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Serial Acquisitions and Industry Roll-ups – Note by South Africa

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More documents related to this discussion can be found at
www.oecd.org/competition/serial-acquisitions-and-industry-roll-ups.htm.

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1. Introduction

1. Serial acquisitions and industry roll-ups (creeping mergers) are a long-standing phenomenon in various competition markets in South Africa. These creeping mergers occur against the backdrop of a highly concentrated South African economy. The Preamble of the Competition Act no 89 of 1998 (as amended) (Competition Act) recognises that the impact of the Apartheid laws resulted in, among others, “*excessive concentrations of ownership and control within the national economy...*”¹ There is acknowledgement that there has been a cumulative increase in concentration in certain sectors of the economy, and at times as a result of creeping mergers.²

2. The Competition Commission’s (Commission) 2021 report titled “*Measurement of Concentration and Participation in the South African Economy: Levels and Trends*”³ (Concentration Tracker report) used information from over 80 industry associations, regulators and government departments to depict the levels and trends in concentration of 144 sectors of the economy. The report found that of the 144 sectors considered, 69.5% are highly concentrated; and 40.3% of these being highly concentrated with a presumptively dominant firm. Only 9.7% of sectors were found to have unconcentrated markets.⁴ That report also identified certain areas where concentration was increasing in the context of creeping mergers, such as retail and healthcare.

3. It is against this context of high concentration levels that the objectives of the Competition Act, from its promulgation, sought to not only protect competition, but also reduce concentration in the economy and actively promoting broader participation by the previously marginalised. This submission sets out the views of the Commission on the issue of creeping mergers, along with examples of the type of work that is being undertaken to respond to this dynamic in various markets in South Africa.

2. Background to Creeping Mergers in South Africa

4. In South Africa, the concern about merger creep was raised by the Competition Tribunal (Tribunal) as far back as 2005. In a merger between Edgars Consolidated Stores Ltd and Rapid Dawn 132 (Pty) Ltd, in the retail apparel sector, the Tribunal stated that “*It*

¹ Competition Act no 89 of 1998 (as amended), p. 4.

² Competition Commission of South Africa. 2021. Measuring concentration and participation in the South African Economy: Levels and Trends. Available online: <https://www.compcom.co.za/wp-content/uploads/2021/12/Concentration-Tracker-Main-Report-1.pdf>; Bosiu, T., 2018. Merger Control Provisions: The Case of Creeping Acquisitions. Available online: [Merger Control Provisions: The case of Creeping Acquisitions — CCRED - A leading university research group. \(competition.org.za\)](https://www.compcom.co.za/wp-content/uploads/2021/12/Concentration-Tracker-Main-Report-1.pdf);

³ Competition Commission of South Africa. 2021. Measuring concentration and participation in the South African Economy: Levels and Trends. Available online: <https://www.compcom.co.za/wp-content/uploads/2021/12/Concentration-Tracker-Main-Report-1.pdf>

⁴ Competition Commission South Africa, (2021), *Measurement of Concentration and Participation in the South African Economy: Levels and Trends*, p. 6, para. 21, available at [Concentration-Tracker-Summary-Report-1.pdf \(compcom.co.za\)](https://www.compcom.co.za/wp-content/uploads/2021/12/Concentration-Tracker-Main-Report-1.pdf)

needs to be noted however that there seems to be an increase in the number of acquisitions in which relatively small players, that claim to be financially constrained, are being bought by larger competitors. The result of this is a slow but steady increase in concentration. Cognizance should be taken of this creeping level of marginal acquisitions and the effect this might have on competition in the retail sector.”⁵

5. In the same year (2005), in a merger between Phodclinics (Pty) Ltd and Protector Group Medical Services (Pty) Ltd⁶ in the private hospitals sector, the Tribunal observed that although the transaction by itself would not have a significant effect on competition, there were indications that creeping acquisitions by the three major private hospital groups (Life Healthcare Group Ltd, Netcare Ltd and Mediclinic Group Ltd) had resulted in increased concentration in the health sector.

6. In 2011, during the merger proceedings between Media24 Ltd and The Natal Witness Printing and Publishing Company (Pty) Ltd, the Tribunal also flagged the concern around market concentration due to the creeping acquisitions strategy in the media industry.⁷ As a result, the Tribunal imposed a condition requiring the merged entity to notify all small mergers going forward.

7. Prior to the amendments to the Competition Act in 2019, there were in eleven mergers that took place in the private hospitals sector where creeping mergers were considered.⁸ The Commission’s healthcare market inquiry (HMI) found that there are high levels of concentration at the national level and in most of the local markets that it assessed and that creeping mergers are one of the main drivers of this phenomenon, which has conferred a significant strategic advantage to the three large hospital groups and has had a significant impact on competition.⁹

8. In 2018, the Competition Act was amended to deal with, among others, the aggregate effect of incremental acquisitions. Section 12A(2)(k) stipulates that when

⁵ Edgars Consolidated Stores (Pty) Ltd / Rapid Dawn 132 (Pty) Ltd, [2005], Competition Tribunal, (case no: 21/LM/Mar05).

