

# Reconciling the "Bittersweet Chemistry" between Technology and Corporate Takeovers through Reinforcing National Security Interests in Merger Control

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## Abstract

This article argues that company takeover regulation regimes must carefully balance two opposing notions. On the one hand, the regime must be designed to enable or facilitate the initiation and successful implementation of takeovers and mergers in the interests of economic growth and technological advancement. On the other hand, such a regulatory framework ought to be sensitive to the ever-increasing need to protect national security interests, especially from veiled threats. These threats include cybercrimes, private data hacking and espionage, which are endemic to takeovers contemplated by foreign persons that possess technological sophistication and are leaders in the rapidly unfolding Fourth Industrial Revolution. Recently some jurisdictions, such as the United States of America and the United Kingdom, have been active in reforming their investment laws to particularly strengthen the protection of national security interests. Similarly, in South Africa the debut introduction of section 18A of the *Competition Amendment Act* 18 of 2018 has enabled the addition of a concurrent but parallel standard to the pre-existing merger control criteria prescribed under section 12A of the *Competition Act* 89 of 1998. This article evaluates the efficacy of South Africa's framework for national security interests' protection in the context of merger control using its US and UK counterparts as comparators. Ultimately, the article proposes reforming the existing statutory and institutional framework to effectively accommodate national security interests in South African merger control.

## Keywords

Foreign Direct Investment (FDI); corporate takeovers; mergers; foreign acquirer; national security threats; 5G wireless technology.

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## 1 Introduction

This article submits that the regulation of the interaction between takeovers and mergers<sup>1</sup> *vis a vis* technology must carefully balance opposing notions. On the one hand, the regulation must be designed to enable or to promote the achievement of takeovers, because the restructuring of companies through such transactions is in the interests of economic growth<sup>2</sup> and technological advancement.<sup>3</sup> On the other hand, the regulatory regime must be sensitive to the ever-increasing need to protect national security interests, especially, from veiled threats unique to parties or entities that possess technological sophistication and are leaders in the unfolding Fourth Industrial Revolution (the 4IR). In this article the scope of the 4IR includes technology, artificial intelligence (AI) and all internet-related systems.<sup>4</sup> Undeniably, the 4IR is important for the sustained wellbeing and progress of national economies, *inter alia* for e-banking, e-commerce, for virtual meetings which have accelerated into becoming the "new normal" in this COVID-19 era, and for 5G wireless technology, the roll-out of which is underway.<sup>5</sup> However, where technology-based mergers are contemplated by a foreign acquirer the transactions are potentially 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.<sup>6</sup>

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<sup>1</sup> Biggs, Scheepers and Botha 2017 *S Afr J Bus Manage* 49; Davies and Worthington *Gower's Principles of Modern Company Law* 917-918; Gullifer and Payne *Corporate Finance Law* 712 argues that a corporate takeover is essentially the acquisition by an external acquirer or existing minority shareholder of sufficient shares in a target company to give the acquirer control of the target company. Corporate takeovers can be completed through an agreement between the acquirer and the target company that is a "friendly takeover", a "negotiated takeover" or a "merger" and or can be accomplished between the acquirer and target shareholders but opposed by the target's directors, which makes it a "hostile takeover". In this article, the terms "merger" and "takeover" are used interchangeably.

<sup>2</sup> Davids, Norwitz and Yuill 2010 *Acta Juridica* 337-338; Cassim *et al Contemporary Company Law* 677; Cassim 2008 *SA Merc LJ* 1; compare Luiz 2010 *SA Merc LJ* 445.

<sup>3</sup> Correia *et al Financial Management* 17-4.

<sup>4</sup> Reville 2020 *CJRL* 136.

<sup>5</sup> Posadas 2017 *Posadas 2017 Fordham Intell Prop Media & Ent LJ* 71.

<sup>6</sup> Barrington 2019 *Transactions* 103; Shields 2018 *J Marshall L Rev* 295, 299.

In South Africa the *Competition Amendment Act 18 of 2018* (the Amendment Act) through section 18A recently integrated the standard of the interests of national security into the criteria of merger control as a way of mitigating the unique potential mischiefs arising in the context of acquisitions by foreign companies trading in among goods technology, sensitive data and internet-related materials. This article assesses the South African framework for the protection of the interests of national security by comparing it with its counterparts in the United States of America (the US) and the United Kingdom (the UK). It is submitted 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 section 18A of the Amendment Act. The article further proposes the establishment of an independent Committee named the Committee on Investment and National Security (CINS) to investigate and decide on the fate of such takeovers rather than vesting such powers in the executive arm of Government.

This article is divided into six parts. Immediately after this introduction, the article discusses the policy rationales behind 4IR-related mergers. This is followed by an exploration of the unique potential mischiefs which arise in the context of the 4IR-related takeovers. The article then focusses on isolating the potential lessons from the US and the UK merger control regimes which can be used to strengthen section 18A of the Amendment Act. Further, the article considers whether the inclusion of section 18A of the Amendment Act into South Africa's merger assessment criteria is appropriate and adequate in the protection of the interests of national security. Lastly, this paper ends with some proposals aimed at strengthening the protection of the interests of national security interests provided under the South African merger control framework, which include proposing the adoption of a new legislative and institutional framework.

## **2 Rationales for internet and technology-related takeovers**

The 21<sup>st</sup> century has birthed the 4IR era, which features various internet-related and technological inventions and developments, and thereby transformed the broader socio-economic and political environment in communities and nations globally, including the manner of conducting business, education, banking, travel and accessing information.<sup>7</sup> Global financial markets incessantly respond to developments in the 4IR age *inter alia* through the sharp market share and share price gains of the internet

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<sup>7</sup> Posadas 2017 *Fordham Intell Prop Media & Ent LJ* 71.

and technology-related companies like Amazon, Tesla, Microsoft, Facebook, Netflix Inc and Alphabet (the owner of Google) as opposed to the significant drops in market share and share price of historically powerful grocery conglomerates like Walmart.<sup>8</sup> Salutary achievements in the area of AI include the production of computer programmable virtual agents with the ability to converse with human beings and complete human tasks, like Amazon's "Alexa" and/or Apple's "Siri".<sup>9</sup> Currently there is a project aimed at the manufacturing of self-driving cars, which is already in the testing phase.<sup>10</sup> Also, 5G technology is in the rollout phase around the globe, led by companies such as Qualcomm, Huawei and ZTE.<sup>11</sup> Some advantages of 5G technology commonly referred to include the internet of things for smarter cities,<sup>12</sup> fast data uploads and downloads, and the fact that it allows more devices to simultaneously connect to mobile internet through the radio spectrum.<sup>13</sup> Even before the full roll-out of 5G globally, big internet-tech companies including those in the US, China, Finland and South Korea have already commenced research and development (R&D) towards inventing the 6<sup>th</sup> Generation (6G) Wireless with a possible roll-out in around 2030.<sup>14</sup>

Against the background of the virtues identified above connected to internet-tech based developments, it is argued that internet-tech foreign takeovers have the potential of being a significant boon for various stakeholders in the host country.<sup>15</sup> Internet-tech takeovers have the potential of improving the technological expertise and output essential for market relevance and competitiveness in the 4IR age.<sup>16</sup> Furthermore, internet-tech related takeovers can potentially attract global expertise into the host country, since relevant experts tend to settle in technology-rich jurisdictions.<sup>17</sup>

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<sup>8</sup> Veilleux 2019 *Cardozo Arts & Ent LJ* 484.

