The 7th Annual Competition and Regulation (ACER) week

The potential for a broader application of the substantial lessening of competition (SLC) standard: A South African perspective[1]

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September 2022

Abstract

This paper considers the bar for intervention in competition matters, in particular the substantial lessening of competition (SLC) standard used in merger control in many jurisdictions and the anti-competitive effects requirement more generally. In the context of research which strongly suggests that there has been systemic underenforcement of competition policy across the globe, this paper considers, firstly, how the SLC and/or competitive effect test has been interpreted more broadly in certain instances and how this may further inform the assessment of competition. The paper finds that the distributive impact of mergers or other conduct is already considered by authorities and public policy must justifiably inform what may ultimately be considered substantial. Secondly, this paper considers the clear gap in enforcement created by the SLC standard (or the practical consideration thereof by competition authorities) whereby only consumer effects that result directly from a change in competition are considered, rather than consequences of the transaction. The paper finds that any competition legislation with provisions for public interest concerns as a result of the transaction itself, should also provide for the consideration of consumer effects or an SLC that results from the transaction itself.

[1] An earlier version of this paper was first published as part of a compendium following the 7th CUTS-CIRC Biennial Conference on Competition, Regulation & Development: "*Building Blocks for an Inclusive and Resilient Economy*", CUTS International, 2022, publication #2207

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Introduction: A substantial lessening of competition

A ubiquitous phrase across many countries with competition laws is the 'SLC' – the substantial lessening of competition or 'SPLC' – the substantial prevention or lessening of competition - or some variation of this.[3] We jointly refer to each of these tests as the 'SLC' test. Mergers can be prohibited where they are expected to result in an SLC, and certainly there are other areas of competition law where similar concepts are routinely spoken of. Such concepts include the abuse of dominance provisions where, for instance, in South Africa the conduct of the firm must have an 'anti-competitive' effect for it to be prohibited (although typically an *ex post* assessment). While there is no moniker before the term 'anti-competitive effect', in practice, these would have to be of a certain magnitude or type in order to be sufficient to hold the dominant firm to account in the form of an administrative penalty or other remedies.

This does of course raise some questions. What type of effects can constitute an SLC? How much of an effect is sufficiently *substantial* to matter? Amidst growing evidence of increasing corporate margins, and the hypothesis that this may reflect increased market power and therefore a gross underenforcement of competition laws or policies[4], a further question can be posed: is the current SLC, or competitive effects standard, whether by definition or by application, sufficiently broad to deliver on the objective of competition policy more broadly. The consideration of a more comprehensive or inclusive approach to the question of competitive effects is not without merit.

A further question is what should constitute a competitive effect. Our understanding as practitioners is that the SLC, or any anti-competitive effect terminology more broadly, essentially captures only pricing and quality effects, while volume effects may also be relevant. However, in the merger assessment context across jurisdictions, the inquiry of whether an SLC would result from the merger in practice focuses almost exclusively on price effects from the merger[5].

In this paper, we explore these questions, primarily from a South African perspective, but also by drawing on selected cases and research from other jurisdictions.

The nature of the effect: the distribution of effects

When considering harm or effects in terms of the SLC (or anti-competitive effect), one must certainly consider the nature of the harm. In particular, harm may not in practice be distributed equally across consumers. Typically, competition investigations are concerned with the 'average consumer'[6], but in

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[3] Countries with an SLC test include the United States, United Kingdom, New Zealand, and Australia. The SPLC is found in South Africa and Canada. The European Union uses the Significant Impediment to Effective Competition (SIEC) standard (Gunnar Niels, Helen Jenkins, James Kavanagh (2016), Economics for Competition Lawyers (2nd Edition), para. 7.03)

[4] Centre for Competition Regulation and Economic Development. 2017. Concentration, profits and investment: *Let's focus on the structure of the economy, not "cash hoarding".* Policy Brief December 2017; Buthelezi, T. Mtani, T & Mncube, L. 2018. *The extent of market concentration in South Africa's product markets* (Working paper CC2018/05); Thakoor, V. 2020. *Market Power, Growth, and Inclusion: The South African Experience* (IMF Working Paper).

