



**The price effects of a hospital merger: a case study of the Mediclinic Southern Africa
(Pty) Limited (Mediclinic) and Matlosana Medical Health Services (Pty) Limited
(MMHS) merger**

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ABSTRACT

This study evaluates the assessment conducted in the prohibited Mediclinic Southern Africa (Pty) Ltd and Matlosana Medical Health Services (Pty) Ltd (MMHS) proposed merger. The study employs a qualitative approach, centred on a case study methodology, to assess the theories of harm discussed. It aims to provide insights into the adequacy and outcome of the competition authorities' assessment drawing comparisons to international literature and policy implications. It uses economic theory to analyse and show the significance of robust and nuanced regulatory frameworks in healthcare merger evaluation.

DECLARATION

I declare that this dissertation is my own work. It is being submitted for the degree of Master of Commerce in Applied Development Economics at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination at any other university.

Marcelle Laurence

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TABLE OF CONTENTS

Chapter 1: Introduction

1.1 Background of Case	6
1.2 Problem Statement	7
1.3 Significance of the Study	8
1.4 Research Objectives	9
1.5 Research Questions	10

Chapter 2: Literature Review

2.1 Horizontal Unilateral Effects	13
2.2 Theory of Merger Evaluations	14
2.3 Effects of Hospital Mergers on Prices and Competition	16
2.4 Efficiency and Economic Justification for Mergers	17
2.5 International Assessments and Policy Implications	19
2.6 Chapter Conclusion	20

Chapter 3: Methodology

3.1 Merger Assessment Methods and Industry-Specific Studies	21
3.2 Research Design	22
3.3 Research Approach	23

Chapter 4: The Price Effects for Insured Patients

4.1 Mergers that Increase Bargaining Leverage	25
4.2 Bargaining Model within a Hospital Setting	27

Chapter 5: The Price Effects for Uninsured and Insured Patients

5.1 Healthcare Landscape in South Africa	28
5.2 Price Effects of the Merger on Uninsured Patients	30
5.3 Price Effects of the Merger on Insured Patients	32

Chapter 6: The Mediclinic/MMHS Case

6.1 The Disputed Facts	34
6.2 The Tribunal's Decision	37
6.3 CAC's Decision	38
6.4 Constitutional Court's Decision	39
6.5 Principles of Competition Law & Evaluation of Local and International Precedents Against Merger	40
6.6 Review of the Decisions & Chapter Conclusion	42

Chapter 7: Policy Implications and Conclusion

7.1 Evaluating Policy Outcomes Against Competition Law Objectives	44
7.2 Conclusion	47

Chapter 8: Reference List

48

CHAPTER 1: INTRODUCTION

1.1 Background of Case

On 29 September 2016, Mediclinic Southern Africa (Pty) Limited (Mediclinic) and Matlosana Medical Health Services (Pty) Limited (MMHS) notified the Competition Commission (Commission) of their intention to merge (ConCourt Judgement 2021). Mediclinic, the primary acquiring firm operates a private hospital group in South Africa, which offers acute multi-disciplinary private hospital services. In the North West province, Mediclinic SA owns and operates among others Mediclinic Potchefstroom, which is a multi-disciplinary private hospital. MMHS the primary target firm owns and operates two multi-disciplinary private hospitals (Wilmed Park and Sunningdale hospitals in Klerksdorp) in the North West province that are relevant to the evaluation of the transaction. The result of the merger, if approved, would have been that Mediclinic SA would own and operate Mediclinic Potchefstroom together with Wilmed Park and Sunningdale hospitals as outlined in the Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another case (2021) (hereafter ConCourt Judgement, 2021).

The Commission investigated the proposed merger and on 28 June 2017, concluded that the proposed merger raises significant competition concerns and is likely to result in increased costs of healthcare services for both insured and uninsured patients (ConCourt Judgement, 2021). The Commission recommended to the Competition Tribunal (Tribunal) that the proposed merger be prohibited. After hearing submissions from the merger parties, the Commission and other third parties, on 22 March 2019, the Tribunal found that the proposed merger would, among other effects, take away the lower tariffs available to insured and uninsured patients at the target hospitals, given the significant differences in the tariffs between the merger parties (ConCourt Judgement, 2021).

Aggrieved by the Tribunal's decision, the merger parties appealed to the Competition Appeal Court (CAC). The majority judgment of the CAC disagreed with the findings of the Tribunal and conditionally approved the merger on 22 March 2019, finding that the prohibition of the proposed merger by the Tribunal could not be justified (ConCourt Judgement, 2021). Unhappy with the majority judgment of the CAC, the Commission appealed the decision of the CAC to the Constitutional Court. On Friday, 15 October 2021 the Constitutional Court

(2021) found the majority of the CAC erred in overturning the decision of the Tribunal and approved the merger.

A central issue raised by the Mediclinic/MMHS transaction was whether Mediclinic's proposed ownership MMHS's Wilmed and Sunningdale hospitals, would result in a likely lessening of competition post-merger. Additionally, whether the proposed merger was likely to result in efficiencies that would lead to lower procurement costs for Wilmed and Sunningdale following the merger due to them being operated by Mediclinic (ConCourt Judgement, 2021).

This transaction provides a case study of a merger that was prohibited. The study's analysis focuses on a fundamental question regarding the Mediclinic/MMHS transaction: how would the merger entity have adjusted price after the merger? We are able to answer this question due to the public availability of judgements of the competition authorities.

The objective of this study is twofold:

- i. Evaluate what can be learned from the proposed merger about how the competition authorities should assess horizontal mergers and the theories of harm that arise in them.
- ii. Assess whether in this case the Tribunal made the right decision ex ante (was it reasonable?) and ex post (was it correct?).

1.2 Problem Statement

Merger evaluations done by competition authorities often hinge on a prospective analysis to forecast any potential effect of a proposed merger on market competition and consumer welfare. One of the most intricate aspects of merger control is the assessment of horizontal mergers within the health sector, where the balance between proposed mergers and public interest is particularly complex and crucial for societal welfare (Gaynor & Vogt, 1999; Blair, Durrance & Sokol, 2016; Walia & Boudreaux, 2019). Attempting to perform an ex-post analysis of prohibited mergers adds to this difficulty, as critical information on post-merger outcomes, such as price adjustments or other non-price related aspects like quality of service, is unavailable due to the non-realization of the merger (Dafny, 2009; Esfahani, 2019).

The Tribunal's decision to prohibit the Mediclinic and MMHS merger, which was ultimately upheld by the Constitutional Court (2021) illustrates the challenges of predicting and interpreting unilateral effects as well as efficiencies promised by the merging entities (OECD, 2020; Moreno & Abreu, 2019). Unilateral effects in the form of increased prices and reduced quality of care, are a crucial factor in the assessment of mergers, where existing economic theory often guides the prediction of these outcomes (Gaynor & Vogt, 2003; Gowrisankaran, 2011). However, ex post evaluations are constrained by the lack of a rich data set. South African assessments are limited to less granular aggregate data, raising concerns about the precision and reliability of these evaluations (Wiik, 2019).

Furthermore, while international literature provides extensive evidence on the effects of horizontal mergers in hospitals on prices and quality of care (Tenn, 2008; Vita & Sacher, 2001; Thompson, 2009), there is a noticeable deficiency of such comprehensive studies done in the South African context. This limitation causes a restriction on the ability of local policymakers to draw insights from global experiences and hinders the formulation of well-grounded and contextually relevant antitrust policies (Monti, 2023; Kaplow, 2021).

Considering these constraints, there emerges a pressing need for a systematic review of the price effects of the Mediclinic and MMHS merger.

1.3 Significance of the study

Understanding the unilateral effects of horizontal hospital mergers on competition and consumer welfare is crucial for informing both policy and regulation oversight (Gaynor & Vogt, 1999; Gaynor & Vogt, 2003). However, the absence of observable post-merger outcomes, particularly in cases where mergers are prohibited, poses a significant challenge for retrospective analysis (Dafny, 2009). In the South African context, the prohibition of the Mediclinic/MMHS merger provides a unique opportunity to study the consequences of regulatory intervention on market structure and consumer prices in a developing country context.

International literature provides ample evidence that hospital mergers can lead to significant changes in prices (Tenn, 2008; Thompson, 2009), and potentially reduce healthcare quality and access (Walia & Boudreaux, 2019). Moreover, there is a substantive discourse on the economic efficiency gains from mergers (Blair, Durrance & Sokol, 2016) as well as on the

challenges in measuring the effects of such corporate consolidations (Craig, Grennan & Swanson, 2018). Yet, detailed analyses specific to South Africa are scarce, which inhibits the application of these findings to the local milieu (OECD, 2020; Wiik, 2019).

The insight from the proposed study is significant because it would contribute to filling this gap in the merger literature by offering an ex-post evaluation of a prohibited merger in South Africa's healthcare industry, a sector where the public interest concerns intersect heavily with antitrust considerations (Snail & Robinson, 1998; Moreno & Abreu, 2019). By examining the Mediclinic/MMHS case through a qualitative review of the judicial decisions, this study aims to shed light on the alignment of the competition authority's decisions with economic theory and international best practices (Esfahani, 2019; Monti, 2023; Kaplow, 2023).

Furthermore, the study aims to enhance the understanding of the "unilateral effects" theory and its applicability in a rapidly changing and highly specialized market such as healthcare, reflecting the broader international trends toward refinement of merger assessment standards (Kaplow, 2021). Not only does the outcome of this research hold potential for influencing future policy and regulatory decisions in South Africa, but it also contributes to the global dialogue on the complexities of healthcare market regulation and the role of competition law in safeguarding consumer interests.