⁶ Phodclinics (Pty) Ltd and Others / Protector Group Medical Services (Pty) Ltd (in liquidation) and Others, [2005], Competition Tribunal, (case no. 122/LM/Dec05).

⁷ Media24 Limited and Paarl Coldset (Pty) Ltd / The Natal Witness Printing and Publishing Company (Pty) Ltd, [2011], Competition Tribunal, (case no: LM109Mar11).

⁸ Netcare Hospital Group (Pty) Ltd / Community Hospital Group (Pty) Ltd, [2006], Competition Tribunal, (case no: 68/LM/Aug06); Life Healthcare Group (Pty) Ltd / Amabubesi Hospitals (Pty) Ltd, [2010], Competition Tribunal, (case no: 11/LM/Mar10); Life Healthcare Group (Pty) Ltd / Joint Medical Holdings Ltd, [2011], Competition Tribunal, (case no: 74/LM/Sep11); Life Healthcare Group (Pty) Ltd / Aurora Hospital (Pty) Ltd, [2011], Competition Commission, (case no: 2011Apr0015); Life Healthcare Group (Pty) Ltd / Presmed Hospitals (Pty) Ltd, Middelburg Hospitaal Ltd and Middelburg Privaat Hospitaal Pty Ltd, [2011], Competition Commission, (case no: 2011May0041); Mediclinic Southern Africa Limited / Solar Spectrum Trading 242 (Pty) Ltd, [2012], Competition Commission, (case no: 2012May0225); Life Healthcare Group (Pty) Ltd / Lowveld Hospital Pty Ltd and Interstate Clearing (126) Pty Ltd, [2014], Competition Commission, (case no: 2014Sep0530); Mediclinic Southern Africa Limited / Matlosana Medical Health Services (Pty) Ltd, [2018], Competition Tribunal, (case no: LM124Oct16) – Competition Appeal Court (case no: 172/CAC/Feb19 [2020] ZACAC 3); Constitutional Court (case no: CCT31/20 [2021] ZACC 35); Netcare Hospital Group (Pty) Ltd / Lakeview Hospital (Pty) Ltd, [2017], Competition Tribunal, (case no: LM193Oct17); Mediclinic Southern Africa Limited / Intercare Group Hospital Holdings (Pty) Ltd, [2018], Competition Commission, (case no: 2018May0041).

⁹ Health Market Inquiry, (2018), Provisional Findings and Recommendations Report, available on <http://www.compcom.co.za/wp-content/uploads/2018/07/Health-Market-Inquiry-1.pdf>.

evaluating the likely effects of the merger the competition authorities can consider “*any other mergers engaged in by a party to a merger for such period as may be stipulated by the Competition Commission.*” These provisions require the Commission to treat a series of transactions with caution and based on their overall effects on the market structure.

9. In the period following the enactment of the amendments, the Commission dealt with creeping mergers in various sectors, including forestry, building supply retail, waste management and pharmacy. These included the acquisition by Mphome Agric (Pty) Ltd of three timber plantations owned by Silicon Smelters (Pty) Ltd,¹⁰ the acquisition by Averda South Africa (Pty) Ltd of A-Thermal Retort Technologies (Pty) Ltd, A-Thermal Resources (Pty) Ltd and Cedor Allied Technologies (Pty) Ltd¹¹; the acquisition by Cashbuild Management Services of The Building Company from Pepkor Holdings Ltd¹²; and the acquisition by Dis-Chem Pharmacies Ltd (Dis-chem) of Pure Pharmacy Holdings (Pty) Ltd (PPH) (Dis-Chem / PPH merger).¹³ In other areas, such as grocery retail, creeping mergers were not necessarily included as a specific theory of harm, but small acquisitions were found to raise substantive competition effects such as in the case of Shoprite’s acquisition of 59 Massmart stores.

3. How South Africa Has Dealt with Creeping Mergers

10. One of the key initiatives that the Commission put in place in dealing with the creeping mergers phenomenon was to identify the characteristics of those sectors that are likely to be susceptible to such strategies. This informed the Commission’s approach to the assessment of mergers in these sectors which, as will be discussed further below, included in-depth assessments of proposed mergers, selection of those cases with high prospects of success in dealing with and establishing precedent on creeping mergers, among others. The Commission has also made its concerns around creeping mergers in specific sectors well known through research and impact studies, a form of advocacy to stem the flow of such mergers.