[5] OECD Policy Roundtables (2009) Standard for Merger Review.

[6] Franco Mariuzzo, Peter Ormosi (2021), Do the poor pay more for increasing market concentration? A study of retail petroleum markets, University of East Anglia, CCP Working Paper 21-08, p.3

actual fact the harm suffered by one consumer may be relatively more substantial than for another consumer. Considering only the 'average consumer' may mask the true harm.

Recent research at the University of East Anglia has attempted to shine some light on the true impacts of changes in competition on different consumers and this is potentially instructive for the interpretation of the SLC. Mariuzzo and Ormosi (2021)[7] use petrol station-level data on fuel prices in Western Australia alongside data on acquisitions and concentration in the retail of fuel to understand the impact of these mergers on different segments of the population.

What the paper finds is particularly interesting. Poorer consumers[8] in fact suffered more harm from the mergers than richer consumers. While fuel prices for richer consumers do not appear to be affected to any significant degree by the merger activity, fuel prices for poorer consumers tend to increase following concentration in the market. Thus there is an unequal distribution of effects in the market, where of course poorer consumers are affected significantly whereas richer consumers experienced little change.

One can easily accept that a merger that results in greater price impacts for richer consumers is objectively preferable to a merger that results in greater price impacts for the poor. This is not only because of one's natural aversion to inequitable outcomes, but in most cases, at least for more essential products, one would expect the practical impact of price increases on poorer consumers to be greater relative to their existing incomes or wealth as compared to the same price increase for richer consumers. Richer, higher-income consumers are more able to sustain price increases in a particular product.

Despite the product in the study (fuel) being homogenous, prices are not uniform because consumers themselves engage with the market differently.[9] One of the reasons posited by the authors for why we might observe such outcomes is search costs. Higher-income consumers may be more able to search, or afford to search, for the lowest prices and thus in wealthier areas prices are more competitive, or at least less susceptible to increases following a merger transaction.

What the paper ultimately shows is firstly, the dangers of only considering the 'average consumer', but also that, in assessing whether an SLC is likely to result from a merger, one may consider how specific consumer groups (such as the poor) may be affected.

This approach has also been followed in practice. In 2019, the United Kingdom's Competition and Markets Authority (CMA) blocked the merger between Asda and Sainsbury due to concerns that the merger would increase prices for consumers, and it would further raise prices at the supermarket's petrol stations and lead to longer checkout queues.[10] In this case the CMA accounted for the distributive effects when determining if the merger would likely lead to unilateral effects in the retail

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[7]Franco Mariuzzo, Peter Ormosi (2021), Do the poor pay more for increasing market concentration? A study of retail petroleum markets, University of East Anglia, CCP Working Paper 21-08

[8] The study tested the pricing effects according to the average income for the area. Thus price effects in lower income areas are used as a clear indicator of price effects for lower-income consumers. Thus "poorer consumers" here can be understood as consumers from poorer areas.

[9]Franco Mariuzzo, Peter Ormosi (2021), Do the poor pay more for increasing market concentration? A study of retail petroleum markets, University of East Anglia, CCP Working Paper 21-08, p.2

[10]CMA. 2019. Anticipated merger between J Sainsbury PLC and Asda Group Ltd- Final Report, p 6-17.

markets for fuel (petrol stations) and groceries in-store. The CMA found that products such as fuel or groceries are considered non-discretionary in terms of household expenditure items, and these goods cover a large share of household expenditure. Even a small price increase for these products could cause significant harm to consumers, especially low-income households. The CMA considered that price effects on these goods can therefore cause significant distributive effects, which is why it found that seemingly small price increases of between 1.5% to 2.75% on fuel and groceries would cause a substantial harm to competition.

A further example of the greater focus on the poor specifically was evidenced in the recently completed Data Services Market Inquiry ("DSMI") of the Competition Commission of South Africa.[11] Part of the DSMI's final report focused on what was termed "anti-poor pricing" – the report showed that the incumbent operators, when looking at effective prices, priced smaller data bundles at exorbitant 'Rand per megabyte' prices compared to the larger bundles. Smaller bundles tend to be associated with poorer consumers, whereas larger bundles tend to be associated with richer consumers. In essence, while one might consider whether pricing of data in a country is high by looking at pricing on average, an entirely different story can emerge when considering a specific group, such as the poor.