1.4 Research Objectives

The overarching aim of this study is to gain insights into the adequacy and outcome of the competition authorities' assessment methodologies in South Africa. The following research objectives have been established to guide the inquiry:

- i. **Theoretical Appraisal:** To evaluate the application of economic theories of harm (TOH) in the context of horizontal mergers, particularly how these theories were utilized by the South African Competition Tribunal in assessing the Mediclinic/MMHS case.
- ii. **Decision Analysis:** To assess the appropriateness of the decision-making process adopted by the Tribunal, the CAC, and the Constitutional Court in their respective analyses of the merger, with a focus on whether the decisions were reasonable and correct based on the evidence available at the time.

- iii. Policy Implications: To investigate the potential implications of the merger prohibition on future competition policy and enforcement actions within the South African healthcare sector.
- iv. International Benchmarking: To draw comparisons between the South African approach to merger assessment and international best practices, as well as the implications for global consistency in antitrust regulations.

1.5 Research Questions

This study seeks to answer the following research questions, which correspond to the objectives outlined above:

- i. Theoretical Utilization:

How were economic theories of unilateral effects and market power utilized by the Tribunal in the Mediclinic/MMHS case, and how does this align with current economic literature on horizontal mergers (Gaynor & Vogt, 1999; Dafny, 2009; Esfahani, 2019)?

- ii. Decision Evaluation:

Were the decisions made by the Tribunal, CAC, and Constitutional Court in the Mediclinic/MMHS case justifiable based on the information and economic evidence available at the time of assessment?

- iii. Policy Examination:

What are the potential policy implications of the Mediclinic/MMHS case for competition enforcement in the South African healthcare sector, and how might this inform future regulatory measures (OECD, 2020; Walia & Boudreaux, 2019)?

- iv. International Comparison:

How does the approach taken by the Tribunal compare to international methods and guidelines for the assessment of hospital mergers in terms of determining market power and consumer welfare (Monti, 2023; Kaplow, 2021)?

Chapter Outline

Chapter 1: Introduction: This chapter introduces the Mediclinic/MMHS merger case, establishing the background and key elements that influenced the transaction. It articulates the problem statement highlighting the complexities involved in assessing the merger's impact on competition and consumer welfare. The significance of the study is emphasized, particularly in filling the gaps in existing literature regarding horizontal mergers in healthcare. The chapter concludes with clearly defined research objectives and questions that guide the analysis.

Chapter 2: Literature Review: The literature review delves into the theoretical framework surrounding horizontal unilateral effects and their implications for merger evaluations. It discusses various studies on hospital mergers and their impacts on pricing and competition, while also exploring the economic justifications for such mergers. This chapter assesses international assessments and policy implications, drawing comparisons to South African context, and concludes with a synthesis of the reviewed literature.

Chapter 3: Methodology : This chapter outlines the methodology used for assessing the merger. It discusses the different merger assessment methods employed in the industry, providing context through relevant studies. The research design and approach are articulated, detailing how data was collected and analyzed to evaluate the merger's effects comprehensively.

Chapter 4: The Price Effects for Insured Patients Focusing on insured patients, this chapter analyzes how the merger may influence pricing dynamics. It discusses mergers that enhance bargaining leverage and introduces a bargaining model tailored to hospital settings, highlighting the implications for negotiated rates between insurers and healthcare providers.

Chapter 5: The Price Effects for Uninsured and Insured Patients This chapter presents an in-depth analysis of the healthcare landscape in South Africa, examining the merger's effects on both uninsured and insured patients. It outlines how the merger might affect pricing structures differently for each group, informed by existing literature and data.

Chapter 6: The Mediclinic/MMHS Case

This chapter reviews the Mediclinic/MMHS case in detail, discussing the disputed facts,

decisions made by the Tribunal, the Competition Appeal Court (CAC), and the Constitutional Court. It evaluates these decisions against established principles of competition law and reviews local and international precedents regarding similar mergers, concluding with an assessment of the judicial reasoning involved.

Chapter 7: Policy Implications and Conclusion

The final chapter evaluates the policy outcomes of the merger assessment against the objectives of competition law. It synthesizes the findings from the previous chapters to draw conclusions regarding the implications of the Mediclinic/MMHS merger on future policy and regulatory frameworks in the healthcare sector, ultimately highlighting the need for ongoing scrutiny and adaptation of competition laws in response to evolving market dynamics.

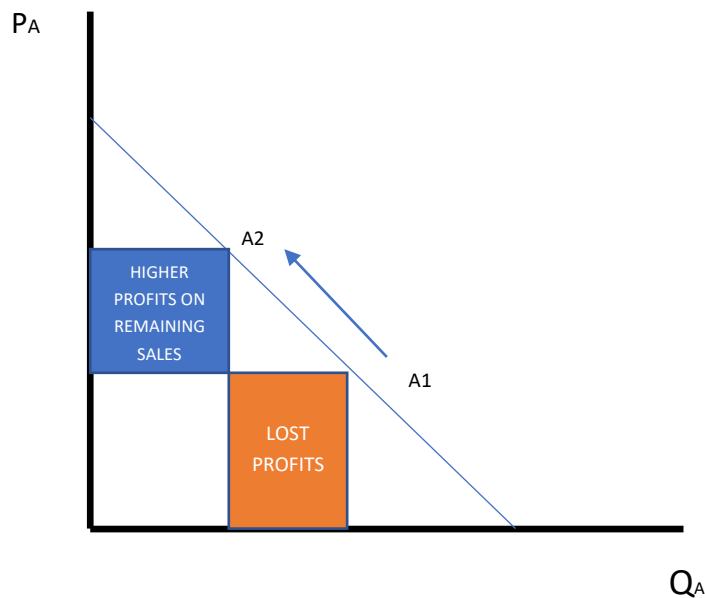
CHAPTER 2: LITERATURE REVIEW

2.1. Horizontal Unilateral Effects

The main theory of harm (TOH) in the Mediclinic/MHHS merger was that of unilateral effects. Such effects occur in horizontal mergers when a firm merges with a competitor which formerly provided a competitive constraint (Motta, 2004; OECD, 2020). This then allows the merged firm to profitably increase prices or reduce the quality, range, innovation and service, independently without the cooperation of rivals (Motta, 2004; OECD, 2020).

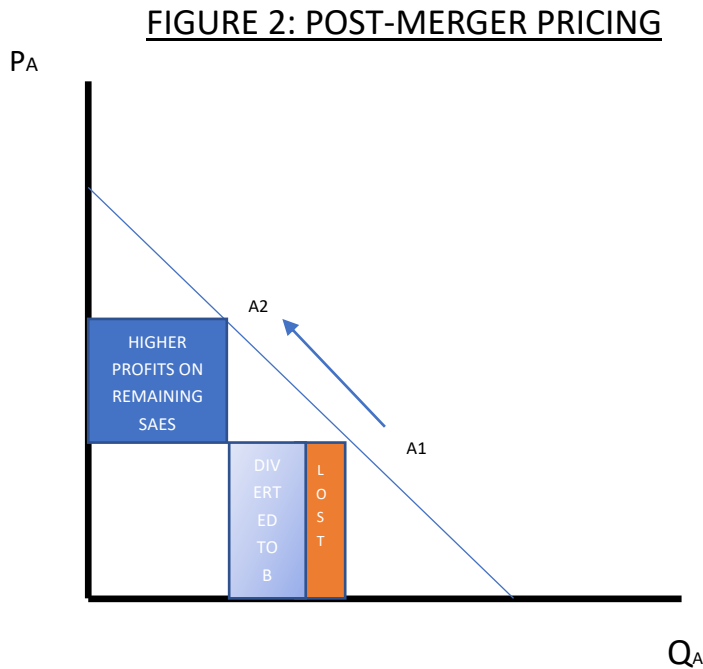
Absent the approved merger, companies must make the trade-off between increasing prices or decreasing the quality, range, innovation or service they offer (Motta, 2004; OECD, 2020). If a firm chooses to increase its price, that firm would incur a cost which is a result of customers choosing to switch to another option which would result in the firm forfeiting potential profits that would have been generated from those consumers. However, as illustrated in Figure 1, the firm may also benefit by increased profits from the customers who continue to purchase from the firm, despite the higher price, or the lower costs incurred from a decrease in quality, range or service (non-price aspects) (Motta, 2004; OECD, 2020).

FIGURE 1: PRE-MERGER PRICING



Following the merger, if the merged entity chooses to increase its price the merged entity finds it would incur lower costs in increasing prices or decreasing quality than prior to the

merger (Massimo, 2003; OECD, 2020). This is because the firm would recoup any potential losses which would occur from customers switching, as illustrated in Figure 2 below.



Unilateral effects are analysed through these aspects and may occur in differentiated product markets as a price increase for the merged entity does not incur as much cost. Unilateral effects are also more likely to occur when the merging firms are close competitors. This is due to a merged firm gaining the ability to recoup any profits that would otherwise be lost due to the price increase or decrease in any other non-price aspects. Resulting in the increase of prices becoming more profitable for the merged entity (Motta, 2004; OECD, 2020).

2.2 Effects of Hospital Mergers on Prices and Competition

Hospital merger reviews, particularly the assessment of the implications for prices and market competition, has been an ongoing point of contention within competition and health economics literature. A considerable amount of research has aimed to determine how these mergers impact market dynamics, with many scholars presenting evidence suggesting a trend towards higher prices following mergers (Gowrisankaran, 2011; Craig, Grennan & Swanson, 2018). Dafny (2009) contribute a significant methodological approach by using a spatial

competition model, allowing for a more contextual understanding of the market and the geographic considerations that affect competition. This approach acknowledges the varying levels of substitutability between hospitals based on their location.