<sup>9</sup> Amazon Date Unknown <https://developer.amazon.com/en-US/alexa/devices/alexa-built-in>; Apple Date Unknown <https://www.apple.com/siri/>.

<sup>10</sup> Wilmot 2020 <https://www.wsj.com/articles/driverless-cars-are-coming-but-not-yet-to-take-over-11606909414>.

<sup>11</sup> Kelion 2019 <https://www.bbc.com/news/technology-49106416>.

<sup>12</sup> Posadas 2017 *Fordham Intell Prop Media & Ent LJ* 75 aptly defined the Internet of things as "objects with sensors networked together that are capable of communicating with one another...synonymous to smart cities and driverless cars".

<sup>13</sup> FitzGerald, Martin and Woo 2020 <https://www.wsj.com/articles/everything-you-need-to-know-about-5g-11605024717>.

<sup>14</sup> Rabbitte 2019 <https://sociable.co/mobile/the-race-for-6g-mobile-technology-is-already-on/>.

<sup>15</sup> Korman 2017 *J Bus & Tech L* 175.

<sup>16</sup> Correia *et al Financial Management* 17-4.

<sup>17</sup> Shields 2018 *J Marshall L Rev* 299-300.

### 3 Unique mischiefs related to internet-tech takeovers

Inextricably connected to internet and technology are complex legal issues that ought to be addressed through effective regulation.<sup>18</sup> One of the serious concerns in the 4IR era is the potential of threats to sensitive (personal) data security. Should we be worried, and/or should we conclude that no-one is safe in the 4IR age? Such queries arise against the backdrop of the myriad fissures in the protection of sensitive data that include the recent Experian (a credit agency) data security breach scandal that exposed about 24 million South Africans' and 800 thousand South African companies' sensitive data to criminal expropriation by hackers.<sup>19</sup> The Facebook data debacle is another recent scandal that saw over 87 million Facebook consumers' data being misappropriated by the now-disestablished British political consulting firm Cambridge Analytica and a consequent ruling by the US Federal Trade Commission (FTC)<sup>20</sup> directing Facebook Inc. to pay a fine of about US\$5 billion (£4 billion) for its lack of transparency and lax consumer data protection.<sup>21</sup> Further, in his testimony before the US Congress the Facebook founder and Chief Executive Officer (CEO), Mr Mark Zuckerberg, admitted that Facebook had failed to adequately protect its users' data against third parties.<sup>22</sup> In yet another related story, WhatsApp Inc, a global company that offers services that include cheap instant mobile messaging and calling, was acquired for USD 19 billion by Facebook in 2014.<sup>23</sup> Recently widespread fears arose after WhatsApp sent out a notice of controversial changes in its privacy policy in January 2021 that effectively allows the company to access and share its over two billion clients' private data with the parent company, Facebook, and third parties to enable unsolicited advertising.<sup>24</sup> In November 2011 the US House of Representatives

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<sup>18</sup> Posadas 2017 *Fordham Intell Prop Media & Ent LJ* 71.

<sup>19</sup> Shapshak 2020 <https://www.businesslive.co.za/fm/fm-fox/digital/2020-08-27-why-experian-handed-over-24m-peoples-data-to-a-crook/>.

<sup>20</sup> According to the United States of America Federal Trade Commission (FTC Date Unknown <https://www.ftc.gov/about-ftc>) the overarching goal of the Federal Trade Commission (FTC) is to protect America's consumers. And the specific roles of the FTC include protecting consumers from unfair and deceptive practices in the market. In addition, the FTC aims to promote and maintain competition in the market through among other things prohibiting anti-competitive mergers. The FTC also seeks to advance its role in managing *inter alia* information technology.

<sup>21</sup> Forrest 2019 <https://www.independent.co.uk/news/world/americas/facebook-data-privacy-scandal-settlement-cambridge-analytica-court-a9003106.html>.

<sup>22</sup> Shah 2018 <https://www.thesun.co.uk/uncategorized/6024893/mark-zuckerberg-net-worth-two-billion-facebook-stock/>.

<sup>23</sup> Dulaney 2014 <https://www.wsj.com/articles/facebook-completes-acquisition-of-whatsapp-1412603898>.

<sup>24</sup> Nguyen 2021 <https://www.wsj.com/articles/signal-telegram-whatsapp-and-imeessage-choosing-a-private-encrypted-chat-app-11610550076>.

Permanent Select Committee on Intelligence (the Committee on Intelligence) held an inquiry into the alleged counterintelligence and security threat(s) posed by the Chinese telecommunications companies (Huawei and ZTE) in doing business in the US markets.<sup>25</sup> Some allegations made by the Committee on Intelligence included that the Chinese Communist Party was actively involved in Huawei and ZTE, that the companies lacked transparency, that there was a possibility of the sharing of private and confidential information in addition to the possibility of wanton cyber-attacks on the US.<sup>26</sup> The Committee on Intelligence recommended how the US must deal with Huawei and ZTE and for the particular purposes of this article, it was resolved that the Committee on Foreign Investment in the United States (the CFIUS) is obliged to prevent the implementation of takeovers or mergers involving Huawei and ZTE based on national security concerns.<sup>27</sup>

Against the backdrop of the potential mischiefs identified above, takeovers by foreign acquirers ought to be screened for possible national security threats, especially when such investments are of a kind with the examples flagged below.<sup>28</sup> For example, national security concerns are typically heightened in scenarios where the foreign acquirer's takeover overtures pertain to investments in critical technology, critical infrastructure, citizens' sensitive data and supplies of military, energy and nuclear equipment.<sup>29</sup> Takeovers of this nature are typically linked to other mischiefs that include the possibility of espionage, counterintelligence, the inappropriate expropriation of private data, and R&D-related and intellectual property (IP) theft for the benefit of the "hostile" country.<sup>30</sup>

#### 4 Merger control in the US and UK

The merger control regimes in the US and the UK alike acknowledge that both the competition-economics based criteria and public interest (including national security interests) ought to be considered when accepting, conditionally approving or rejecting takeovers that involve a foreign acquirer.

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<sup>25</sup> Rogers and Ruppertsberger *Investigative Report 7*. Importantly, in the United States of America (US) the House Permanent Select Committee on Intelligence (the Committee) is a body responsible *inter alia* for authorising intelligence activities in the US and overseeing such activities by ensuring that they are legal, effective and sufficiently well-resourced to protect the national security interests of the US.

<sup>26</sup> Rogers and Ruppertsberger *Investigative Report 10*.

<sup>27</sup> Rogers and Ruppertsberger *Investigative Report 45*.

<sup>28</sup> Barrington 2019 *Transactions 87*.

<sup>29</sup> Piscitelli 2019 *CoRe 388*; Shields 2018 *J Marshall L Rev 295, 299*.

<sup>30</sup> Barrington 2019 *Transactions 103*; Shields 2018 *J Marshall L Rev 295, 299*.