However, what is also at the heart of placing more emphasis on one group of consumers over another (such as poorer consumers over richer) is *policy*. If it is public policy to reduce inequality and/or uplift the conditions of the poorest citizens, then surely this should be factored into what one considers to be 'substantial' or meaningful, even if the policy is not necessarily directly expressed in the legislation. In fact, part of the underlying reason why one might be amenable to an SLC being interpreted differently for poorer consumers may well be policy itself, and thus citizens and authorities alike already implicitly accept that policy positions may justifiably inform the interpretation of substantiality in an SLC.

This perspective is also evident in the prioritisation of sectors by competition agencies. Sectors like agriculture and transport, which form a greater part of lower-income consumers' salaries, are understandably prioritised. Groups that have been historically disadvantaged are understandably prioritised, or groups (such as the youth) which face particular challenges in an economy such as South Africa's may be given focus in public policy too.

Thus public policy or economic policy should arguably be a relevant factor in interpreting what amounts to an SLC. Outside of questions of the magnitude of the effects, what can be considered to be substantial is likely more readily judged through the lens of policy than anything else. Thus the interpretation and application of the SLC standard can potentially be broader.

Effects of the transaction versus effects of a change in competition

When considering whether the effects of a merger amount to an SLC itself, it appears that the courts routinely consider only effects that directly result from a change in competition in the market. However, one may question whether there is room to consider a broader interpretation where the transaction results in harm to consumer welfare as a consequence of the transaction rather than

[11]Competition Commission of South Africa, Data Services Market Inquiry, Final Report, December 2019

competition itself. At first glance, this is already provided for to some extent by public interest provisions, such as those in the South African Competition Act. In South Africa, public interest provisions include considering the effect on a particular industry or region; employment; the ability of small firms and firms held by historically disadvantaged persons to participate and expand in the market; the ability of a national industry to compete in international markets; and the promotion of a greater spread of ownership[12].

However, what is also apparent is that these public interest provisions, at least in South Africa, seem to steer clear of any consumer-centred effects. Thus, while these broader public interest concerns are covered as well as the effects on consumer welfare stemming directly from changes in competition, other harms to consumer welfare that may not stem directly from a change in competition appear not to be considered in the same light by legislators or at least the adjudicators of the legislation. Three cases illustrate the potential for important merger-specific effects that may be candidates for a more expansive interpretation of SLC and competitive effects (or a change to the policy or legislation around this): the dialysis market in the United States; the Walmart case in South Africa; and the more recent Mediclinic/Matlosana Medical Health Services (MMHS) merger in South Africa.

A recent study of acquisitions of outpatient dialysis facilities in the United States revealed an interesting conclusion. Eliason et al (2019)[13] studied the industry for dialysis treatment. The study covered a period of 12 years, and more than 1,200 acquisitions of independent dialysis facilities by 'large chains'. The assessment shows that concentration levels naturally increased markedly over the period given the acquisitions, with two firms ultimately accounting for 60% of all facilities. Whereas the industry was initially quite fragmented, the industry changed as the larger players gradually acquired the independent players. What the research paper found was that where an independent was purchased by the large firm, the quality of care fell substantially. Among other effects, the prescription of costly treatment medications (paid for by health insurance) increased, while recommendations for kidney replacements fell (enabling greater claims for treatment medication), patient loads per employee increased, and more highly skilled nurses were replaced with less highly skilled technicians. This all translated into higher earnings for the acquiring firms and inferior patient outcomes (i.e. a negative impact on quality).

