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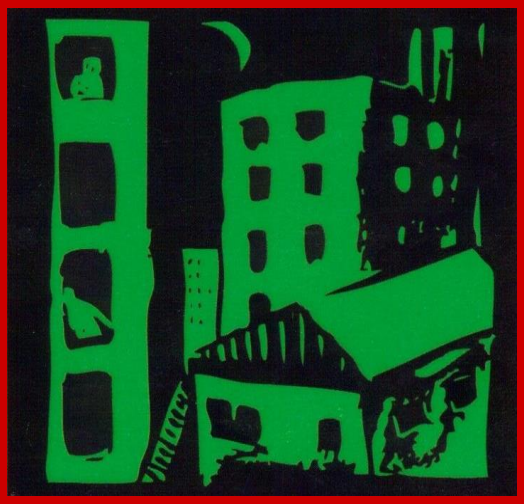

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Reflections on the justiciability of the "national security" clause as stipulated by section 18A of the Competition Act 89 of 1998: Lessons from *Russia – Measures Concerning Traffic in Transit WTO Panel Decision*

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ABSTRACT

This article discusses the justiciability of the national security clause of the Competition Act 89 of 1998, which was introduced through recent amendments to the merger regulation framework. The clause provides for the executive, through the establishment of a national security committee, to intervene in mergers which

may pose a threat to national security interests of the country. The national security committee will have authority to determine whether a proposed merger may be approved, approved subject to conditions, or prohibited. International practice does permit national security concerns as one of the public interest considerations in the assessments of a merger involving a foreign firm. However, section 18A of the Competition Act fails to provide a clear guideline for recourse for parties to a merger that has been deemed to be in contravention of the provision. Consequently, this article assesses the justiciability of the national security clause in section 18A of the Competition Act by advancing the approach of the WTO Panel in Russia – Measures Concerning Traffic in Transit. *In the light of this, it is our view that the decision of the national security committee to prohibit a merger based on national security interests could be challenged by an aggrieved party, even though the Act makes no provision for such a scenario on the grounds of the correlative principles of rule of law, legality and legal certainty, as well as the inherent jurisdiction of our higher (in relative terms) courts.*

Keywords: Competition law; Competition Act; South Africa; national security; mergers; justiciability; rule of law; Panel Report *Russia – Measures Concerning Traffic in Transit*; WTO.

1 INTRODUCTION

The Competition Act 89 of 1998 ("the Act"), amongst other objectives, seeks to facilitate Cabinet's intervention in respect of mergers that negatively impact the "national security interests" of the Republic of South Africa.[1] This novel ethos is reflected in the insertion of section 18A into the Act,[2] which authorises the President to appoint a committee to evaluate whether the implementation of a merger that involves a "foreign acquiring firm" may have an adverse effect on the national security interests of South Africa.[3] Section 18A does not define the term national security, but it does provide several factors that will assist the Committee in deciding whether the merger in question would have an adverse effect on national security interests.[4]

The consideration of national security interest is a new approach in the South African competition regulation framework, and the implications of section 18A are unclear. This article therefore assesses the justiciability of the national security clause in section 18A of the Competition Act. This assessment will be conducted through an analysis of the relevant legislation, case law and international law. It should be mentioned at the outset that national security criteria are widely accepted as legitimate on the basis that they ensure that further evaluation is targeted at mergers involving enterprises with assets, operations or geographic locations that are regarded as fundamental to public safety and security.[5] It must be noted, too, that the novelty of the national security clause is

[1] Preamble of the Competition Amendment Act 18 of 2018 ("Competition Amendment Act").

[2] Section 14, Competition Amendment Act.

[3] Section 18A(1), Competition Act 89 of 1998 ("Competition Act").

[4] Section 18A(4), Competition Act.

[5] Reader D "Extending 'national security in merger control and investment: A good deal for the UK?" (2008) 14(1) *Competition Law International* at 1.

only remarkable in South Africa, as in international law, national security clauses are commonplace.[6] As such, the rationale behind the insertion of section 18A is not on trial in this article. It should also be noted that section 18A is not yet in operation. It will take effect on a date determined by the President by proclamation in the Government Gazette.

2 THE "NATIONAL SECURITY" CLAUSE

To place in context the introduction of the national security clause in terms of section 18A of the Act, it would be apposite to proffer a brief exposition on merger control in South Africa. The subsection below discusses the South African merger control regime, defining what a merger is, highlighting who the responsible authorities for merger control are, and providing an exposition of the factors taken into consideration in the review of mergers.

2.1 Merger control in South Africa

A merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.[7] There are two possible avenues to achieve a merger in terms of the above definition: first, through "acquisition", and secondly, through "control" of a target firm. The acquisition aspect is simple – a merger can be achieved through the purchase or lease of shares or an interest or the assets of the target firm, or by an amalgamation or a combination of the aforementioned.[8] The control aspect is flexible; the Act provides a control test, which sets out at length the different ways of achieving control, whether directly or indirectly.[9] The construct of what constitutes control was authoritatively decided on by

[6] For example, the United States (US) of America, through various legislation, provides for national security considerations in mergers. Section 721 of the Defence Production Act 1950 gives authority to the US President to block or approve mergers, acquisitions and takeovers based on national security grounds. Furthermore, section 232 of the Trade Expansion Act of 1962, entitled "Safeguarding National Security", 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. In Brazil, foreign investments, including investments through mergers, are subject to investigation and regulation by the National Congress and the National Defence Council based on national security interests. In Australia, the Treasury is authorised to either block or approve investment transactions based on national security interests. For a more detailed discussion of the aforementioned jurisdictions, see Tavuyanago S "An analysis of the 'national security interest' provision in terms of Section 18A of the Competition Act 89 of 1998" (2021) *Potchefstroom Electronic Law Journal* (2021) 24(1) DOI https://doi.org/10.17159/1727-3781/2021/v24i0a6031.

[7] Section 12(1)*(a)*, Competition Act.

[8] Section 12(1)*(b)*, Competition Act.