Although this article focusses only on the protection of national security interests in merger control, it is important to provide a brief overview of competition-economics based merger assessment as a means of putting merger control into context. In the US, section 7 of the *Clayton Antitrust Act* of 1914 prohibits takeovers that substantially lessen competition in a relevant market.<sup>31</sup> If the acquisition is certain to lead to unfair competition, then section 5 of the *Federal Trade Commission Act* applies.<sup>32</sup> The 1914 *Clayton Act* was later amended by the *Hart Scott Rodino Act* (the *HSR Act*).<sup>33</sup> Under the *HSR Act* the parties to takeover transactions must file pre-merger notifications to the US Antitrust Department of the Department of Justice (DOJ) and the FTC.<sup>34</sup> For the duration of the period<sup>35</sup> when the DOJ and the FTC are investigating the nature of the merger the merging parties must stand still, even though the investigation may take several months.<sup>36</sup> Moreover, the US assesses mergers on national security concerns as will be discussed below.<sup>37</sup>

Similarly, under the UK's scheme of merger control the *Enterprise Act*<sup>38</sup> provides for merger control on a pure competition-law based standard and also on the grounds of public interest. Notably, the Competition and Markets Authority (the CMA) is the regulatory body that is empowered by the *Enterprise Act* to examine takeovers in a competition-economics related context.<sup>39</sup> From the UK national law perspective, it is not mandatory for the parties to a takeover to submit a filing to the CMA but they can voluntarily make such a filing.<sup>40</sup>

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<sup>31</sup> Section 7 of the *Clayton Antitrust Act*, 1914.

<sup>32</sup> Section 5 of the *Federal Trade Commission Act*, 1914.

<sup>33</sup> FTC Date Unknown <https://www.ftc.gov/enforcement/merger-review>.

<sup>34</sup> Section 18a(d)(1) of the *US Code Title 15 - Commerce and Trade* (October 2020).

<sup>35</sup> According to s 18a(b)(1) of the *US Code Title 15 - Commerce and Trade: Pre-Merger and Waiting Period* (October 2020), the waiting period begins when the merger notification is filed with the FTC and the Assistant Attorney General in Charge of the Antitrust Division of the Department of Justice (DOJ).

<sup>36</sup> See s 18a(a)(1) and (2) of the *US Code Title 15 - Commerce and Trade: Pre-Merger and Waiting Period* (October 2020) for the thresholds for compulsory merger filing.

<sup>37</sup> Sections 1714, 1718-1719 of the *Foreign Investment Risk Review Modernization Act* of 2018; Article II of the *United States Constitution*.

<sup>38</sup> *Enterprise Act* of 2002 as amended by the *Enterprise and Regulatory Reform Act* of 2013 and further amendments made through the *Enterprise Act 2002 (Turnover Test) (Amendment) Order*, 2018.

<sup>39</sup> Section 26 of the *Enterprise and the Regulatory Reform Act*, 2013.

<sup>40</sup> CMA 2020 <https://www.gov.uk/government/publications/mergers-forms-and-fee-information>.

#### 4.1 National security and Takeovers: Regulatory responses in the US

As a response to the above concerns, the *Foreign Investment Risk Review Modernisation Act* of 2018 (the FIRRMA) was enacted in 2018 and replaced the *Foreign Investment and National Security Act* of 2007 (the FINSA).<sup>41</sup> Contrasting views have been expressed on what the "hidden agenda" behind the FIRRMA is. On the one hand, the Trump administration and policymakers argued that the FIRRMA aims at safeguarding US technology, whereas on the other some sceptics are convinced that FIRRMA strategically targets Chinese investment trends.<sup>42</sup> This article shies away from detailing the aforementioned debate but focusses on whether the FIRRMA adequately protects the national security interests of the US in scenarios where the contemplated takeovers have the potential of posing national security threats, especially through the exercise of powers by the CFIUS, Congress and the President. In summary, FIRRMA expanded the jurisdiction of the CFIUS to "covered transactions"<sup>43</sup> that relate to critical infrastructure,<sup>44</sup> critical technologies,<sup>45</sup> and the sensitive personal data of US citizens.<sup>46</sup> Through its Chairperson the CFIUS has the power to suspend a proposed or pending covered transaction that may pose a risk to the national security of the US after review or investigation of the covered transaction in question.<sup>47</sup> In addition, the CFIUS may at any time during the review or investigation of a covered transaction refer the transaction to the President.<sup>48</sup> If the aggrieved parties want to challenge the action or finding of the CFIUS under the FIRRMA, they can do so only by means of a civil trial in the United States Court of Appeals for the District of Columbia Circuit and ordinarily the decision of the President cannot be subjected to review or appeal.<sup>49</sup> Generally, under the judicial review, most of the documentation on national security interests is classified and the review is presented *ex parte* in camera and kept sealed by the court.<sup>50</sup> It is submitted that this judicial review is skewed towards the President and the CFIUS, thus

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<sup>41</sup> Reville 2020 *CJRL* 131, 136.

<sup>42</sup> Reville 2020 *CJRL* 136.

<sup>43</sup> Section 1703 of the *Foreign Investment Risk Review Modernisation Act, 2018* (FIRRMA) defines covered transactions to include: "any merger, acquisition or takeover that is proposed after August 23 1988, by or with any foreign person that could result in foreign control of any US business, including a merger or acquisition carried out through a joint venture".

<sup>44</sup> For express examples of critical infrastructure, see s 1703(a)(5) of the FIRRMA.

<sup>45</sup> For express examples of critical technologies, see s 1703(a)(6) of the FIRRMA.

<sup>46</sup> Section 1702(c) of the FIRRMA.

<sup>47</sup> Section 1718 of the FIRRMA.

<sup>48</sup> Section 1718 of the FIRRMA.

<sup>49</sup> Section 1715 of the FIRRMA.

<sup>50</sup> Section 1715 of the FIRRMA.



technically making the decisions of the President and the CFIUS on national security concerns final.

However, it is submitted that the review of takeovers on national security grounds is sound legal policy. The former US President, Mr Barack Obama, blocked his first takeover for national security reasons upon recommendation by the CFIUS in 2012.<sup>51</sup> In terms of the President's decision, Ralls International (Ralls), a Delaware based company owned by two Chinese nationals, was compelled to divest itself of four wind farm acquisitions based on national security reasons.<sup>52</sup> The rationale for making the order to divest was that the target companies had wind farms on restricted areas that included sensitive airspace and a bombing zone.<sup>53</sup> The parties challenged the decision of the President in the District of Columbia Circuit Court, where the court held that FINSA did not bar judicial review of the President's decision *per se*, but that since the parties had failed to challenge President Obama's reason that the transaction would constitute a national security threat, the court upheld the decision.<sup>54</sup> The narrative advanced in this study is that arguably there is a downside in having the President of a country, "a politician", possess and exercise powers to allow or block an investment, even if based on national interests. It is submitted that given that politicians typically make "politically correct" decisions that are aimed at appeasing voters (as a means of securing re-election) and their political party members, the President's decisions may not be rational *per se*.

Recently the then US President, Donald Trump, blocked the proposed US\$117 billion takeover of Qualcomm, a US company, by Broadcom, a Singapore-based company, *inter alia* after allegations had been made by the CFIUS and the US Deputy Assistant Secretary of Investment Security (Aimen N Mir) that Broadcom was linked with the Chinese companies

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<sup>51</sup> *Ralls Corporation, Appellant v Committee on Foreign Investments in the United States et al, Appellees* (United States Court of Appeals, District of Columbia Circuit) (unreported) case number 13-5315 of 15 July 2014 para IB.

<sup>52</sup> *Ralls Corporation, Appellant v Committee on Foreign Investments in the United States et al, Appellees* (United States Court of Appeals, District of Columbia Circuit) (unreported) case number 13-5315 of 15 July 2014 para IB.