11. Typically, the sectors that the Commission has found prone to creeping merger strategies are characterized by (i) the presence of numerous small independent, and generally differentiated, firms; and (ii) outside of the small independents, an oligopoly market structure with a few large firms. The oligopoly structure means that merger activity amongst these players is likely to give rise to competition concerns, whereas the numerous small independents provides the opportunity to acquire greater share through numerous individual mergers. In addition, these sectors may present some dimensions of competition which include both national and local dynamics. National competition may occur in instances where there are national players such as retail chains, hospital groups, and pharmacy groups, but where local competition dynamics also play out.

¹⁰ Mphome Agric Proprietary Limited and The business being disposed of by Silicon Smelters Proprietary Limited, [2019], Competition Commission, (case no: 2019APR0023).

¹¹ Averda South Africa (Pty) Ltd / A-Thermal Retort Technologies (Pty) Ltd, and A-Thermal Resources (Pty) Ltd and Cedor Allied Technologies (Pty) Ltd, [2002], Competition Commission, (case no. 2020Aug0002).

¹² Cashbuild Management Services (Pty) Ltd and The Building Company (Pty) Ltd, [2020], Competition Commission, (case no. 2020Oct0033).

¹³ Dis-chem Pharmacies Ltd and Pure Pharmacy Holdings (Pty) Ltd, [2020], Competition Commission, (case no. 2020Dec0043)

12. The reference to national competition is informed, in part, by setting of prices or tariffs at a national level. However, the presence of national competitors does not negate the importance of local competition in localised markets. While a merger may not pose any competition concerns on a national basis, due to low market share accretion, different competitive dynamics may emerge in localised markets given the closeness of competition that may exist in such markets. For instance, in retail sectors, localised competition is important, especially non-price competition dimensions such as promotion frequency, location, quality of service, shop refurbishments, speed of service, opening hours, stocking levels, waiting times etc.

13. The Commission's Concentration Tracker report¹⁴ identified potential merger creep concerns in the retail pharmacy market and this was further expanded upon in a Competition News article. Creeping merger concerns have also been noted by Tribunal in the retail sector, the inpatient private hospital market, and the publishing sector. Further, the Commission has assessed creeping merger concerns in inpatient private hospital markets, the forestry industry, waste management services, retail hardware markets, and retail pharmacy markets. Furthermore, the Commission has also identified the automotive retail sector as susceptible to merger creep, given a slew of acquisitions of independent OEM dealerships and service centres by motor groups. The Commission uses both research and merger filings as a means to identify sectors susceptible to merger creep strategies.

14. The creeping mergers assessed by the Commission demonstrated various strategies through which firms seek to incrementally enhance their market power and these included the acquisition of smaller rival firms or smaller complementary firms to either buy out potential future competition or defending the acquirer's core position; non-merger initiatives such as license applications in regulated markets, such as healthcare markets, or expansion of existing facilities and floor space. At face value, such acquisitions may look unproblematic because of the absence of direct competition. However, over time, such acquisitions may pose competition concerns depending on the intentions and strategies of the acquiring firm. The discussion below focusses on select cases to demonstrate the Commission's approach in dealing with creeping mergers in various sectors.

3.1. Private hospital services sector

15. The South Africa private hospital services sector has seen a large number of merger activity, primarily led by the three large private hospital groups acquiring small independent hospitals. As previously indicated, the Commission's HMI found high levels of concentration in the national private hospital services market and in most of the local markets that it assessed. It indicated that creeping mergers are one of the main drivers of the observed market concentration and that they conferred a significant strategic advantage on the three private large hospital groups and had a significant impact on competition in this market.

16. Historically, the approach adopted by merging parties and the competition authorities in assessing mergers in this sector was based on viewing competition on a national market basis for insured patients. As a result, mergers were generally approved on the basis that the market share accretion was minimal and considered unlikely to harm competition given price negotiations (in respect of the insured) occurred on a national basis. A combination of these factors underpinned the arguments by merging parties that each

¹⁴ The report is available at <https://www.compcom.co.za/wp-content/uploads/2021/12/Concentration-Tracker-Main-Report-1.pdf>

individual transaction was unlikely to give rise to competition concerns as its impact on competition would be unlikely to be substantial.

17. However, the acquisition by Mediclinic Southern Africa Limited (Mediclinic) of Matlosana Medical Health Services (Pty) Ltd (MMHS) and Another (Mediclinic/MMHS merger) was the first transaction in the private hospital services sector that the Commission successfully prohibited. This prohibition was primarily as a result of the Commission re-focusing its analysis of the impact of the transaction on different customer segment within the local market to establish a substantial prevention or lessening of competition (SPLC).

18. In its assessment, the Commission established that the removal of close competition between the merging parties would lead to adverse price effects for both insured, in the regional market, and uninsured patients in a local market. It further argued that the merger acted as a stepping-stone in strengthening the acquiring firm's market dominance and acknowledged the link between increasing concentration and price increases in the local private hospital services market.

