Submission in response to the Competition Amendment Bill, 2018 (Gazette No. 41756, 5 July 2018)

A - Introduction

The Helen Suzman Foundation ("**HSF**") welcomes the opportunity to make submissions to the Portfolio Committee on Economic Development ("**the Committee**") on the Competition Amendment Bill, 2018 [B23-2018] ("**the Bill**"). Should the opportunity arise, the HSF wishes to make oral presentations to the Committee.

The HSF is a non-governmental organisation whose main objective is to defend the values of our constitutional democracy in South Africa, with a focus on the rule of law, good governance and accountability.

The HSF endorses the objectives of the Bill, namely to address high levels of concentration and the skewed ownership profile of the economy, and encourages the promotion of administrative efficiency of the Competition Commission and Tribunal. We recognise the Constitutional imperative found in section 198 of the Constitution, which sets out the governing principles of national security in the Republic. Morever, we recognise that national security is subject to the authority of both Parliament and the national executive.

We believe the recommendations made in this submission will mitigate the risk of future legal challenge of Section 18A of the Bill.

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B – Scope of the Submission

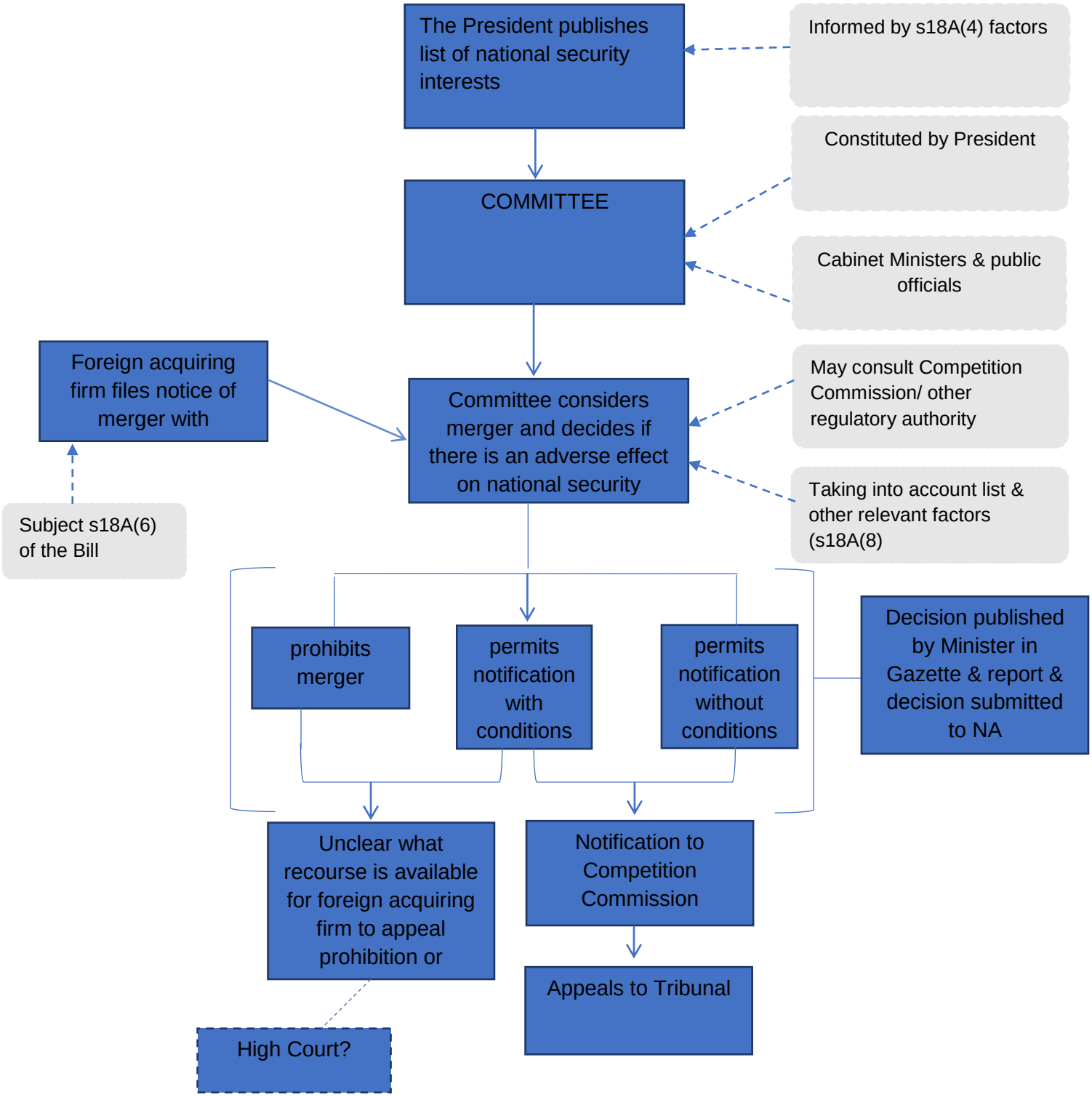
This submission is confined to comments relating to the newly inserted section 18A of the Bill. With experience in interdisciplinary research and policy work, the HSF is well placed to engage with an amendment of this nature as it relates to complex matters beyond the boundaries of economics and competition law.