What is most interesting about the results of the study is that it found that these effects were not driven by changes in competition or increased market power. Markets for dialysis treatment are narrow and local, as patients reside in the immediate vicinity of the facility and are unlikely to travel far for their treatment, or switch to a facility which is further away. However, the effects were apparent regardless of whether the large chain and the target were both present in the local market before the acquisition. Even where the target firm would be the only local facility in an area, the effects remained. What the paper finds is "*that chains transfer several prominent strategies to the facilities they acquire*"[14]. The results for patients are not driven by competition but rather the adoption of the chains' strategies and practices following the acquisition. Many of the independents were not-for-

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[12] Competition Act of South Africa, Section 12A(3)

[13] Paul J. Eliason, Benjamin Heebsh, Ryan C. McDevitt, James W. Roberts (July 12th 2019) "*How Acquisitions Affect Firm Behavior and Performance: Evidence from the Dialysis Industry*".

[14] Paul J. Eliason, Benjamin Heebsh, Ryan C. McDevitt, James W. Roberts (July 12th 2019) "*How Acquisitions Affect Firm Behavior and Performance: Evidence from the Dialysis Industry*", p. 1

profit whereas the chains are for-profit, and the authors show that the change in strategy is also clear from the patient level data.

Thus, in this case there is clear evidence of harm to consumer welfare from these acquisitions, and therefore it is questionable whether these transactions should have been allowed. However, it appears that there is little room for such transactions to be addressed under the current application of competition laws and the SLC test. Referring to the US Horizontal Merger Guidelines, Eliason et al recognise that "*most acquisitions of dialysis facilities fall outside the scope of current antitrust laws, which prohibit acquisitions if 'the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly'*"[15].

What this research may in fact suggest is that the acquiring firm (the large chain) was merely more willing to exploit the market power that the independent facility had already possessed due to the narrow, local geographic markets in which they operated. It is not apparent that the large chain did anything innovative or invested in the acquired businesses in any significant way – the effects were observed across the month prior and post the acquisition.

However, what this then suggests is that these mergers did in fact result in a type of SLC – the substitution of a more competitive incumbent firm with a less competitive acquiring firm, or at least a firm more willing to take advantage of market power, to the detriment of consumer welfare. It is not clear therefore that such a case should be simply excluded from the SLC rubric.

The *Walmart*[16] case in South Africa raised a similar issue. In this case, Massmart, a mass retailer, was to be purchased by Walmart – the American retail group. On the face of it, there were no competition concerns with the merger, as it involved a foreign entity with no operations in South Africa purchasing the local entity. However, objections were raised by a labour union, which argued that Walmart's acquisition of Massmart would result in harm to labour given Walmart's reputation for poor labour practices. Thus, the argument was that the merger would result in negative effects even if not directly a consequence of a change in competition.

An area of debate therefore arose in the hearing concerning the relevance of public policy in assessing the nature of the impact of the merger. There were a number of concerns from a policy perspective that the acquisition, or aspects thereof, may not be in the best interest of consumers, labour and the economy more broadly. However, the Tribunal found unequivocally that it could only limit itself to the specific public interest considerations contained within the Competition Act rather than any public policy concerns, regardless of how legitimate. Naturally, the legislation must only account for certain public interest considerations. But at the very heart of the public interest provisions is public policy – these provisions capture what the policy maker believes is in the public interest. However, public policy is to some degree fluid and thus it does beg the question of whether the public interest provisions should have a broader reference to public policy, or whether the SLC itself can be interpreted more broadly to engage with public policy as argued above.

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[15]Paul J. Eliason, Benjamin Heebsh, Ryan C. McDevitt, James W. Roberts (July 12th 2019) "*How Acquisitions Affect Firm Behavior and Performance: Evidence from the Dialysis Industry*", p. 50

[16] Competition Tribunal, Walmart Stores Inc v Massmart Holdings Ltd (73/LM/Dec10) [2011] ZACT 42 (29 June 2011)

The *Mediclinic/MMHS* case in South Africa also speaks to the same concerns, but with interesting recent developments. In this case a small independent hospital group was to be acquired by one of the three largest hospital groups in the country. Mediclinic's plans to acquire MMHS based in Klerksdorp in the North West province of South Africa were prohibited by the Commission in 2019. The Commission successfully argued that should the transaction be allowed there would be an SLC in the area and prices would likely increase. In February 2020, the Competition Appeal Court of South Africa (CAC) overturned the Tribunal's decision to block the acquisition of MMHS and ruled in favour of Mediclinic after the group appealed. The Commission appealed to the Constitutional Court on the basis that the case involved the interpretation, protection and actualisation of the constitutional right of access to healthcare services.