[9] Section 12(2), Competition Act.

the Competition Tribunal in *Bulmer*.[10] In this regard, the Competition Tribunal (the Tribunal) held that section 12(2) of the Act elicits the prevalent situations to be found within the boundary of the meaning of indirect control but does not set the boundary itself; the list, therefore, is not exhaustive.[11] The rationale for this broad interpretation of control was elucidated by the Competition Appeal Court, which remarked:

> "The purpose of merger control envisages a wide definition of control, so as to allow the relevant competition authorities a wide range of transactions which could result in an alteration of the market structure and in particular reduce the level of competition in the relevant market."[12]

Thus, a merger may be effected by direct acquisition or through control of the target firm, as discussed above. "Merger control" refers to legislation and regulations enacted to actively control the structure of the economy to guarantee that it functions effectively.[13] In this way, merger control is an essential part of competition policy, which is aimed at preventing market structures that may countenance abuse of market power by firms to the detriment of consumers.[14] Merger control is necessary because, when a firm gains enough market power, it may end up controlling prices, excluding competition and acting to a certain degree independently of competitors, suppliers, and consumers, all to the detriment of consumers.[15] Therefore, merger control is indispensable in preventing future abuses of dominance by a firm that has attained a dominant position in the market, as well as in maintaining competitive markets that lead to better outcomes for consumers.[16]

Merger regulation and consideration are mandated to the competition authorities, which are the Competition Commission, the Competition Tribunal, and the Competition Appeal Court.[17] The Competition Commission (the Commission) is an independent

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[10] *Bulmer SA (Proprietary) Limited and Another v Distillers Corporation (SA) Limited* and Others [2001] ZACT 13 (19 April 2001).

[11] *Bulmer* (2001) at para [B(3)].

[12] *Distillers Corporation SA Ltd and Another v Bulmer SA (Pty) Ltd and Another* [2001-2002] CPLR 36 (CAC) (27 November 2001) at para 26 (*Distillers* (2002).

[13] Neuhoff M (ed) *A practical guide to the South African Competition Act* 2nd ed Durban: LexisNexis (2017) at 237.

[14] See Neuhoff (2017) at 237.

[15] Section 1 of the Act defines "market power" as the power of a firm to regulate prices, to hinder competition or to behave to a substantial extent, "independently" of its competitors, customers or suppliers.

[16] Whish R & Bailey D *Competition law* 9th ed Oxford: Oxford University Press (2018) at 837. According to section 7 of the Act, a firm is "dominant" in a market if it has at least 45 per cent of that market, or it has at least 35 per cent but less than 45 per cent of that market, unless it can show that it does not have market power; or it has less than 35 per cent of that market, but has market power.

[17] Section 12A, Competition Act; Kelly L et al. *Principles of competition law in South Africa* Cape Town: Oxford University Press (2016) at 163.

investigatory body with jurisdiction throughout South Africa.[18] It is mandated to consider mergers, as one of its roles set out in section 21(1)(e) of the Act. The Commission must investigate and consider "small mergers", where parties to a small merger voluntarily notify the Commission of a merger,[19] or where the Commission requires the parties to notify it of their merger.[20] The Commission is also responsible for the investigation and consideration of "intermediate mergers", and is the decision-maker in terms of such mergers.[21]

The Competition Tribunal is responsible for the consideration of "large mergers"[22] referred to it by the Commission in terms of section 14A of the Act, taking into consideration the recommendation of the Commission, whereafter it must either approve the merger with or without conditions, or prohibit implementation of the merger.[23] The Tribunal has oversight over the decisions of the Commission by functioning as a "court of appeal" with respect to small and intermediate mergers, and has jurisdiction throughout South Africa.[24] The Competition Appeal Court has no direct role in the consideration of mergers. It is a court of record as contemplated by section 166(e) of the Constitution of the Republic of South Africa[25] (Constitution), with a status similar to a High Court.[26] However, as a court of appeal, it is responsible for hearing appeals on the Tribunal's decisions relating to small, intermediate and large mergers.[27]

[18] Section 19, Competition Act; see also section 20, Competition Act on the independence of the Commission.

[19] Section 13(2), Competition Act; according to section 11(5)(a), Competition Act, "a small merger" means a merger or proposed merger with a value at or below the lower threshold established in terms of section 11(1)(a).

[20] Section 13(3), Competition Act.

[21] Section 13A(1), Competition Act; Dini T "South African merger litigations" (2013) 58(2) *The Antitrust Bulletin* at 357. In terms of section 11(5)(b), Competition Act, "an intermediate merger" means a merger or proposed merger with a value between the lower and higher thresholds established in terms of section 11(1)(a).

[22] Section 16, Competition Act. According to section 11(5)(c) of the Act, a "large merger" means a merger or proposed merger with a value at or above the higher threshold established in terms of section 11(1)(a).

[23] Section 16(2), Competition Act.

[24] Section 27(1)(c), Competition Act.

[25] Constitution of the Republic of South Africa, 1996.

[26] Section 36(1), Competition Act.

[27] Section 17(1), Competition Act.

In this regard, the Competition Appeal Court may set aside, amend or confirm the decision of the Tribunal on mergers.[28]

Whenever required to consider a merger, the Commission or Tribunal must initially establish whether or not the merger is likely to "substantially prevent or lessen competition".[29] The factors under consideration include the actual and potential level of import competition in the market and the ease of entry into the market, including tariff and regulatory barriers.[30] If it appears that the merger is likely to substantially prevent or lessen competition, the Commission or the Tribunal must determine whether the merger may be justified on technological, efficiency or other pro-competitive gains that would offset the prevention or lessening of competition, and whether it can be justified on public interest grounds.[31]

Notwithstanding its determination in respect of the effect of a merger on competition, the Commission or Tribunal must still determine whether the merger can or cannot be justified on substantial public interest grounds.[32] The grounds that would be considered in the "substantial public interest" test include the effect the merger would have on a specific industrial sector or region, employment, and the capacity of small businesses or firms owned by previously disadvantaged persons to become competitive.[33]

