



COMMERCE COMMISSION

Decision No. 692

Determination pursuant to the Commerce Act 1986 in the matter of an application for clearance of a business acquisition involving:

Novartis AG

and

Alcon, Inc.

- The Commission:** Dr Mark Berry
Sue Begg
Gowan Pickering
- Summary of Application:** Novartis AG submitted an application for clearance for the acquisition of Nestlé's 52.15% shareholding in Alcon, Inc.
- Determination:** Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance for the proposed acquisition.
- Date of Determination:** 6 May 2010

THE PROPOSAL

1. A Notice pursuant to s 66(1) of the Commerce Act 1986 (the Act) was registered on 1 April 2010. The notice sought clearance for Novartis AG (Novartis or the Applicant) to acquire Nestlé S.A.'s 52.15% shareholding in Alcon, Inc. (Alcon). Following the completion of the proposed acquisition, Novartis would hold approximately 77% of the shares in Alcon.

DECISION

2. Post acquisition there would be aggregation of market share in four markets in New Zealand for the manufacture/import and wholesale supply of:
 - prescription only miotics for use in cataract surgery;
 - over the counter (OTC) ocular anti-allergies, decongestants and antiseptics;
 - OTC artificial tears; and
 - OTC preparations for use with contact lenses.
3. The Commission considers that strong existing competition from global pharmaceutical corporations such as Allergan, Bausch & Lomb, Aspen, Sigma, Abbott and others are likely to provide competitive constraint in those markets. Accordingly, the Commission is satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in any of the relevant markets.

ANALYTICAL FRAMEWORK

4. The Commission applies a consistent analytical framework to all its clearance decisions.¹ The first step is to determine the relevant markets. As acquisitions considered under s 66 are prospective, the Commission uses a forward-looking type of analysis to assess whether a lessening of competition is likely in the defined market(s). Hence, an important subsequent step is to establish the appropriate hypothetical future with and without scenarios, defined as the situations expected:
 - with the acquisition (the factual); and
 - in the absence of the acquisition (the counterfactual).
5. The impact of the acquisition on competition is then viewed as the prospective difference in the extent of competition in the relevant markets between those two scenarios. To analyse the extent of competition in the factual and counterfactual, the Commission considers:
 - existing competition;
 - potential competition;
 - other competition factors, such as the countervailing market power of buyers and suppliers; and
 - co-ordinated behaviour – whether the acquisition would enhance the ability of market participants to collude either tacitly or explicitly.

¹ Commerce Commission, *Mergers and Acquisitions Guidelines*, January 2004.

THE PARTIES

The Acquirer - Novartis

6. Novartis operates in New Zealand through Novartis New Zealand Limited. Novartis New Zealand is responsible for the sales, marketing and distribution of Novartis' human pharmaceuticals, including some eye care products, and animal health products. The Novartis Group also includes two further New Zealand divisions, CIBA Vision, and Novartis Consumer Health, which are operated from Australia. CIBA Vision researches, develops, manufactures and markets contact lenses and lens care products.

The Target - Alcon

7. Alcon is a global medical company specialising in eye care. Alcon operates in New Zealand through Alcon New Zealand Ltd.² Pharmaco NZ Ltd provides distribution and warehousing services for Alcon New Zealand Ltd in New Zealand.

OTHER PARTIES

Multi-national Pharmaceutical Corporations

8. There are a number of large multi-national pharmaceutical corporations that manufacture and supply a wide range of eye care products into New Zealand. Of relevance to this application for clearance are:
- Allergan, Inc. (Allergan);
 - Bausch & Lomb Inc. (Bausch & Lomb);
 - Abbott Laboratories (Abbott);
 - Aspen Pharmacare Holdings Limited (Aspen);
 - Sigma Pharmaceuticals Limited (Sigma); and
 - Johnson & Johnson Services, Inc. (Johnson & Johnson).

PHARMAC

9. PHARMAC, the Pharmaceutical Management Agency, is a Crown entity established by the New Zealand Public Health and Disability Act 2000. PHARMAC manages the purchase of a list of subsidised pharmaceuticals, the Pharmaceutical Schedule, on behalf of the Crown.³

² Alcon also operates in New Zealand to a smaller extent through Alcon Pharmaceuticals Ltd and Alcon Laboratories Inc.