<sup>53</sup> *Ralls Corporation, Appellant v Committee on Foreign Investments in the United States et al, Appellees* (United States Court of Appeals, District of Columbia Circuit) (unreported) case number 13-5315 of 15 July 2014 para IB.

<sup>54</sup> *Ralls Corporation, Appellant v Committee on Foreign Investments in the United States et al, Appellees* (United States Court of Appeals, District of Columbia Circuit) (unreported) case number 13-5315 of 15 July 2014 para III B.

Huawei and ZTE.<sup>55</sup> When the Broadcom-Qualcomm takeover proposal was rolling, the deal received very close monitoring, since various intelligence agencies in the US claimed that implementation of the deal could lead to national security risks including spying on US citizens by the Chinese government.<sup>56</sup> The monitoring intensified to investigation and review by the CFIUS after Qualcomm's board filed a voluntary notice to the CFIUS on the proposed hostile takeover. Notably, the call by Qualcomm for US government intervention was flagged as "unusual" because the filing of a notice ordinarily occurs only after a takeover deal has been agreed upon and is usually made by the acquirer.<sup>57</sup> Some US legislators (political actors) supported the CFIUS investigation of Broadcom's proposed takeover.<sup>58</sup> After its investigation the CFIUS pointed out three areas of concern: First, the takeover would have interfered with Qualcomm's position as a leading company in the area of 5G technology development and standard-setting.<sup>59</sup> Second, the CFIUS cited national security concerns, especially that the takeover would weaken the position of Qualcomm as a trusted superior technology leader, thus opening opportunities for untrusted companies like Huawei.<sup>60</sup> Third, the CFIUS alleged that the takeover would disrupt the supply relationship between Qualcomm and the US government.<sup>61</sup> Broadcom averred that it was in the process of re-domiciling to Delaware, thus resulting in the CFIUS lacking jurisdiction over the transaction.<sup>62</sup> However, even before the formal completion of the CFIUS review President Trump ordered an immediate and permanent termination of the Broadcom takeover on the basis that there was "credible evidence" that Broadcom had the potential of becoming involved in activities that would impair national security.<sup>63</sup> It is submitted that, regarding the granting of unfettered powers to politicians either to accept or block takeovers, the decision by President Trump to block the merger even before the formal completion of the investigation<sup>64</sup> into the proposed takeover is at least questionable.

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<sup>55</sup> Musil 2019 <https://www.cnet.com/news/trump-order-blocks-broadcom-qualcomm-merger/>.

<sup>56</sup> Bosnjak 2020 <https://www.androidheadlines.com/2018/03/qualcomm-broadcom-merger-may-impact-national-security-us.html>.

<sup>57</sup> Westbrook 2019 *Marq L Rev* 653.

<sup>58</sup> Nolter 2018 <https://www.thestreet.com/markets/mergers-and-acquisitions/calls-for-congressional-review-of-broadcom-qualcomm-deal-feel-weak-14507810>.

<sup>59</sup> Westbrook 2019 *Marq L Rev* 655.

<sup>60</sup> Kang and Rapperport 2018 <https://www.nytimes.com/2018/03/12/technology/trump-broadcom-qualcomm-merger.html>.

<sup>61</sup> Westbrook 2019 *Marq L Rev* 656.

<sup>62</sup> Westbrook 2019 *Marq L Rev* 657.

<sup>63</sup> Westbrook 2019 *Marq L Rev* 658.

<sup>64</sup> Kang and Rapperport 2018 <https://www.nytimes.com/2018/03/12/technology/trump-broadcom-qualcomm-merger.html>.

Furthermore, it is submitted against the backdrop of the action by President Trump before a full investigation by CFIUS,<sup>65</sup> that the President's decision after disregarding the takeover review process was "populist" and its correctness is at least questionable. Some argue that the CFIUS has become a barrier to foreign companies investing in the US, and to technology transfers.<sup>66</sup> However, it is submitted that it is imperative to strengthen the position of national security "watchdogs" like the CFIUS in takeover transactions through providing resources, be they human and or financial, as well as the legal space for them to discharge their duties effectively.<sup>67</sup> It is further submitted that there is a need for reconsideration and or rethinking of the US President's powers, especially along the lines of allowing at least some level of judicial review of the President's verdict in the context of takeovers that are deemed to have national security implications.<sup>68</sup> However, the takeover regulation regime must also recognise that the President should not be obliged to disclose classified details during the review proceedings where such disclosure may pose a danger to US national security.<sup>69</sup> The argument advanced here is founded, in part, on the fact that presidents are political figures, a fact which creates a danger that most of their decisions might be politically motivated as opposed to being rational.<sup>70</sup>

#### **4.2 The UK takeover regulation and national security concerns**

Notably, in the UK the *Enterprise Act* confers upon the Secretary of State (the SOS) the powers to intervene in a proposed merger on the grounds of public interest.<sup>71</sup> The SOS may give an intervention notice to the CMA if s/he believes that one or more public interests could possibly arise in the

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<sup>65</sup> Kang and Rapperport 2018 <https://www.nytimes.com/2018/03/12/technology/trump-broadcom-qualcomm-merger.html>.

<sup>66</sup> Xiaoming and Jiawen 2018 *China International Studies* 163.

<sup>67</sup> Berg 2018 *Colum L Rev* 1765 opined that because of the novel threats related to technology there is a need to continuously update and strengthen the Committee on Foreign Investment in the United States (CFIUS) for it effectively to consider and block transactions on national security grounds.

<sup>68</sup> A fairly similar submission has been made by Barrington 2019 *Transactions* 139, who asserts that the unfettered role and the discretion of the US President in national security matters appears to trump the need for transparency.

<sup>69</sup> In *Ralls Corporation, Appellant v Committee on Foreign Investments in the United States et al, Appellees* (United States Court of Appeals, District of Columbia Circuit) (unreported) case number 13-5315 of 15 July 2014 para 2 it was held that "due process does not require disclosure of classified information supporting official action".

<sup>70</sup> Barrington 2019 *Transactions* 105 suggests that the general antipathy towards Chinese companies like Huawei by the Trump administration showed how politics had motivated the decisions in the area of investments and takeovers in particular.

<sup>71</sup> Section 42 read with s 58 of the *Enterprise Act* of 2002.

context of the proposed merger.<sup>72</sup> The specific public interests that warrant such an intervention notice are provided for in section 58 of the *Enterprise Act*.<sup>73</sup> Notwithstanding that one of the specified public interests is national security, the *Enterprise Act* does not provide a definition of what constitutes national security.<sup>74</sup> Currently, since a new amendment of the *Enterprise Act* came into force on 11 June 2018 the SOS can intervene in takeovers on national security grounds if the target trades in any of three specified sectors: (i) the development or production of items for military and civilian use; (ii) quantum technology; or (iii) computer processing units.<sup>75</sup> It is submitted that the lack of statutory definition and specification of the characteristics of what constitutes national security is an unsound legal policy as it is contrary to the principle that the law ought to be clear and certain.