In essence, the Commission or Tribunal must carry out a two-part test when evaluating a merger. First, in the "competition test", it must consider whether a merger is anti-competitive and, if so, whether it may still be justified for reasons of technological advance, efficiency, pro-competitive gain or public interest. Secondly, in the "public interest test", it must assess whether the merger is anti-competitive or not. The Commission or Tribunal must consider public interest grounds independently of the competition test. The net effect of this two-pronged test is that a competitive merger that adversely affects public interest grounds may be prohibited based on its impact on the public interest, and conversely, a merger that is anti-competitive may be saved where it has a positive impact on the public interest.[34]

In this regard, section 18A of the Act will add another layer to merger control in respect of mergers involving foreign acquiring firms, albeit outside of the jurisdiction of the Commission and the Tribunal. It is against this backdrop and within the merger control framework that Parliament introduced the "national security" clause through the insertion of section 18A into the Act.

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[28] Section 17(2), Competition Act.

[29] Section 12A(1), Competition Act.

[30] Section 12A(2), Competition Act.

[31] Section 12A(1)(a)–(b), Competition Act.

[32] Section 12A(1A), Competition Act.

[33] Section 12A(3), Competition Act.

[34] Tavuyanago S "Public interest considerations and their impact on merger regulation in South Africa" (2015) 15(7) *Global Journal of Human and Social Science: E Economics* at 23; see also Competition Commission "Guidelines on the assessment of public interest: Provisions in Merger Regulation Competition Act No. 89 of 1998" *Economic Development Department Notice 309 of 2016 in GG 40039* (2 June 2016) at para 6.

2.2 The "national security" clause under section 18A of the Act

In terms of section 18A, entitled "Intervention in merger proceedings involving *foreign acquiring firms"*, the President must establish a committee which has the mandate to consider 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.[35] This committee will consist of Cabinet members and public officials as deemed necessary by the President.[36] 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".[37] In essence, an acquiring firm is defined in section 1 of the Act as a firm that, as a consequence of a transaction in any circumstances outlined in section 12, "would directly or indirectly acquire, or establish direct or indirect control over, the whole or part of the business of another firm".

In this way, the national security clause adds another fundamental part to the traditional merger-evaluation process. Where the competition authorities traditionally considered "competition" and "public interest" factors in their review of mergers, section 18A creates a third test that has to be conducted, albeit only in mergers involving a foreign acquiring firm. What constitutes "national security interests" is still uncertain, as a determination has to be made by the President in respect of markets, industries, goods or services and sectors or regions that may fall under the ambit of section 18A.[38] In aiding the above-mentioned determination, the President must take into account various factors, including the potential impact of a merger transaction on:

a the Republic's defence capabilities and interests;
b the use or transfer of technology or know-how outside of the Republic;
c 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 the supply of critical goods and services to citizens, or the supply of goods or services to the government;
e the enabling of foreign surveillance or espionage, or hindering of current or future intelligence or law enforcement operations;
f the Republic's international interests, including foreign relationships;
g the enabling or facilitation of activities of illicit actors, such as terrorists, terrorist organisations or organised crime; and
h the economic and social stability of the Republic.[39]

[35] Section 18A(1), Competition Act.

[36] Section 18A(2), Competition Act.

[37] Section 1(d), Competition Amendment Act read with section 1, Competition Act.

[38] Section 18A(3), Competition Act.

[39] Section 18A(4), Competition Act.

It is clear that this list is not closed. In fact, the committee may consider other relevant factors, including whether the foreign acquiring firm is controlled by a foreign government.[40] A foreign acquiring firm which is required to notify the Commission in terms of section 13A(1) of an intended merger must, when it notifies the merger to the Commission, file a notice with the committee in the prescribed manner if the merger concerns the list of national security interests of the country as stipulated by the President.[41] Unless the committee decides otherwise, the approval or conditional approval of a merger involving a foreign acquiring firm by the Commission or Tribunal is deemed to be revoked if the foreign acquiring firm has failed to notify the committee in terms of section 18A(6).[42]

There is a view that the committee decision must preclude the consideration of a merger in section 12A by the competition authorities. However, section 18A(6) simply requires that the foreign acquiring firm must, at the time of the notification of the merger to the Competition Commission, file the notice to the committee. This requires a concurrent notification of both the committee and the competition authorities, but the actual text of section 18A(6) does not preclude the concurrent consideration of a merger by the Commission and the committee. A contextual approach, reading both provisions holistically in line with the requirements of efficiency in Public Administration as required by section 195(1)*(b)* of the Constitution, would be that the notice to the committee must stay the proceeding of the Commission until such time as a decision has been made by the committee on section 18A.

Section 18A(7) then provides that, within 60 days of the receipt of this notice, or, upon good cause, such further period which the President may consent to, the committee must consider and make a decision as to whether the merger involving a foreign acquiring firm may have an adverse effect on the national security interests of the Republic stipulated by the President. Section 18A(7) read with section 18A(10) simply provides that, after the committee decides on whether a merger involving a foreign acquiring firm adversely affects national security interests, the Minister of Trade and Industry and Competition (Minister) must, within 30 days of this decision, proceed to "publish" a notice in the Government Gazette of the decision to either permit or prohibit the merger and "inform" the National Assembly (hereafter, Parliament) in "appropriate detail" of the committee's decision.[43] Once this decision has been made, the Commission and Tribunal cannot consider this merger.[44] Section 18A therefore outlines the procedure for the assessment of a merger involving a foreign acquiring

[40] Section 18A(8), Competition Act.

[41] Section 18A(6), Competition Act.

[42] Section 18A(13)(c), Competition Act.

[43] The term "Parliament" is apt here, since the National Assembly represents one of the two houses of Parliament in South Africa. It is common cause that the Constitution (as well as s 18A here) confers this "oversight" power only to the National Assembly, and not the National Council of Provinces. However, the courts routinely prefer to say that this power rests with "Parliament" rather than the National Assembly. We concur with this expansive approach for purposes of this discussion.

