1 The determination of what constitutes national security

The first major takeaway from the US system is the definition and determination of what constitutes national security within the context of mergers and investments. While the term 'national security' is not mechanically defined, the US regime provides an expansive and determined list of what must be considered in a national security assessment.¹¹⁴⁴ Clarity on the factors to be considered in the US system is further provided by the defining and elaborating of those factors.

For example, 'critical technology', 'critical infrastructure' and 'sensitive personal data' as factors to be considered under the DPA and FINSA, are defined and elaborated on by the FIRRMA. Regarding critical technology, a list of 27 industries that fall under the critical technology umbrella is provided. Regarding what constitutes critical infrastructure, the FIRRMA provides a list of 28 areas that are considered as critical infrastructure, and an elaborative list of 10 examples of what constitutes sensitive personal data is also provided.

While the US President is authorised to consider additional factors that may be deemed necessary, these additional factors cannot replace or supersede the 12 original factors plus the six factors added by the FIRRMA. If anything, the additional factors will have to be concomitant with and complementary to the existing established list. Having a determined list of factors that must be considered under the national security test, as well as the further definition of those factors, provides certainty to foreign investors in respect of the factors that will be considered by the regulatory authorities where a proposed merger is concerned.

Unfortunately, the South African provision relating to the determination of national security falls short of creating the certainty contemplated above. Section 18A(4) of the

¹¹⁴⁴ See section 6.2.1 above.

Competition Act provides a list that the President must consider in determining what constitutes national security. As the Act currently reads, national security is thus, not defined, and such determination has been left to the interpretation of section 18A(4) of the Competition Act by the President.

The lesson for South Africa here is that to create certainty, there must be a determined list of factors that will be considered in a national security assessment. Where a list is codified in statute and further elaborated on through the definition of the specific factors, this provides the steadfastness of those factors and the meaning of national security. This will have the effect of boosting investor confidence, as foreign firms will be more inclined to invest in regimes where they are aware of how their investment through merger will be assessed, instead of leaving the determination of those factors to a political actor whose motivations in determining what constitutes national interest may change depending on the political climate.

6.4.1.2 Mandate for the consideration of NSI in mergers

The second takeaway from the US regime is in relation to the regulator(s) mandated with the consideration of NSI in a merger. It was observed that the US has two sets of regulators regarding mergers. The first set of regulators is responsible for the consideration of mergers where there are no national security concerns. The DOJ and the FTC are responsible for considering mergers from an antitrust perspective.

They consider the effect of a proposed merger on competition and public interest grounds, much like the South African Competition Commission, and do not play any part in the consideration of national security concerns. That role falls to the CFIUS and the Presidency. Regarding the CFIUS, it was noted that it is an independent interagency body, which is laudable as its decision-making should be free from political bias or interference. Further, the CFIUS' composition is worth mentioning as it is comprised of nine cabinet members and two *ex officio* members.

The effect of having such a diverse membership is that it creates checks and balances, ensuring that no one person or department has absolute control of the decision-making process and no one factor will be placed above others because of a specific political agenda. The balance achieved by the composition of the CFIUS is also remarkable. On the one hand, there are representatives from the defense, security and intelligence departments, expressive of the need for national security, and on the other hand, there are representatives from the trade, commerce and economic departments, underscoring the importance of being open to foreign investments for the benefit of the economy. The representation in the CFIUS ensures that a balanced consideration of the proposed merger's effect on all aspects important to American consumers (security, economy, competition and labour) are adequately considered.

The certainty and balance extant in the American system regarding the bodies mandated with merger regulation is absent in the South African system. Section 18A(2) of the Competition simply provides that the President must constitute an NSC comprising of 'such Cabinet Members and other public officials'. No further elaboration is provided regarding how many members the NSC must have, which departments within the Cabinet must be represented in the NSC, who it is from the public that the President may deem fit and what influence the different members will have within the NSC. To this end, two lessons may be drawn from the American system.

The first lesson from the US system is that independence of the NSC (or equivalent alternative) must be guaranteed to ensure certainty in the manner in which decisions will be made as well as to protect the rule of law. The lack of a provision on the independence of the NSC was lamented in chapter five, and this may have the effect of deterring foreign investments as institutional independence is a prerequisite for most investors. The second lesson that may be drawn from the US system is that the members of the NSC must be determined or determinable beforehand, instead of leaving the constitution of the NSC entirely in the President's prerogative. Further, the appointment of members from the 'other public officials' must be based on merit, skills and expertise rather than partisanship.

6.4.1.3 The procedure and timelines for assessing NSI

The third key takeaway from the American system relates to the process of considering national security in a merger and the timelines associated therewith. It was observed that the process of considering national security by the CFIUS comprises a defined three-stage procedure. The first, an informal stage, allows for parties intending to conclude a merger that may adversely affect the national security of the country to have an 'off the record' consultation with the CFIUS and be provided with feedback regarding the proposed transaction. This procedure is beneficial to both the merger parties and the CFIUS: in the first instance, it allows the merger parties to remedy any identified potential issues regarding national security and secondly, it streamlines the formal review for CFIUS where parties have already taken proactive steps to comply with the law, which also increases compliance with the law.

The second stage is a formal review of the proposed transaction by the CFIUS, to determine whether the merger raises any national security concerns. This process must be completed within 45 days of the CFIUS receiving a complete notice. Where no national security concerns are identified, then the review ends however, where potential threats to national security are identified, the process moves to the third stage. The third stage comprises a formal investigation of the national security concerns identified in stage two.

The CFIUS will assess the level of threat to national security that the proposed transaction may pose and whether the merger should be approved, approved subject to conditions or prohibited. The investigation must be completed within 45 days, which period may be extended in extraordinary circumstances, once, by a further 15 days. Subsequent to the CFIUS making a decision and providing the President with its recommendation, the President has 15 days within which to make a decision, although the President is not bound to the recommendation of the CFIUS.

Within the South African system, section 18A(7) of the Competition Act provides that the NSC must consider and decide on a proposed merger that raises NSI concerns within 60 days, or such further [indeterminate] period which the President may agree to. It is appropriate to note that the initial 60-day period given to the NSC is in fact not an inordinately long period, considering that the US provides for two 45-day periods with a possible extension of a further 15 days.

However, the troubling provision is the authority given to the President to approve an extension for an unspecified period, which does not comply with the principle of certainty. A further issue with section 18A(7) is that it does not provide any indication or guidance on the actual process that will be followed within the 60-day period. This raises questions of how many steps or stages there are within the NSC's consideration, whether the NSC must work with other agencies, and if so, what timeframes those agencies have to provide their input to the NSC.

The lesson that can be taken away from the American system is that more clarity is needed in relation to the actual consideration of NSI by the NSC. A breakdown of the stages of consideration would be a welcome addition to the provision. An 'informal consultation stage' analogous to stage one of the CFIUS process may also assist in allaying apprehensions that foreign investors may have where they would otherwise walk into a national security assessment blindly. Additionally, while the 60-day consideration period is acceptable, the lack of certainty regarding the possible extension is worrying. The US system provides for a once-off 15-day extension, a comparable provision would greatly assist in creating certainty.

6.4.1.4 Accountability of the CFIUS/President regarding a national security decision

The last major takeaway from the US system is in relation to holding those conferred with power to make decisions based on national security accountable. The authority bestowed on the President of the USA, to do 'whatever it takes' to protect the national security of the country, is a cause for concern as this power may be open to abuse. In

doing whatever it takes, the President may block a proposed merger transaction based on national security in order to further a protectionist agenda.¹¹⁴⁵

However, that concern is quelled because the FIRRMA makes provision for judicial review of the process by which a decision to block a merger based on national security was made. This means that the process by which the CFIUS considers national security and decides to recommend the blocking of a merger to the President is reviewable.¹¹⁴⁶ Further, the CFIUS is accountable to the United States Congress through an obligation to provide periodic reports on national security decisions as well as through the compulsion to provide any member of Congress with an impromptu report on a specific national security decision where the member of Congress makes such a request to the CFIUS.

It has been hazarded that within the South African system, a decision of the NSC or the President, where the NSC makes a recommendation to the President to make a decision, based on national security, may be construed as non-justiciable.¹¹⁴⁷ The first reason why such a decision may be construed as being non-justiciable is because section 18A of the Competition Act makes no provision for recourse to a party who may be aggrieved by a decision of the NSC. The second reason that may lead to the question of justiciability is that it may be argued that in deciding on a merger based on NSI, the President would be making an executive decision akin to a 'non-justiciable political question' in the USA.

¹¹⁴⁵ In this regard, the ongoing trade war between the USA and China has been well documented, and examples of how former President Donald Trump invoked the national security clause to block certain Chinese investments, which was a protectionist manoeuvre, was already discussed.

¹¹⁴⁶ This was confirmed prior to the enactment of the FIRRMA, through *Ralls v CFIUS et al* (2014) where the court found that the review of a decision of a national security decision by the President was not a "non-justiciable political question" but rather a justiciable legal challenge based on the Constitutional right to due process (the equivalent of just administrative action in South Africa).

¹¹⁴⁷ See chapter five, where the challenge of justiciability was raised; see also Tavuyanago & Vinti (2023) where the authors advance reasons why such a decision should be justiciable.