19. Briefly, the acquiring firm had an estimated 20.3% national market share while the target firm had 0.7% (based on the number of hospital beds).¹⁵ The merging parties argued that the merger would not lead to competition concerns given their low market shares. From a local market perspective however, the merged entity's post-merger market share was 63%, with an estimated 32.3% accretion. Given its dominance in the local market, the Tribunal held that the merged entity's post-merger dominance, rendered it a must-have for medical insurance suppliers seeking representation in the local market. It held that the merger would make medical insurance suppliers' and patients' outside options much less attractive, giving the merged firm the ability to offer lower or no discounts on designated service provider schemes and deteriorate non-price factors.

20. In respect of price effects, the Tribunal held that the merger would substantially increase the target hospitals' prices (referred to as cost-per-event) for both insured and uninsured patients. Specifically, the Tribunal found that the Proposed Transaction would negatively impact uninsured patients in the local market by diminishing their ability to negotiate and receive higher discounts as well as the opportunity to switch to more affordable hospitals (the target hospitals).

21. This merger shows how a focus on narrower local markets or sub-sets of customers can correctly enable the demonstration of an SPLC in creeping mergers. A focus on local markets means that the relative importance of an individual rival is greater.

3.2. Pharmacy retail sector

22. In the Dis-Chem / PPH merger, the Commission discovered that the acquisition of existing independent pharmacies was a key component of Dis-chem's growth strategy, which was explicitly stated in its 2020 Annual Report. In assessing this transaction, the Commission reviewed all the transactions engaged in by Dis-chem in the preceding five years and identified several relevant markets implicated by its creeping mergers strategy. For example, the merger also involved a division that provided primary care services and consideration was given to how the pharmacy base of Dis-chem may enable it to realise market power in primary care as well. This was an important consideration given the move towards the implementation of national health insurance policy by government, which is

¹⁵ Notably, the two other large hospital groups held 24.9% (Netcare) and 21.3% (Life Healthcare) market share respectively, while the National Hospital Network (NHN), a loose alliance of independent hospitals, accounted for 24.7%. 8.8% was made up of unaffiliated hospitals.

guided by, among others, the World Health Organisation’s recommendation to reorientate health systems using a primary health care approach.¹⁶ Ultimately, the Tribunal approved the merger subject to several conditions which, in respect of creeping mergers, included a requirement that Dis-Chem must notify the Commission of any “small merger” in terms of which it may acquire control over another entity in the pharmaceutical market for a period of five years from the date of decision. This was an important condition as it made the creeping merger strategy transparent, but also deters such a strategy as it raises the costs of individual acquisitions and delays such acquisitions through merger control assessment.

23. While many of these mergers engaged in by Dis-Chem directly involved the retail pharmacy market, there were also a number of transactions at the wholesale level and in complementary markets such as short-term health insurance, pharmaceutical distribution services, pharmacy courier services, and healthcare management software. The transactions raised the concern that Dis-Chem’s position in its core market (retail pharmacy) would be inured to competition – particularly from rivals that would have had a unique offering in the retail pharmacy space when combined with these complementary services. Most of these acquisitions were not notified to the Commission due to the transactions not meeting merger notification thresholds.

24. Further to the requirements for Dis-Chem to inform the Commission of future small acquisitions, the Commission also used its Concentration Tracker report and quarterly Competition News publication to articulate its concerns regarding creeping mergers in the pharmacy sector. The combination of these interventions has seen a reduction in the number of creeping mergers in this sector since 2021. Therefore the combination of active merger control on small acquisitions and advocacy which raises awareness of the strategies to acquire a dominant share have been successful in containing creeping mergers.

3.3. Forestry sector

25. In the forestry sector, the Commission has historically approved a large number of mergers, most of which were largely vertical in nature, characterised by the acquisition of independently-owned plantations by large vertically integrated players. This gave rise to concerns about deepening vertical integration by large vertically integrated players through creeping mergers was resulting in input foreclosure (log supply access) affecting, particularly, small integrated and non-vertically integrated competitors. The Commission, in its impact assessment study on the forestry sector, noted that the result of the inability to address these concerns in its merger decisions led to a perpetuation of concentration in this market and a lack of broader participation in the downstream processing level of the sector.¹⁷

26. A similar strategy was observed in the Commission’s assessment of creeping mergers in respect of the proposed acquisition by Mphome Agric (Pty) Ltd (Mphome) of three timber plantations owned by Silicon Smelters Proprietary Limited (ASF Group transaction), the Commission identified several transactions by the ASF Group of companies involved across different areas of the broader forestry industry in the preceding 9-year period. These acquisitions included firms involved in the harvesting of saw logs,

¹⁶ Department of Health, National Health Insurance, available at [NHI – Home – National Department of Health](#).