The following concerns will be addressed in this submission:

1. The absence of certain definitions.
2. The appropriateness of locating section 18A in the Competition Act.
3. A lack of clarity with regards to the appeal and review processes.
4. The pre-decision engagement process.
5. List of factors in S18(4).
6. The President may delegate determination in S18(12).
7. The appropriate balance between interests of national security and protection of an open investment policy.

C - The Structure to be established by S18A

The HSF understands the process of intervening in a merger by a foreign acquiring firm to take place in the following way:



This basic illustration provides a framework for identifying where section 18A lacks clarity and the consequential uncertainty.

D – Our Suggestions

1. Definitional issues

a. 'a Committee' is not defined in the Act or the Bill. We suggest that the definition reads as follows:

"means the standing committee as constituted by the President of the Republic, tasked with determining the national security threat or interest occasioned by a merger involving a foreign acquiring firm";

b. 'Foreign acquiring firm' includes the definition of a firm "whose place of effective management is outside the Republic". There is no provided definition of "effective management" leaving the term undesirably vague. This creates the possibility for an inconsistent application of which firms may be considered as "foreign acquiring".

We propose that the deficiency be remedied as follows:

> That "effective management" be clearly defined within the definitions to make the intention of the drafters clear about whom the provision applies to.

2. Appropriateness of locating S18A in the Competition Act

South Africa does not have an integrated national security policy. We caution the Committee against pursuing a national security strategy in the arena of competition law, in the absence of a coherent national security policy.

Other jurisdictions have taken care to either draft similar provisions into specific defense legislation or create dedicated Acts which set out the review and decision making process. We consider three comparative examples: the United States, Australia and Canada

The United States: The United States model can be found in Section 721 of the Defense Production Act of 1950, also known as the "Exon-Florio Amendment". This section entitled "Authority to review certain mergers, acquisitions, and takeovers" effectively delegates the investigation of transactions to the Committee on Foreign Investment in the United States (CFIUS) while the President retains the authority to block or approve transactions.

The CFIUS enlists senior officials within their respective departments. These include the Secretary of Treasury, the Secretary of Homeland Security, the Secretary of

Commerce, the Secretary of Defense, the Secretary of State, the Attorney General of the United States, the Secretary of Energy, the Secretary of Labor (non-voting, ex officio), and the Director of National Intelligence (non-voting, ex officio).

The President of the United States may also determine if it is appropriate to include the heads of any other executive department, agency or office generally or on a case-by-case basis.