³ For a full explanation of the role of PHARMAC, see Decision 594 Johnson & Johnson / Pfizer Consumer Healthcare <http://www.comcom.govt.nz/assets/Imported-from-old-site/PublicRegisters/ContentFiles/Documents/PUBLIC-Johnson--Johnson-Pfizer-Consumer-Healthcare-Decision-594-FINAL.pdf>

INDUSTRY BACKGROUND

10. In New Zealand, both Novartis and Alcon import their products from their respective overseas manufacturing companies.
11. Novartis, Alcon, and their competitors largely sell their products via wholesalers. Wholesalers then supply pharmacies and hospitals. For OTC products, Novartis, Alcon and other competitors often negotiate discounts directly with pharmacy groups such as Life Pharmacy and the Radius Group.
12. In respect of lens solution products, around 25% of sales occur through opticians and optometrists while 75% are sold through pharmacies, although Novartis' CIBA Vision division sells its products solely through opticians and optometrists.

MARKET DEFINITION

13. The applicant submitted that the appropriate market definitions should be broken down into therapeutic classes according to the Anatomical Therapeutic Classification (the ATC). The ATC was devised by the European Pharmaceutical Marketing Research Association.⁴
14. The applicant submitted that the relevant markets should be based on the ATC, and therefore are those for the manufacture/import and wholesale supply in New Zealand of:
 - miotics preparations for use in cataract surgery (treatments that cause paralysis of the ciliary muscle, stop the eye from moving during surgery and/or reduce the size of the pupil in order to assist with the surgery, as well as pre and post operative treatments);
 - ocular anti-allergies, decongestants and antiseptics (eye drops that treat eye allergies such as red eye, hayfever and conjunctivitis);
 - artificial tears and ocular lubricants (treatments for dry eyes); and
 - preparations for use with contact lens (peroxide and multi-purpose solutions).
15. The ATC was used by the Commission as a starting point for assessing the appropriate market definition in Decisions 398 and 496.⁵ In Decision 398, the Commission noted that “there may be instances where broader or narrower classifications are necessary, dependent upon the particular circumstances of the pharmaceuticals and the condition requiring treatment”. The Commission considers that it remains appropriate to use the ATC as a starting point.
16. Industry participants broadly agreed with the market definitions proposed by the Applicant. PHARMAC advised the Commission that within each ATC category there is a wide variety of products with similar active ingredients that treat similar conditions (from minor to acute). Many products within each category have

⁴ For a full explanation of the ATC Classification system, see Decision 621 Schering-Plough Corporation / Organon Biosciences N.V. <http://www.comcom.govt.nz/assets/Imported-from-old-site/PublicRegisters/ContentFiles/Documents/Public-version-written-reasons-Schering-Plough.pdf>

⁵ Decision 398 Glaxo Wellcome Plc / SmithKline Beecham Plc <http://www.comcom.govt.nz/assets/Imported-from-old-site/PublicRegisters/ContentFiles/Documents/398.pdf>
 Decision 496 Pfizer Laboratories Limited / Pharmacia Limited <http://www.comcom.govt.nz/assets/Imported-from-old-site/PublicRegisters/ContentFiles/Documents/496.pdf>

overlapping uses and some have quite specific uses. Therefore, in some cases, it might be appropriate to define separate product markets within each category.