¹⁷ Competition Commission. 2021. The impact of vertical integration on competition and the participation of SMEs and HDPs in the Forestry Sector. Available at [Forestry-Impact-Assessment-31072020 Non-confidential Final-clean.pdf \(compcom.co.za\)](#).

suppliers of timber, transmission poles, agricultural poles, woodchips, pulpwood, and forestry plantations.

27. The Commission's approach to assessing mergers in this sector was based on the concern regarding input scarcity and how vertical integration may increase the prospects of input foreclosure, particularly within regional or local markets. The increased focus on the impact of mergers on narrow local markets enabled the Commission to successfully challenge creeping mergers in this sector. The above merger was prohibited and not challenged before the Tribunal as the clear theory of harm was persuasive to the parties. In a subsequent merger stringent supply conditions were placed on the parties for an extended period. The use of advocacy tools such as impact assessment studies enabled the Commission to articulate its views regarding the competitive implications of the developments in the industry and ultimately succeeded in chilling the creeping mergers phenomenon in the sector. Further mergers have not come before the Commission in forestry of this nature.

3.4. Other sectors

28. In the retail sector, the Commission's understanding and approach to the market has evolved. Whereas historically there was more focus on national competition amongst the grocery chains, the Grocery Retail Market Inquiry identified that the market had important local dimensions of competition whilst assessing long-term exclusive lease agreements in shopping malls. This included the frequency and depth of promotional activity and quality dimensions such as shop furnishings, stock levels and teller queues. Moreover, retail chains have developed different store brands and formats for different income markets, resulting in separate markets for lower income vs middle and high income. The evolution of the conception of the markets has enabled the Commission to challenge smaller scale acquisitions in grocery retail which would otherwise not raise concerns at a national level. That evolution and the establishment of precedent before the Tribunal has discouraged a strategy of acquisition through individual or small group stores.

29. In waste management the Commission successfully prohibited a merger by one of the leading waste management companies which had grown into importance due to a strategy of serial acquisitions. In the prohibition assessment, the Commission identified that these acquisitions were rapidly concentrating the industry and the merger before it would strengthen their position in the actual disposal of waste. Once more, the prohibition has deterred further acquisitions of a similar nature by that company.

4. The Evolving Character of Creeping Mergers

30. Creeping mergers and acquisitions generally refer to a series of acquisitions over time that individually might not 'substantially prevent or lessen' competition by themselves, but when taken together, may have a significant impact on competition.¹⁸ Such creeping mergers and acquisitions may enable a firm to incrementally enhance its existing substantial market power through one (or more) acquisitions which individually do not

¹⁸ Australian Competition and Consumer Commission (ACCC). 2008. Submission to the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs regarding creeping acquisitions.

substantially lessen competition.¹⁹ The acquisitions may either involve parties in a horizontal relationship who are actual competitors or potential competitors, or parties in related markets.²⁰ Creeping acquisitions may also form part of a deliberate strategy by a firm to (i) gain or entrench market power (either in the relevant or related markets), (ii) weaken competitors, (iii) deter entry, and (iv) remove potential competition.

31. In greater part, creeping mergers and acquisitions in South Africa have typically involved the acquisition of actual competitors or potential competitors, particularly smaller players. This trend has mostly been observed across sectors such as retail, healthcare, and media. By way of example, in more recent years, the nature of creeping mergers and acquisitions has evolved to also include strategic arrangements between competing firms which include, among others, the acquisition of trademarks and the right to franchise by large competitors in markets. Whilst some of these acquisitions are notifiable to the Commission, franchise arrangements in particular are being used to avoid merger notification. This does present a new challenge to controlling serial acquisitions of smaller competitors.

32. In a merger whereby Shoprite Checkers (Pty) Ltd (Shoprite), the largest grocery retailer in South Africa, acquired various registered trademarks owned by Mr. Basil Synodinos, the Commission found that Shoprite will own the Trademarks which the President Outlets uses in conducting its retail grocery operations. Under this arrangement, the President Outlets were obliged to pay Shoprite royalties/fees associated with using the Trademarks. The merging parties concluded a franchise agreement to facilitate the President Outlets continuing to use the Trademarks post-merger. The Commission further found that the merging parties had separately concluded a Call and Put Option Agreement (“Option Agreement”) which, *inter alia*, granted Shoprite Group the ability to exercise an option to acquire all the President Outlets from Mr Synodinos by September 2025. The Commission noted that Shoprite intended to acquire the Trademarks to roll out a new large retail supermarket format franchise offering using the Trademarks.