Empirical research, including notable case studies such as the Sutter-Summit transaction, has provided concrete evidence of mergers leading to considerable increases in inpatient prices. Tenn (2008), reveals how mergers can dramatically alter the pricing power of hospitals, resulting in marked price elevation on a variety of healthcare services. This is further supported by the work of Thompson (2009), who establishes a quantifiable relationship between mergers and price surges in hospital services. Their findings suggest not just isolated incidents, but also an overarching trend that prompts the need for meticulous regulatory oversight, driven by the trepidation of reduced competition leading to market failures and consumer harm. Cross-regional analyses have broadened this view, with Moreno and Abreu (2019) documenting similar price effects stemming from hospital mergers in the Barcelona region, echoing the international relevance of such fiscal outcomes in the healthcare sector.

Notwithstanding the predominant narrative of price increases following a horizontal merger, the literature reflects some discrepancies based on the nature of the merging entities. Vita and Sacher (2001) present a more differentiated perspective by highlighting instances where not-for-profit hospital mergers did not result in heightened prices, calling attention to the potential for different merger motivations and outcomes contingent on the financial goals and operational structures of the institutions involved. Such nuances underline the importance of considering the type of hospital ownership in the analysis of post-merger market behaviors, as it could signal varying impacts on competition and pricing.

It is evident from the literature that the effects of hospital mergers on prices and competition are far-reaching and multifarious, implicating a range of policy concerns (Wiik, 2019; Walia & Boudreaux, 2019). These concerns require rigorous evaluation mechanisms that consider not only price changes but also the broader implications on access to care, quality of service, and long-term competitive viability within the healthcare industry (Blair, Durrance & Sokol, 2016). The collective findings of these studies serve as a crucial basis for policy formulation and regulatory intervention, emphasizing the need for a balanced view that takes into account economic efficiencies, pricing strategies, and the social welfare objectives of healthcare provision.

2.3 Efficiency Justification for Mergers

The question of whether hospital mergers generate sufficient efficiencies to outweigh potential increases in market power occupies a significant place in merger-related discourse. This line of inquiry is largely driven by the search for a more robust economic justification for consolidation within the healthcare industry. Blair, Durrance, and Sokol (2016) delve into this topic by examining how the potential operational efficiencies achieved through mergers—such as streamlining administrative functions, consolidating purchasing power, and spreading fixed costs across a larger patient base—could translate into benefits for consumers. These efficiencies are often cited by merging entities as a counterbalance to fears surrounding increased market power that might otherwise suggest an anticompetitive outcome.

The theoretical rationale behind this efficiency argument posits that a merged entity can harness economies of scale and scope, ultimately leading to reduced operating costs and possibly enhanced service quality (Blair, Durrance & Sokol, 2016). It suggests that these mergers can eliminate duplicative services and lead to a more concentrated investment in cutting-edge technologies and specialized staff, with the latter poised to increase the overall quality of care provided (Gaynor & Vogt, 1999; Gaynor & Vogt, 2003). Furthermore, there is an implication that increased financial stability from mergers could facilitate more substantial investment in infrastructure and innovation, potentially yielding long-term community health benefits.

However, Gowrisankaran (2011) cautions against an uncritical acceptance of these efficiency claims, outlining the inherent difficulties in their measurement and the potential long-term consequences of a lessened competitive landscape. His scepticism is rooted in the complex nature of healthcare provision, where cost structures and service quality metrics can vary widely between providers and where reductions in competitive pressure might lead to a decline in the urgency to enhance service offerings.

Esfahani (2019), analyzes the profitability of horizontal mergers among price stickiness, suggests that the hoped-for efficiencies may not always materialize as significantly as projected in the face of rigid pricing structures. The dynamic is further complicated when considering mergers involving not-for-profit entities, which may pursue efficiencies for different motives than their for-profit counterparts, such as the desire to expand access to care rather than to leverage market power for price increases (Vita & Sacher, 2001).

Overall, the literature indicates that while there is some evidence to support claims that hospital mergers can lead to operational efficiencies, there is equal support for a healthy skepticism regarding these claims. The need for a delicate and informed balance in the evaluation of proposed mergers is emphasized, underscoring the requirement for healthcare merger reviews to be grounded in a rigorous and thorough economic analysis—a sentiment echoed by the recommendations put forth in merger investigation guides such as the OECD’s (2020). This balance must essentially weigh the promised post-merger efficiencies against the practical realities of healthcare economics, competitive dynamics, and the preservation of consumer welfare.

2.4 International Assessments and Policy Implications

The assessment of hospital mergers transcends national boundaries, offering crucial insights into their universal implications for healthcare systems. International studies such as Wiik’s (2019) delve into the repercussions of horizontal mergers beyond mere price alterations, revealing that treatment diversity can also be compromised. This observation raises important questions about the impact of reduced competition on the variety and innovativeness of healthcare services. A similar study by Moreno and Abreu (2019), based on the merger of hospitals in Barcelona, complements this understanding by offering empirical evidence of price increases following mergers in a different healthcare setting.

The range of effects documented in these studies emphasize the significance of having robust and nuanced regulatory frameworks. Recognizing this need, the OECD (2020) underlines the importance of comprehensive economic analysis in merger investigations, encapsulating both the macro and micro-economic facets of healthcare markets. Such analysis should not only assess the potential for price increases but also examine factors such as patient mobility, insurance structures, and variations in healthcare delivery models, all of which can play pivotal roles in shaping outcomes post-merger.

Walia and Boudreaux’s (2019) research extends the discourse further by highlighting how mergers can potentially influence access to healthcare services, especially for vulnerable populations who may be disproportionately impacted by changes in the healthcare market. Their findings articulate that mergers can extend their impact beyond economic dimensions,

affecting the very fabric of service provision and possibly leading to a concentration of market power that could stifle competition and innovation over the long term.

The policy implications of these findings are vast, necessitating careful consideration by regulators and policymakers. For instance, the potential reduction in service diversity can have grave implications for patient choice, and consequently, for the patient-centric quality of care—considerations that are paramount in healthcare regulation (Gaynor & Vogt, 2003; Kaplow, 2021). Furthermore, the effects of mergers on market power require rigorous scrutiny since unchecked consolidation could lead to oligopolistic market structures, inherently detrimental to consumer welfare (Kaplow, 2023; Monti, 2023).

Research by Craig, Grennan, and Swanson (2018) introduce additional perspectives on hospital buyer power, suggesting that mergers could potentially strengthen bargaining power against suppliers, with ambiguous effects on end-users. This complexity underscores how the implications of mergers can permeate through multiple levels of healthcare markets, from suppliers to providers to patients, warranting meticulous regulatory oversight.

In light of the comprehensive consequences that hospital mergers can entail, the literature advocates for policies that not only deter anti-competitive practices but also promote an environment conducive to high-quality, accessible, and varied healthcare services. These studies collectively call for a dynamic and context-sensitive approach to merger regulation—one that can adeptly respond to a landscape marked by rapid technological advancements and evolving patient needs, while remaining vigilant against potential market distortions (Blair, Durrance & Sokol, 2016; Esfahani, 2019). Such a perspective is critical for ensuring that the benefits of healthcare mergers, where present, are fully realized without undermining the competitive integrity of the market.

Hospital mergers have been the subject of extensive research, the study by Cooper, Craig, Gaynor and Van Reenen (2019) focused on the evolution of prices in hospitals before and after mergers occurred using a difference-in-difference method. Building off of Uwe Reinhardt's ideas, the study utilizes data from the National Bureau of Economic Research (NBER) and the Health Care Cost Institute (HCCI). The main focal point of the study was to identify how hospital pricing changes after mergers, particularly when the merging entities are within close geographical proximity. The study's conclusions pointed to a significant hike in prices of more than 6% following the hospital mergers of the geographically close entities. It also explored how market structure, prices as well as contract formation interact with one

another. Notably, the study highlighted that when hospitals are more than twenty-five miles apart, the merger coefficients become insignificant. Furthermore, there were no observable pre-merger price trend differentials found, amongst hospitals undergoing mergers and those that remained independent. The research in this paper was mainly descriptive in nature and so caution should be taken in the conclusions of any causality.

Tenn (2008) conducts a retrospective study of the Sutter-Summit hospital merger to assess whether antitrust enforcement in this matter was appropriate. This approved merger combined two hospitals located close together in the Oakland-Berkeley region of the San Francisco Bay Area. The greater metropolitan area contained many other hospitals that offered a similar range of services, but which were located farther away. A central issue raised by the Sutter-Summit transaction was whether travel costs were low enough such that these hospitals were a sufficient constraint on the merging parties to prevent an anticompetitive price increase. Tenn (2008) shows that charges at Summit Hospital increased by 28% to 44%, depending on the insurance.

Gowrisankaran (2010) comments on Tenn (2008) and concludes that Tenn (2008) provides compelling evidence that the merger led to a price increase at Summit Hospital. Further, Gowrisankaran (2010) finds that the causes of the price increase and the welfare implications of the merger are less clear, particularly since anecdotal evidence suggests that quality increased at Summit Hospital post-merger.

The above literature mainly looks at hospital mergers within the United States of America. To the best of our knowledge at the time of this study, the Mediclinic/MMHS transaction is the first successful hospital merger prohibition by the competition authorities in South Africa. This study differs from above literature from the US in a number of ways. Unlike the US studies which employed a very rich dataset to access post-merger prices, the study will assess the aggregate level data as reported by the competition authorities in the Mediclinic/MHSS merger.

2.6 Chapter Conclusion

The body of literature makes it evident that hospital mergers warrant careful scrutiny due to their potential impact on prices, healthcare quality, and market power. The study of the Mediclinic/MMHS merger stands to contribute to both the South African context and the

global narrative by incorporating these research findings into the evaluation of a merger prohibition and its subsequent validation by judicial bodies (ConCourt Judgement, 2021). This research will draw on these diverse perspectives and empirical studies to critically analyze the consequences on price of the merger prohibition and offer insights into potential policy enhancements and regulatory adaptations in the evolving landscape of healthcare competition.