17. However, for the purposes of the analysis, the Commission considers it is unnecessary to define narrow product markets for ocular anti-allergies, decongestants and antiseptics, artificial tears; and preparations for use with contact lenses because:
 - there is broad industry consensus in respect of the applicant's proposed market definitions; and
 - the aggregation and competition concerns are effectively caught within the categories.
18. However, the Commission was informed by industry participants and PHARMAC that the category that contains cataract and glaucoma related products have very specific uses. Industry participants stated that miotics for use in cataract surgery have very specific medical functions that are not substitutable for miotics for use in treating glaucoma.
19. Similarly, the Applicant noted that there might be a sub category for miotics in cataract surgery. Further, the Applicant noted that aggregation would only occur in respect of miotics for cataract surgery. Therefore, for the purposes of this analysis, the Commission considers that it is appropriate to define a separate product market for miotics for cataract surgery
20. Medicines in New Zealand are generally divided into two categories: prescription (generally funded by PHARMAC) and OTC medicines.⁶ The Commission notes that in a number of previous Decisions, it has defined separate product markets for prescription versus OTC medicines.⁷ Based on the information collected, and the views of industry participants, the Commission sees no reason to depart from the distinction in this case.
21. The applicant submitted that the geographic markets are national. The Commission found that competitors sell their products to wholesalers who distribute nationwide. The geographic markets should be considered national in scope.
22. The Commission concludes that the relevant markets are those for the manufacture/import and wholesale supply in New Zealand of:
 - prescription only miotics for use in cataract surgery (the miotics market);
 - OTC ocular anti-allergies, decongestants and antiseptics;⁸
 - OTC artificial tears; and
 - OTC preparations for use with contact lenses.

⁶ For a full explanation of the differences between prescription only and OTC medicines see Decision 594 Johnson & Johnson / Pfizer Consumer Healthcare <http://www.comcom.govt.nz/assets/Imported-from-old-site/PublicRegisters/ContentFiles/Documents/PUBLIC-Johnson--Johnson-Pfizer-Consumer-Healthcare-Decision-594-FINAL.pdf>

⁷ For a full explanation on the Commission's approach to defining product markets based on prescription versus OTC, see Decision 594 Johnson & Johnson / Pfizer Consumer Healthcare <http://www.comcom.govt.nz/assets/Imported-from-old-site/PublicRegisters/ContentFiles/Documents/PUBLIC-Johnson--Johnson-Pfizer-Consumer-Healthcare-Decision-594-FINAL.pdf>

⁸ This category includes both prescription only and OTC products. However, aggregation between Novartis and Alcon only occurs with regard to OTC products.

FACTUAL/COUNTERFACTUAL

Factual

23. In the factual Novartis would own 77% of Alcon. Aggregation of market share would occur in the four markets described above.

Counterfactual

24. Absent the acquisition, Novartis and Alcon would maintain their existing operations; therefore, the Commission considers that the relevant counterfactual is the status quo.

COMPETITION ANALYSIS

25. The Applicant provided market share data from IMS Health Inc (IMS Health). The large competitors in the relevant markets (such as Allergan, Bausch & Lomb, Sigma, Aspen and Abbott) advised the Commission that they regularly contribute data to IMS Health. Industry participants confirmed that the IMS Health market share data is accurate. The Commission will therefore use the IMS market share data, as well as other market share data collected from other participants in the market.
26. Industry participants advised the Commission that the proposed acquisition would be unlikely to raise any competition concerns within the identified markets. This is because Alcon is one of the leading competitors in New Zealand in respect of eye care products compared to Novartis which is viewed as a much smaller competitor. The combined entity would likely be constrained in its ability to exercise any market power by the presence of strong existing competitors.

Existing Competition

The Miotics Market

27. The estimated market shares for the miotics market are set out in Table 1.

Table 1: Estimated Market Shares for the Miotics Market

Participant	Revenue (NZD)	Share (%)
Novartis	[]	[]
Alcon	[]	[]
<i>Combined Entity</i>	[]	[]
Bausch & Lomb	[]	[]
Sigma	[]	[]
Total	[]	100

28. Table 1 indicates that in the miotics market the combined entity would have a market share of around []% and the three-firm concentration would be []%. This is well inside the Commission's safe harbour guidelines and as such, the Commission does not intend to further consider this market.

OTC Ocular Anti-allergies, Decongestants and Antiseptics Market

29. The estimated market shares for OTC ocular anti-allergies, decongestants and antiseptics are set out in Table 2.

Table 2: Estimated Market Shares for OTC Ocular Anti-allergies, Decongestants and Antiseptics in 2009

Participant	Revenue (NZD)	Share (%)
Novartis	[]	[]
Alcon	[]	[]
<i>Combined entity</i>	[]	[]
Aspen	[]	[]
Bausch & Lomb	[]	[]
Johnson & Johnson	[]	[]
AFT	[]	[]
Allergan	[]	[]
Others	[]	[]
Total	[]	100

30. Table 2 indicates that in the OTC ocular anti-allergies, decongestants and antiseptics market, the combined entity would account for around []% of the market and the three-firm concentration would be []%. This is inside the Commission's safe harbour guidelines.