The lesson that may be learnt from the US system is that a determined accountability model is needed to ensure that the powers vested in the NSC, and the President are exercised within legal parameters and are not abused in the pursuit of industrial or political agendas. The US does this through the FIRRMA, which provides for judicial review of a decision of the CFIUS.¹¹⁴⁸ A similar provision within the Competition Act would have been a sensible addition, to provide recourse for an aggrieved party. While it has been argued that based on the principle of rule of law, the promotion of just administrative action and international law, the decision of the NSC is justiciable,¹¹⁴⁹ the USA unequivocally provides for the accountability of the CFIUS by specifically spelling out the process by and circumstances in which a review of the CFIUS' decision can be applied for and be made.

6.4.2 Key takeaways from the Australian screening regime

6.4.2.1 The determination of what constitutes national security

The first observation made regarding the Australian regulation of national security in mergers is that like many jurisdictions, Australia does not provide a technical definition of national security. Instead, Australia initially refers to the 'national interest', a broader aspirational mission of the government, which also incorporates national security as one of the considerations affecting the national interest.

Within merger regulation, Australia provides for both the national interest and national security tests. An understanding of what Australia views as national security can be gleaned from what the Australian Government considers as its most important function, to wit, "the safety of a country from war, espionage, serious and organised crime, biosecurity threats, terrorism and cyberattacks".¹¹⁵⁰

¹¹⁴⁸ Section 1715 of the FIRRMA.

¹¹⁴⁹ Tavuyanago & Vinti (2023).

¹¹⁵⁰ Australian Government, Productivity Commission (2020) at 64.

Considering the above functional definition and the strategic areas that need to be protected, Australia provides a determined list of five factors in relation to security businesses and security land that are considered national security interests. The list is further elaborated upon by providing specific definitions of what constitutes a security business, what is considered security land and what is considered critical infrastructure.

A further observation is that the factors that are considered national security interests are defined and regulated by different legislation relevant to different contexts.¹¹⁵¹ It was also noted that when it comes to the determination of what constitutes NSI, no mention was made in relation to the powers of the head of state, the Prime Minister, to determine, define or add to the national security factors. This is a welcome development as the delineation of national security is left to legislation and the legislature.

As has been extensively discussed, the determination of national security in South Africa is left to the President, who must consider the list of factors listed in section 18A(4), which section is not exhaustive. This leaves the determination of what constitutes national security open-ended and makes the definition or determination of national security subject to change, perhaps as often as the President changes.

Two lessons may be learnt from the Australian determination of national security. First, that legal certainty is a fundamental tenet of the rule of law and that the law regarding national security determination must be certain. A determined list of national security interests is imperative, and the Australian approach shows that it need not be as expansive as the US one. Australia provides a list of only five factors, which are then elaborated on by providing classification and definition of those aspects constituting NSI.

¹¹⁵¹ For example, the FATA regulates national security as it relates to investments, the SOCI Act regulates certain aspects of national security as it relates to the protection of critical infrastructure and the Telecommunications Act regulates national security within the telecoms sector.

The second lesson that may be taken from the Australian system is the differentiation between national interest and national security. When considering national security, it is important to steer clear from conflating it with national interest and by so doing, provide for considerations that are so broad that they may be potentially abused. In South Africa, the consideration of ‘the effective functioning of government’,¹¹⁵² the ‘promotion of the Republic’s international interests, including foreign relationships’,¹¹⁵³ and the ‘the economic and social stability of the Republic’,¹¹⁵⁴ arguably fall under the broader national interest objective rather than national security. It might therefore be prudent to reconsider the list of factors to be considered under national security and narrow it from the current list which speaks more to the broader national interest.

6.4.2.2 Mandate for the consideration of NSI in mergers

The second key takeaway regarding the Australian system of considering NSI in mergers is in relation to the authorities responsible for the assessment of national security. Australia, like the US, has a bifurcated model where there are two sets of regulators responsible for considering mergers. The ACCC is the traditional merger regulator, responsible for considering a proposed merger’s potential impact on competition and public interest.¹¹⁵⁵ The ACCC does not consider merger involving NSI, nor does it consider national security as part of its traditional merger assessment. Furthermore, the applicable legislation, the CCA does not contain any provisions relating to the consideration of NSI, rather, its focus is the enhancement of the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.¹¹⁵⁶

¹¹⁵² Section 18A(4)(c) of the Competition Act.

¹¹⁵³ Section 18(A4)(f) of the Competition Act.

¹¹⁵⁴ Section 18A(4)(h) of the Competition Act.

¹¹⁵⁵ Regarding the public interest element, reference is made to public benefit and public detriment.

¹¹⁵⁶ Section 2 of the CCA.

The assessment of mergers that have NSI concerns is mandated to the Australian Treasurer as part of their responsibilities in terms of the Australian investment policy.¹¹⁵⁷ In terms of the FATA, the Treasurer is empowered to block a merger that threatens the national security of Australia however, the actual assessment of such a merger is conducted by the FIRB, which then provides advice to the Treasurer. The FIRB is an independent non-statutory board consisting of experts in law, public policy, governance, private sector management and economics.¹¹⁵⁸ The members conduct a merit-based assessment of a transaction referred to them, considering the effect of a proposed merger on national security, competition and public interest.

The FIRB in considering the proposed merger's impact on competition and public interest, will consult with the ACCC to enable them to make a holistic assessment of the proposed merger. It is noteworthy that members of the FIRB are not political appointees and serve the FIRB on a part-time basis, meaning that they do not owe any political allegiances or partisanship, thus, guaranteeing their independence in conducting an NSI assessment.

The South African position regarding the constitution of an NSC and its mandate have been discussed at length. Suffice it to say that because the NSC reports to the President, it accordingly consists of political appointees who may not be independent or impartial in their consideration of national security in a merger. There are two lessons that may be learned from the Australian regime. First, the Australian system makes an unequivocal acknowledgement of the fact that the consideration of national security falls outside the purview of competition and consumer law. In that vein, the CCA makes no reference to the consideration of national security in a merger transaction.

Further, the competition and consumer authority, the ACCC, cannot and does not consider a merger where it has NSI concerns. Its involvement in such a is limited to

¹¹⁵⁷ Australian Government, The Treasury (June 2023) "Australia's Foreign Investment Policy" at 1.

¹¹⁵⁸ See the profiles and qualifications of the current board members, which include degrees in law, economics, applied science, and management.

when the FIRB consults it on the competition and public interest aspects of a proposed merger. South Africa seems to have done the opposite, in using competition law to regulate national security policy. It has been advanced that it was perhaps more sensible to have inserted the national security clause in the investment law of South Africa, the PIA.¹¹⁵⁹ This would have emulated the Australian position where national security in mergers is regulated through investment legislation, the FATA, and would have been part of the broader South African investment policy.

The second lesson for South Africa as far as the FIRB is concerned, is that the FIRB creates a safeguard against use and potential abuse of political power by the Treasurer in the consideration of NSI concerns. This is because the FIRB is an independent body consisting of industry experts, who, based on their knowledge, skills and experience, are the most suitable individuals to consider NSI and thus make decisions that are based on fact and not a specific political program. It behoves the South African regime to create such a buffer through the establishment of a separate board like the FIRB or a sub-committee of the NSC, comprising of industry experts to consider NSI concerns and assist the NSC in making informed and judicious decisions in relation to national security.

6.4.2.3 The procedure and timelines for considering NSI

The third takeaway from Australia is the procedure by which a decision regarding a merger with NSI concerns is made. In terms of the FATA, merger parties have to notify the Treasurer of the proposed merger transaction where the transaction relates to the identified national security factors or where the acquiring party is a foreign person. The Treasurer also has 'call-in' powers which empower them to initiate a national security investigation *ex mero motu*, including requiring parties to undergo a national security assessment up to 10 years after a transaction was concluded.

¹¹⁵⁹ Tavuyanago (2021) at 24.

Once the Treasurer has received a complete notice from the parties or has exercised their call-in powers, they have 30 days to conclude the national security assessment. The period may be extended by an initial 90 days by notifying the parties in writing and for a further 90 days through the issuing of an interim order. Whereas the FATA provides for a potential 210-day consideration period (30 days + 90 days extension + 90 days interim order), in practice, the median period of consideration for the 2022-23 year was 44 days.¹¹⁶⁰ The Treasurer has to make their decision on the advice of the FIRB, which in turn consults the ACCC regarding the ACCC's section 50 merger assessment. The FIRB's consultation with the ACCC and its subsequent advice and recommendation(s) to the Treasurer must all take place within the 30 and 90-day periods afforded to the Treasurer.

In South Africa, the 60-day period afforded to the NSC to decide regarding national security *prima facie* seems better than the Australian system, which provides for a total of up to 210 days. However, a problem arises in relation to the possible extension that the President may sanction. Because it is indeterminate, such an extension could be 15 days or 150 days, which may end up making it longer than the Australian period. The Australian procedure and timeline provide two potential lessons for South Africa. First, the timeframe for consideration of NSI must be determined, like the Australian system that provides for a clear 30-day consideration period, with possible extensions of 90 days per extension.

It is acknowledged that in practice, the NSC's consideration of an NSI merger may take less than the provisioned 60 days, which would negate the above objections. However, the converse is also true, where the consideration of NSI may be extended indefinitely and end up taking an inordinately long time. The Competition Act therefore needs to

¹¹⁶⁰ See Australian Government, The Treasury "Quarterly Report on Foreign Investment" (1 July – 30 September 2022) at https://treasury.gov.au/sites/default/files/2022-12/p2022-344038_1_0.pdf (accessed 3 January 2024) at 5, where it was also noted that more than 25 per cent of investment proposals were considered in the initial 30 days.

provide a determined period by which the President may extend the initial 60 days given to the NSC.