The Exon-Florio Amendment defines "control" as having the meaning "given to such term in regulations which the Committee shall prescribe." and "covered transaction" as "any merger, acquisition, or takeover that is proposed or pending after August 23, 1988, by or with any foreign person which could result in foreign control of any person in interstate commerce in the United States."[1]

Australia: In Australia, the decision to approve or deny a foreign investment application rests with the Treasurer of Australia - who consults with the Foreign Investment Review Board (FIRB). The legislative framework for foreign investment policy is a complex set of statute, regulations and policy geared at strengthening oversight and review mechanisms.

The Foreign Acquisitions and Takeovers Act 1975 defines "foreign entity" as an "entity that is not an Australian entity."

Canada: Canada enacted the Investment Canada Act which is administered by the Investment Review Division (IRD) a government department situate in the Ministry of Innovation, Science and Economic Development Canada (ISED). The IRD works together with the Minister of ISED, the Minister of Public Safety and Emergency Preparedness whereafter the proposed investment is refered to Cabinet (the Prime Minister and appointed Ministers) who may order a formal review to test for adverse national security risks. This Cabinet-ordered review process is an investigative process which involves Public Safety Canada - the security and intelligence agency of Canada. Other investigative bodies as set out in the National Security Review of Investments Regulations are also involved.

The Investment Canada Act defines "non-Canadian" as meaning "an individual, a government or an agency thereof or an entity that is not a Canadian; (non-Canadien)."

Section 18A (2) of the Bill allows the President of the Republic of South Africa to appoint Cabinet members as well as "other public officials" to the Committee. Given

[1] Reform of CFIUS is currently being debated in the United States through the proposal of the 'The Foreign Investment Risk Review Modernization Act' which seeks to expand the definition of "covered transaction" beyond those that could result in control of a U.S. business by a foreign person. The HSF believes legislative reform of this nature is too far-reaching and overall will weaken competitiveness.

the high-level determination sought to be made, the composition of the Committee should be stipulated to cater for officials in senior positions with the requisite expertise and experience, and from relevant departments or portfolios.

We specifically suggest that high-ranking senior officials from Economic Development, Trade and Industry, State Security, National Intelligence, Treasury and Policing be identified as necessary members of the Committee.

3. Appeal and review mechanisms

Section 18A makes no provision for an aggrieved party to challenge a decision taken by the Committee established in terms of this section.

If the situation arises where the Committee decides to prohibit a merger in terms of section 18A and a foreign acquiring firm is unhappy with this outcome, what recourse is there? Without specification in the Bill, the foreign acquiring firm would have to approach the High Court of South Africa. The fact that the decision relates to national security interests presumably precludes the Competition Commission, Tribunal or Competition Appeal Court from adjudicating on the matter, on the grounds that they lack the relevant expertise.

External review/appeal mechanisms

The roles of the Competition Commission, Tribunal and Appeal Court must be made clear in the Bill as regards the review and appeals processes of decisions taken by the Committee. If they are precluded from adjudicating over a decision of the Committee or taking a decision on review, this must be specified and the appropriate forum, such as the courts, must be stipulated.

Internal review/appeal mechanisms

Review can occur internally, at the Committee stage. The HSF recommends the inclusion of an internal review mechanism whereby parties can challenge a decision of the Committee before seeking relief from a court. A good model of this can be found in section 41(4)(b)(iv) of the Promotion of Access to Information Act[2] (PAIA) whereby a requester of information may lodge an internal appeal or application with a court against the refusal of an application.

[2] Act 2 of 2000.

4. Pre-decision Engagement

The Bill does not make provision for parties to engage with the Committee prior to it taking a decision - either to mitigate or negotiate merger conditions that may lessen the risk of rejection on the grounds of national security concerns.

Models for effective pre-decision engagement or condition setting can be drawn from the USA, Canadian and Australian models.