Amongst a number of aspects to the case, the Commission argued that the acquisition would result in the acquiring firm (Mediclinic), a large national group of hospitals, enforcing its own pricing policies and strategies on the independent group. The argument was that the independent hospital was a lower-priced business, and the acquisition would result in higher prices for both insured and uninsured patients. However, in the appeal at the CAC, Mediclinic successfully argued that there was no competitive effect – no SLC – resulting from the merger, and thus it could not be prohibited.

On further appeal to the Constitutional Court, while also arguing there was a competition effect, the Commission also argued that it would be unconstitutional for it not to consider the welfare effects of lower access to healthcare due to the likely price increases. The Commission argued that the proposed merger would make the options outside of medical insurance schemes much less attractive, which provides the merged firm the ability to offer lower or no discounts on Designated Service Provider networks (DSPs) and deteriorate non-price factors in the relevant market. As stated by the Commission, "*Medical scheme members on low-cost options collectively are an important group from a public interest perspective since they are particularly vulnerable to increasing costs of private health care in South Africa*".[17]

The Commission also viewed that the likely price effects of the proposed merger raised public interest concerns regarding the health care sector and the relevant region, with no positive countervailing public interest grounds that mitigate against these concerns. The Commission emphasised that a particularly vulnerable group is uninsured patients in the area, as they would post-merger have less choice (of cheaper hospitals) and less ability to switch to cheaper options.

Consequently, the argument is that to the extent that the impact of the merger is to restrict or impede human rights there is effectively an SLC and the Commission must therefore be able to prohibit such a merger. On 15 October 2021 the Constitutional Court upheld the Commission's appeal, setting aside the CAC ruling which had allowed the merger. The Court considered the effects on the healthcare costs of patients living in the relatively rural region, but especially the cost of uninsured patients as it would deny them of the lower tariffs charged by the target hospitals while also limiting the ability to negotiate better prices or switch to cheaper hospitals.[18] The Court's decision also acknowledges the

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[17]Application for Leave to Appeal Volume 1 (CCT Case No. 31/20). Commission Founding Affidavit p. 14. See: Application for leave to appeal.1pdf (concourt.org.za)

[18]Constitutional Court of South Africa, *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another.* 2021. Judgement 15 October 2021 Case CCT 31/20. P. 33-34.

Tribunal's consideration for the broader public interest concerns within the context of healthcare in South Africa, where it reads, *"[…] the Tribunal grappled with a pertinent public interest concern that there is already a high and historical concentration of ownership and control in the private hospital sector which would be somewhat exacerbated by the proposed merger […]".*[19] Thus, the context and nature of the impact on uninsured persons who were seen as relatively poorer consumers was a critical aspect of the decision, and again supports the emphasis on the distributional impact of mergers, as discussed above.

What is also interesting, and more relevant for this section of this paper, is that the judgement appears to delink the SLC from a change in competition, or at least open the door to do so. It found that the CAC "*… misdirected itself in a material respect by construing section 12A(1)(a) and (2) of the Act as requiring that a price increase post-merger be shown to be the result of the market share changes, which it termed "enhancement of market power". This is not the test required by the Act. And nothing in the language and context of section 12A(1)(a) and (2) allows for the assessment to be conducted with reference to the "enhancement of market power" which is not even listed as one of the factors listed in section 12A(2). … All that section 12A requires in this regard is that a determination be made whether there is a substantial prevention or lessening of competition. And this is ordinarily measured with reference to a potential increase in price*"[20] (emphasis added).

While the impact of the Constitutional Court judgement is not yet clear, what the discussion above suggests is that there is room for the SLC, at least in South Africa, to be interpreted more broadly in that the SLC need not result from a change in competition but can also merely result from the transaction in that the acquiring firm has a different strategy. If this approach is not taken, it would appear that there would be a gap in the application of competition law in many jurisdictions, including South Africa. Certainly, where competition laws allow for the consideration of public interest provisions resulting from the *transaction* – like South Africa's – it would be an odd position if negative effects on consumers as a result of the same *transaction* are not considered by the legislation, or the application thereof.