CHAPTER 3: METHODOLOGY

3.1 Merger Assessment Methods and Industry-Specific Studies

The scholarly pursuit of understanding hospital mergers encompasses diverse research methodologies, reflecting the multi-layered impacts of such corporate activities on market competition. A significant portion of this literature situates within the Structure-Conduct-Performance (S-C-P) paradigm, a classic analytical framework that correlates market structure with organizational behavior and market outcomes. These studies traditionally employ cross-sectional analyses to estimate the potential pricing power of consolidated entities and engage in extensive examinations of how market concentration may portend changes in competition and performance levels (Gaynor & Vogt, 1999; Vita & Sacher, 2001). The S-C-P paradigm posits that increased concentration could reduce competition, theoretically leading to less favorable outcomes for consumers—principally in the form of higher prices and potentially in qualitatively poorer service delivery.

Complementing this approach, another thread of academic inquiries adopts case study methodologies to illustrate the immediate effects of hospital mergers, gauging market reactions to such events through the analysis of stock price movements and other financial indicators. These case studies have been particularly useful in shedding light on investor sentiment and the expected economic implications of mergers, offering insights that may not be captured by traditional cross-sectional models (Tenn, 2008; Thompson, 2009). This branch of the literature provides real-time analysis, allowing for a dynamic assessment that captures the complexities and rapid adjustments within healthcare markets that are indicative of post-merger realities.

While the S-C-P paradigm and event studies offer valuable insights, recent scholarship has pushed for the development of more nuanced and industry-specific assessment techniques that address the peculiarities of different business sectors. Monti (2023) and Kaplow (2023, 2021) lead the discourse in refining analytical frameworks for competition assessments, particularly within the healthcare industry. Recognizing that the straightforward economic principles that govern competitive analysis in traditional markets may not directly apply to the healthcare domain, they advocate for the creation of tailored assessment tools. Their research underscores the vital need for methodologies that consider factors such as barriers to entry, the heterogeneity of patient populations, regulatory influences, and the social dimension of healthcare services when evaluating hospital mergers.

Observations from the literature suggest that both the S-C-P paradigm and event studies have their place in merger analysis. Yet, there is a burgeoning consensus that methodological flexibility and sector-specific insights are critical for effective competition policy formation—especially in the healthcare arena, where market dynamics are distinct, and the stakes involve not just economic welfare but public health outcomes (OECD, 2020; Kaplow, 2023). As the field of competition economics continues to evolve, there is an apparent need for ongoing empirical research and methodological refinement that keeps pace with the rapidly changing healthcare landscape and adequately informs regulatory practices to promote competitive, efficient, and accessible healthcare markets.

3.1 Research Design

The study employs a qualitative research design, granting an explorative in-depth analysis of the complex decision-making process surrounding the Mediclinic/MMHS merger. This approach is appropriate for dissecting the nuanced intricacies inherent in the judicial and economic assessments made by the Tribunal and the CAC (ConCourt Judgement, 2021). By delving into the qualitative aspects of the decision-making process, the research aims to capture the multifaceted rationalities, shed light on the economic justifications presented, and assess the application of various economic theories in the context of merger regulation (Gaynor & Vogt, 1999; Vita & Sacher, 2001).

By concentrating on qualitative inquiry, the study aims to produce an understanding of the antitrust decision processes as well as the content and context of the decisions made. This, in turn, should furnish insights regarding how economic theories of harm (TOH), such as those relating to market power and competition lessening, have been interpreted and applied in practice (Monti, 2023).

In essence, the qualitative design of this research is pivotal in constructing an intellectual bridge between the specific case study of the Mediclinic/MMHS merger and the broader body of knowledge on merger assessments. It seeks to enrich the discourse on competition law enforcement by exploring the intersection of economic theory, legal reasoning, and regulatory practice, thus contributing to a more nuanced comprehension of the complexities involved in health sector merger evaluations.

3.2 Research Approach

The research approach centers on a case study methodology, meticulously chosen for its robustness in providing a detailed examination of complex issues within real-life contexts. The focal point of the approach is the Mediclinic/MMHS merger, a significant event in the South African healthcare industry that culminated in a prohibited merger decision upheld by the Constitutional Court (2021). By concentrating on a single case, the study aims to extensively explore the dimensions of the decision. This includes scrutinizing the application of economic theories of harm (TOH) brought up by the competition authorities to assess the merger's potential anti-competitive effects. A case study approach facilitates a deconstruction of the rationale behind the Tribunal's and CAC's decisions, providing rich insights into how legal frameworks intertwine with economic principles in reaching a verdict (Kaplow, 2021; Monti, 2023). The case study will also draw upon precedent cases and existing literature, juxtaposing theory with the observed evidence and articulated judgments, thus leaning heavily on legal and economic scholarly works to inform the research framework (Vita & Sacher, 2001; Blair, Durrance & Sokol, 2016).

Given the intricacies of merger evaluations, especially in healthcare — an industry characterized by complex service offerings, critical public interest considerations, and significant regulatory oversight — the chosen approach is well-positioned to navigate the convergence of legal standards, economic analysis, and market realities (Gaynor & Vogt, 2003; Gowrisankaran, 2011). The case study will also draw upon precedent cases and existing literature, juxtaposing theory with the observed evidence and articulated judgments, thus leaning heavily on legal and economic scholarly works to inform the research framework (Vita & Sacher, 2001; Blair, Durrance & Sokol, 2016).

Moreover, this approach allows for an exploration of the decision's congruity with international standards and practices, comparing them to findings from similar assessments in various jurisdictions, as denoted by OECD guidelines and international case law (OECD, 2020). By employing a case study approach, not only does it encapsulate an extensive investigation of the Mediclinic/MMHS merger, but it also contributes to the broader dialogue on how to effectively analyze and regulate horizontal mergers within the unique context of the healthcare industry.

The data collection process in this study involves a meticulous document analysis where public records, such as Tribunal decisions, CAC judgements (Competition Commission of

South Africa v Mediclinic Southern Africa (Pty) Ltd and Another [2021]), and other materials pertinent to the case, are closely examined. These documents are invaluable as they provide the official narrative and rationale behind the regulatory bodies' decisions, affording insights into the legal and economic considerations that were at play (Monti, 2023).

The analysis will seek to uncover recurring themes of similar cases and couple these with the documented evidence from the case materials. It will strive to contextualize the role and application of economic theories of harm and assess whether these were appropriately and effectively used in evaluating the Mediclinic/MMHS merger. Particular attention will be given to the alignment—or lack thereof—between these theories and the actual outcomes and arguments presented in the Tribunal's and CAC's decisions (Gaynor & Vogt, 1999; Vita & Sacher, 2001).

With the prevailing economic theories and regulatory standards, the analysis will endeavor to offer a nuanced evaluation of the merger assessment process as it occurred. This will enable the researcher to make informed judgments about the correctness of the economic analyses performed by the competition authorities, as well as to address if and how the merger may have spurred detrimental policy outcomes in South Africa's healthcare sector (OECD, 2020; Walia & Boudreaux, 2019). The research ultimately seeks to contribute a substantive understanding of the impact and effectiveness of merger regulations in the context of a critical case study.

In summary, the case study research approach is purposefully selected for its strength in facilitating an exhaustive exploration of the choices made by the Tribunal and CAC, the evidence and theories used, and the implications of such decisions within the parameters of the healthcare sector and competition law. This methodological choice aims to provide both depth and clarity to the complex issue at hand, upholding the study's commitment to a nuanced and contextually informed analysis.

CHAPTER 4: THE PRICE EFFECTS FOR INSURED PATIENTS

4.1 Mergers that Increase Bargaining Leverage

A number of industries are characterised by bargaining between providers who supply goods and distributors, who often sell the goods in a bundled form. Aviv Nevo (2014), provides an apt framework of the conceptual underpinnings of bargaining leverage and its importance when it comes to its effects on prices in mergers. The economic theory that underpins the model is based on the Nash Bargaining solution (Nash 1950, as cited in Nevo, 2014). In Nash's model, entities split surplus between the benefits of agreeing and the benefits of disagreeing. The outcome hinges on the splitting of these gains which is noted as the bargaining power, along with the leverage that each entity acquires. Importantly, this method relies on the assumption that each pair of companies negotiates pricing or contracts without considering any adjustments made by other pairs of enterprises in reaction to a disagreement or breakdown in negotiations. The Nash-in-Nash solution refers to a certain sort of contract equilibrium, as first defined by Cremer and Riordan (1987). This solution has been utilized in various theoretical studies, including those by Davidson (1988), Dobson (1994), and Björnerstedt and Stennek (2007), Dobson and Waterson (2007), as well as Inderst and Montez's publication from 2014 (as cited by Nevo, 2014).

Suppose a distributor, the medical insurer, negotiates with two providers, the hospitals in this scenario. If a bundle encompasses both providers it will net R 2 200. If the bundle encompasses only one of the two, it earns R 2 000, and when neither provider is included. The provider earns fees, only if it is included in a bundle, notwithstanding, providers earn R0 (Nevo, 2014). The incremental gain in adding either provider to the bundle, relative to disagreeing is R200, when the other provider is already included in the bundle. Therefore, an exclusionary threat to a provider, while the other provider is included, creates a gain of R 200 to the medical insurer, which when equally split with the hospital results in earning R 100.

Now suppose the two hospitals merger and bargain as one unit, as opposed to two separate units. The gain from agreeing to a deal with the merged providers is R 2 200. When split equally results in the newly merged entity acting a single unit, earning R 1 100. When acting as two separate units, the providers could only bargain for R 100 each, or R 200 total.

Meaning the providers gain from bargaining as a single unit as opposed to two separate units (Nevo, 2014).

When changing the numbers the results could possibly change and give a counterpart of a merger in a price setting framework. In the case where both providers generate R 1 100, regardless, then bargaining as a single unit or independently would earn R 550 each. Yet when the value of having one provider in the bundle alone was R200 and R2 200 with both, the bargaining independently the providers would get R 1 000 each, which would be more than joint bargaining.