[44] Section 18A(12), Competition Act.

firm, such as the notification process,[45] the evaluation process,[46] and the decision-making process.[47] It is against this backdrop that this article discusses the justiciability of section 18A.

3 THE JUSTICIABILITY OF SECTION 18A OF THE ACT

Section 18A gives authority to the executive to intervene in mergers involving foreign acquiring firms. While this is not a novel approach, it still raises several questions regarding the implications of the exercise of such authority.[48] Before we tackle the issue of the justiciability of section 18A, it is apposite to set the scene by addressing the antecedent issues of the authority of Parliament in respect of national security issues, and indeed the legal position of the national security committee, as these have a bearing on the position of the courts as the locus of contestation in respect of the national security requirement in the approval of mergers.

3.1 The authority of Parliament

First, it is inconceivable that the duty to "inform" Parliament contemplated by section 18A(10)(b) complies with the power of Parliament to have concurrent authority with the national executive over national security decisions. In this way, the duty to inform Parliament in section 18A violates the Constitution, which provides that one of the principles of national security is that it is subject to the authority of both Parliament and the national executive.[49] Thus there is shared authority or concurrent authority between Parliament and the national executive in respect of national security matters and decisions. Section 18A is therefore unconstitutional in that it reduces the constitutional power of Parliament from that of a concurrent authority with the national executive over all national security decisions to that of an entity merely "informed" of the appropriate details of the national security decisions of the committee. This is a drastic power that undermines Parliament's oversight function in respect of the exercise of executive authority as provided by section 55(2)(b) read with section 198(d) of the Constitution.[50]

Secondly, Parliamentary oversight should provide a counterbalance to the unfettered discretion granted to the committee by section 18A(7) read with section 18A(10)(b), in that this only requires that Parliament be informed of the appropriate details of the decision of the committee, rather than exercising authority over it, which implies

[45] Section 18A(6), Competition Act.

[46] Section 18A(7)–(9), Competition Act.

[47] Section 18A(10)–(13), Competition Act.

[48] See the elaborate discussion in footnote 6 above.

[49] Section 198*(d)*, Constitution of the Republic of South Africa, 1996 (Constitution).

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

Parliament's power to "veto" the national security decision of the committee.[51] The parliamentary oversight envisaged by section 18A is so diluted that it confirms that the power of the committee when making national security decisions is untrammelled.[52] This is in conflict with the Constitution, which requires that national security decisions must be in line with the law, including the Constitution itself. That also requires that Parliament must have oversight or, more precisely here, authority over the committee's decision rather than merely being informed of it.[53] Section 18A is nowhere designed to afford it as active an involvement in its oversight function as is required by the Constitution.[54] The committee has sole discretion on which information will be disclosed to Parliament, since it must provide appropriate detail, which is undefined. This is a fundamental power, which may weaken the capacity of Parliament to exercise oversight over the committee.[55]

It is the committee's extent, and the extent to which it looms in the absence of other safeguards, that is inimical to the role of Parliament in mergers involving foreign acquiring firms under section 18A.[56] For Parliament to effectively exercise its oversight function over the national executive, it must work in a climate that protects, rather than curtails, its freedoms.[57] However, the text, language and structure of section 18A seek to give unfettered discretion to the committee with no parliamentary oversight, in contravention of the principle of accountability.[58] The duty to "notify" Parliament in "appropriate detail" is an insufficient safeguard that neither dilutes nor counterweighs the power of the committee,[59] in that Parliament is unable to scrutinise the committee's decision.[60] In short, section 18A is unconstitutional. It stultifies the oversight function of Parliament contemplated in section 55(2)(b) read with section 198(d) of the Constitution.

Moreover, section 18A(10)(a) of the Act requires the mere publication of a notice of the committee's decision in the Government Gazette by the Minister. It is unclear whether this notice would provide substantive reasons or justification for the committee's decision. Section 18A(10)(b) also requires that the committee, through the Minister, give Parliament appropriate details of the decision. We have already argued

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[51] *Glenister* (2011) at para 144; *McBride v Minister of Police* 2016 (11) BCLR 1398 (CC) at para 55 (*McBride* (2016)).

[52] *Glenister* (2011) at para 241.

[53] Section 198(c)–(d) read with section 55(2)(b), Constitution.

[54] *Glenister* (2011) at para 242.

[55] *Glenister* (2011) at para 242.

[56] *Glenister* (2011) at para 244.

[57] *Democratic Alliance v Speaker of National Assembly* 2016 (3) SA 487 (CC) at para 17.

[58] *Glenister* (2011) at para 144.

[59] *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC) at paras 162–163 (*Helen Suzman Foundation* (2015)).

[60] *Helen Suzman Foundation* (2015) at para 165.

that this provision is unconstitutional, in that it falls short of the rule that Parliament has concurrent authority with the national executive with regard to national security decisions. Furthermore, the word "appropriate" is subjective, and may simply mean the information that the committee deems it permissible to divulge. This might not satisfy the "sufficient explanation" threshold. A balance must be found to make Parliament and the committee concurrent authorities with respect to national security matters.

3.2 The place of the committee on national security issues in South Africa

It should be noted that the committee will be expected to work in tandem with the National Security Council (NSC), which is a body at the level of the national executive with the duty to protect the national security of the Republic of South Africa.[61] The NSC has the duty to approve the National Security Strategy, the National Intelligence Estimate, and National Intelligence Priorities; to harmonise the duties of the security services, law enforcement agencies and relevant state organs in promoting national security; to receive harmonised intelligence assessments from the national security institutions of the Republic; and to require that the institutions in question attend to matters of national security as required.[62]

This means that the committee must work with the NSC to formulate a holistic and harmonised national security policy on mergers involving foreign acquiring firms. While it is unclear which interests constitute national security, it is enough to say that the work of the NSC should be guided by the governing principles of national security as provided by section 198 of the Constitution.[63] In tandem with the NSC, the committee must also cooperate with the National Intelligence Co-ordinating Committee (NINOC), which has the duties of protecting, detecting and identifying any threat or potential threat to the national security of South Africa, and of making recommendations to the Cabinet on intelligence priorities under section 4 of the National Strategic Intelligence Act 39 of 1994. It is necessary that these organs of government must cooperate in good faith.[64]

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[61] Section 4.1 of Proclamation No. 13 of 2020 by the President of the Republic of South Africa on the Establishment of the National Security Council of 10 March 2020 ("Proclamation").