Substantiality and magnitude: the importance of context

A further area of uncertainty when considering whether there is an SLC is the *magnitude* of the effects – is it sufficiently large to warrant a prohibition or other action from the competition authority? If, for instance, one considers SLC in terms of pricing effects, how much of a price increase is sufficient? As one might expect there is no simple rule as to what kind of increase is enough. While case precedent in South Africa shows that an SLC cannot simply be non-trivial[21], what constitutes an SLC in terms of the magnitude of effect is less clear.

However, what *must* filter into this is an understanding of the market context and the nature of the ultimate harm. Although not a merger scenario, the 'price gouging' cases pursued by the Competition

[19]Constitutional Court of South Africa *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another.* 2021. Judgement 15 October 2021 Case CCT 31/20. p. 33 para. 77

[20] Constitutional Court of South Africa, *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another.* 2021. Judgement 15 October 2021 Case CCT 31/20. P. 22 para.53-54

[21] The *Nationwide Poles* case and appeal dealt with this issue where it was found by the Competition Appeal Court that "substantial" does not equate to non-trivial.

Commission of South Africa in the midst of the initial stages of the Covid-19 pandemic (and associated lockdown) illustrates this. The term 'price gouging' is used to describe a situation in which firms take advantage of the victims of a natural disaster or emergency by charging exorbitant prices for goods and services that are essential to the public during that crisis.[22] The Commission used the excessive pricing provisions in Section 8(1)(a) of the Competition Act to provide the legal framework for the first cases of price gouging in South Africa, and used these provisions to argue that in the specific market context, suppliers with access to certain Personal Protective Equipment (PPE) items may possess a temporary form of market power whereby customers were unable to shop around due to the lack of supply in the short term.

The importance of market context in competitive assessment is also emphasised by the Tribunal and the Competition Appeal Court in decisions on the most high-profile price gouging cases in South Africa, namely the *Babelegi*[23] case and the *Dis-Chem*[24] case.

Although these cases were not mergers, the structure of the assessment for excessive pricing was first for the Commission (as the complainant) to establish a *prima facie* case of excessive pricing whereby the price is found to exceed the competitive price. After that, under the new section 8(1)(a), the burden of proof shifts to the respondent to show that the price is reasonably related to the competitive price. This assessment of reasonableness evokes a sense of magnitude, much like the SLC. The Tribunal's decision in *Babelegi* and *Dis-Chem*, and the CAC's decision in *Babelegi,* all of which were in the Commission's favour, revealed key insights into the thinking of the adjudicators.

The Tribunal, while acknowledging that some level of price increase would be acceptable (the Commission suggested that in the Covid-19 context a threshold of 10% should be used), noted that "*Babelegi's increases in both prices and mark-ups are however so far above any acceptable level that they clearly are exploitative*".[25] The CAC similarly found that "*the price charged was manifestly far higher than the yardstick price, that is the price charged in a relatively competitive pre-COVID-19 market*".[26]

Lastly, the context of overpricing on key items of PPE and the specific nature of the harm in the midst of the Covid-19 crisis – facial masks in both cases –appeared to be key factors in the decisions. In both the *Babelegi* and *Dischem* cases the Tribunal highlighted the importance of the COVID-19 outbreak and that the pricing conduct of these firms during a crisis be contextualised within the Tribunal's role in protecting public interest and the broader purpose of the Act. The Tribunal noted in Babelegi that *"…one must have regard to context, including the nature of the conduct, or the theory of harm, as well as the economic and other circumstances, in this case the substantial hiking up of prices in the time of*

[22]Keleme, M & Moeketsi, N. 2020. *Excessive pricing in the time of COVID-19: insights from a regulator's perspective*. Competition Commission.

[23]Competition Commission vs Babelegi Workwear and Industrial Supplies CC (Tribunal Case no. CR00Apr20), at para 159.

[24]Competition Commission v Dis-Chem Pharmacies Limited Competition Tribunal Case No. CR008Apr2

[25]Competition Commission vs Babelegi Workwear and Industrial Supplies CC (Tribunal Case no. CR00Apr20), at para 171.