In a price setting framework, the effect of a merger is dependent on the curvature of the function that relates to net gain from an agreement. When the function is concave, the incremental gains decreases when adding a provider, which would mean a merger would increase prices (Nevo,2014).

The incremental value of providers can decrease due to a number of factors. When consumers view the providers as substitutes the provider increases its value to the distributor as it makes a distributor's bundle more attractive to consumers as some consumers prefer some providers over other. But the more providers already in a bundle, the less incremental value of each additional provider (Nevo,2014).

Although the above paragraphs follow the impact of the distributor's value function, provider's incentives can also cause similar effects. As with the distributor, in negotiations the provider weighs the benefits of agreeing versus disagreeing. In the case of a smaller hospital, bargaining independently a reasonable assumption is that when there is a disagreement, majority of consumers will stay and therefore there is loss incurred by the providers who received those patients from the distributor. However in the case of a much larger system, where all or nothing is stipulated in the occurrence of a disagreement some consumer may switch to a different alternative in order to be recaptured by their chosen provider. In this case, disagreeing is less harmful to providers and provides leverage when negotiating (Nevo, 2014).

4.2 Bargaining model within a hospital setting

In the context of healthcare, providers are hospitals, and physicians and distributors are insurers. Patients purchase insurance plans based on their needs and preferences and use providers based on when those needs arise. Private insurers engage in negotiations with providers, such as physicians or hospitals, to determine reimbursement rates. These services are then bundled with administrative and oversight components, and in the case of "full insurance" products, assume the risk. They subsequently offer medical health plans to employers and households. Hospitals play a crucial role as primary upstream suppliers to health insurance. While analysing the appropriate conceptualization of antitrust within this particular context, the primary concern that arises is the importance in noting the inherent competition that is established when individual suppliers enter separate negotiations with distributors. Establishing this then justifies and allows one to understand how a merger would then lessen competition.

Much in the same way a traditional merger in a differentiated market could lessen competition so can a merger in this scenario. In this case, each provider offers an opportunity to increase the standard of service of a distributor's bundle and/or network. Those changes are substitutable and reflects an identical framework seen in differentiated markets. In light of this Nevo (2014) argues that mergers have the ability to transform dynamics of negotiation by altering the bargaining power, which could in turn affect the agreed-upon prices. The ability of merged entities to augment negotiapricepricetions could lead to potentially less favourable terms for distributors which on turn incurs higher costs for consumers.

The aforementioned merger assessment is supported and echoed by empirical studies, such as those conducted by Gowrisankaran, Nevo, and Town (2013), which quantify the extent to which MCO bargaining acts as a price-containment mechanism. The study by Gowrisankaran et al. (2013) is particularly pertinent as it provides empirical evidence of the implications of mergers in the healthcare sector, specifically regarding how these consolidations can significantly influence the negotiated prices between hospitals and MCOs. The crux of their analysis lies in the estimation of a bargaining model that evaluates the competitive effects of hospital mergers, bringing to bear the full impact of bargaining leverage on price structures. In the case of the Mediclinic/MHHS merger, the nuanced understanding of bargaining leverage is essential, as it directly impacts the price negotiations between hospitals and insurers.

CHAPTER 5: THE PRICE EFFECTS FOR UNINSURED AND INSURED PATIENTS

5.1 Healthcare Landscape in South Africa

The healthcare system within the South African context is unique and multifaceted in that it is made up of a dual-system structure, with increasingly high levels of inequality, and distinct regulatory issues. The following descriptive analysis of this dual system which was created due to the nation's historically political inequality, will reveal the nuances of how it operates, with careful consideration on how it impact competition law, access to healthcare, and affordability. The system is divided into a dual- system, public and private, which has led to significant disparities in the distribution of resources as well as quality of care between these two sectors.

The public sector acts as the main healthcare provider for approximately 80% of the population, and is government funded. It caters to low and middle income individuals who are unable to afford private healthcare. Despite majority of the population relying on this sector, it faces constant difficulties in the form of a lack of funding, shortage of healthcare professionals, along with the overcrowding of healthcare facilities (McIntyre & Doherty, 2020). These difficulties limit access and impede quality of care as resources are thinly stretched to address the high demand.

On the other hand the private sector caters to roughly 20% of the population. Yet receives a disproportionate share of the population's healthcare expenditure, which is largely funded through private medical aid. The sector is characterized by higher quality facilities, reduced waiting times, and more resources. However the high demand among insured patients and consolidation among private providers has caused a spike in costs in recent years, which has adversely made private healthcare more unaffordable, even amongst insured patients (Competition Commission of South Africa, 2019).

This increasing disparity is a direct reflection of the broader socio-economic struggles in the nation, where income and medical aid is often a pre-requisite for accessibility to high-quality care.

The private healthcare system in South Africa is identified by high levels of concentration, predominately controlled by the major hospital groups, namely; Netcare, Mediclinic, and Life Healthcare. The three groups collectively control a significant proportion of the private healthcare facilities, which garnered considerable bargaining leverage in negotiation with

medical aid schemes and insurance providers. Because there are fewer possibilities for competition, there is less pricing competition, which drives up the cost of healthcare services. Because insurers pass these costs on to customers, this arrangement not only raises medical program premiums but also has an immediate impact on patients (Competition Commission of South Africa, 2019; Fourie & Burger, 2019). Smaller healthcare providers find it difficult to compete with these larger organizations due to their inability to match their operational and pricing scale, which leads to more consolidation and less options for patients. Brekke et al. (2017) and other academic assessments of healthcare competition show that excessive market concentration frequently results in price power that compromises market efficiency, especially when firms become "must-have" providers in their regions. Low competition among private healthcare providers and a lack of public healthcare options in South Africa exacerbate this issue, creating a situation where high hospital costs are borne by both patients and insurance. Because healthcare is becoming more and more expensive, the business disproportionately affects patients with lower incomes (McIntyre & Doherty, 2020).

Insurers and consumers are greatly impacted by the market consolidation among Netcare, Mediclinic, and Life Healthcare. Higher contractual fees for healthcare services are the result of insurers having little negotiating power due to the market dominance of these groups. This negotiation gap between hospital groups and insurers drives up healthcare costs, which in turn raise rates for insured patients, according to studies from the Health Market Inquiry (HMI) (Competition Commission of South Africa, 2019). Because customers must bear the growing premiums, this results in a cost structure that strains affordability and makes it more difficult to obtain high-quality healthcare (Hovenkamp, 2021).

In addition to reducing competition, the obstacles for smaller hospital providers raise regulatory concerns about excessive costs and anti-competitive behavior. Similar market systems in nations like the US and the UK, according to international comparisons, frequently result in regulatory action meant to curb anti-competitive activity and advance pricing transparency (Whish & Bailey, 2021). Similar concerns have been voiced by South Africa's competition regulators, who warn that unchecked consolidation could result in a healthcare sector controlled by a small number of influential companies with no accountability or motivation to maintain competitive pricing (Fourie, 2019).

The Competition Commission of South Africa issued concerns that the concentrated structure of the private hospital industry calls for further regulatory control in light of these dynamics. According to the Health Market Inquiry, measures like regulating prices and creating a Supply-Side Regulator for Health (SSRH) could combat exorbitant prices and encourage fair competition (Competition Commission of South Africa, 2019). These suggestions are in line with global norms, where authorities have put in place structures to deal with healthcare consolidation and safeguard the interests of consumers. For example, in order to prevent monopolistic tactics and safeguard consumers, the Federal Trade Commission (FTC) in the United States has stressed the significance of preventing excessive concentration in healthcare markets (Gaynor et al., 2015).

The evaluation of consequences for both uninsured and insured patients is a crucial factor in determining the price effects that arise due to hospital mergers. The decisions made by the CAC, Tribunal and ConCourt emphasize the concerns raised by the Commission. Concerns that revolve around the possibility of increased prices as a result of the merger, which could disproportionately impact vulnerable uninsured patients within the healthcare market. The assessment of the dynamics of negotiations as well as the impact of leverage is important as it can potentially impact tariffs. The ConCourt's ruling on the merger restriction underscores the delicate equilibrium between market dominance and the ability of patients to obtain inexpensive healthcare. The Tribunal also argued that the merger would significantly impact health care costs for both uninsured and insured patients within the relevant region (ConCourt Judgement, 2021, para. 30). The CAC and Tribunal both found that a price increase would result for both insured and uninsured patients and thus was common cause.

5.2 Price effects of the merger on uninsured patients

The price effects of the potential merger underscore the vulnerability of individuals without health insurance coverage, who are not affiliated with any medical schemes and thus lack the protection provided by agreements about tariffs and other benefits covered by the agreement (Commission's Heads of Argument, 2019, para. 58). Consequently, individuals without health insurance are obligated to personally cover the costs of medical care, rendering them especially vulnerable to price hikes. The common cause was that there would be an adverse price effect for uninsured patients (Commission's Head of Argument, 2019, para. 57).

As noted above, NHN tariffs, were significantly lower than Mediclinic's tariffs for both insured and uninsured patients. The proposed merger would see a hike in tariffs as Mediclinic's higher tariffs replace the previously lower NHN tariffs. The approved exemption would also allow hospitals under NHN to provide lower tariffs for uninsured patients (Commission's Heads of Argument, 2019, para. 18). The documented difference of the tariffs between 27% and 35%, will see, post-merger, a heavier impact on uninsured patients as the options to switch to a more affordable hospital, and negotiate would be eliminated and weakened, respectively (Commission's Head of Argument, 2019, para.74).

Uninsured individuals lack the advantage of a medical insurer negotiating on their behalf, highlighting the importance of this group from a public interest standpoint, as given the landscape of private healthcare in South Africa makes them vulnerable to such unilateral effects.