31. Post acquisition, the combined entity would be the [] largest supplier of ocular anti-allergies, decongestants and antiseptics. The combined entity would continue to face strong competition from existing competitors such as Aspen (the recognised market leader), Bausch & Lomb and Johnson and Johnson.

32. The Commission considers that existing competition would likely constrain the combined entity post-acquisition.

OTC Artificial Tears Market

33. The estimated market shares for artificial tears are set out in Table 3.

Table 3: Estimated Market Shares for OTC Artificial Tears in 2009

Participant	Revenue (NZD)	Share (%)
Novartis	[]	[]
Alcon	[]	[]
<i>Combined entity</i>	[]	[]
Allergan	[]	[]
AFT	[]	[]
Bausch & Lomb	[]	[]
Others	[]	[]
Total	[]	100

34. Table 3 shows that in the OTC artificial tears market the combined entity would account for around []% of the market and the three-firm concentration would be []%. This is outside the Commission's safe harbour guidelines.

35. Post acquisition, the combined entity would be the [] largest supplier of artificial tears products. The combined entity would continue to face strong competition from Allergan. Allergan considers itself to be the market leader for artificial tears products. [].
36. [] advised the Commission that the market was likely to remain competitive as most of the artificial tears products are “off patent” making it quite easy for existing competitors to expand in the market with generic products.
37. [] advised the Commission that [] viewed OTC eye care products such as artificial tears and contact lens solutions products as “commodity type products”. [] buying power would remain strong post- acquisition.
38. The Commission considers that the combined entity would likely be constrained in its ability to exercise any market power by the presence of Allergan and Bausch and Lomb and also by [].

The OTC Preparations for use with Contact Lenses Market

39. The estimated market shares for preparations for use with contact lenses are set out in Table 4.

Table 4: Estimated Market Shares for OTC Preparations for use with Contact Lenses in 2009

Participant	Revenue (NZD)	Share (%)
Novartis	[]	[]
Alcon	[]	[]
<i>Combined entity</i>	[]	[]
Bausch & Lomb	[]	[]
Abbott	[]	[]
Independent Optical	[]	[]
Others	[]	[]
Total	[]	100

40. Table 4 indicates that in the OTC preparations for use with contact lenses market, the combined entity would account for around []% of the market and the three-firm concentration would be []%. This is outside the Commission’s safe harbour guidelines.
41. Post acquisition, the combined entity would be the [] largest supplier of OTC preparations for use with contact lenses. The combined entity would continue to face strong competition from Bausch & Lomb and Abbott which both have similar market shares to the combined entity. Similar to the other markets discussed above, market participants were of the view that the proposed acquisition would be unlikely to raise any competition concerns.
42. However, the Commission was advised that Novartis is viewed as a strong competitor with regard to sales of peroxide lens solution products directly to optometrists. [] were concerned that the combined entity would have a particularly strong position with the optometry channel as it would be able to supply both peroxide and multi-purpose lens solution products via the optometry channel.

43. The Commission notes that peroxide lens solution products account for less than 5% of the market in New Zealand, and that most customers prefer to use multi purpose solution products. In addition, the optometry channel accounts for around 25% of the OTC preparations for use with contact lenses market. While the combined entity would have a strengthened position with regard to the optometry channel, competition is likely to remain strong in the much larger pharmacy channel with multi-purpose lens solutions products.
44. Accordingly, the Commission considers that existing competition would be likely to constrain the combined entity.

OVERALL CONCLUSION

45. Having considered the competition effects in each of the relevant markets, the Commission is satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in the national markets for the manufacture/import and wholesale supply of:
 - prescription only miotics for use in cataract surgery;
 - OTC ocular anti-allergies, decongestants and antiseptics;
 - OTC artificial tears; and
 - OTC preparations for use with contact lenses.

DETERMINATION ON NOTICE OF CLEARANCE

46. Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to grant clearance for Novartis AG to acquire Nestlé's 52.15% shareholding in Alcon, Inc.

Dated 6th May 2010

Dr Mark Berry
Chair