The second lesson is regarding the role of the Competition Commission in the consideration of an NSI merger. Section 18A(9) of the Competition Act provides that in making its decision, the NSC may consult and seek advice from the Competition Commission. The section, therefore, makes the involvement of the Commission in the process optional, notwithstanding that the Commission is the most suitable body to provide input on a proposed merger's potential impact on competition and the public interest. In Australia, even though the Treasurer is empowered to make the final decision on a merger that has NSI concerns, the Treasurer does so on the recommendation of the FIRB, which will consult the ACCC where competition and public interest matters are concerned.¹¹⁶¹ A provision making it obligatory for the NSC to consider advice or representations from the Commission would be a welcome amendment to the Act.

6.4.2.4 Accountability of the Treasurer/FIRB regarding a national security decision

There are two key takeaways regarding the answerability of the Treasurer on the exercise of their power to block a merger based on national security. In the first instance, it is trite that the Treasurer forms part of the executive branch of government as they are a member of the Australian Cabinet. As such, the Treasurer is accountable to Parliament, and during Parliament's sitting, members are given an opportunity to question the Treasurer on the exercise of their power, including the power to block mergers and investments based on national security. Additionally, within 15 days of the sitting of Parliament, the Treasurer must also provide a report to Parliament, which report must consider and demonstrate how the balancing of national interest (including

¹¹⁶¹ The use of the verb "will", signifies a positive future obligation on the FIRB to consult the ACCC, as opposed to the use of "may", which is a modal verb that indicates something that may or may not happen in the future. "May" is therefore not peremptory, whereas "will" is.

national security) and Australia being open to foreign investments (including investments through mergers and acquisitions) has been realised.

The second takeaway relates to the justiciability of the Treasurer's decision to block a merger based on national security. The FATA, which empowers the Treasurer to block a merger based on national security, also provides that such a decision of the Treasurer is reviewable. The Treasurer's decision may be reviewed by the Administrative Appeals Tribunal,¹¹⁶² meaning that such a decision is justiciable, and the AAT is imbued with jurisdiction over such reviews. Where the AAT makes an adverse finding against the Treasurer's decision on national security, the Treasurer is barred from enforcing such a decision.

As has been previously articulated, in South Africa, there is no provision regarding the justiciability of the NSC in terms of section 18A of the Competition Act. A party aggrieved by a decision of the NSC therefore has no recourse, which is contra the rule of law. The lesson that may be drawn from the Australian regime is that there needs to be an avenue for recourse for a party against whom an adverse decision may be made. Such a provision would prove beneficial for two reasons: first, the NSC will know that due to the availability of an accountability mechanism, it will have to exercise its powers within the ambit of the law, which will ensure objective and fair decisions. Secondly, such a provision will guarantee certainty of the law. This may have the effect of increasing investor confidence in South Africa as an investment destination, knowing that if an adverse decision is made, they can legally contest that decision through administrative or judicial review.

¹¹⁶² Because the Treasurer is a member of the executive, exercising power in a public function – equivalent to the definition of administrative action in South Africa, it is apposite that an administrative Tribunal has jurisdiction to review such a decision.

6.5 CONCLUSION

This chapter comprised a comparative analysis of the treatment of national security in merger regulation in two jurisdictions, the United States of America, and Australia. This was done to attempt to find solutions to the challenges raised in chapter 5 on the shortcomings of section 18A of the Competition Act. The chapter first considered the regulation of national security under the US regime,¹¹⁶³ it then proceeded to consider the regulation of national security under the Australian system.¹¹⁶⁴ After that, the chapter discussed the key takeaways from both the US and Australian systems and identified lessons for South Africa.¹¹⁶⁵

The chapter was guided by four significant questions, which in being answered, would potentially provide solutions to the deficiencies highlighted in chapter 5. The questions that guided the chapter were the following: (a) What is national security and how is it defined or determined? (b) Who is responsible for the consideration of national security in a merger? (c) What is the procedure for the consideration of a merger that has national security implications? and, (d) What are the accountability mechanisms in place in the two systems?

The chapter found that while South Africa was not alone in not providing a technical definition of national security, the US and Australia did a better job at providing determined lists of factors considered as NSI. The two jurisdictions also provide further elaboration on the concept of national security by providing definitions of specific factors considered as NSI. For example, NSI factors such as critical technology, critical infrastructure, and sensitive personal data, which are provided for in both jurisdictions are further elaborated on by being defined.

The chapter also found that regarding the relevant legislation regulating the consideration of national security, South Africa is the outlier because it regulates

¹¹⁶³ See part 6.2 above.

¹¹⁶⁴ See part 6.3 above.

¹¹⁶⁵ See part 6.4 above.

national security through competition law. In the US, national security is regulated through various sector-specific legislation which means that national security is given contextual meaning.¹¹⁶⁶ In Australia, national security is regulated through the investment policy and the investment Act, with sector specific legislation further elaborating on national security factors by defining them within the meaning of those sectors.¹¹⁶⁷

The chapter also observed that in both the US and Australia, the competition authorities do not have any role to play in the consideration of national security.¹¹⁶⁸ While they may be consulted, to give input regarding their traditional competition and public interest assessments, the mandate to consider national security is given to separate executive offices (President in the US and Treasurer in Australia), who consider national security independent of the competition authorities.¹¹⁶⁹

Lastly, the chapter also found that in both the jurisdictions analysed, a key takeaway is that decisions of those endowed with the authority to consider national security interests in merger review are justiciable. In the US, a decision of the President, on recommendation from the CFIUS, can be challenged under the due process doctrine.¹¹⁷⁰ In Australia, the decision of the Treasurer, on recommendation from the FIRB can be challenged in the Administrative Appeals Tribunal.¹¹⁷¹

In both jurisdictions, those responsible for making decisions on mergers that have NSI concerns are also accountable to either Congress (in the US) or Parliament (in Australia) through an obligation to provide periodic reports on the exercise of their authority to block mergers or investments that have a bearing on the national security of the country. The accountability and justiciability mechanisms in both countries are

¹¹⁶⁶ See part 6.2.1 above.

¹¹⁶⁷ See part 6.3.1 above.

¹¹⁶⁸ See parts 6.2.2 and 6.3.2 above.

¹¹⁶⁹ See parts 6.2.3 and 6.3.3 above.

¹¹⁷⁰ See part 6.2.4 above.

¹¹⁷¹ See part 6.3.4 above.

highly commendable as they both provide for legal certainty, which contributes to the rule of law.

The chapter identified several lessons that may be learnt from the comparative analysis, which lessons will inform some of the recommendations made in the succeeding chapter.¹¹⁷² The next chapter comprises a conclusion of the thesis and provides recommendations.

¹¹⁷² See part 6.4 above.

CHAPTER 7

CONCLUSION AND RECOMMENDATIONS

7.1 INTRODUCTION

This thesis opened on the premise that while some have strongly contended that the sole goal of competition law is to protect and promote competition, competition policy may also have a plurality of objectives and may serve to achieve broader societal aspirations.¹¹⁷³ Such is the case with the South African Competition Act, which seeks to achieve, among other things, transformation and full participation in the economy by all South Africans.¹¹⁷⁴ Based on this plurality of objectives principle, the legislature broadly interpreted the Act and inserted a national security veto' clause within the South African merger regulation framework.

This thesis aimed to conduct a critical analysis of the national security veto and establish first whether competition law was the appropriate vehicle for regulating broader national security and, second, what potential challenges the national security veto may precipitate in future.¹¹⁷⁵ The thesis comprised a comparative analysis of national security regulation and sought to draw lessons from the USA and Australia.¹¹⁷⁶ It found that while the protection of national security is a constitutional obligation and thus, fundamental for any country, the regulation thereof is often done through more appropriate legislation other than competition law.¹¹⁷⁷ This chapter summarises the key findings of the thesis and provides recommendations.

¹¹⁷³ See part 1.1 above.

¹¹⁷⁴ See part 1.1 above; Preamble to the Competition Act.

¹¹⁷⁵ See parts 1.3 - 1.5 and part 5 above.

¹¹⁷⁶ See part 6 above.

¹¹⁷⁷ See part 6.4 above.

7.2 SUMMARY OF THESIS' KEY FINDINGS

Chapter One of the thesis comprised an introduction to the study, which noted from the onset that the South African Competition Act has multiple objectives, including public interest objects.¹¹⁷⁸ It observed that through a wide interpretation of the objectives of the Act and the need to effectively regulate mergers, a national security veto, which aims to regulate national security concerns in mergers involving a foreign acquiring firm was inserted into the merger regulation framework of the Competition Act. The chapter identified that there was a *lacuna* in the literature related to the confluence of national security and merger regulation because the national security veto was novel in South Africa.¹¹⁷⁹ The chapter outlined the aim of the thesis, which was to comparatively examine the national security veto and determine whether competition law was the most appropriate medium for the regulation of national security policy.¹¹⁸⁰

Chapter Two was divided into two parts. Part A investigated the philosophical underpinnings of competition law. It discussed the difference between competition policy and competition law, and the relationship between economic doctrine and competition law.¹¹⁸¹ The chapter found that there is a strong correlation between competition law and economics, with some scholars advancing that competition law cannot exist without economics and such, labelling it as 'economic' law.¹¹⁸² Under the investigation of the economic nature of competition law, the chapter considered the different economic schools of thought that inform competition law. It found that the first school of thought, the Classical school, propagated the belief that a free-market economy was the best approach to competition law. They trusted in the 'invisible hand'

¹¹⁷⁸ See part 1.1 of Chapter 1 above.