In addition to this the targeted hospitals, whose tariffs are lower, are seen to have more favourable discount rates for theatre and ward costs, just over twice as much as the merging entity provides. The merger could also see a possible adverse effect on patient bills of the uninsured. It was noted that a potential price effect of the merger on uninsured patients would be a 18-24% rise in the CPE in the targeted hospitals because of the higher tariffs. Following this, the projected efficiency gains would not lead to a big enough decrease in CPE, in relation to insured patients (Commission's Head of Argument, 2019, para. 58).

The relatively smaller number of uninsured patients affected, "is significant for purposes of section 12A(1) and (2), especially given the provisions of section 2(b) of the Act and read in light of the constitutional obligation to achieve the progressive realisation of everyone's right to health care services is significant for purposes of section 12A(1) and (2), especially given the provisions of section 2(b) of the Act," (Commission's Head of Argument, 2019, para. 61).

The decision by the ConCourt and Tribunal to find the significance of the effect on uninsured patients is correct given the landscape of South African Healthcare, the amount of people who are uninsured would be disproportionately be affected and access to affordable healthcare would be worsened for this demographic (ConCourt Judgement, 2021, para. 26).

The Tribunal was right in finding that Mediclinic's claim of achieving economies of scale is undermined by the considerably higher fees charged to uninsured patients along with the decreased discounts, particularly for ward expenses (Tribunals' Judgment, para. 119).

Furthermore, the idea that uninsured individuals might choose a competing hospital overlooks the limited options available to them and their lack of bargaining power as uninsured patients. The Tribunal's decision that the proposed merger would negatively impact the price for uninsured patients of the target hospitals, so restricting their options and bargaining power, was warranted considering these factors. The Tribunal also took into account the perspectives of customers regarding the potential impacts of the proposed merger (Commission's Heads of Argument, 2019, para. 62-65).

5.3 Price effects of the merger on insured patients

Inextricably linked to the notion of bargaining leverage is the impact of patient coinsurance rates, as posited by Gowrisankaran et al. (2013). Their research suggests that an increase in coinsurance rates could lead to a concomitant decrease in hospital prices by effectively empowering MCOs to direct patients towards more cost-efficient healthcare options. The implications of this finding for an analysis of the Mediclinic/MMHS merger are profound, as it indicates that structural changes in insurance design could potentially mitigate the increased bargaining power that a merger may confer upon a hospital.

The potential price effects of the merger primarily focused on uninsured patients and the vulnerable state they would be in post-merger, however insured patients are also still set to have adverse effects. It is important to note that patients who have insurance through medical schemes may be bound by the agreements made between their schemes and the hospital groups. The payment structure for insured patients may vary based on their medical scheme coverage.

For insured patients, the extent to which these price increases are absorbed by their insurance policies can vary significantly, depending on the specifics of their coverage and the nature of the contracts between hospitals and insurers. The theoretical underpinnings of unilateral effects, as discussed by Gaynor and Vogt (1999, 2003), and Nevo (2014) provide a framework for understanding how mergers can lead to increased market power and, subsequently, higher prices. This theory suggests that in markets where products are differentiated, such as healthcare, mergers can reduce competitive constraints, allowing the merged entity to raise prices. For insured patients, the impact of these price increases might be mediated by their insurance plans, which could negotiate rates or include cost-sharing

mechanisms that influence the ultimate cost to the patient. However the merger would allow for the hospitals under Mediclinic to have a great leveraging power and therefore more weight to dictate prices.

The Tribunal also found that a reduction in alternative choices available to patients and insurers would allow the merged company capacity to provide reduced or non-existent discounts on Designated Service Providers (DSPs) and influence aspects other than pricing (ConCourt's Judgment, para. 25). Discovery, as a medical insurer did not testify as a consumer witness for the merging parties.

The common cause of the price effects manifested in a post-merger increase of 8.7% in tariffs for insured patients would occur, and as ward and theatre tariffs cover majority of the overall patient bill, these increased tariffs will affect 68% of the patient bill. The implication of Mediclinic's higher tariffs is that there is then a static 6% increase in Cost Per Event (CPE) (Commission's Head of Argument, 2019, para. 101-103). Meaning absent efficiency gains, the price effect of the merger is a 6% price increase on the target hospitals for insured patients (Commission's Head of Argument, 2021 para. 104).

CHAPTER 6: THE MEDICLINIC/MMHSS CASE

The proposed merger was between Mediclinic (MC) and Matlosana Medical Health Services (MMHS), where Mediclinic would acquire a majority stake in MHHS and become the owner of Wilmed Park Hospital and Sunningdale Hospital in Klerksdorp. The hospitals included in the merger were multi-disciplinary private hospitals in the North West. The two were in separate towns namely, Klerksdorp and Potchefstroom. Important to note is that MHHS was a part of the National Health Network (NHN) (ConCourt Judgement, 2021, para. 16), a non-profit organization responsible for negotiating tariffs and perks with medical schemes on behalf of various independent hospitals. Another point to note is also that Mediclinic has a higher average cost per admission compared to the hospitals it would absorb in the merger, meaning they have higher tariffs

6.1 The disputed Facts

The disputed facts in the case primarily concerned the potential efficiency gains, the geographical market definition as well as the market condition. Mediclinic, representing the merging parties made claims about potential efficiency gains that would result from the proposed merger with MHHS (Commission's Head of Argument, 2019, para. 20) (hereafter referred to as Commission's Heads of Argument, 2019). The gains would arise from possible cost saving, increased service quality which increases patient satisfaction, as well as the capability to influence physician behaviour through the implementation of operational protocols and systems (Commission's Heads of Argument, 2019).

In the Heads of Argument document, the Commission expressed reservations about the ability to verify and measure the stated efficiency (Commission's Heads of Argument, 2019, para. 79). The Commission found that the hospitals under MHHS, were more likely to be more cost-effective than Mediclinic Potchefstroom, in the relevant market. The lack of standardized benchmarking also led to the scepticism from the Commission on the claims by Mediclinic about their ability to influence physician behaviour as well as the cost efficiencies that would occur (ConCourt Judgement, 2021, para. 79).

There was also a disagreement concerning the appropriate geographical market. Where the merging parties advocated for a broad market, the Commission found that the relevant market need not extend passed the MaJB area (Commission's Heads of Argument, 2019, para. 22). The Commission determined the relevant geographic market based on a hypothetical monopoly having the capability to impose a Small but Significant Non-transitory Increase in Price (SSNIP) (Commission's Heads of Argument, 2019).

The Commission found that the relevant market was said to be significant as majority of the patients had a standing preference to receiving local inpatient private healthcare, with the bulk of the cost incurred by medical insurers (Commission's Heads of Argument, 2019, para. 22). The geographic market definition presented by the Commission took into account the patient preferences and negotiation dynamics. The criteria used geographical reach, network involvement, and the potential influence of a hypothetical monopolistic entity controlling all hospitals in the area.

The merging parties also presented documents to substantiate their claims about potential growth of the Klerksdorp area and the anticipated need for private medical care within the region, however the Commission expressed doubts about the validity and significance of the presented records, in particular the evaluation of the non-price aspects and the comparability of patient outcomes (ConCourt Judgement, 2021).

Post-merger the Commission found that the merged entity would hold a dominant position in the market of the merging parties would post-merger be the dominant player in the market for the provision of private multi-disciplinary acute inpatient hospital services. The Commission stated that the proposed merger would result in a combined market share of around 63%, from the current 31% at the time of the merger, completely dominating the market and dwarfing the next greatest competitor (ConCourt Judgement, 2021, para. 24).

The concept of market power concentration is central to this discussion. It posits that the amalgamation of two previously competing entities under a single banner significantly enhances their ability to influence market prices, potentially to the detriment of consumer welfare. This perspective is grounded in the foundational theories of unilateral effects, which articulate how mergers in differentiated product markets might reduce competitive pressures, thereby enabling the merged entity to profitably raise prices or degrade service quality without the need to coordinate with rivals (Gaynor & Vogt, 1999; Snail & Robinson, 1998).

This theoretical framework provides a lens through which to view the potential for the Mediclinic/MMHS merger to alter the competitive equilibrium in the healthcare sector.

Empirical evidence further enriches this analysis. Research by Gowrisankaran, Nevo, and Town (2013) and Dafny (2009) offers insights into how market power dynamics can shift post-merger, affecting negotiation processes between hospitals and managed care organizations and, by extension, pricing structures. Such studies highlight the real-world consequences of increased bargaining leverage, underscoring the need for a nuanced examination of how enhanced market power post-merger might impact both insured and non-insured patients in terms of healthcare costs.

Conversely, the merger's anticipated efficiencies represent a critical counterpoint to concerns over increased market power. Merging entities often argue that consolidation will yield operational and economic efficiencies—ranging from reduced administrative costs to improved patient care through the integration of services—that can offset potential negative impacts on competition. This argument is rooted in economic theories that posit mergers can lead to economies of scale and scope, potentially resulting in lower costs and enhanced service quality (Blair, Durrance & Sokol, 2016). Such efficiencies, if realized, could theoretically mitigate the adverse effects of increased market power on pricing, thus preserving or even enhancing consumer welfare.

The literature provides a mixed perspective on the realization of these efficiencies. While some studies highlight instances where mergers have led to operational improvements and cost savings (Gaynor & Vogt, 2003), others caution against an overly optimistic view, pointing out the challenges in measuring these efficiencies and their actual impact on prices and service quality (Gowrisankaran, 2011). This dichotomy underscores the complexity of predicting merger outcomes and the importance of empirical analysis to discern the actual effects of specific mergers.

International research further broadens the context, with studies by Wiik (2019) and Moreno and Abreu (2019) indicating that the implications of hospital mergers on market power and efficiencies are not confined to any single healthcare system. These insights underscore the global relevance of rigorous merger analysis and the necessity for policy frameworks capable of balancing the potential for increased market power against the promise of merger-driven efficiencies.