In October 2017, as part of an effort to update the law and align it with the trends in the regulation of new technology and data-rich companies, a Green Paper on National Security and Infrastructure Investment was issued to provide bases for a review of the national security implications that arise from investment in general and foreign takeovers in particular.<sup>76</sup> Some of the concerns highlighted were that technology and data-rich companies are often accused of engaging in espionage (especially because they harvest and store personal data) or of engaging in sabotage, especially through investments having to do with the military use and technology sectors.<sup>77</sup> A White Paper on National Security and Infrastructure Investment was subsequently issued in July 2018 and it proposes the extraction of the national security interest test from the public interest considerations under the *Enterprises Act*.<sup>78</sup> Consequent to the proposed removal of the national security test from the said public interest considerations, it is suggested that there should be new and separate primary legislation devoted to managing national security concerns in the context of takeovers and investment in

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<sup>72</sup> Sections 42(2) and (3) of the *Enterprise Act* of 2002.

<sup>73</sup> Section 42(2) of the *Enterprise Act* of 2002.

<sup>74</sup> Section 58(1) of the *Enterprise Act* of 2002.

<sup>75</sup> Section 23 of the *Enterprise Act 2002 (Turnover Test) (Amendment) Order*, 2018.

<sup>76</sup> Department for Business, Energy and Industrial Strategy 2017 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/652505/2017\\_10\\_16\\_NSII\\_Green\\_Paper\\_final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652505/2017_10_16_NSII_Green_Paper_final.pdf) Ch 3 20-24.

<sup>77</sup> Department for Business, Energy and Industrial Strategy 2017 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/652505/2017\\_10\\_16\\_NSII\\_Green\\_Paper\\_final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652505/2017_10_16_NSII_Green_Paper_final.pdf) Ch 3 22.

<sup>78</sup> Department for Business, Energy and Industrial Strategy *National Security and Investment* para 11.04.

general.<sup>79</sup> The White Paper suggests that the new statute ought to establish a new procedure for the assessment of the national security factor and that the CMA should pause its competition-based evaluation of the proposed takeover pending the outcome of the national security appraisal.<sup>80</sup> It is suggested in the White Paper that only when it is deemed necessary and in proportionate circumstances should the government be given powers to block a takeover on the grounds of national security, which would terminate the ongoing competition assessment.<sup>81</sup> It is submitted that in circumstances where national security concerns and competition-related benefits compete, the law must require the CMA to approach the SOS to discuss the prospects of accepting with conditions a takeover that potentially raises national security concerns but is otherwise good for competition in the UK. It is submitted here that the idea of placing the national security provision into a separate and devoted statute is a salutary one. It is aligned with similar US regulation and it has the potential of clarifying the complex terminology surrounding national security for interested parties including legal practitioners. It is further submitted that the *Enterprise Act* and the SOS still effectively function as the relevant takeover statutory and institutional framework in the UK, as discussed above. While neither the Green Paper nor the White Paper<sup>82</sup> constitutes the existing law of the UK, they have persuasive value in the context of the discussion presented in this article and clearly show that the UK policymakers have identified the need for reforming the law on merger control, particularly the aspects pertaining to the interests of national security.

## 5 Infusing national security concerns into South Africa's merger control regime

The South African takeover regulation regime recognises that lowering the hurdles against takeover transactions is necessary for the promotion of

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<sup>79</sup> Department for Business, Energy and Industrial Strategy *National Security and Investment* para 11.05.

<sup>80</sup> Department for Business, Energy and Industrial Strategy *National Security and Investment* para 11.12.

<sup>81</sup> Department for Business, Energy and Industrial Strategy *National Security and Investment* para 11.13.

<sup>82</sup> Department for Business, Energy and Industrial Strategy 2017 <https://www.gov.uk/government/consultations/national-security-and-infrastructure-investment-review>. The issuing of both Green and White Papers is a stage in the law-making process and is a means by which the policymakers consult with stakeholders on proposed legislation. For the National Security and Infrastructure Investment review (NSII), the stakeholders that took part in the consultations included legal and advisory firms, trade associations, industry groups, individual businesses, government bodies, research bodies, investors and individuals.

economic growth.<sup>83</sup> However, the procedure for the approval or rejection of a merger must avoid or at least reduce the adverse impact on the broader stakeholders' interests; including market competition, public interest and national security interests.<sup>84</sup> More specifically, it is the norm that for a merger proposal to be successful in the South African context it must first meet the requirements stipulated under the *Companies Act*<sup>85</sup> and Companies Regulations,<sup>86</sup> and then subsequently the merger must pass regulatory scrutiny under section 12A of the *Competition Act* 89 of 1998 (the *Competition Act* or the 1998 Act). This was the position before the introduction of section 18A of the *Competition Amendment Act* (the Amendment Act).<sup>87</sup>

Scrutiny under the section 12A merger control provision in the 1998 Act was and is still purely competition-economics based and public interests based.<sup>88</sup> In terms of the new section 18A of the Amendment Act, the protection of national security interests has now been infused into the merger control regime. It will operate as a new and parallel merger evaluation yardstick that complements the pre-existing assessment criteria under section 12A of the 1998 Act. It should be noted here that in terms of its scope, this article seeks to interrogate South Africa's merger control regime only in terms of whether it carefully balances the competing interests of promoting the need for foreign internet-tech related takeovers and the effective protection of related national security interests.<sup>89</sup>

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<sup>83</sup> Preamble and s 7(c) of the *Companies Act* 71 of 2008 read with s 2 of the *Competition Act* 89 of 1998.

<sup>84</sup> Section 12A of the *Competition Act* 89 of 1998 read together with s 18A of the *Competition Amendment Act* 18 of 2018.

<sup>85</sup> Chapter 5 of the *Companies Act* 71 of 2008. This is comparable to the Delaware and the UK legislation.

<sup>86</sup> Regulations 81-122 of the Companies Regulations, 2011.

<sup>87</sup> SabinetLaw 2020 <https://legal.sabinet.co.za/articles/section-18a-of-competition-amendment-act-under-the-spotlight/>; Competition Commission 2020 <http://www.thedtic.gov.za/wp-content/uploads/CC-Competition-Act.pdf>. It must be noted that the *Competition Amendment Act* 18 of 2018 was signed into law on 13 February 2019. Subsequently, on 12 July 2019 and 13 February 2020, certain provisions of the *Competition Amendment Act* 18 of 2018 came into force after President Cyril Ramaphosa published related notices in the Government Gazette. However, it should be noted that s 18A of the Amendment Act is yet to come into effect, but its implementation is in the pipeline.

<sup>88</sup> Section 12A of the *Competition Act* 89 of 1998 as amended by the *Competition Amendment Act* 18 of 2018.

<sup>89</sup> Davids, Norwitz and Yuill 2010 *Acta Juridica* 337-338; Cassim *et al Contemporary Company Law* 677; Cassim 2008 *SA Merc LJ* 1; Luiz 2010 *SA Merc LJ* 445; Reville 2020 *CJRL* 136.