¹¹⁷⁹ See part 1.2 of Chapter 1 above.

¹¹⁸⁰ See part 1.3 and 1.5 of Chapter 1 above.

¹¹⁸¹ See part 2.2 of Chapter 2 above.

¹¹⁸² See part 2.3 of Chapter 2 above.

theory, which refers to the ability of markets to self-correct based on the influence of the demand and supply of goods in a free market, without government regulation.¹¹⁸³

Part A of the chapter also observed the progression from the classical to the neo-classical theory, which developed the 'perfect competition' model. Under this model, they believed that in a perfectly competitive market, there would be an effective allocation of resources and a firm would produce a product for as long as the cost of producing a single unit (marginal cost) was equal to the revenue that would be realised from the sale of an additional unit (marginal revenue).¹¹⁸⁴ However, the limitation to this theory was the reality that perfect competition has never, does not and will never exist as markets are often characterised by monopolies.

Out of the deficiencies of the neo-classical theorists emerged the Harvard school. Championed by economists such as Edward Chamberlain, Edward Mason and Joe Bain, the Harvard school argued to maintain competition and competitiveness through government intervention, as there was less confidence in the self-regulation of markets. Harvard scholars developed a model for the detection of anticompetitive conduct through an assessment of the connection between market structure and its consequences, known as the Structure-Conduct-Performance (SCP) test.¹¹⁸⁵ The test assumed that the characteristics or composition of a market (Structure) determines firms' actions in the market (Conduct) which in turn determines economic results in the market (Performance).

However, a new school, the Chicago school, argued against the Harvard schools' antitrust structuralism and posited that the SCP model did not consider other variables and market forces that may affect performance and lead to undesirable market performances.¹¹⁸⁶ The Chicago school argued that since the goal of antitrust was to perfect the operation of competitive markets and to promote both productive and

¹¹⁸³ See part 2.3.1 of Chapter 2 above; Munyai (2016) at 278.

¹¹⁸⁴ See part 2.3.1 of Chapter 2 above.

¹¹⁸⁵ See part 2.3.1 of Chapter 2 above.

¹¹⁸⁶ See part 2.3.1 of Chapter 2 above.

allocative efficiency, and since business interactions required some level of co-operation, courts were encouraged not to penalise all cooperation but to find a balance between competition and collaboration.¹¹⁸⁷ Perhaps the most enduring of the Chicago school's contribution to competition theory was its awareness to variables within the market and its blending of different theories, taking wealth maximisation, efficiency and consumer welfare into account in competition regulation and enforcement.

The challenge with the Chicago school was that it insisted on the achievement of economic efficiency as the principal goal of competition law, failing to take into account other considerations. Post-Chicago, a new school was developed that aimed at improving the Chicago school's theory. The post-Chicago school paid homage to the Chicago school by acknowledging competition goals but added thereto, the need to regulate markets through government intervention. The post-Chicago school introduced the 'contestable' market theory, which based competition analysis on the investigation of potential competition and entrance by new firms into a market and was a welcome departure from the market structure theory of the Harvard School and the *per se* illegality based on firm size model followed by the Chicago school.¹¹⁸⁸

Part B of chapter two investigated the origins and evolution of competition law from 1890 to the present day South African Competition Act. It traced the history of competition law from its purported origins in the USA to its development and eventual adoption in South Africa.¹¹⁸⁹ It found that there are various theories surrounding the origins of competition law. The foundations of modern competition law were traced back to 1754 B.C. when the Babylonian Code of Hammurabi sought to limit the emergence and proliferation of monopolies.¹¹⁹⁰

The first codification of modern competition law was found to have been done in the Americas (USA and Canada) when Canada promulgated the Act for the Prevention and

¹¹⁸⁷ See part 2.3.1 of Chapter 2 above.

¹¹⁸⁸ See part 2.3.1 of Chapter 2 above.

¹¹⁸⁹ See part 2.4 of Chapter 2 above.

¹¹⁹⁰ See part 2.4.1 of Chapter 2 above.

Suppression of Combinations formed in Restraint of Trade in 1889 and the USA promulgated the Sherman Act in 1890.¹¹⁹¹ It is understood that antitrust law in the USA was a reaction to the emergence of trusts, which were associations and pooling of competitors as well as amalgamations through mergers, within the railway industry. The concentration and size of the trusts had an adverse impact on small businesses and sole proprietors, raising the regulatory eyebrow of Congress, which then passed the Sherman Antitrust Act to dismantle the monopoly of trust (hence the term 'antitrust').¹¹⁹²

Within the European context, there are three theories regarding the origins of competition law. The first theory propounds that competition law originated in Germany in 1923 after the First World War and in response to the prevalence of cartels.¹¹⁹³ The second theory posits that while Germany was the first European territory to enact a competition law, the competition law was transplanted from the USA. In terms of the Germanic-American theory, the USA, which led the allied occupation of Germany post the First World War, was weary of the fact that if the pre-war prevalence of cartels in Germany was allowed to continue, it would potentially jeopardize potential European markets to American goods.¹¹⁹⁴

The last theory regarding the origins of competition law in Europe, which is the most accepted viewpoint, contends that competition law was the result of a negotiated consensus between EU member states. The theory proceeds to record that competition law was born out of the need to address the regulation of coal and steel production in France and Germany. After rounds of meetings and negotiations, six member states, France, Germany, Italy, Belgium, Luxemburg and the Netherlands established the European Coal and Steel Community (ECSC) under the Paris Treaty, which is believed to have been the birth of European competition regulation. The section of the chapter

¹¹⁹¹ See part 2.4.1 of Chapter 2 above.

¹¹⁹² See part 2.4.1 of Chapter 2 above.

¹¹⁹³ See part 2.4.2 of Chapter 2 above.

¹¹⁹⁴ See part 2.4.2 of Chapter 2 above.

found that while there were three different theories, they could all be reconciled through a historical and chronological excursion. To that end, the integrated theory postulates that competition law originated in the USA in 1890, then was transplanted to Germany in 1923 when the USA had a leading role in the post-war occupation of Germany. By the time that the Treaty of Paris was negotiated, Germany had a key role in the negotiation phase, thus it could have suggested a transplantation of the already existing American-based German competition law.¹¹⁹⁵

After considering the origins and development of European competition law, the chapter also investigated the origins and development of South African competition law. It found that prior to the enactment of the first competition legislation, the regulation of monopolies and unfair trade practices was done through the common law under the law of delict and utilising the 'restraint of trade' doctrine.¹¹⁹⁶ However, the common law principles proved inadequate in dealing with challenges related to monopolies, highlighting the need for legislative intervention. Between 1900 and 1950, the regulation of competition law was fragmented, often depending on industry specific regulation of certain aspects of competition.¹¹⁹⁷

The regulation of competition law can be traced to the promulgation of the Board of Trade and Industries Act of 1944, which established the Board of Trade and Industries whose mandate was to consult with and advise government on matters of competition policy and law. However, competition law enforcement remained fragmented and there was a need for a consolidated competition law that would cut across different sectors. This led to the enactment of the Undue Restraints of Trade Act in 1949.¹¹⁹⁸ The Act prohibited resale price maintenance as well as other anticompetitive practices in relation to goods classified as 'controlled articles' by the Board. The Act was however

¹¹⁹⁵ See part 2.4.2 of Chapter 2 above.

¹¹⁹⁶ See part 2.5.1 of Chapter 2 above.

¹¹⁹⁷ See part 2.5.2 of Chapter 2 above.

¹¹⁹⁸ See part 2.5.2 of Chapter 2 above.

still deficient insofar as it provided too much discretion to the Minister and Board to determine which conditions posed a harm to competition.

After identification of the deficiencies in the Undue Restraints of Trade Act as well as an extensive research project into international best practices, the Regulation of Monopolistic Conditions Act (RMCA) was promulgated in 1955. The RMCA is widely recognised as the first and comprehensive competition law in South Africa.¹¹⁹⁹ It was noted that the RMCA although touted as a competition law seeking to regulate various anticompetitive practices, in practice, it was really aimed at regulating monopolies. A commission of enquiry to investigate the shortcomings of the RMCA was established and in 1977, it released a report that outlined a myriad of deficiencies with the Act.

Some of the shortcomings identified included: the fact that the RMCA actually did not provide a per se prohibition of monopolies; due to the fact that the RMCA only applied to current or existing monopolies, it fell short of regulating emergence of future monopolies; the RMCA provided a lot of exclusions when it came to the application of the act, including exclusion of rights relating to intellectual property, collective labour law, and, agricultural products by cooperatives; and the RMCA also failed to effectively regulate mergers and acquisitions.¹²⁰⁰ On the recommendations of the Mouton Commission, a new competition law had to be enacted, to address the shortcomings of the RMCA.

The next law that was promulgated was the Maintenance and Promotion of Competition Act (MPCA) in 1979. The MPCA established the Competition Board, an independent administrative body mandated with the investigation of competition issues and the administration of the Act.¹²⁰¹ The MPCA sought to regulate monopolies, mergers and restrictive practices, which seemed to address the shortcomings of the RMCA. However, it faced a number of challenges including the lack of independence of the

¹¹⁹⁹ See part 2.5.2 of Chapter 2 above.

¹²⁰⁰ See part 2.5.2 of Chapter 2 above.

¹²⁰¹ See part 2.5.2 of Chapter 2 above.