33. A question arises as to how does the Commission deal with the issue that the market definition may have changed between the time of the current merger being considered, and any past mergers; as markets evolve. The Commission is of the view that market definition is not an end, in itself, in that it does not mechanistically determine the outcomes of a competitive effects analysis. Market definition is a facilitatory intermediate step and does not take into account, in full, the competitive dynamic, the exercise of market power and the constraints that may be exerted in markets. As a result, the Commission focuses on understanding how firms acquire market power in markets, which is informed, in part, by a firm’s strategy and developments in markets; and how such market power is exercised and constrained. This enables the Commission to appreciate the dynamic evolution of competition in markets and how creeping merger strategies fit in with such changes and the long-term strategic objectives of firms in markets.

34. Following the greater scrutiny of individual store or small group acquisitions in retail pharmacy and grocery, the Commission has observed an increase in franchise arrangements. For instance, Shoprite, whose acquisition of a small group of Massmart stores was found to result in harm to competition and required divestitures, has recently sought to bring another small group, Choppies, into a franchise arrangement which they

¹⁹ Robb, G. 2014. Creeping mergers – should we be concerned? A case study of hospital mergers in South Africa. Accessed from: <http://www.compcom.co.za/wp-content/uploads/2014/09/Creeping-mergers-conference-paper-Final.pdf>.

²⁰ A “related” market is one in which there is no overlap among merging parties, i.e., a market in which only one of the parties is competing.

argue is not a notifiable merger. Similarly, Dischem in the pharmacy sector has sought to bring some independent pharmacies into its franchise operation, the Local Choice, and not notify the transactions. The Commission is considering whether these franchise arrangements do involve a form of control and hence constitute mergers.

35. Whether the creeping acquisitions involve parties in a horizontal relationship or in related markets, they cumulatively have a significant impact on competition through either a substantial increase in market concentration over time or allowing for other anti-competitive outcomes to arise from conglomerate effects, for example. It is acknowledged that the ultimate result of creeping acquisitions is the decline in consumer welfare over time.²¹

5. The Challenges of Capturing the Potential Competitive Harm of Serial Acquisitions and Solutions to Better Address These

36. The regulation of creeping mergers raises a number of challenges, some with less obvious solutions than others. The primary challenge of creeping mergers is a fundamental one – creeping mergers are generally not easily identified. As described above, creeping mergers may involve a firm sequentially purchasing a number of smaller firms which may have a cumulative effect on its market share while having no appreciable impact on competition if considered in isolation. Importantly, for purposes of detection, these mergers may (and often do) fall below thresholds for mandatory notification. This means, as these mergers are implemented over time, it may not be possible to identify them.

37. It has been the case in a number of the matters where creeping merger concerns were raised, that a significant number of the mergers had already been implemented, making it difficult to design appropriate interventions if necessary. The Small Merger Guidelines updated from 1 December 2022²² go some way to remedying this concern in respect of digital acquisitions as they require certain acquisitions to be informed to the Commission where the transaction value crosses the normal turnover and asset value where the Commission can then determine if notification is required. To date the Commission has not been informed of any such transactions.

38. Assuming at least one of these transactions is identified by the competition authorities, either through a notification or other means, the identification of the harm to competition resulting from aggregation of these mergers may be complicated. The amendments to the Competition Act introduced provisions aimed at assessing creeping mergers.

39. The discussion below focusses on the strategies that the Commission has adopted to deal with creeping mergers.

5.1. Identification of susceptible sectors and case selection

40. As previously indicated, a key part of the Commission's interventions in dealing with creeping mergers was the identification of those sectors that may be prone to such

²¹ Robb, G., 2012. *Creeping mergers—should we be concerned? A case study of hospital mergers in South Africa*. Unpublished Working Paper, available at [Creeping-mergers-conference-paper-Final.pdf \(compcom.co.za\)](https://www.compcom.co.za/wp-content/uploads/2022/09/FINAL-GUIDELINES-ON-SMALL-MERGER-NOTIFICATION_.pdf).

²² See Competition Commission Guidelines On Small Merger Notification available at https://www.compcom.co.za/wp-content/uploads/2022/09/FINAL-GUIDELINES-ON-SMALL-MERGER-NOTIFICATION_.pdf

strategies. The identification of these sectors can be guided by looking at the history of merger filings and public company strategic documents such as annual reports and investor presentations. Such documents may provide insights on the broader strategy to which the merger(s) may relate. Research on trends in concentration levels can also identify where merger creep is occurring but not notified as mergers.

41. Once the sectors have been identified, mergers by firms, particularly players who typically may engage in such acquisitions, are assessed extensively to ensure that the competitive effects of these transactions are adequately considered. As discussed further below, the assessment of such transactions requires a close assessment of their impact in, sometimes, narrower markets or sub-segments of markets to establish an SPLC. In this regard, the Commission has found that a narrower focus on the competitive impact of these transactions on local geographic markets or a sub-set of customers provides a compelling basis for an SPLC.