- The United States includes provision in the Exon-Florio Amendment in Section 721 (l) for "Mitigation, Tracking, and Post Consummation Monitoring and Enforcement", for the CFIUS to "negotiate, enter into or impose, and enforce any agreement or condition with any party to the covered transaction in order to mitigate any threat to the national security of the United States that arises as a result of the covered transaction."

- In Canada, review of this nature may take place before or after the transaction. The Canadian government may impose terms or conditions or ask for undertakings to mitigate risks to national security interests, in a similar manner to the United States model.

- Australia invites foreign investors to engage with its Foreign Investment Review Board (FIRB) in order to explore options of structuring a transaction so that it has a higher chance of being approved.

The HSF strongly urges the inclusion of a provision in the Bill that allows the Committee to afford merging parties an opportunity to commit to conditions or take certain actions so as to satisfy the Committee that the merger will not adversely affect South Africa's national security interests.

5. List of factors in section 18A (4)

In determining what constitutes national security interests the President must consider all relevant factors. Section 18A(4) elaborates on one of these factors being the potential impact of a merger transaction on, *inter alia,* the Republic's defence capabilities and interests; the economic and social stability and the Republic's international interests, including foreign relationships. The list of factors should serve as a guiding criterion which assist the President in drafting regulations defining national security interests, which are specific, clear and focussed. Instead, subsection 4 contains very broad and vague factors which drastically widen the scope of what constitutes a national security interest and is therefore open to potential abuse.

The HSF recommends amending this subsection to include narrower, more detailed factors relating to national security interests. An example of more limited factors for consideration appear in section 41(2) of PAIA.[3]

6. Section 18A (12): President may delegate determination

We are very concerned about the inclusion of section 18A (12). Given that the Bill goes to great lengths to mandate the President, the highest officer of the country, to publish what South Africa's national security interests are, it does not make sense that such a duty should then be allowed to be delegated. Such a provision creates uncertainty as to how South Africa's national security interests are determined. This will not bode well for investor confidence. Additionally, this hampers South Africa's ability to create a uniform and coherent national security policy.

7. Balancing the interests of national security against the protection of an open investment policy

> *"Significant growth of the economy requires accelerated inbound and outbound trade (in particular higher-value products) as well as attracting significant volumes of foreign direct investment."* - South African Defence Review, 2015

The Bill should identify national security as an interest of the state, while it should also making explicit South Africa's receptiveness to foreign investment. We propose the following:

The inclusion of the italicised text in the preamble of the following:

",including making provision for National Executive intervention in respect of mergers that affect the national security interests of the Republic *whilst also promoting an open investment policy*."

We further recommend the following clause be inserted after section 18A (9):

"The Committee in considering a merger in terms of section 18A must take into account economic factors which may adversely affect an open investment policy if the merger is not approved."

[3] These are factors which an information officer may rely on when refusing to disclose certain information on the grounds of defence, security and international relations of the Republic.

E - Conclusion

What this submission has sought to do is two things:

First, we have identified legislative deficiencies that we believe if remedied, strengthen the Bill by doing away with vagueness, over-broad definitions and factors, and the potential for ambiguity in interpreting certain clauses. Additionally, there is a need to clarify the roles of various actors subject to the Bill, such as the Competition Commission, Tribunal and Appeal Court as well as the Committee. Our recommendations as to operations and mechanisms seek to optimise the internal working relationship between these bodies, as well as with merging parties.

Secondly, we have taken cognisance of the need to balance national security interests of South Africa with encouraging an economic environment that is open and receptive to foreign investment. We believe that the recommendations we suggest allow for these priorities to be considered in a way that benefits South Africa and all its people. As a developing economy, stunted by low growth and high unemployment, it is imperative that investor confidence is maintained through certainty and stability. The composition of this Committee is of paramount importance in instilling confidence in its ability to appropriately consider applications that come before it, striking the right balance between national security and economic development.

Our proposals for review and interaction will improve the rationality of the Committee's decisions.

This submission has been prepared by Kimera Chetty, Mira Menell Briel, Charles Simkins and Francis Antonie.