Competition Board and the consideration of mergers under extreme secrecy. As an indictment of the MPCA, no competition jurisprudence was developed during its existence.¹²⁰² The MPCA was subsequently replaced by the current legislation, the Competition Act (CA) of 1998.

It was observed that the CA was enacted during a period of transition and renewed hope, as such, it is peppered with objectives that seek to address the economic injustices perpetrated on the black majority during the apartheid years.¹²⁰³ The CA, while being mindful of the South African socio-economic history, aligns with international best practices as it was modelled along the lines of competition legislation in other jurisdictions such as the USA, Canada, Australia and the European Union.¹²⁰⁴ The hallmark of the CA is its inclusion of broader public interest aspects generally as part of the objectives of the Act, and specifically as part of its merger regulation regime.¹²⁰⁵ The CA in pursuing the stated objectives, specifically regulates restrictive horizontal practices, restrictive vertical practices, abuse of dominance, and mergers.

Within the merger regulation framework, the biggest contribution that the CA makes in pursuance of economic transformation is that it provides for the consideration of public interest factors such as employment, the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market, and the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.¹²⁰⁶ The chapter concludes by discussing the goals of the South African Competition Act in detail. It observed that

¹²⁰² See part 2.5.2 of Chapter 2 above; Ndlovu (2017) at 29-30.

¹²⁰³ See part 2.5.2 of Chapter 2 above; Kelly *et al* (2017) at 9.

¹²⁰⁴ See part 2.5.2 of Chapter 2 above; OECD (2003) at 10; Competition Commission of South Africa (2019) at 3-4.

¹²⁰⁵ See part 2.5.2 of Chapter 2 above; Preamble to the Competition Act, where it records the need to take into consideration the discriminatory past of apartheid, the excessive concentration of ownership and control, the need to open the economy to a greater number of South Africans and the need for the balancing of the interests of owners, workers and consumers.

¹²⁰⁶ See part 2.5.2 of Chapter 2 above; s 12A(3) of the Competition Act.

whereas the core goal of the CA remains the protection and promotion of competition, there are also public interest and grey-zone goals that cannot be ignored.¹²⁰⁷ To this end, the section identified eight specific goals of the CA, spanning the entire breadth of competition, public interest and grey-zone goals.¹²⁰⁸

Chapter Three comprised an overview of the South African merger regulation framework. It sought to establish the regulatory framework for the consideration of mergers as a foundation for chapter four which discussed the substantive analysis of mergers.¹²⁰⁹ The chapter started by examining the role of merger regulation in achieving the goal of the CA. To this end, it observed that merger regulation serves a proactive role in preventing future abuses of market power, which would negate the aspirations of the CA as a whole.¹²¹⁰ It was noted that market power, which is the ability of a firm to act independently of other competitors and fix prices, exclude competition or behave in any other manner that is detrimental to competition, may be attained through a merger of two or more firms.

Merger regulation therefore seeks to anticipate future abuses due to a firm or firms having attained market power through merger and prevent that eventuality from manifesting. Considering the goals of competition law and the CA, it was observed that merger regulation has a direct impact on the attainment of those goals because through the effective regulation of mergers, competition within a market is protected, resulting in lower prices and a wider product range for consumers.¹²¹¹

Having established the value of merger regulation, the chapter proceeded to define a merger and discuss the classification of mergers. It was observed that a merger, which is the acquisition or establishment of direct or indirect control over the whole or part of

¹²⁰⁷ See part 2.5.3 of Chapter 2 above.

¹²⁰⁸ See part 2.5.3 of Chapter 2 above; s 2 of the Competition Act.

¹²⁰⁹ See part 3.1 of Chapter 3 above.

¹²¹⁰ See part 3.2 of Chapter 3 above.

¹²¹¹ See part 3.2 of Chapter 3 above.

the business of a firm by one or more firms, may be attained in one of two ways, either through acquisition or through control of a target firm.¹²¹² The chapter observed that there are three types of mergers regulated by the CA: Horizontal, Vertical and Conglomerate. Of the three, horizontal mergers, which are mergers between firms in a horizontal relationship and therefore in competition with each other, attract the most scrutiny from competition authorities because they effectively remove a competitor from the market.¹²¹³

It was observed that under the different types of mergers, there is a further categorisation of mergers into small, intermediate and large mergers.¹²¹⁴ Small mergers do not need to be notified to the Commission however, the Commission reserves the right to request parties to notify a small merger within six months of its implementation if it is of the opinion that the merger may substantially lessen competition or that it cannot be justified on public interest grounds.¹²¹⁵ Intermediate mergers are required to be notified to the Commission which will conduct the competition and public interest tests to determine whether to approve or prohibit the merger. Large mergers have to be notified to the Commission, which will refer the merger to the Tribunal for consideration. Where parties fail to notify a notifiable merger the competition authorities may remedy the non-notification through imposition of administrative penalties, imposition of conditions, voiding the merger, or ordering divestiture.¹²¹⁶

Chapter Four consisted of an examination of the substantive analysis of a merger. The purpose of the chapter was to lay a foundation for the analysis of the insertion of the national security veto into the merger regulation framework by identifying the factors

¹²¹² See part 3.3.1 of Chapter 3 above.

¹²¹³ See part 3.3.3 of Chapter 3 above.

¹²¹⁴ See part 3.3.4 of Chapter 3 above.

¹²¹⁵ See part 3.3.4 of Chapter 3 above; s 13(3) of the Competition Act.

¹²¹⁶ See part 3.3.5 of Chapter 3 above.

that impact the assessment of a merger.¹²¹⁷ The chapter reinforced the idea that mergers are prophylactic for market power abuse through a discussion of the nature of merger regulation.¹²¹⁸ It was observed that in the substantive assessment of mergers, a two-pronged assessment has to be conducted by the relevant competition authority.

In the first instance, the Commission or Tribunal must consider the proposed merger's impact on competition by assessing whether the merger may substantially lessen competition in the market.¹²¹⁹ If it is found that the merger may substantially lessen competition, the Commission or Tribunal has to consider whether there are any technological, efficiency or other competitive gains the merger may present and whether the merger can or cannot be justified on substantial public interest grounds.¹²²⁰ Despite the outcome of the competition assessment, the Commission or Tribunal must move to the second leg of the assessment, the consideration of public interest grounds of the proposed merger.

In the public interest test, the Commission or Tribunal must consider whether the proposed merger can or cannot be justified on public interest grounds which include the consideration of factors listed in section 12A(3) of the CA.¹²²¹ It was further observed that the regulation of mergers is not without its challenges. Two particular challenges were identified, the regulation of mergers in digital markets and the regulation of cross-border mergers.¹²²² Regarding digital markets, it was noted that until 2018, the competition authorities had not paid much attention to mergers in the digital space.

It was found that there were mergers in the digital market that were potentially anticompetitive and were escaping regulatory scrutiny because they constituted small

¹²¹⁷ See part 4.1 of Chapter 4 above.

¹²¹⁸ See part 4.2 of Chapter 4 above.

¹²¹⁹ See part 4.3 of Chapter 4 above; s 12A(1)-(2) of the Competition Act.

¹²²⁰ See part 4.3.1 of Chapter 4 above.

¹²²¹ See part 4.3.2 of Chapter 4 above.

¹²²² See part 4.4 of Chapter 4 above.

mergers and thus did not trigger the notification thresholds.¹²²³ To remedy this gap, the Commission issued revised guidelines for small merger notification in 2022 where it stated that there would be more attention paid to small mergers in digital markets. It was also noted that mergers in digital markets may lead to national security concerns, especially where the acquiring firm acquires sensitive personal data or access to sensitive government information.

Regarding the second challenge, the regulation of cross-border mergers, it was observed that whereas the jurisdiction of the competition authorities is clearly spelled out in terms of section 3 of the CA, questions have recently arisen in light of the adoption of the African Continental Free Trade Area (AFCFTA).¹²²⁴ The AFCFTA envisages a common African market with free trade and movement of goods and people. The AFCFTA enacted a competition protocol that establishes a supranational competition authority. The question then arises regarding the jurisdiction of national, regional and African competition authorities in cross-border mergers. The challenges discussed, while not the primary focus of the thesis, provided insight into how cross-border mergers and mergers in digital markets may potentially lead to national security concerns.

Chapter Five comprised a critical analysis of the national security veto in terms of section 18A of the CA. It observed that one of the aims of the Competition Amendment Act of 2018 was to facilitate the effective participation of the National Executive within proceedings contemplated in the Act, including making provision for the National Executive intervention in respect of mergers that affect the national security interests of the Republic.¹²²⁵ To that end, the President is empowered to constitute a National Security Committee (NSC) to assess whether a merger involving a foreign acquiring

¹²²³ See part 4.4.1 of Chapter 4 above.

¹²²⁴ See part 4.4.2 of Chapter 4 above.

¹²²⁵ See part 5.1 of Chapter 5 above; Long title of the Competition Amendment Act.

firm may have any adverse effects on the national security of the country.¹²²⁶ Cognizance was taken of the fact that the protection of national security is a constitutional imperative however, the question was asked whether regulating national security through competition law was the most appropriate approach.