42. The selection of appropriate cases to successfully sustain a prohibition of such transactions is critically important. The extensive assessment of such cases also signals to market participants the authorities' views about these kinds of strategies in markets. Similarly, the imposition of structural remedies such as divestitures, where appropriate, can also deter such strategies by firms.

43. Further, continuous monitoring of the identified sectors, particularly through requirements for firms to notify mergers and acquisitions, including those that may not meet mandatory notification thresholds, may also serve to deter firms from engaging in such strategies. This is because it raises the costs of such an acquisition strategy, and imposes delays. Lastly, it is important to also employ advocacy tools to articulate the authority's position regarding creeping mergers up front which may discourage such a strategy as parties are then aware their mergers will get enhanced scrutiny. For instance, in forestry, the Commission articulated these concerns through an impact study on merger approvals in the sector, whereas in the pharmacy sector the concern was articulated first through a Competition News article and then the Concentration report. These were given wide publicity.

5.2. The assessment period

44. Paragraph (k) was introduced when the Act was amended in 2018 and allows the competition authorities to request the disclosure of merger activity by the merging parties in the preceding years and consider these previous mergers in the assessment of a merger before it. This new provision therefore allows for the application of the aggregation model for the assessment of creeping mergers, as it allows the Commission to consider prior transactions engaged in by parties to the merger in its competition assessment of the merger that would be under review. It should be noted that the clause does not prescribe the time period over which the competition authorities may consider these previously completed mergers – this grants the competition authorities some flexibility in determining the appropriate time period for the assessment, which is likely to be different depending on the circumstances of each case.

45. Assessing a creeping mergers strategy over a sufficiently long period of time enables competition authorities to understanding firm strategy, beyond the immediate acquisition (unless if there is a clear link as was the case with the Dis-Chem merger discussed above), and tracking market developments that may have a bearing on that firm's strategy. This necessitates that there must be flexibility on the duration of the assessment period to enable authorities to consider market dynamics better as well as contextualise the concerned firm's strategy within these developments.

46. Typically, when assessing a creeping mergers strategy, the Commission considers a five year period as likely to be consistent in capturing creeping effects arising across different markets. The Competition Act does not prescribe a period within which creeping mergers must be assessed. This is important because in instances where a longer period than five years is deemed necessary to conduct the analysis, particularly if there have been other significant prior transactions beyond the five-year period or instances where there are longer industry cycles such as in forestry markets, the Commission has sufficient flexibility to conduct its analysis taking into account such dynamics.

47. Another consideration related to duration is whether the creeping mergers engaged in by the acquiring are considered extensive. What constitutes “extensive” will differ depending on the markets implicated. For example, a merger every two years in the market for inpatient private hospital services would be considered more extensive than a merger every two years in the market for retail grocery services. Similarly, in forestry where the assets take time to develop but have a permanent effect on supply share given constraints in developing new plantations, infrequent mergers still have a material impact.

5.3. Merger-specificity and Substantiality

48. However, competition authorities are still required to determine whether the notified merger itself is likely to substantially prevent or lessen competition, while considering prior mergers – and presumably their competitive effects – as a factor in this determination. The substantiality of the effect of the notified merger may still present an impediment in investigating a creeping mergers theory of harm when one of the parties to the transaction is already able to exercise market power in the relevant market(s) due to prior acquisitions, but the present transaction does not result in a substantial change in this ability and, therefore, no substantial lessening or prevention of competition relative to the status quo (or other relevant counterfactual absent the merger).

49. The key concern with creeping mergers is that the individual mergers that comprise the overall strategy may not on their own result in an SPLC in the implicated markets. The SPLC may arise from the overall creeping acquisitions strategy, i.e., when considered in aggregate, the acquisitions that constitute the strategy may result in an SPLC. If an individual merger is a necessary step in the implementation of the creeping acquisitions strategy that is likely to result in an SPLC, then that merger is also likely to result in an SPLC.

50. To determine whether a creeping mergers strategy – and each merger implicated in that strategy – is likely to result in an SPLC, the Commission must consider the impact on rivalry between competitors in the relevant market(s). Rivalry between firms is the mechanism through which firms are incentivised to flex the different parameters of competition, such as by reducing prices, increasing output, improving quality, enhancing efficiency, or launching new and improved products. Assessing the likelihood of an SPLC requires an investigation into the impact of the transaction on these parameters of competition. The relative importance of these different parameters is dependent on how the competitive process works in the relevant markets and, as such, are to be determined on a case-by-case basis.