[62] Section 4.2, Proclamation.

[63] Section 198, Constitution provides that the following principles govern national security in the Republic: "(i) 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; (ii) 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; (iii) National security must be pursued in compliance with the law, including international law; (iv) National security is subject to the authority of Parliament and the national executive."

[64] Section 41(1)*(h)*, Constitution.

3.3 The justiciability of the committee decision

It is common cause that the decisions of the Commission, Tribunal and the Competition Appeal Court are all justiciable.[65] While the committee can revoke its approval of a merger, much like the Tribunal and the Commission, section 18A provides no avenue for aggrieved foreign acquiring firms to petition the courts in respect of its decision.[66] Therefore, it is our view that the power conferred on the committee by section 18A is unfettered and could be construed as non-justiciable.

In this regard, "justiciability" is a concept that assesses whether an issue may in any way be adjudicated upon by the courts, whereas "jurisdiction" presupposes justiciability and serves the complementary function of establishing which court has the competence to hear a specific matter. Justiciability always precedes jurisdiction, and once a matter is non-justiciable, the question of jurisdiction does not even arise. To this end, the committee is required, through the Minister, only to publish its decision in the Government Gazette and to inform Parliament of the appropriate detail of this decision. Therefore, from a strict reading of the section, the courts seem to have neither oversight nor the authority to reverse the decision of the committee. There is also no provision in section 18A for a party to a merger that may adversely affect national security interests to appeal an unfavourable decision of the committee, even to the committee itself. This position is untenable.

First, the right of judicial review by the courts has subsumed the common law principle that no legislative provision can oust the jurisdiction of the courts.[67] This approach reinforces the separation of powers doctrine.[68] It is trite law that the courts in South Africa have the right to test all legislation.[69] At the very least, the question of the justiciability of section 18A raises a constitutional issue, as provided by section 167(3)(b)(i) of the Constitution, and an arguable point of law of general public

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[65] Munyai P "Claims for damages arising from conduct prohibited under the Competition Act 1998" (2017) 50(1) *De Jure Law Journal* at 18 & 35.

[66] Sections 15, 16(3) & 18A(13), Competition Act. The revocation of approval by either the Commission or the Tribunal can occur if the approval was based on incorrect information for which a party to the merger is responsible or the approval was acquired through dishonesty or the firm in question has contravened a duty attached to the approval. If the Committee revokes its permission in this regard, the Commission or Tribunal's approval or conditional approval of the merger is deemed to be revoked.

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

[68] Du Plessis (2002) at 169; see also *SA Association of Personal Injury Lawyers v Heath* 2001 (I) SA 883 (CC); *S v Mamabolo (ETV, Business Day and the Freedom of Expression Institute Intervening)* 2001 (3) SA 409 (CC).

[69] *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 (*Fedsure* (1999)); du Plessis (2002) at 172. For further discussion, see, for instance, Mayat MA "Judicial review: A fertile field of contention" (2019) 6(1) *Journal of Law, Society and Development* 1–21; Lenta P "Democracy, rights disagreements and judicial review" (2004) 20(1) *South African Journal on Human Rights* at 1–31.

importance, as provided by section 167(3)(b)(ii) of the Constitution, which gives the Constitutional Court the jurisdiction to hear such matters.[70]

National security is a constitutional matter as provided by section 198 of the Constitution.[71] It is generally accepted that the construal and application of legislation mandated explicitly by the Constitution is a constitutional matter.[72] The Act seeks to give effect to section 9 of the Constitution, and so the interpretation of the Act raises a constitutional matter.[73] Section 9 of the Constitution is the equality clause, which provides that everyone is equal before the law and has the right to equal protection and benefit of the law. The equality clause guarantees equal participation and access to economic opportunities for South Africans, as encapsulated by the Preamble and section 2 of the Competition Act. It has already been held that a question about the powers of the Commission and the Tribunal raises a constitutional issue.[74] This, in our view, brings section 18A within the purview of the matters that can be adjudicated upon by the courts, so making it justiciable.

In this regard, an arguable point of law of general public importance includes issues relating to the powers and functions of an organ of state.[75] For the purposes of this discussion, an organ of state is any institution exercising a power or performing a function in terms of the Constitution, or exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer as provided by section 239 of the Constitution. In this way, it is common cause that the Commission and the Tribunal are organs of state, since they exercise public powers and perform public functions as conferred by the Act.[76]

This means that section 18A raises an arguable point of law of general public importance since it has a significant impact on merger control.[77] If the Act were read to

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[70] *Competition Commission of South Africa v Media 24 (Pty) Limited* 2019 (5) SA 598 (CC) at para 35 (*Media 24 (Pty) Limited* (2019)).

[71] A similar approach was employed in *AB and Another v Pridwin Preparatory School and Others* 2020 (5) SA 327 (17 June 2020) at para 47.

[72] *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.

[73] See *Competition Commission v Loungefoam (Pty) Ltd* 2012 (9) BCLR 907 (CC) at para 16 (*Loungefoam* (2012).

[74] *Loungefoam* (2012) at para 16; *Competition Commission of South Africa v Senwes Ltd* 2012 (7) BCLR 667 (CC) at paras 16 and 18 (*Senwes* (2012)).

[75] *Loungefoam* (2012) at para 16.

[76] *Loungefoam* (2012) at par 16.