The chapter provided a critiques of section 18A by partitioning the provision into specific topics and going through each subsection of the section to identify challenges that may be associated with the section.¹²²⁷ It was observed that in establishing the NSC, no proper context was provided regarding its mandate as ‘national security’ was not defined prior to the establishment of the NSC.¹²²⁸ Considering that the NSC is given the mandate to assess all mergers involving a foreign acquiring firm, it was also questioned whether it was the most appropriate body to consider mergers. The CA mandates merger regulation to the Commission and Tribunal, specialist bodies that have the requisite knowledge and experience in considering mergers whereas the NSC lacks all the above.¹²²⁹

It must be borne in mind that ‘national security’ is not defined, rather, a list of consideration to be taken into account by the President when he determines the scope of national security is provided.¹²³⁰ The provision of an open-ended list of consideration to be taken into account to make a future determination of what constitutes national security goes against the principle of legal certainty, which in turn violates the rule of law. Further, the powers afforded to the President to determine what constitutes national security is unchecked, which raises concerns of potential abuse of that power in pursuit of industrial or political agendas.¹²³¹

¹²²⁶ See part 5.1 of Chapter 5 above; s 18A of the Competition Act.

¹²²⁷ See part 5.2 of Chapter 5 above.

¹²²⁸ See part 5.2.1 of Chapter 5 above.

¹²²⁹ See part 5.2.1 of Chapter 5 above.

¹²³⁰ See part 5.2.2 of Chapter 5 above; s 18A(4) of the Competition Act.

¹²³¹ See part 5.2.2 of Chapter 5 above; The example of the abuse of the national security provision in the USA by President Trump in blocking several mergers due to Chinese interests is instructive here.

Regarding the procedure for consideration of a NSI merger, it was noted that while a timeframe is provided, the section further provides the President with authority to extend the review period by an undetermined period. This again goes against the principles of legal certainty and the rule of law.¹²³² It was argued that section 18A(10) of the national security clause, which regulates the publication of an NSC decision and the informing of Parliament of the decision by the Minister, is unconstitutional. This is because it reduces the authority of Parliament from that of having oversight over the National Executive to being merely informed of a decision of a committee of the Executive.¹²³³

The challenge of the justiciability of an NSC decision was also addressed. It was proffered that because section 18A of the CA does not provide for a review mechanism regarding a decision of the NSC, it could be construed as being non-justiciable. However, arguments were advanced on why section 18A is justiciable including the constitutional right to judicial review, the principle of the rule of law, and the application of international law through an analysis of a panel decision of the WTO.¹²³⁴

A link between chapters three, four and five was established through an assessment of the role of competition authorities in the consideration of a merger that raises NSI concerns. It was noted that the jurisdiction of the competition authorities was ousted where the NSC makes an adverse decision regarding an NSI merger. This is because the competition authorities are barred from considering a merger where the NSC has decided to block it.¹²³⁵ The position is untenable as it prevents the traditional merger review process from happening. Lastly, the chapter considered the delegation of Presidential power in terms of section 18A(15) of the CA. The delegation of power to

¹²³² See part 5.2.3 of Chapter 5 above.

¹²³³ See part 5.2.3 of Chapter 5 above.

¹²³⁴ See part 5.2.3 of Chapter 5 above; Tavuyanago & Vinti (2023).

¹²³⁵ See part 5.2.4 of Chapter 5 above; s 18A(11)-(12) of the Competition Act.

'any member of Cabinet' goes against the principle of the rule of law as it subverts the accountability of the executive.¹²³⁶

Chapter Six comprised of a critical comparative analysis of the treatment of national security in merger regulation in the USA and Australia. From the onset, the chapter observed that the consideration of national security in competition and or investment regimes is not unique to South Africa as the USA and Australia also provide for the national security screening of mergers and investments through mergers.¹²³⁷ In terms of the US system, national security in mergers and investments is regulated through several pieces of legislation.¹²³⁸ While national security is not mechanically defined, the US system provides an expansive list of what factors must be taken into account when determining whether a merger or investment raises national security concerns. The list is further elaborated upon through definitions of the listed factors. For example, regarding critical infrastructure as a national security factor, the US provides a further list of 28 areas considered to be critical infrastructure, thus creating certainty.¹²³⁹

In the US, the assessment of mergers that potentially impact national security is conducted by the CFIUS, an independent interagency body that comprises of representatives of departments in which national security concerns, if not identified and neutralised, may have a direct impact on.¹²⁴⁰ Further, the US system provides clear guidelines and a definite timeline regarding the assessment of a merger which raises NSI concerns. To this end, the entire three-stage process of notification and assessment of a merger can take up to 90 days, with the President allowed to extend the period with a once-off 15-day extension.¹²⁴¹ Lastly, a decision of the CFIUS, implemented by the US President is reviewable. While the President's executive

¹²³⁶ See part 5.2.5 of Chapter 5 above.

¹²³⁷ See part 6.1 of Chapter 6 above.

¹²³⁸ See part 6.2.1 of Chapter 6 above.

¹²³⁹ See part 6.2.1 of Chapter 6 above.

¹²⁴⁰ See part 6.2.2 of Chapter 6 above.

¹²⁴¹ See part 6.2.3 of Chapter 6 above.

decisions are not subject to judicial review, the process by which the President makes that decision is reviewable based on the constitutional right to due process.¹²⁴²

In terms of the Australian system, national security in mergers and investments is regulated through investment law.¹²⁴³ While national security is not mechanically defined, the Australian system provides a narrow list of five factors that must be considered when determining whether a merger or investment raises national security concerns. The list relates to only two areas, the starting or carrying on of a national security business, and the acquisition of national security land.¹²⁴⁴ What constitutes a national security business and national security land is elaborated on through definitions in separate legislation that regulates specific industries.¹²⁴⁵ Investors are therefore provided with sufficient information with which to make an informed decision in relation to whether their intended investment will trigger a national security assessment.

The assessment of mergers that potentially impact national security in Australia is conducted by the Treasurer who is assisted by the FIRB. The FIRB is an independent non-statutory body that comprises of experts in competition, law, economics and public policy.¹²⁴⁶ The competition authority in Australia, the ACCC does not consider mergers that have NSI concerns, nor does it consider national security as a factor in its traditional merger assessment. However, the ACCC still plays some role in the assessment of a merger that has NSI concerns as it is consulted by the FIRB on competition and public interest implications of such a merger.¹²⁴⁷

The Australian system also provides clear guidelines and a definite timeline regarding the assessment of a merger which raises NSI concerns, including an informal

¹²⁴² See part 6.3.3 of Chapter 6 above; *Ralls v CFIUS et al* (2014).

¹²⁴³ See part 6.3.1 of Chapter 6 above; Foreign Acquisitions and Takeovers Act of 1975.

¹²⁴⁴ See part 6.3.1 of Chapter 6 above.

¹²⁴⁵ See part 6.3.1 of Chapter 6 above; Security of Critical Infrastructure Act of 2018; Security Legislation Amendment (Critical Infrastructure) Act of 2021; Telecommunications Act of 1997

¹²⁴⁶ See part 6.3.2 of Chapter 6 above.

¹²⁴⁷ See part 6.3.2 of Chapter 6 above.

consultation between merger parties and the FIRB prior to notification of the proposed transaction to the Treasurer.¹²⁴⁸In that vein, Australia provides that an assessment of an NSI merger may take up to 210 days however, as a matter of practice, reviews are completed within an average of 44 days.¹²⁴⁹

Lastly, Australia provides an accountability mechanism to hold the Treasurer to account for their power to block a merger or investment based on national security. The decision of the Treasurer is subject to judicial review under the FATA. An aggrieved party may apply for judicial review of the Treasurer's decision in the Administrative Appeals Tribunal, which may confirm, amend or overturn the Treasurer's decision.¹²⁵⁰ Further, the Treasurer is also accountable to the Australian Parliament, to which they must provide report on all decisions made in relation to national security, which report must demonstrate how a balance has been struck between protecting national security and promoting foreign investment, including investment through mergers.

The chapter provides, in its penultimate section, a summary of key findings from the USA and Australian systems, citing what lessons South Africa may learn therefrom.¹²⁵¹

The US system provides a number of lessons, namely:

- that in order to create certainty, there must be a determined list of factors that will be considered in a national security assessment;
- that the independence of the NSC must be guaranteed through a specific subsection of section 18A in order to ensure certainty in relation to the manner in which decisions will be made as well as to protect the rule of law;
- that the members of the NSC must be determined or determinable beforehand, instead of leaving the constitution of the NSC entirely in the President's

¹²⁴⁸ See part 6.3.3 of Chapter 6 above.

¹²⁴⁹ See part 6.3.3 of Chapter 6 above.

¹²⁵⁰ See part 6.3.3 of Chapter 6 above.

¹²⁵¹ See part 6.4 of Chapter 6 above.

prerogative; that more clarity is needed in relation to the actual consideration of NSI by the NSC; and

- that a determined accountability model is needed to ensure that the powers vested in the NSC, and the President are exercised within legal parameters and are not abused in the pursuit of industrial or political agendas.¹²⁵²

The Australian system also provides several lessons, namely:

- that legal certainty is a fundamental tenet of the rule of law and that the law regarding national security determination must be certain;
- that when considering national security, it is important to steer clear from conflating it with national interest and by so doing, provide for considerations that are so broad that they may be potentially abused;
- that the consideration of national security falls outside the purview of competition and consumer law;
- that the South African regime must create a buffer in the consideration of NSI by the NSC through the establishment of a separate board like the FIRB or a sub-committee of the NSC, comprising of industry experts to consider NSI concerns and assist the NSC in making informed and judicious decisions in relation to national security;
- that the timeframe for a consideration of NSI must be determined, like the Australian system which provides for a clear 30-day consideration period, with possible extensions of 90 days per extension;
- that there must be a provision making it obligatory for the NSC to consider advice or representations from the Commission would be a welcome amendment to the Act; and

¹²⁵² See part 6.4.1 of Chapter 6 above.