6.2 The Tribunal's decision

After evaluating the potential impact on competition, market structure and the effects that could potentially be anticompetitive, the Tribunal recommended an overall prohibition of the merger based on the facts and evidence presented.

The Tribunal looked at whether the proposed merger could result in substantial lessening of competition (SLC) within the relevant market. It is important to note that the Tribunal agreed on the presented definition of the geographical market presented by the commission (Commission's Head of Argument, 2019, para. 111 and 148). Although the Tribunal acknowledged the preference of patients to go to a hospital situated closest to their homes, (para. 139), they determined that the distance between Potchefstroom and Klerksdorp was not unreasonable enough for consumers to travel in the event of increased prices (Commission's Head of Argument, 2019, para. 146).

Using the Herfindahl-Hirschman Index (HHI), the Tribunal (2019), evaluated market shares in order to determine market concentration, finding that the merger would in fact lead to market concentration indicative of anticompetitive behaviour and thus significantly reducing competition.

The Tribunal (2019) also found potential unilateral effects as a result of the merger, which would increase prices and result a decline in non-price related aspects, such as service quality and patient experience. The unilateral effects in the form of price increases would come in the form of increased tariffs (Commission's Head of Argument, 2019).

The Tribunal (2019) also noted that Mediclinic's argument that post-merger the increased tariffs would balance out due to efficiency gains received from the consolidation, was voided when there was an exemption counterfactual. Mediclinic argued efficiency gains resulting from the merged entity being able to provide surgical and ethical supplies for the affected hospitals at lower costs. However, NHN had received a conditional exemption to carry out centralized procurement on behalf of its members just before the conclusion of the proceedings (Commission's Head of Argument, 2019, para. 21). Meaning absent the merger, procurement costs would substantially decrease for Wilmed and Sunningdale Hospitals, a fact that altered the counterfactual and invalidated the merging parties' assertions of increased efficiency. In light of this, the Tribunal found that the merging entities did not provide

significant merger-specific efficiencies that would counter the anticipated unilateral effects in the form of increased tariffs.

The Tribunal also evaluated the remedies to the theories of harm, such as the proposed price cap (CPE) and determined that this remedy would be insufficient in combatting the anticompetitive effects due to the challenging nature of execution and monitoring of it (Commission's Head of Argument, 2019).

The Tribunal's ruling to disallow the MMHS (Medical Management and Health Services) merger can be rigorously assessed using economic theory, specifically examining unilateral impacts, and by juxtaposing its forecasts on price and market results with international benchmarks. According to the economic theory of unilateral effects, even in the absence of coordinated business action, a merger may result in lower output or higher pricing. When the combined company acquires substantial market power, it might raise prices above levels that are competitive. The Tribunal had to determine whether the MMHS merger would significantly reduce competition in a way that would have unilateral repercussions. The rationale must encompass a comprehensive examination of market shares, the level of concentration before and after the merger, and the likelihood of the merged business to independently increase prices owing to reduced competitive pressure.

6.3 CAC's decision

Aggrieved by the Tribunal's decision, the merging parties appealed to the CAC. The majority judgment of the CAC disagreed with the findings of the Tribunal and conditionally approved the merger on 22 March 2019. Finding that the prohibition of the proposed merger by the Tribunal could not be justified.

The CAC (2019) disagreed with the definition of the relevant market put forward by the Commission and Tribunal. The CAC concluded there lacked any evidence to support the claim of patients travelling between the two towns, (Commission's Head of Argument, 2019 para. 53). Due to this rejection, the CAC concluded that as the target hospitals and Mediclinic are not part of the same geographical market, the merger would not lead to any substantial lessening of competition (SLC) in the local market. (Commission's Head of Argument, 2019, para. 98). The CAC (2019) also dismissed the arguments put out by the merging parties on the possible cost reductions in ethicals and surgicals for Wilmed and Sunningdale. The CAC

rejected the notion that the planned merger would result in a likely drop in the Cost to Patients Experience (CPE) of these two hospitals. In addition, the CAC determined that the data provided by the actuaries employed by both parties about their calculations of the different CPEs at Wilmed and Sunningdale, as well as some Mediclinic facilities, had no significance. The CAC (2019) carefully examined the critiques of the actuaries' techniques and findings, and eventually determined that the actuarial estimates from both parties should not be considered as valid evidence.

The CAC overturned the Tribunal's verdict on nearly every element, assessing matters as if it were a court of first instance and showed little regard to the Tribunal. The Tribunal's ability to make decisions to correct a situation was disrupted without considering the strict criteria for intervention in these situations.

6.4 Constitutional Court's Decision

Following the judgement by the CAC, the Commission lodged an appeal with the Constitutional Court (Con Court) against the decision made by the CAC. The Constitutional Court overturned the decision made by the CAC by majority (ConCourt Judgement, 2021). Thus, the ruling to prohibit the merger, of the Tribunal remained valid.

“The deference, by the Competition Appeal Court to the Tribunal, alluded to in both Schumann and Imerys, dictates that the Tribunal’s factual findings and policy oriented predictive decision should, in this case, have been left unaltered. The Tribunal has rendered a well-reasoned decision regarding the local geographic market, and the substantial lessening of competition. And Mediclinic’s inability to address or provide a satisfactory solution to the deleterious effect of the immediate post-merger tariff increase on the consumer or the market, and its long term effects is properly explained. Much more is required than a mere difference of opinion or preference, for the Competition Appeal Court to be entitled to set aside these findings of the Tribunal.” (ConCourt Judgement, 2021, para.70).

The Constitutional Court (2021), overturned two rulings made by the CAC that have significant implications for merger regulation. Initially, it challenged the CAC's assertion that a price hike after a merger must be caused by a rise in market power (namely, increases in

market share resulting from the merger) in order for there to be a substantial lessening of competition (SLC) under section 12A(1)(a) and (2) of the Competition Act. A price rise is deemed sufficient if it is significant and directly attributed to the merger.

Secondly the CAC was unable to demonstrate that the Tribunal made significant errors in its assessment of the relevant geographic market, potential significant lessening of competition (SLC), public interest concerns, and remedy. Therefore, the CAC did not have the right to intervene in the Tribunal's evaluation of the facts and its decision on the appropriate solution. (ConCourt Judgement, 2021, para. 37).

The majority found that the Tribunal had undergone rigorous and appropriate testing and analysis and therefore held that the decision to prohibit the merger was not wrong and the CACs decision was not. (ConCourt Judgement, 2021, para. 50).

6.5 Principles of Competition Law & Evaluation of Local and International Precedents

Against Merger

The necessity of critically evaluating the court's ruling, especially in a case like MMHS where important questions of economics and competition law were raised. Richer understandings could be provided by an analytical approach that looks at the applied principles and takes into account both domestic and foreign precedents. In addition to the wider ramifications for South African competition law, this could help draw attention to any other interpretations or applications that might have influenced the ruling.

Because it influences the evaluation of competitive dynamics and the possible effects of mergers, market definition is fundamental to competition law (Motta, 2004). When defining the relevant healthcare services market, the MMHS merger brought up important questions, particularly the differences between services provided by the public and commercial sectors (Competition Tribunal of South Africa, 2023). In this case, a changing position on the kinds of information considered necessary for competitive analysis is reflected in the Competition Appeal Court's (CAC) decision to reject actuarial evidence as non-significant.

The CAC rejected the actuarial evidence as non-significant, even though it might have contested the merger's possible consequences on competition. Since actuarial data often

focuses more on risk and insurance price than on competitive impacts or customer choice, this may have been caused by limits in the actuarial approach's ability to capture competitive dynamics. This rejection suggests that the CAC is taking a more nuanced approach to evidence that might not be directly related to competitive effects, which will force South African competition law to rely more on economic and empirical analyses that are especially suited to competitive impact rather than broad financial evaluations. This might result in improved market definition techniques that use information that directly affects competition rather than ancillary financial indicators.

This case also highlights how difficult it is to define the healthcare market in South Africa, where access inequalities and divisions between the public and private sectors produce various market dynamics. The ruling might encourage competition authorities to create more sector-specific economic models by setting a precedent for courts to look for stronger evidence that distinguishes competitive dynamics between industries and consumer groups.

Analyzing the court's reasoning critically entails looking at the fundamental ideas it used and determining whether or not these ideas are consistent with accepted theories of competition law in South Africa and abroad. For example, the Competition Act's public interest mandate, which takes into account the effects on employment, the general public, and historically underrepresented groups, is followed by South African competition law. In other jurisdictions, like the U.S. or the EU, where antitrust assessments are more narrowly focused on market consequences and consumer welfare, this requirement goes beyond those standards (Whish & Bailey, 2021).

Market Definition and Competitive Effects: To properly evaluate competitive effects, local precedents, such as the *Medicross Healthcare Group (Pty) Ltd v. Competition Tribunal* case, place a strong emphasis on precise market definitions. A clear framework for evaluating dominance based on variables like market share and consumer choice is provided by the European Court of Justice's (ECJ) international approach in cases such as *United Brands v. Commission* (1978), which may have been used to evaluate market power in this instance. A case for a stricter definition of market boundaries or other measures to assess competition and consumer impact could be made by referencing these precedents (Bishop & Walker, 2010).

6.6 Review of the Decisions & Chapter Conclusion

The decision-making process of the Tribunal in the Mediclinic/MMHS merger is a complex blend of evaluating economic theory, analysing empirical evidence, and market insights. This meticulous approach reflects the nuanced nature of antitrust evaluation, particularly within the healthcare sector, where the consequences of mergers extend far beyond mere economic metrics to the very essence of public health and access to care.