[77] See *Competition Commission of South Africa v Hosken Consolidated Investments Limited* 2019 (3) SA 1 (CC) at para 32; *Senwes* (2012) at para 18.

exclude arguable points of law of general public importance from the jurisdiction of the Constitutional Court, it would then violate the Constitution.[78] Legislation must not be construed to deviate from the constitutionally conferred powers of the Constitutional Court – rather, an interpretation that is in accordance with the Constitution must be followed.[79] Therefore, in the broader sense, the Constitutional Court has jurisdiction to hear appeals in respect of section 18A since it raises a constitutional issue and, in any event, raises an arguable point of law of general public importance on which this court must adjudicate.[80] There is no cogent basis for the CAC and the Constitutional Court to refuse to adjudicate on public policy considerations of an economic nature, such as national security considerations on mergers as provided by section 18A.[81]

It goes without saying that one can use the direct-access route to the Constitutional Court under section 167(6) of the Constitution on the ground of interests of justice. So, at the very least, we submit that section 18A is justiciable. The jurisdictional avenue of the CAC and the Tribunal is firmly closed by the yet-to-be promulgated section 62(2A), which, textually, is married to section 18A.[82] Presumably, section 62(2A) would be promulgated simultaneously with section 18A. In other words, the Constitutional Court is the only court with jurisdiction, which limits the grounds of challenge for aggrieved parties.

Secondly, the integrity of the administration of justice and legal certainty in South Africa would be frustrated by subjugating the courts to the untrammelled will of the committee in section 18A. Legal certainty is a function of the rule of law.[83] The rule of law is a foundational value in section 1 of the Constitution, which states that no one is above the law. This is entrenched by section 172 of the Constitution, which gives the courts the right of judicial review.[84] This, of course, is supported by section 165(5) of the Constitution, which states that the decisions of the courts bind everyone. Cardinal to the rule of law is the principle of legality, which demands that the law must be "certain,

[78] *Media 24 (Pty) Limited* (2019) at para 35.

[79] *Media 24 (Pty Limited)* (2019) at para 35.

[80] See *Media 24 (Pty) Limited* (2019) at para 35; *Loungefoam* (2012) at para 23. See in this regard section 63(2), Competition Act read with sections 167 and 168(3), Constitution.

[81] See *Media 24 (Pty) Limited* (2019) at para 164.

[82] Section 62(2A) of the Competition Act 89 of 1998 inserted by section 35(a) of the Competition Amendment Act 18 of 2018.

[83] *Beadica 231 CC v Trustees for the time being of the Oregon Trust* 2020 (5) SA 247 (17 June 2020) at para 81; See section 1*(c)*, Constitution; *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at para 108 (*Affordable Medicines Trust* (2006)).

[84] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 para 56 footnote 52.

clear and stable".[85] Therefore, statutes are meant to "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed".[86]

The national security clause is not susceptible to this immutable requirement of the law. In other words, legal certainty is not only an inherent tenet of the rule of law, but an unassailable object of any legal instrument. In this way, judicial review would be indispensable to providing legal certainty since it turns on judicial precedent and invariably brings the national security clause within the confines of the law.[87] The courts have extolled the significance of certainty in the contemporary modern bureaucratic state as a value that must be reflected in legislation, as it facilitates the principle of legality.[88] As stated earlier, as a rider to the preceding discussion, the principle of legality is a part of the rule of law and one of the constitutional apparatus through which the Constitution regulates the exercise of public power.[89] In this regard, a legality review demands the evaluation of the relationship between the mechanism employed to achieve a specific objective and the stated purpose.[90] This would also make section 18A justiciable. It can be argued too that, if the implication of section 18A is that the decision of the committee is an executive decision, it would have to comply with the principle of rationality as part of the principle of legality.[91] This notion is affirmed by the Preamble to the Competition Amendment Act, which stipulates that section 18A seeks to ensure the national executive's intervention in respect of mergers that affect the national security interests of the Republic.

An executive decision is one that is policy-laden and polycentric.[92] It is trite that all exercise of public power is to a certain extent justiciable under the Constitution, but the exact ambit of the justiciability will hinge on various factors, including the nature of

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[85] *Veldman v Director of Public Prosecutions (Witwatersrand Local Division)* 2007 (3) SA 210 (CC) at para 26.

[86] Veldman (2017) at para 26. *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374.

[87] *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] 3 All SA 1 (SCA) at para 36 (*Oudekraal Estates (Pty) Ltd* (2004)).

[88] *Oudekraal Estates (Pty) Ltd* (2004) at para 37.

[89] *Affordable Medicines Trust* (2006) at para 49; see section 1*(c)*, Constitution; *Fedsure Life Assurance Ltd* (1999) at para 58.

[90] *Wakkerstroom Natural Heritage Association v Dr Pixley ka Isaka Local Municipality* (1765/19) [2019] ZAMPMHC 20 at para 34; *Fair-Trade Association v President of the Republic of South Africa* (21688/2020) [2020] ZAGPPHC 246 at para 19.

[91] *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.

[92] *One South Africa Movement v President of the Republic of South Africa* (24259/2020) [2020] ZAGPPHC 249 at para 87; *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC) at para 114; *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 85.

the power being exercised.[93] Similar to other powers of the executive, this power must be exercised lawfully and rationally.[94] Rationality requires that a decision must be based on reason. All that is required is a rational link between the power being exercised and the decision.[95] The process by which the decision is made and the decision itself must be rational.[96] In this regard, the Constitutional Court has held that rationality and bad faith are examples of grounds on which a court may consent to the notion that a particular issue is justiciable.[97] This is not a closed list.[98] Thus, the decision of the committee is subject to the requirements of rationality and good faith.

Alternatively, if the committee decision were deemed an administrative action, it would still be subject to judicial review, as provided by section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Administrative action is a decision or failure to make a decision – by an organ of state or any person who exercises a public power or function or power in terms of the Constitution or empowering provision – that adversely affects the rights or legitimate expectations of any person and which has a direct and external legal effect.[99] This dual approach is endorsed by the courts, which have held that the review of the exercise of public power can occur through the legality principle or rights conferred by PAJA.[100] Therefore, whether the decision of the committee is classified as executive or administrative in nature, it would still be subject to the constraints of the law. Thus, section 18A is justiciable.