Notably, the national security provision is triggered when a proposed merger involves a foreign acquiring firm.<sup>90</sup> Keet postulates that already the South African literature presents inconsistency in defining the extent of the scope of national security.<sup>91</sup> It is submitted that what constitutes a national security threat is a "slippery determination" making it difficult to have certainty in defining national security interests since, "like an accordion", its character changes on a case by case basis.<sup>92</sup> In agreement with Oxenham *et al*, it is submitted that to have such a position of uncertainty in the law is problematic and may result in lengthy review periods, manipulation or the inflation of national security interests, thereby irrationally restricting potentially competition-friendly and/or legitimate takeovers.<sup>93</sup> Thus, it is submitted that when formulating a South African prototype definition of national security, lessons can be drawn from the US, especially through the incorporation of an instructive open-ended definition that resembles that used in US merger control.<sup>94</sup> Such a definition together with the identified 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.<sup>95</sup> It is further submitted that the suggestion of a uniquely South African definition of what

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<sup>90</sup> Section 18A of the *Competition Amendment Act* 18 of 2018. S 1 of the *Competition Amendment Act* defined a foreign acquiring firm as "an acquiring firm (a) which was incorporated, established or formed under the laws of a country other than the Republic; or (b) whose place of effective management is outside the Republic". According to Keet 2018 *Without Prejudice* 15, it appears that the scope of the definition of a "foreign acquirer" is too wide to the extent of having the potential to encompass several companies that may have originated in South Africa but have expanded their business beyond the Republic's borders to the extent that the headquarters and management of such multinational companies are outside South Africa.

<sup>91</sup> Keet 2018 *Without Prejudice* 14. See s 198 of the *Constitution of the Republic of South Africa*, 1996; the *Promotion of Access to Information Act* 2 of 2000; the *Defence Act* 42 of 2002 and *Critical Infrastructure Protection Act* 8 of 2018.

<sup>92</sup> This definitional malleability and tentativeness are not novel to national security. In the *Japan-Alcoholic Beverages II* WT/DS8/R, WTDS10/R, WTDS11/R 21 the Appellate Body of the World Trade Organisation, through using the analogy of the "accordion", attested to the fact that some complex concepts cannot be captured by a single structured definition.

<sup>93</sup> Oxenham, Currie and Stargard 2019 *Journal of European Competition Law and Practice* 235.

<sup>94</sup> Section 1703 of FIRRMA defines national security to "include those issues relating to homeland security, including its application to critical infrastructure".

<sup>95</sup> Like s 1703 of FIRRMA, such a definition of national security would be used as the point of departure in the reform of South Africa's merger control regime.

constitutes national security interests is inspired by the fact that what constitutes national security varies from one jurisdiction to another.<sup>96</sup>

Section 18A of the Amendment Act bestows on the President a peremptory duty to constitute a Committee (hereafter referred to as the Section 18A Committee) responsible for assessing whether a merger proposed by a foreign acquirer has the potential to adversely affect the national security interests of the Republic.<sup>97</sup> The Section 18A Committee must be comprised of Cabinet Ministers and other public officials.<sup>98</sup> The President is also required to 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 that must be notified to the Section 18A Committee by the foreign acquiring party to a takeover.<sup>99</sup> It is submitted that by design section 18A of the Amendment Act 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, thus making the procedure for scrutinising mergers and their possible outcomes highly unpredictable.<sup>100</sup> However, because the scope of national security interests is wide,<sup>101</sup> 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. In addition, others may argue that the rapid evolution of 4IR<sup>102</sup> is making it impossible or at least difficult to enact precise and easily ascertainable hard law rules.

The Amendment Act provides an open-ended list of factors that the President must consider when determining what constitutes the interests of national security for the purposes of the Amendment Act.<sup>103</sup> In the context

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<sup>96</sup> As Keet 2018 *Without Prejudice* 14 points out, there is inconsistency in South Africa on the topic of what national security is. See s 198 of the *Constitution of the Republic of South Africa*, 1996; the *Promotion of Access to Information Act 2* of 2000; the *Defence Act 42* of 2002; and the *Critical Infrastructure Protection Act 8* of 2018.

<sup>97</sup> Section 18A(1) of the *Competition Amendment Act 18* of 2018.

<sup>98</sup> Section 18A(2) of the *Competition Amendment Act 18* of 2018.

<sup>99</sup> Section 18A(3) of the *Competition Amendment Act 18* of 2018.

<sup>100</sup> Oxenham, Currie and Stargard 2019 *Journal of European Competition Law and Practice* 235 made a relatively similar submission when they argued that the nature of s 18A of the Competition Amendment Bill, now the *Competition Amendment Act 18* of 2018, has the potential of adulterating competition-based merger evaluations and may yield unpredictable results.

<sup>101</sup> Keet 2018 *Without Prejudice* 15.

<sup>102</sup> Posadas 2017 *Fordham Intell Prop Media & Ent LJ* 71.

<sup>103</sup> Accordingly under s 18A(4) of the *Competition Amendment Act 18* of 2018 the list in question includes "the potential effect of the merger transaction on: (a) the Republic's



of this article's narrow focus on internet-tech related takeovers, it is submitted that the absence of a definition of what constitutes sensitive technology potentially undermines the substance and spirit of the section 18A provision in that without such a definition 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. One may argue that the decision of the former US President, Mr Donald J Trump, to reject the Broadcom-Qualcomm takeover on national security grounds, while the national security interests-threats appraisal by the CFIUS was still ongoing,<sup>104</sup> is confirmation that presidents could be preoccupied with populist agendas rather than policy when exercising the powers conferred on them in the merger control context. This supports the concern raised earlier in this article regarding the danger of bequeathing unfettered powers to determine the fate of a merger to the President and executive arm of government. Currently the other relevant factors that the President also considers in ascertaining the effect of the proposed merger on national security include the security of infrastructure, as characterised by a list of processes, systems, facilities and networks.<sup>105</sup> It is submitted that from the acquirers' perspective, unless there is a clear description of the contents of instances of such infrastructure, it would be difficult to establish the "exact" meaning of all those descriptors.<sup>106</sup>

Furthermore, the President must issue regulations governing (a) the notification, processes, procedure and timeframes to be followed by the Section 18A Committee and (b) access to confidential information concerning the merger.<sup>107</sup> Section 13A(1) prompts the foreign acquiring firm to simultaneously notify the Competition Commission (the Commission) and the said Section 18A Committee if the contemplated merger relates to the list of national security interests as identified by the President.<sup>108</sup> Thence, the Section 18A Committee must within 60 days after receipt of the above notice from the foreign acquirer or an extended period agreed to by the

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defence capabilities and interests; (b) the use or transfer of sensitive technology or know-how outside the Republic; (c) the security of infrastructure, including processes, systems, facilities, technologies, networks, assets and services and essential health, safety, security or economic wellbeing of citizens and the effective functioning of government; (d) 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".

<sup>104</sup> Kang and Rapperport 2018 <https://www.nytimes.com/2018/03/12/technology/trump-broadcom-qualcomm-merger.html>.

<sup>105</sup> Section 18A(4) of the *Competition Amendment Act* 18 of 2018.

<sup>106</sup> Section 18A(4) of the *Competition Amendment Act* 18 of 2018.

<sup>107</sup> Section 18A(5) of the *Competition Amendment Act* 18 of 2018.

<sup>108</sup> Section 18A(6) of the *Competition Amendment Act* 18 of 2018.