- that there needs to be an avenue for recourse for a party against whom an adverse decision may be made.¹²⁵³

Having summarised the key findings of the thesis, including the identification of potential challenges to section 18A, the ensuing section aims to provide recommendations on how to remedy the identified deficiencies.

¹²⁵³ See part 6.4.2 of Chapter 6 above.

7.3 RECOMMENDATIONS

From the discussion on the thesis' key findings above, and the thesis more broadly, it has been established that the national security veto faces challenges in relation to both its placement and formulation. The challenges can summarily be categorised into the following clusters:

- (a) The suitability of regulation of national security through competition law;
- (b) The lack of legal certainty regarding the definition of national security, the appointment of the NSC;
- (c) The procedure of considering NSI, including the role of the competition authorities in that process;
- (d) The independence and accountability of the NSC;
- (e) The lack of a review mechanism regarding a decision of the NSC.

The solutions to the identified challenges may be found in the following proposals for reform:

- (a) The regulation of national security through separate and holistic legislation specifically aimed at governing national security concerns that may fall outside the domain of mergers and acquisitions;
- (b) The regulation of national security through South Africa's investment policy and law;
- (c) Review of the national security clause to provide clarity with respect to some of the identified deficient provisions.

The sections below provide an elucidation of the proposed solutions. It should be noted that while some of the proposed reforms may be in the alternative, a combination of the proposals is also possible. Thus, national security could be regulated by separate

legislation, and the provision still be amended to address some of the formulation challenges identified by the study.

7.3.1 Proposal for separate regulation of national security

One of the objectives of this study has been to investigate whether competition law is the most suitable means for the regulation of national security. It was observed that South Africa does not have cohesive national security legislation, as the concept of national security is provided for and referred to piecemeal within the varied contexts of defence, national intelligence, protection of information and merger regulation.¹²⁵⁴ However, such disjointed regulation is untenable. In that spirit, it has been argued that competition law is not the most suitable vehicle for the protection and promotion of national security, considering that the aims and objectives of the Competition Act are to promote and maintain competition.¹²⁵⁵

Considering that as far back as 1996, the government understood national security to include political, economic, social and environmental matters, that, national security in respect of the South African people, “is an all-encompassing condition in which individual citizens live in freedom, peace and safety; participate fully in the process of governance; enjoy the protection of fundamental rights; have access to resources and the basic necessities of life; and inhabit an environment which is not detrimental to their health and well-being”, and that, “the objectives of security policy, therefore, encompass the consolidation of democracy; the achievement of social justice, economic development and a safe environment; and a substantial reduction in the level of crime, violence and political instability”,¹²⁵⁶ it is evident that the scope of national security goes far beyond the aims and objectives of competition law.

¹²⁵⁴ See part 5.2.2 of Chapter 5 above.

¹²⁵⁵ Tavuyanago (2021) at 22.

¹²⁵⁶ South African Department of Defence “Defence in a Democracy: White Paper on National Defence for the Republic of South Africa” (May 1996) at

Furthermore, during deliberations relating to insertion of section 18A into the Competition Act, the Minister of Economic Development admitted that the regulation of national security could have been done through separate legislation, with one of the advantages of stand-alone legislation being its ability to “go beyond mergers such as when a foreign firm is acquiring a business overlooking a national key point, thus falling outside the scope of competition”.¹²⁵⁷

To this end, it is appropriate to enact a separate piece of legislation to specifically define and govern national security. This suggestion has been previously mooted and supported by some scholars.¹²⁵⁸ The new law regulating national security could have a section referring to the consideration of national security in competition, investment and consumer law, and referencing the furtherance of the objectives of the relevant legislation regulating these identified areas.

The regimes of the USA and Australia are also instructive in this regard. In the USA, national security is regulated as part of the overarching defence policy of the USA through the Defense Production Act, as amended and supplemented by the FINSA and the FIRRMA. While in Australia, national security is regulated as part of the broader Australian investment policy through the FATA. Neither of the above jurisdictions includes or considers national security as part of their competition regimes. This is

<http://www.dod.mil.za/document/LegislationNav/Legislation/White%20Paper%20on%20Defence.pdf> (accessed 6 January 2024), chapter 2.

¹²⁵⁷ See Tavuyanago (2021) at 23; PMG “Competition Amendment Bill B23-2018: Ministry response to submissions: Economic Development” (11 September 2018) at <https://pmg.org.za/committee-meeting/27045/> (accessed 6 January 2024).

¹²⁵⁸ Tavuyanago (2021) at 22-23, where the author suggests that it would have been more appropriate to have stand-alone legislation regulating national security interests; Oxenham, Currie & Stargard (2019) at 235, where the authors suggest that national security issues should be regulated by separate legislative instruments rather than through the distinct vehicle of competition legislation; Mudzamiri & Osode (2021) at 3, where the authors suggest that the satisfactory protection of national security interests in the South African merger control context requires, among other things, adopting separate primary legislation and regulations designed to supplement s 18A of the Amendment Act; and at 13, where the authors applaud the UK’s proposed removal of national security from the Enterprise Act and placing the national security provision into a separate and devoted statute.

because competition law is aimed at the promotion and maintenance of competition, not the protection and advancement of national security. To ensure that the aims and objectives of the Competition Act are not obfuscated by burdening it with broader national security objectives, a proposal is therefore made for national security to be regulated by separate legislation.

7.3.2 Proposal for regulation of national security under PIA

If the regulation of national security through separate legislation is not desirable or practicable, for whatever reason, it is proposed that national security alternatively be regulated through investment law by relocating section 18A of the Competition Act to the Protection of Investment Act. This proposal is sound, based on two reasons. First, investment law and policy are broader than competition law, contemplating “the committal of resources of economic value over a reasonable period of time”,¹²⁵⁹ which would incorporate greenfield investments as well as investments through mergers and acquisitions.

It is also observed that mergers and acquisitions are contemplated and defined under the definition of ‘investment’ in terms of the PIA.¹²⁶⁰ In that vein, the PIA is suitably positioned to regulate mergers involving foreign acquiring firms, as it provides for the right to regulate foreign investments in accordance with the Republic’s sovereignty and pursuance of public interest.¹²⁶¹ Section 4(b) of the PIA could thus be construed to include the consideration of national security as part of South Africa’s sovereignty and provisioning the screening of foreign investments to protect that sovereignty.

Furthermore, the PIA provides that the government or any organ of state may take measures that are necessary for the fulfilment of the Republic’s obligations regarding the maintenance, compliance or restoration of international peace and security, or the

¹²⁵⁹ See section 2(1)(a) of the Protection of Investment Act.

¹²⁶⁰ Section 2(1)(c) of the Protection of Investment Act.

¹²⁶¹ Section 4(b) of the Protection of Investment Act.

protection of the security interests, including the financial stability of the Republic.¹²⁶² The 'measures that are necessary' provided for by the section, in my opinion, include the prohibition of a merger involving a foreign acquiring firm that raises national security concerns as such a merger would qualify as an investment under the PIA and therefore, would be subject to investment screening based on national security.

It is reasonable to consider relocation of the national security veto to section 12 of the PIA, which already provides justifications for investment screening and enables the government to take whatever steps are necessary to protect... [national security]. The logistics around the assessment of a merger that raises national security concerns would be thrashed out through regulations, mandating the responsible screening body to consult the competition authorities regarding the potential impact of a proposed merger on competition and public interest thus, ensuring that the competition authorities still play a role in merger assessments as envisaged by the Competition Act.

The second reason that would justify placing national security considerations in investment is that the example of the Australian regime provides a blueprint for this avenue. As noted by this study, national security is regulated through the FATA, an investment law. The Australian regime takes cognizance of the fact that investment law is broader than competition and consumer protection law, as mergers also fall under the scope of investment law.

To that end, the Treasury, assisted by the FIRB is responsible for the governance of Australia's investment law, under which the Treasurer is empowered to block a merger that will potentially adversely affect the national security of Australia. In its assessment of a proposed merger that raises NSI concerns, the FIRB is obligated to consult the relevant competition authority, the ACCC, and consider the ACCC's traditional assessment of the proposed merger, considering its potential impact on competition and public interest. A balance must then be struck between protecting national security

¹²⁶² Section 12(2) of the Protection of Investment Act.

and being open to investments by considering the potential benefits to competition and public interest of a proposed merger.

Considering the above reasons, the proposal for the relocation of the national security veto to the PIA is therefore well grounded.

7.3.3 Proposal for amendments to section 18A

The current framing of the national security clause, as detailed in chapter five above leaves a lot to be desired. The provision fails among other things: to define national security, to provide checks to the power given to the President, to ensure the independence of the NSC, to provide a review mechanism in respect of a decision of the NSC and to provide certainty regarding the procedure and timelines for the consideration of NSI by the NSC.

To address the above shortcomings, an amendment of section 18A of the Competition Act is suggested. The suggested amendments will apply to the national security veto whether it is retained in the Competition Act, placed in a new 'National Security Act' or relocated to the Protection of Investment Act, with the necessary alterations made to references to the Competition Act and the competition authorities.¹²⁶³ Hereunder, I provide suggested amendments to the national security clause by providing additions and deletions to the current provision in bold and parenthesis.

¹²⁶³ For the purposes of the suggested amendments, the assumption is made that the national security veto will be retained in the Competition Act, therefore, the section is amended as it currently reads.