4 POTENTIAL LESSONS FROM *RUSSIA – MEASURES CONCERNING TRAFFIC IN TRANSIT*

In the light of the above finding, it is our view that South Africa can learn from the World Trade Organization (WTO) Panel decision in *Russia – Measures Concerning Traffic in Transit*, which adjudicated on the justiciability of the "national security clause" in Article XXI(b) of the General Agreement on Tariffs and Trade, 1994 (GATT).[101]

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[93] *Kaunda v President of the Republic of South Africa* 2004 (10) BCLR 1009 (CC); 2005 (4) SA 235 (CC) at paras 78 and 244 (*Kaunda* (2004)).

[94] *Kaunda* (2004) at para 245; *Earthlife Africa Johannesburg v Minister of Energy* 2017 (5) SA 227 (WCC) at para 103.

[95] *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 *SALJ* at 260, 267–268.

[96] *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) at para 34.

[97] *Kaunda* (2004) at para 80.

[98] *Kaunda* (2004) at para 80.

[99] See section 1, PAJA; See also section 33, Constitution.

[100] *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.

[101] WT/DS512/7, adopted on 26 April 2019. This approach is not uncommon in view of the community of interest between international trade law and competition law – see, for instance, Vinti C

The basis of this approach is sound. First, one of the main objects of the Act is to ensure the equitable participation of all South Africans and, thus, transformation in the national economy.[102] This promotes the right to equality, as provided by section 9 of the Constitution.[103] Since 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, this means that the interpretation of that right must consider international law and may consider foreign law.[104] It is also required that, when interpreting any legislation, one must prefer a "reasonable interpretation" which is in accordance with international law.[105] This approach is specifically required by section 198(c) of the Constitution, which provides that national security must be construed in conformance with international law. This approach is also cogent because South Africa is one of the founding members of the WTO and must align its legislation with its obligations under the GATT.[106] Consequently, this allows a consideration of WTO jurisprudence.

Furthermore, there is a significant textual correlation between section 18A of the Act and Article XXI(b) of the GATT. Article XXI(b)(iii) states that nothing in the GATT shall be construed "to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations". Thus, Article XXI(b) of the GATT regulates "essential security interests", while section 18A of the Act regulates "national security interests".[107] The Panel in *Russia – Measures Concerning Traffic in Transit* clarified that the term "essential security interests" in Article XXI(b) of the GATT refers

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"'Dumping' and the Competition Act of South Africa" (2019) 52(1) *De Jure Law Journal* at 207–220 on the overlap of these two areas of law.

[102] Sections 2*(e)* and *(f),* Competition Act; *Media 24 (Pty) Limited* (2019) at para 30.

[103] *Media 24 (Pty) Limited* (2019) at para 30.

[104] Section 39(2)*(b)*, Constitution; *Media 24 (Pty) Limited* (2019) para 31.

[105] See section 233, Constitution; *Media 24 (Pty) Limited* (2019) at para 185.

[106] *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.

[107] To this end, Article XXI(b)(iii) of the GATT 1994 is a component of the "Security Exceptions" in Article XXI, which provides: "Nothing in this Agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests: (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations; or (iii) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."

only to matters of fundamental "national security", which are subjectively determined by each member.[108]

It is our submission that matters before the committee in this regard under section 18A would, at the very least, qualify as essential security interests in line with Article XXI(b) of the GATT. This can be gleaned from section 18A(4), which cites matters relating to the Republic's defence capability and interests, the use of sensitive technology, espionage, terrorism, the supply of critical goods, and socio-economic stability. It is conceivable that these fall within the category of essential security interests. Section 18A and Article XXI(b) therefore constitute "national security clauses". Similarly, Article XXI of the GATT 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. In this regard, section 18A of the Act merely provides that the national security decision of the committee must be published in the Government Gazette and Parliament be informed of this decision. In this way, section 18A implies that it is non-justiciable. Thus, section 18A could be argued to be non-justiciable in the same manner as contended by Russia and the US in respect of Article XXI(b) of the GATT in the Panel decision in *Russia – Measures Concerning Traffic in Transit*. It goes without saying that the difference is that Article XXI(b)(iii) only applies to security interests taken in time of war or other emergency in international relations, whereas section 18A would apply in both times of war and peace.

To this end, the Panel in *Russia – Measures Concerning Traffic in Transit* had to establish whether it had jurisdiction to review Russia's invocation of Article XXI(b)(iii) of the GATT.[109] According to Russia, the use of Article XXI(b)(iii) by a member meant that its conduct fell outside the jurisdiction of a WTO dispute settlement panel.[110] Russia's argument was based on its construal of Article XXI(b)(iii) as "self-judging".[111] According to this argument, Article XXI(b)(iii) fell outside of the scope of the Panel's jurisdiction since it evinced conduct that a GATT member regards as necessary for the protection of its essential security interests implemented in a time of war or other emergency in international relations.[112] In response, the Panel held that international adjudicative tribunals, including WTO dispute settlement panels, possess inherent jurisdiction derived from the exercise of their adjudicative function.[113] A part of this inherent jurisdiction is the power to decide on all matters emanating from the exercise of their own substantive jurisdiction.[114]

[108] WTO Panel Report *Russia – Measures Concerning Traffic in Transit* at para 7.128.

[109] WTO Panel Report *Russia – Measures Concerning Traffic in Transit* at para 7.25.

[110] WTO Panel Report *Russia – Measures Concerning Traffic in Transit* at para 7.57.

[111] WTO Panel Report *Russia – Measures Concerning Traffic in Transit* at para 7.57.

[112] WTO Panel Report *Russia – Measures Concerning Traffic in Transit* at para 7.57.

[113] WTO Panel Report *Russia – Measures Concerning Traffic in Transit* at para 7.25.

[114] WTO Panel Report *Russia – Measures Concerning Traffic in Transit* at para 7.25.