President upon good cause shown, consider and decide whether the merger harms national security interests.<sup>109</sup> The Section 18A Committee may seek advice from the Commission, any relevant regulatory authority or any public institution when considering a merger.<sup>110</sup> Oxenham *et al* lament the policy rationale behind requiring the Section 18A Committee<sup>111</sup> to consult the Competition Commission, especially given that it is difficult to comprehend how the Commission will be of assistance in the management of merger-related national security issues.<sup>112</sup> This article recommends that where different verdicts are reached by the Competition Authorities and the Section 18A Committee, the Section 18A Committee's decision should prevail. However, the Competition Authorities must be allowed to consult with the Section 18A Committee.<sup>113</sup>

Section 18A of the Amendment Act,<sup>114</sup> obliges the President to appoint a Section 18A Committee responsible for assessing proposed mergers on national security interests; however, it is not clear whether such a Section 18A Committee is an *ad hoc* committee or not. It is submitted that it would have been desirable that the Committee be permanent rather than *ad hoc* and be equipped with permanent employees and *ex officio* experts who would intermittently assist the Committee with specific tasks, to ensure consistency and certainty in its decision making. However, a literal interpretation of section 18A appears to make it peremptory for the President to appoint Ministers in their *ex officio* capacity to membership of the Committee.<sup>115</sup> This raises more questions than answers. For instance, what will happen to the *ex officio* Committee members when a new Government comes into power? or when a new President takes over? or when a cabinet

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<sup>109</sup> Section 18A(7) of the *Competition Amendment Act 18 of 2018*.

<sup>110</sup> Section 18A(9) of the *Competition Amendment Act 18 of 2018*.

<sup>111</sup> Referring to the Section 18A Committee that the South African President is required to establish in terms of s 18A(1) of the *Competition Amendment Act 18 of 2018*.

<sup>112</sup> Oxenham, Currie and Stargard 2019 *Journal of European Competition Law and Practice* 235.

<sup>113</sup> The submission to have the Competition Authorities consult the Section 18A Committee 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 Amendment Act 18 of 2018* requires. The current s 18A requires the Section 18A Committee to consult and seek advice from the Competition Authorities or any other institution, but such advice as may be sought is unspecified in the Amendment Act. In trying to reduce the number of takeovers that could be rejected on national security interests-grounds, Keet 2018 *Without Prejudice* 15 suggests a "pre-decision engagement" where the party to a merger in question is allowed to negotiate with the Section 18A Committee in order to mitigate the national security concerns as a condition for the contemplated takeover to be approved with or without conditions.

<sup>114</sup> Section 18A(1) of the *Competition Amendment Act 18 of 2018*.

<sup>115</sup> Section 18A(2) of the *Competition Amendment Act 18 of 2018*.

reshuffle takes place? It is submitted that for the sake of continuity, independence from politics or populism, effectiveness and service to the best interests of the broader South African community as well as in line with the recommendations of the United Nations Conference on Trade and Development (the UNCTAD).<sup>116</sup> In agreement with the suggested criteria put forward by Oxenham *et al* when recommending the "proper" manner of appointing the Competition Tribunal members, it is submitted that the section 18A Committee ought to have its members appointed 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.<sup>117</sup> The establishment of the section 18A Committee is acceptable. The main concern in this article is the composition of the Committee.

It is submitted that the above innovations recently incorporated into the 1998 Act through the insertion of section 18A of the Amendment Act are plausible. In agreement with Oxenham *et al*, it is submitted that endowing the executive branch of government with unfettered powers to recommend, approve or reject takeovers, as provided for under section 18A of the Amendment Act, may subject economics to the populist agendas of politicians.<sup>118</sup> In addition, tasking the President with identifying and publishing a list of national security interests in the Gazette from time to time appears to be at odds with the requirement that the law must be certain, since there is 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.<sup>119</sup> Given the nature of takeovers that implicate national security interests, this article argues that it is preferable to establish an expert Advisory Committee named the Committee on Investment and National Security (the CINS) that would investigate and make recommendations to the President<sup>120</sup> on matters related to national security interests in the context of takeovers involving a foreign acquirer. The CINS ought to be tasked with the evaluation of all takeovers involving foreign

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<sup>116</sup> Oxenham, Currie and Stargard 2019 *Journal of European Competition Law and Practice* 237 quoted UNCTAD Secretariat 2008 [https://digitallibrary.un.org/record/627278/files/TD\\_B\\_COM.2\\_CLP\\_67-EN.pdf](https://digitallibrary.un.org/record/627278/files/TD_B_COM.2_CLP_67-EN.pdf) para 21.

<sup>117</sup> Oxenham, Currie and Stargard 2019 *Journal of European Competition Law and Practice* 237 quoted UNCTAD Secretariat 2008 [https://digitallibrary.un.org/record/627278/files/TD\\_B\\_COM.2\\_CLP\\_67-EN.pdf](https://digitallibrary.un.org/record/627278/files/TD_B_COM.2_CLP_67-EN.pdf) para 21. See ch 8 of the *Labour Relations Act* 66 of 1995 that governs dismissals and ch 5 of the *Basic Conditions of Employment Act* 75 of 1997 that provides for the termination of employment in South Africa.

<sup>118</sup> Oxenham, Currie and Stargard 2019 *Journal of European Competition Law and Practice* 240.

<sup>119</sup> Section 18A(3) of the *Competition Amendment Act* 18 of 2018.

<sup>120</sup> Section 83 of the *Constitution of the Republic of South Africa*, 1996.

persons as acquirers.<sup>121</sup> This proposal sharply differs from the provision of section 18A, which empowers the President to set up a Committee which comprises of Ministers and a number of public sector officials who are largely political heads without requisite expertise on mergers.<sup>122</sup> More specifically, the CINS should comprise of 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. The Committee would be responsible for investigating and assessing tech-related merger implications for national security interests.<sup>123</sup> The CINS ought to engage in a two-staged inquiry involving the determination of whether any serious national security threats are posed by a particular takeover. If the answer is in the affirmative, then the CINS will require the acquirer to make submissions on the reasons why the takeover should be approved. The second leg of the inquiry will then require the CINS to make a final determination by considering the submissions of the interested parties including the Competition Authorities<sup>124</sup> and the foreign acquirer. This is a complete departure from the current position under section 18A(9), which is queried by Oxenham *et al*, on why the Section 18A Committee should seek advice from the

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<sup>121</sup> US Department of the Treasury Date Unknown <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-overview>.

<sup>122</sup> Sections 18A(1) and (3) of the *Competition Amendment Act* 18 of 2018.

<sup>123</sup> The above proposed composition of CINS draws inspiration from the United States of America's Committee on of Foreign Investment in the United States (CFIUS) model. According to US Department of the Treasury Date Unknown <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-overview>, the composition of the CFIUS includes Department of Treasury (chair), Department of Justice, Department of Homeland Security, Department of Commerce, Department of Defence, Department of State, Department of Energy, Office of the US Trade Representative, Office of Science and Technology Policy and some councils under the White House or the President's office.

<sup>124</sup> US Department of the Treasury Date Unknown <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-overview>. In as much as the proposals on the functions of CINS will have similarities with the CFIUS, the main difference is that the proposed CINS ought not to refer their investigations to the President. Also, the CINS' decision can be subjected to review by a specialised *ad hoc* Special Committee whose members could be selected from CINS professionals who were not part of the hearing whose outcome is sought to be challenged by the aggrieved parties.