PROPOSED SECTION 18A OF THE COMPETITION ACT (INTERVENTION IN MERGER PROCEEDINGS INVOLVING FOREIGN ACQUIRING FIRM)

S18A:

- (1) The President must constitute a Committee which must be responsible for considering, in terms of this section, whether the implementation of a merger involving a foreign acquiring firm may have an adverse effect on the national security interests of the Republic.
- (2) The Committee contemplated in subsection (1) must consist of ~~[such]~~
 - (a) Cabinet Members **[representing the Departments of Communications and Digital Technologies; Defence; Employment and Labour; Government and Information Systems; Home Affairs; Justice and Constitutional Development; National Treasury; State Security Agency; Trade, Industry and Competition (Chair); and The Presidency];** and
 - (b) other public officials as may be determined and appointed by the President;
 - (c) **[an independent advisory panel responsible for advising the Committee and consisting of experts in business; competition policy; economics; investment policy; law; national security and public administration, appointed by the President subject to the necessary security clearances.]**
- (3) The President ~~(must)~~ **[may]** identify and publish in the Gazette **[an additional list of]** national security interests of the Republic **[in congruence with national security as defined and provided for under subsection (4)],** including the markets, industries, goods or services, sectors or regions in which a merger involving a foreign acquiring firm must be notified to the committee referred to in subsection (1), in terms of subsection **(5)**.

(4) **[(1) The term ‘national security’ shall be construed to include those issues relating to the protection of South Africa’s sovereignty and the related priorities of: territorial integrity; constitutional order; security and continuance of national institutions; economic development; the well-being, prosperity and upliftment of the people; and demonstrable good governance.]**

(2) In determining what constitutes national security interests for purposes of **[the application of]** this Act, the **(President) [Committee referred to in subsection (1)]** must take into account all relevant factors, including the potential impact of a merger transaction

- (a) on the Republic’s defence capabilities and interests;
- (b) on the use or transfer of sensitive technology or knowhow outside of the Republic;
- (c) on the security of infrastructure, including processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of citizens and the effective functioning of government;
- (d) on the supply of critical goods or services to citizens, or the supply of goods or services to government;
- (e) to enable foreign surveillance or espionage, or hinder current or future intelligence or law enforcement operations;
- ~~((f) on the Republic’s international interests, including foreign relationships;)~~
- (f) to enable or facilitate the activities of illicit actors, such as terrorists, terrorist organisations, **[cyber-crime]** or organised crime; **(and)**
- (g) on the economic and social stability of the Republic; **[and]**
- [(h) on the sovereignty of the Republic where the foreign acquiring firm is a firm controlled by a foreign government.]**

~~**((5) The President must issue regulations governing**~~

- ~~(a) the notification, processes, procedure and timeframes to be followed by the Committee referred to in subsection (1) when performing its functions under this section; and~~
- ~~(b) access to information concerning the merger, including confidential information.)~~
- (5) A foreign acquiring firm which is required to notify the Competition Commission in terms of section 13A(1) of an intended merger must, at the time of the notification of the merger to the Competition Commission, file a notice with the Committee referred to in subsection (1) in the prescribed form and manner if the merger relates to **[national security as defined and identified in terms of subsection (4)]** ~~(the list of national security interests of the Republic as identified by the President in terms of subsection (3).)~~
- (6) Within 60 days of receipt by the Committee referred to in subsection (1) of a notice in terms of subsection (5), or ~~(such further period)~~ **[a once-off 30-day extension]** which the President may agree to, on good cause shown, the Committee must consider and decide on whether the merger involving a foreign acquiring firm may have an adverse effect on the national security interests of the Republic **[defined and identified in terms of subsection (4).]** ~~(identified by the President in terms of subsection (3).)~~
- ~~((8) The Committee referred to in subsection (1) may take into account other relevant factors, including whether the foreign acquiring firm is a firm controlled by a foreign government.)~~
- (7) During its consideration of a merger in terms of this section, the Committee ~~(may)~~ **[must]** consult and seek the advice of the Competition Commission **[or the Competition Tribunal regarding the proposed merger's potential impact on competition and public interest – in line with their assessment of mergers**

under section 12A of this Act and may consult and seek the advice of] ~~(or)~~
any other relevant regulatory authority or public institution.

- (8)** The Minister must, within 30 days of the decision contemplated in subsection **(6)**
- (a) publish a notice in the Gazette of the decision to permit, permit with conditions or prohibit the implementation of a merger; and
 - (b) ~~(inform the National Assembly, in appropriate detail, of the decision)~~
[provide a report to the National Assembly, in which a description of the outcome of the national security review, and reasons for the decision are provided.]
- (9)** The Competition Commission may not consider a merger in terms of section 12A, and the Competition Tribunal may not consider a merger in terms of section 16(2), if the foreign acquiring firm failed to notify the Committee in terms of subsection **(5)**.
- (10)** The Competition Commission may not make a decision in terms of section 13(5) (b) or 14(1)(b), and the Competition Tribunal may not make an order in terms of section 16 (2), where the Minister has published a notice in the Gazette prohibiting the implementation of the merger on national security grounds.
- (11)** (a) The Committee may revoke its approval of the merger or, in respect of a conditional approval, make any appropriate decision regarding any condition relating to the merger, if
- (i) the approval was based on incorrect information for which a party to the merger is responsible;
 - (ii) the approval was obtained by deceit; or
 - (iii) a firm concerned has breached an obligation attached to the approval.
- (b) If the Committee revokes its permission in terms of paragraph (a), the Competition Commission's or Competition Tribunal's approval or conditional approval of the merger is deemed to be revoked.

- (c) Unless the Committee determines otherwise, the Competition Commission's or Competition Tribunal's approval or conditional approval of a merger involving a foreign acquiring firm is deemed to be revoked if the foreign acquiring firm failed to notify the Committee in terms of subsection (5).
- (12) The Competition Tribunal may impose an administrative penalty, in accordance with the provisions of section 59(3), on the parties to a merger involving a foreign acquiring firm for any contravention contemplated in section 59(1)(d), read with the changes required by the context.
- (13) The President may delegate any power or function conferred on him or her under subsection (3) or (4) to any Cabinet Member.
- [(14) A party to a merger may apply to the High Court of South Africa for review of a decision of the Committee to prohibit or impose conditions on a merger on the basis that a national security risk exists, in accordance with the provisions of the Promotion of Administrative Justice Act 3 of 2000 and the Superior Courts Act 10 of 2013.]**

The above-suggested amendments address the challenges raised by this study. For example, in relation to the lack of legal certainty regarding the definition and scope of national security, a functional definition was provided in subsection (4). Regarding the appointment and composition of the NSC, an amendment in relation to the composition of the NSC was made to subsection 2 of the provision to allow for definite membership of the NSC.

Regarding the procedure of assessing and deciding on a proposed merger, an amendment to subsection (6) was suggested, in terms of which the President is given the allowance to extend the review period by a once-off 30-day period. The provision of a once-off extension provides certainty and a sense of finality regarding the

timeframe for the national security review as opposed to the possibility of an indeterminate extension.

Regarding the role of the competition authorities in a national security review, an amendment was made in subsection (7), replacing the discretionary 'may' with the obligatory 'must' concerning the NSC's consultation with competition authorities. Further, an addition was made to subsection (7) relating to the role of the competition authorities, in terms of which the authorities will still be able to conduct the traditional merger assessment and provide advice or recommendations to the NSC.

As far as the challenge regarding the independence and accountability of the NSC is concerned, three amendments were suggested. First, an addition to subsection (2) was made, inserting a new subsection (2)(c) which creates an independent advisory panel responsible for actually conducting the national security review and advising the NSC in respect of NSI implications of a proposed merger.

The second amendment was made under subsection (8) of the new provision wherein a paragraph (b) was inserted. The paragraph mandates the Minister to, within 30 days of the NSC making a decision, provide the National Assembly with a report detailing an NSC decision regarding a merger involving a foreign acquiring firm, as well as reasons for the decision. The third amendment, which also addresses the challenge of the lack of a review mechanism regarding a decision of the NSC, was the insertion of a new subsection (14) which provides for the judicial review of a decision of the NSC.

These amendments will ensure that the NSC is held accountable for its decisions and will limit the consideration of agendas outside the scope of the defined national security.

7.4 CONCLUDING REMARKS

This study has found that the protection and maintenance of national security is a constitutional imperative. As such, the government must do all that is necessary to ensure that national security is protected. This is usually done through the formulation of a National Security Policy or a National Security Strategy, implemented through specific national security legislation. In situating national security within the Competition Act, the legislature seems to have missed the mark and gone against the grain of international best practices as the aim of competition law worldwide, is to promote and maintain competition within the market, not effect national security policy.

This thesis proposed the enactment of stand-alone legislation to govern national security, which would go beyond the narrow competition scope given in the Competition Act. In the alternative, the thesis proposed relocation of the national security clause to the Protection of Investment Act, considering that investment law is wider than competition law and the definition of an investment encompasses mergers and acquisitions. Lastly, the thesis made a proposal for the amendment of the national security veto to address the deficiencies identified in the critical analysis of section 18A under chapter five. While the amendments were made to the existing section 18A of the Competition Act, it is suggested that should the national security veto be moved to separate national security legislation or the Protection of Investment Act, the amendments would apply thereto *mutatis mutandis*.

In conclusion, it is hoped that this thesis makes a meaningful contribution to competition jurisprudence and the future regulation of national security.

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