Central to this process is the examination of unilateral effects, as described in the theoretical literature review. Such effects spotlight the potential for the merged entity to unilaterally raise prices or degrade service quality in the absence of sufficient competitive restraint (ConCourt Judgement, 2021). This analysis hinges on understanding the unique dynamics of healthcare markets, where the substitutability between providers significantly influences the merger's potential impact on competition and, by extension, on patient care and costs.

Moreover, the Tribunal must scrutinize the efficiency claims presented by the merging parties. The literature underscores that while mergers might promise operational efficiencies and improvements in service quality that could benefit consumers, these benefits are not guaranteed (Gaynor & Vogt, 1999; Blair, Durrance & Sokol, 2016). The authority's challenge lies in discerning whether these claimed efficiencies are substantial and likely to materialize or if they are overstated and unlikely to offset the potential harms of increased market power.

The decision-making framework employed by the Tribunal is thus characterized by a rigorous and evidence-based evaluation, blending theoretical models with empirical data to predict the merger's effects on market dynamics accurately. This includes drawing on insights from past case studies and economic research that have documented the price and quality impacts of hospital mergers (Gowrisankaran, 2011; Tenn, 2008). Such an approach ensures a comprehensive understanding of how the merger could reshape the healthcare landscape, influencing everything from pricing strategies to the availability and quality of care. In evaluating the Mediclinic/MMHS merger, the authority's process exemplifies the critical balance between acknowledging the potential for efficiencies and remaining vigilant to the risks of reduced competition. This balance is pivotal, especially in a sector as crucial as healthcare, where the implications of mergers transcend economic concerns to touch on the core values of accessibility, quality, and equity in health services.

The Tribunal's decision to recommend a prohibition of the proposed merger was grounded in a thorough evaluation of the potential anticompetitive effects, the degrees of market concentration, and the insufficiency of offered remedies. The judgment demonstrates a dedication to preserving competition and maintaining the well-being of consumers in the relevant market.

As noted by the ConCourt (2021) the decisions of the CAC lacked evidentiary support and relied solely on speculative reasoning, which was considered unjustified and weakened the meticulous institutional framework established by the Competition Act. The CAC did not adequately consider the objectives of the Competition Act, particularly in its evaluation of the potential significant reduction in competition (SLC) and the considerations of public interest. In addition, the CAC failed to adequately consider the wider hospital market context, such as the current levels of national concentration and the implications of merger creep, when evaluating the competitive and public interest consequences of the transaction. (ConCourt Judgement, 2021).

The CAC made a mistake by concluding that there is no competition between hospitals in Klerksdorp and Potchefstroom when it comes to providing private multidisciplinary acute inpatient hospital services. This includes the hospitals of both the acquiring and target firms, and these hospitals are considered to be in different geographic markets. In general, the CAC's approach was defective and should be reversed.

Overall the decision of the ConCourt to uphold the decisions by the Tribunal seems to be the right one.

CHAPTER 7: POLICY IMPLICATIONS AND CONCLUSION

7.1 Evaluating Policy Outcomes Against Competition Law Objectives

The evaluation of policy outcomes in the context of the Mediclinic/MMHS merger against the objectives of competition law involves a multifaceted analysis that intertwines empirical findings, economic theories, and the overarching aim of fostering consumer welfare. This assessment is paramount in ensuring that the enforcement actions and regulatory measures taken by competition authorities align with the fundamental principles of promoting competitive markets, deterring anti-competitive practices, and, ultimately, safeguarding the interests of consumers.

At the heart of competition law is the goal to prevent market distortions that could arise from undue concentrations of market power, as these can lead to higher prices, reduced service quality, or stifled innovation. The literature, including works by Gaynor and Vogt (1999) and Blair, Durrance & Sokol (2016), emphasizes that competition drives not only price competitiveness but also improvements in quality, innovation, and the efficient allocation of resources. Hence, the policy outcomes of merger evaluations must critically reflect these dimensions, ensuring that market dynamics post-merger do not deviate from these competitive ideals.

The challenge in evaluating policy outcomes lies in the inherently complex nature of healthcare markets, characterized by factors such as information asymmetry, the pivotal role of insurance, and the non-uniformity of consumer preferences. These factors necessitate a nuanced approach to merger analysis, as highlighted by the OECD (2020), which underscores the importance of a comprehensive economic analysis that goes beyond simplistic assessments of market concentration to include an understanding of patient mobility, insurance structures, and the heterogeneity of healthcare provision.

In the case of the Mediclinic/MMHS merger, the competition authority's decision-making process, as informed by empirical studies and theoretical insights, serves as a litmus test for how well policy outcomes align with the objectives of competition law. This involves a careful weighing of the merger's potential to bring about efficiencies against the risk of increasing the merged entity's ability to exert market power to the detriment of consumers, a concern that is particularly acute in healthcare where the stakes include access to essential

services. Furthermore, the authority's evaluation extends to considering the merger's implications for non-price competition aspects such as service quality, innovation, and the availability of healthcare services. The literature suggests that robust competition is crucial for incentivizing improvements in these areas, which are as important as price in determining consumer welfare (Gaynor & Vogt, 2003).

In the intricate landscape of healthcare regulation and competition law enforcement, the Mediclinic/MMHS merger case underscores the need for a multifaceted and anticipatory regulatory approach. To ensure the effectiveness of competition law and its alignment with the evolving dynamics of healthcare markets, several forward-looking recommendations can be distilled from the empirical evidence and theoretical insights gleaned throughout the analysis. First and foremost, strengthening the pre-merger evaluation process is paramount. This entails the enhancement of analytical tools to more accurately assess potential competitive impacts, including sophisticated economic models that account for a broad spectrum of effects beyond price, such as quality, innovation, and accessibility of services. Moreover, a more rigorous scrutiny of the efficiencies claimed by merging entities is required. Regulators should demand substantial, detailed evidence demonstrating how proposed mergers will directly benefit consumers, ensuring that efficiency claims are not merely theoretical but translate into tangible improvements in consumer welfare.

Prioritizing consumer welfare in all regulatory decisions is essential. This means ensuring that regulatory actions are guided by their potential impact on patients, both in terms of cost and quality of care. Developing specific metrics and benchmarks to evaluate the effects of mergers and market activities on consumer welfare can provide a solid foundation for enforcement actions, ensuring that competition law serves its ultimate purpose of protecting consumers and fostering a vibrant, innovative healthcare ecosystem. These recommendations collectively chart a path towards more effective, anticipatory, and consumer-focused competition law enforcement in the healthcare sector, emphasizing the need for regulatory agility and a comprehensive approach to safeguarding consumer welfare in an increasingly complex and dynamic market landscape.

In the past, a nationwide market for insured patients has been the main focus of merger evaluation in this industry. Because pricing negotiations for insured patients were carried out at the national level, numerous mergers were therefore permitted with the understanding that slight gains in market share would have little effect on competition. The merging parties

contended that individual transactions were unlikely to raise significant competition concerns as a result of this national-level examination (Fourie & Burger, 2019).

Given the fact it was the first hospital merger prohibited, the combination of Mediclinic Southern Africa Limited and Matlosana Medical Health Services (MMHS) constituted a watershed. The prohibition came about as a result of a change in the Commission's analysis, which showed a substantial prevention or lessening of competition (SPLC) by taking into account how the merger affected different customer segments within local markets (McIntyre & Doherty, 2020).

According to the Commission's investigating the elimination of Mediclinic and MMHS's intense rivalry would result in higher costs for both insured and uninsured patients locally and regionally. Given the established correlation between growing levels of concentration and price rises in local private hospital markets, the merger was viewed as a step toward Mediclinic's greater market domination. In particular, the local market implications proved striking: the post-merger business would command a 63% local market share, a huge rise of 32.3%, whilst Mediclinic held a 20.3% national market share and MMHS held a 0.7% share (based on hospital beds) (Competition Tribunal, 2022).

The Tribunal's ruling highlighted how this local dominance would make the combined company necessary for insurers looking to enter the market, decreasing the competition of other options and giving Mediclinic the ability to restrict discounts and lower the quality of its services. This would probably result in significant price increases for both insured and uninsured patients, especially for uninsured patients who would have fewer options and less access to discounted services (Whish & Bailey, 2021).

This merger case shows how SPLC risks in progressive concentration can be clearly illustrated by a localized market analysis that is targeted at particular client categories. The competition authority emphasized the greater importance of individual competitors in these smaller, more centralized markets by giving priority to local market impact (Hovenkamp, 2021).

7.2 CONCLUSION

The findings of this study have shed light on the complexities involved in evaluating horizontal mergers within the healthcare sector, particularly in the context of the Mediclinic/MMHS case. The analysis of economic theories of harm, such as unilateral effects and market power, has provided valuable insights into the potential anticompetitive effects of mergers and the challenges of predicting post-merger outcomes. In conclusion, the qualitative research design employed in this study has provided a comprehensive and in-depth analysis of the Mediclinic/MMHS merger and its implications for competition law enforcement within the South African healthcare sector. The study has successfully achieved its objectives of evaluating the application of economic theories of harm, assessing the decision-making process of the competition authorities, investigating potential policy implications, and drawing comparisons with international best practices.

The study has also emphasized the significance of the Mediclinic/MMHS case in filling the gap in the merger literature specific to South Africa and has underscored the implications of the case for regulatory practices, policy formation, and economic outcomes. Furthermore, the comparison with international standards has highlighted the global relevance of rigorous merger analysis and the necessity for policy frameworks capable of balancing the potential for increased market power against the promise of merger-driven efficiencies.

In light of the findings, it is evident that the Mediclinic/MMHS case has significant implications for the future of competition policy and enforcement actions within the South African healthcare sector. The case has provided valuable lessons for the competition authorities and policymakers in understanding the complexities of merger evaluations and the role of competition law in safeguarding consumer interests. Moreover, the case has contributed to the global dialogue on the complexities of healthcare market regulation and the refinement of merger assessment standards.

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