[26]Competition Appeal Court decision on the Babelegi case (Case no. 186/CAC/JUN20), para. 59.

a health crisis. Such conduct by a firm at such a time should from a public interest perspective be regarded as offensive.”.[27]

In the Dis-Chem case, the nature of conduct and detriment to consumers was also emphasised within the context of the global pandemic and health crisis. The Tribunal agreed with the Commission's view that price increases during Covid-19 "…*have the most detrimental impact on poor individuals and families, who are already the most vulnerable during such crisis.*"[28] Material price increases in the time of crisis (viewed as price gouging) are especially concerning as they could cut off poor consumers from goods essential to their health, (surgical face masks in the Dis-Chem case) by either making the goods unaffordable or imposing higher costs to poor consumers.[29]

In its judgement the Tribunal emphasised that the excessive pricing conduct of Dis-Chem was to the detriment of consumers as "*material price increases of the magnitude of 47%-261% without corresponding increases in costs, of any goods in a country such as South Africa with a long history of economic exclusion and deep inequality would seriously affect the public interest adversely*",[30] and further highlighted the skewed nature of more consumer harm towards poorer customers, noting that "*material price increases of surgical face masks […] would seriously impact vulnerable and poorer consumers even more. Poorer customers would have been excluded from accessing the masks by such exorbitant increases, other customers would have spent more on these items as a percentage of their disposable income"*.[31]

The importance of considerations around consumer detriment is further demonstrated in the CAC judgement in the *Babelegi* case which states, "*in this case, the excessive prices were charged at a time of crisis when the employment of a mask by every person in the country was seen as being essential to the protection of health, safety and welfare of others and therefore as critical to the reduction of the danger posed by Covid-19. The high prices of such a necessity unquestionably acted to the detriment of consumers in the country.*"[32] The context of health and safety of individuals appears to have been key in the assessment of reasonableness (or magnitude) across the courts.

Conclusions

This paper has explored the rationale and possibility for a more expansive and inclusive interpretation of the SLC and anti-competitive effect terminology. There are essentially three key findings from this paper.

Firstly, public policy or economic policy should naturally be considered relevant to the question of what constitutes an SLC or anti-competitive effect. In some ways, the South African authorities and

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[27]Competition Commission vs Babelegi Workwear and Industrial Supplies CC (Tribunal Case no. CR00Apr20), at para 169.
[28]Competition Commission v Dis-Chem Pharmacies Limited Competition Tribunal Case No. CR008Apr20 para.226.
[29]Competition Commission v Dis-Chem Pharmacies Limited Competition Tribunal Case No. CR008Apr20 para.226.
[30]Competition Commission v Dis-Chem Pharmacies Limited Competition Tribunal Case No. CR008Apr20 para.228.
[31]Competition Commission v Dis-Chem Pharmacies Limited Competition Tribunal Case No. CR008Apr20 para.228.
[32]Competition Appeal Court decision on the Babelegicase (Case no. 186/CAC/JUN20), para. 67.

others may already be taking a broader approach, which would likely be driven further by the recent Constitutional Court ruling in the Mediclinic/MMHS case. But there is also a question as to whether legislation could provide a more fluid provision for the consideration of public policy.

Secondly, policy makers should consider providing for a broader definition of effects that includes provision for prohibiting transactions based on the likely impact of the transaction itself on consumer welfare outcomes. Competition authorities may consider whether there are changes to the nature of competition through, for instance, a further or larger exploitation of market power and whether this is sufficient for a prohibition under an SLC standard. Importantly, where competition legislation provides for the assessment of public interest considerations as a result of the transaction itself, it must be the case that effects on consumers as a consequence of the transaction itself must also be included in any consideration of a merger.

Thirdly, any assessment of SLC must take account of context in assessing the relevant magnitude of effects that would constitute an SLC.

Moreover, there is a question as to whether a broader interpretation of the SLC or competitive effects may produce a more effective competition enforcement and regulation regime. This paper has explored ways in which the SLC standard can interpreted more broadly, but also raised the question of whether policy and legislation (or the application thereof) is sufficiently and comprehensively formulated, and changes may be required.