51. Further, it is important to note that a merger transaction may impact on a subset of customers or market segments (geographic or otherwise) differently. This is consistent with the General Court’s endorsement of the European Commission’s position in the

Wieland/Aurubis merger where it held that the merger could lead to competition concerns in specific segments or sub-segments of an identified broader market.²³

52. Aside from assessments in a narrower market or sub-segment, the focus of a case will also include evidence on the actual strategy to build a dominant position through serial acquisitions. This may be based on actual merger activity, notified and non-notified, but also the company strategy as articulated internally or through investor presentations. This evidence also brings the case squarely within the additional creeping merger factor required for merger assessment under the new amendments.

53. The discussion below provides an illustrative example of how the South African competition authorities assessed merger-specificity and substantiality in a creeping merger case in the market for inpatient private hospital services.

54. The *Mediclinic / MHHS* merger illustrates how the reframing of substantiality can assist in the assessment of creeping mergers. In its assessment of the merger, the Commission established that the removal of close competition between the merging parties would lead to adverse price effects for both the insured and uninsured customers. It further used the argument for creeping mergers to reinforce its findings on unilateral price effects. In this respect, the Commission argued that the merger acted as a stepping-stone in strengthening the acquiring firm's market dominance and acknowledged the link between increasing concentration and price increases in the hospital market. Considering the merger from a local market perspective, the Commission argued that the merged firm would be dominant post-merger and that this dominance rendered it a must-have for medical insurance suppliers seeking representation in the local market.

55. Notably, the Tribunal held that from a public interest perspective, medical aid members on low-cost options collectively are an important group because they are particularly vulnerable to the increasing costs of private health care in South Africa. It further found that if the parties on the low-cost options could no longer afford private health care, this would put further constraints on the public health care sector in our country.

56. The Tribunal held that the unilateral price effects arising from the merger would have a significant impact on the healthcare costs of both insured and uninsured patients in the relevant market, particularly so given the target hospitals' significantly lower tariffs in comparison to Mediclinic. Moreover, the uninsured patients in that area, who are a vulnerable group, would have less choice of cheaper hospitals post-merger and this would adversely affect their ability to switch between cheaper options.

57. Further, the Commission argued that Mediclinic had acquired eight facilities over the period 2014 to 2018 with the number rising to ten when the merged was included. The merging parties challenged this, arguing that many of these transactions were associated with a change from joint to sole control. The Tribunal concurred with the Commission that merger creep should be carefully considered in any hospital merger in South Africa and further stated that it is equally a competition issue as it is a public interest issue. However, the Tribunal noted that there was a lack of evidence on the impact of the Mediclinic's previous acquisitions on concentration levels, and the regional and national competitive landscape.

58. The Constitutional Court, South Africa's apex court, confirmed the Tribunal's assessment of the unilateral effects arising from the merger, noting that the substantiality of the identified adverse effects were further motivated by the fact that the merger related to the constitutional right to access to healthcare services for all citizens. This, it found,

²³ T-251/19, *Wieland-Werke AG v European Commission*, paras. 64 - 74.

meant that substantiality of the effects arising from the merger, particularly on the vulnerable uninsured, could not be reduced to mere numbers. The merging parties had argued that the uninsured were an insignificant portion of the merging parties' customers, at less than 1%. The Constitutional Court found that properly contextualised within the ambit of the South African constitution and the Bill of Rights, which grant citizens the right to access healthcare services, the price and non-price effects that arose from the merger and their negative impact on this constitutionally-enshrined right was significant.

59. This case introduces the need to consider and reframe the articulation of substantiality in competitive effects arising from mergers. Merging parties typically raise the *de minimis* argument to seek the approval of creeping mergers on the basis that there is no substantial lessening of competition in the relevant market(s). This case shows that a broadening of the approach to merger-specificity and substantiality, where appropriate, can assist in dealing with creeping mergers.

6. Conclusion

60. South Africa has observed the creeping mergers phenomenon in a number of sectors over long periods of time. While the competition authorities considered creeping mergers as part of the merger control assessment, the amendments to the Competition Act in 2019 explicitly made provisions for the competition authorities to deal with this issue. A key feature of the creeping mergers phenomenon in South Africa has been their contribution to the increasing levels of concentration and the associated lack of broader participation by small and medium enterprises as well as historically disadvantaged individuals in the economy. The Commission's interventions in various sectors provide useful insights on how such strategies by firms can be deterred. First, the identification of those sectors that may be prone to creeping mergers assists in enabling competition authorities to develop an appropriate response strategy.

61. A response strategy may include the use of several tools at the disposal of competition authorities; ranging from extensive and in-depth assessments of mergers in the identified sectors, mandatory notification obligations, focus on the competitive impact of mergers on narrower local markets and sub-sets of customers, and consideration of creeping mergers over longer periods of time (as may be appropriate). Further, the use of advocacy tools is similarly important insofar as it enables competition authorities to articulate their views on the impact of creeping mergers in the identified sectors. A combination of these interventions contributes towards effective deterrent outcomes in markets that can chill creeping mergers over time.