In essence, the Panel held that it would be wholly contrary to the integrity and certainty of the multilateral trading system established by the GATT and the WTO Agreements, including the concessions that allow for exemptions from obligations in specific instances, to construe Article XXI as a pure "potestative condition", making the existence of a member's GATT and WTO obligations subject to a simple expression of the arbitrary will of that member.[115] Thus, Russia's contention that the Panel lacked jurisdiction to review Russia's invocation of Article XXI(b)(iii) was rejected.[116] This means that the Panel's construal of Article XXI(b)(iii) also meant that it rejected the US's argument that Russia's invocation of Article XXI(b)(iii) is non-justiciable to the extent that this submission depends on the alleged totally self-judging nature of the provision[117]

This brings to the fore the logical fallacy in the Panel's approach to the nub of the dispute, which saw the matter of the invocation of Article XXI being dealt with primarily as a matter of jurisdiction rather than of justiciability. Russia had raised the matter as one of jurisdiction, whereas the US saw it as that of justiciability.[118] In response, the Panel saw the Article XXI invocation as a matter of jurisdiction. However, the Panel conflated both terms by holding that since it had jurisdiction, this then made Article XXI justiciable. This cannot be so because while these two points *in limine* are interrelated, they differ markedly. In this matter, the Panel inverted this logical process to say that since it had jurisdiction, the issue was therefore justiciable.

In our view, this approach shows circular reasoning. Ironically, the Panel was alive to the difference between these two terms as raised by the US. Hence, the Panel asserted that if that were the case, the argument would still fail on the basis that the International Court of Justice has rejected this very same contention, as even so-called "political questions" are justiciable if they turn on a legal question.[119] In this way, the Panel appears to be of the view that the preliminary issue of justiciability did not merit further consideration. Suffice it to say that it saw Article XXI(b) as justiciable regardless of how it was positioned and as long as it raised a legal question. We presume that this nonchalant approach owes its strength to the Panel's earlier dictum that the legal certainty and integrity of the international trade system would be undermined if it were made subject to the whims of a WTO member.

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[115] WTO Panel Report, *Russia – Measures Concerning Traffic in Transit* at para 7.71.

[116] WTO Panel Report, *Russia – Measures Concerning Traffic in Transit* at para 103.

[117] WTO Panel Report, *Russia – Measures Concerning Traffic in Transit* at para 103.

[118] WTO Panel Report, *Russia – Measures Concerning Traffic in Transit* at para 7.30.

[119] WTO Panel Report, *Russia – Measures Concerning Traffic in Transit*. See further United Nations "Advisory opinion, certain expenses of the United Nations" (1962) ICJ Reports at 155. In this regard, the ICJ has explained that a "political" question is one with "political significance, great or small" or "political character" but that this does not detract from the judicial mandate to interpret treaty provisions.

However, the Panel's circuitous logic is not fatal to the value of this decision in national security disputes. Since both concepts, in essence, regulate the right of a court to hear a matter, the Panel's decision offers international endorsement of the justiciability of national security clauses. Furthermore, the Panel 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. Thus, the Panel saw no decision as being outside of the reach of the law, thereby endorsing the principle of rule of law. The Panel also sought refuge in the principle of "inherent jurisdiction", which in South Africa is bestowed by the Constitution on the High Court, Supreme Court of Appeal and the Constitutional Court.[120] Here, of course, only the Constitutional Court would have jurisdiction on account of section 168(3) of the Constitution.

The inherent jurisdiction of these courts is only used to address a "lacuna which, in the absence of judicial intervention, would result in injustice".[121] There is a "need to supplement … [the] otherwise limited statutory procedure" of section 18A.[122] The decision of the national security committee is firmly within this ambit, since section 18A does not provide for the right of judicial review for aggrieved parties. The national security decision falls within this ambit. The exclusive jurisdiction of the Constitutional Court is confirmed by the yet-to-be promulgated section 62(2A) of the Competition Act, which closes the door to approaching the Tribunal and CAC. Ultimately, a coalescence of the rule of law, legality, legal certainty and the inherent jurisdiction of the courts can then be employed as a basis for courts in South Africa to deem the decision of the national security committee under section 18A of the Competition Act as justiciable.

5 CONCLUSION

This article assessed the justiciability of the national security clause in section 18A of the Competition Act. It noted that the introduction of the national security clause through section 18A alters the traditional merger control regime by creating an additional test for mergers involving foreign acquiring firms that may have an adverse effect on the national security interests of the Republic of South Africa. In this regard, the committee can either permit or prohibit the implementation of the merger. If a decision is made to prohibit the merger, the competition authorities are precluded from considering it. Thus, it is postulated that the committee's decision predates the consideration of a merger by the competition authorities under section 12A of the Act. Upon making a decision to permit or prohibit the merger, the committee through the Minister is required only to notify Parliament in appropriate detail and to publish its decision in the Government Gazette. Consequently, we argue that section 18A is unconstitutional in that it impedes the oversight function and undermines the concurrent or shared authority of Parliament on national security issues.

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[120] Section 173 of the Constitution. *Phillips* 2006 paras 47–51.

[121] *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.

[122] *Phillips* (2006) at para 49.

Secondly, the committee will have to navigate the murky labyrinth of national security structures, including the NSC and NINOC, in accordance with the principle of cooperative governance, which has been the subject of much controversy recently. Thirdly, the decision of the committee must comply with the grounds of rationality and/or administrative justice, which dictate that as a matter of principle, decisions made at an executive or administrative level are justiciable.

These are the antecedent issues that have led us to the conclusion that the decision of the committee is justiciable, since it raises a constitutional issue and an arguable point of law of general public importance. This approach is in line with international law. In the main, gleaning from WTO jurisprudence and our domestic law, we contend that, at the very least, the principles of the rule of law, legality, legal certainty and the inherent jurisdiction of the courts in South Africa offer clear grounds for the justiciability of the decision of the national security committee.

AUTHORS' CONTRIBUTIONS

The authors contributed equally to the conceptualisation, literature review, drafting and editing of the manuscript.

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