Competition Authorities.<sup>125</sup> Given that matters of national security are notoriously sensitive and of paramount importance, it is submitted that the CINS ought to be approached by the Competition Authorities and not *vice versa*.<sup>126</sup> Oxenham *et al* lament that the 60-day review period on national security interests raises the possibility of the extension of the merger review period arguing, that it would result in unpredictable outcomes.<sup>127</sup> This is so because the Commission can proceed with investigations of the merger only after the Section 18A Committee has approved of the merger, which may take up to 60 days. It is submitted that such mischief can be curtailed by ensuring that the Competition Authorities and the CINS evaluations run concurrently.<sup>128</sup> Another point of contention is that, like its US counterpart, section 18A of the Amendment Act does not provide for an appeal and/or review recourse for the foreign acquirer.<sup>129</sup> Keet suggests that regardless of the inevitable loss of time and the associated legal costs, the High Court is probably the best candidate to consider such an appeal and/or review.<sup>130</sup> However, contrary to Keet's submission, this article argues that given the classified and confidential nature of national security concerns, it is preferable to create a special appeal forum for the CINS' decisions that will be vested with both appeal and review powers, where the parties make further submissions and the appeal forum's final determination is recommended to the President as a final decision.

It is submitted that a national security provision pertaining to foreign investment and takeovers must be anchored in a primary statute and regulations which enshrine the national security interests and related matters.<sup>131</sup> It is further submitted that although the insertion of the new

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<sup>125</sup> Section 18A(7) of the *Competition Amendment Act* 18 of 2018; compare Oxenham, Currie and Stargard 2019 *Journal of European Competition Law and Practice* 235.

<sup>126</sup> Although national security interests are of paramount importance, it is submitted here that this does not necessarily mean that if a merger threatens national security interests it ought to be rejected automatically. This is because national security must not be used as a barrier to hamper economic development. There could be ways of carefully balancing national interests and economic considerations by ensuring that mergers that improve competition in the South African market could be accepted if there are undertakings by the foreign acquirer to abandon the problematic activities and there are pro-competitive gains associated with the merger.

<sup>127</sup> Oxenham, Currie and Stargard 2019 *Journal of European Competition Law and Practice* 235; s 18A(7) of the *Competition Amendment Act* 18 of 2018.

<sup>128</sup> Section 18A(7) of the *Competition Amendment Act* 18 of 2018.

<sup>129</sup> Keet 2018 *Without Prejudice* 15.

<sup>130</sup> Keet 2018 *Without Prejudice* 15.

<sup>131</sup> Therefore, this article advances a position that differs slightly from that in the United States of America and the position proposed under the United Kingdom (UK) White Paper on National Security and Investment, 2018, which endorse the use of a separate legislation on national security interest screening and assessment without a secondary provision in the competition legislation. The article goes further than the

national security provision into the *Competition Act* is commendable, the provision in question is flawed. This is especially so if one considers that the President must publish a list of national security interests in the Government Gazette on a case-by-case basis. The resulting legal fragmentation and inconsistency is untenable. Accordingly, the above submission partially differs from the proposal of Oxenham *et al* and Keet for the complete removal of the national security provision from Competition legislation and the enactment of another statute altogether in line with the US regime and the UK proposals on national security interests protection in the context of takeovers.<sup>132</sup> This article argues that section 18A of the Amendment Act can function as a secondary provision that must subsist with other dedicated primary national security interests legislation and regulations. Such primary legislation could be named the *Foreign Investment Review and Control Act* (the FIRCA). Regarding the textual scope of this legislation, it is submitted that given the confidential and classified nature of national security interests, it is probably advisable not to exhaustively elaborate the security concerns in the statute in order to ensure space for some level of secrecy and thereby enable the thwarting of the efforts of foreign players (especially those emanating from hostile countries) aimed at circumventing the law. Further, the detailed functions of the CINS and the President would be clarified under the FIRCA.

## 6 Conclusion

Ideally, internet-tech takeovers are essential if South Africa is to be competitive in this 4IR era. However, States must be vigilant in allowing technology-related investments, especially those emanating from foreign companies. This is so because some foreign companies may invest in a country with unorthodox objectives that may be inconsistent with national security interests. For example, the US adopted the FIRRMA in 2018 as a statute aimed at protecting the national security interests of the US in the context of internet-tech takeovers and or other investments that involve a foreign acquirer. The FIRRMA is enforced through institutions like the CFIUS and the US President. Similarly, in the UK national security interests in the context of takeovers that involve a foreign acquirer are protected

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submissions made by Oxenham, Currie and Stargard 2019 *Journal of European Competition Law and Practice* 235 and Keet 2018 *Without Prejudice* 15 that there is a need for separate legislation rather than the competition legislation. The proposal advanced in this article differs in that it argues for retaining s 18A of the *Competition Amendment Act* 18 of 2018 and applying it in conjunction with separate legislation coupled with related regulations, as will be further discussed below.

<sup>132</sup> Oxenham, Currie and Stargard 2019 *Journal of European Competition Law and Practice* 235. See also Keet 2018 *Without Prejudice* 15.

through merger control in terms of the *Enterprise Act*, and the SOS is responsible for enforcement. Likewise, in South Africa section 18A of the Amendment Act has incorporated national security interests into the merger control regime applicable when a takeover involves a foreign acquirer. Incorporating the national security provision into the South African merger control law is plausible and in line with takeover control regulations in other progressive jurisdictions like the US and the UK that already have in place such provisions relating to the interests of national security. However, as discussed above, this study contests the rationality of some of the presidential powers and the composition of the Section 18A Committee established to review foreign mergers in South Africa. It is submitted that South Africa should instead create a CINS with a composition different from that of the Section 18A Committee, and that CINS should be tasked with the evaluation of all takeovers involving a foreign acquirer. This CINS would be empowered to make a recommendation to the President to accept or reject a merger with or without conditions. Remarkably, due to the complexity and the unprecedented growth of technology and the related threats to national security, the US has established a stand-alone statutory and institutional framework that ensures protection against unique threats to national security emanating from mergers and other forms of FDI. Current discussions on law reform in the UK have also recognised the need for excising the national security interests-provision from the Enterprise Act and enacting primary legislation exclusively dedicated to curbing threats to national security related to takeovers and other types of FDI. Hence, in line with the new trends in both the US and the UK, this article argues that in South Africa there is a compelling need to harmonise the fragmented national security interests provisions and the President's Gazette publications into an overarching primary statute to be named the *Foreign Investment Review and Control Act* and accompanying regulations that will supplement section 18A of the Amendment Act.

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## List of Abbreviations

4IR	Fourth Industrial Revolution
AI	artificial intelligence
Cardozo Arts & Ent LJ	Cardozo Arts and Entertainment Law Journal
CFIUS	Committee on Foreign Investment in the United States
CINS	Committee on Investment and National Security
CJRL	Columbia Journal for Race and Law
CMA	Competition and Markets Authority
Colum L Rev	Columbia Law Review
CoRe	European Competition and Regulatory Law Review
DOJ	Department of Justice
FDI	foreign direct investment
FINSA	Foreign Investment and National Security Act of 2007
FIRCA	Foreign Investment Review and Control Act
FIRRMA	Foreign Investment Risk Review Modernisation Act of 2018
Fordham Intell Prop Media & Ent LJ	Fordham Intellectual Property, Media and Entertainment Law Journal
FTC	Federal Trade Commission
HSR Act	Hart Scott Rodino Antitrust Improvements Act, 1976
J Bus & Tech L	Journal of Business and Technology Law
J Marshall L Rev	John Marshall Law Review
Marq L Rev	Marquette Law Review

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NSII	National Security and Infrastructure Investment
R&D	research and development
S Afr J Bus Manage	South African Journal for Business Management
SA Merc LJ	South African Mercantile Law Journal
SOS	Secretary of State for Business, Energy and Industrial Strategy
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
US	United States of America