

Determination

King Pharmacy Group Ltd and Community Pharmacy Ltd [2013] NZCC 14

The Commission: Dr Mark Berry
Sue Begg
Dr Stephen Gale

Summary of application: King Pharmacy Group seeks clearance to acquire the pharmacy business of Community Pharmacy, Linwood.

Determination: Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission gives clearance for King Pharmacy Group Limited, or nominee, to acquire the pharmacy business of Community Pharmacy Linwood.

Date of determination: 3 September 2013

Confidential material in this report has been removed. Its location in the document is denoted by [].

The proposal

1. On 15 August 2013, King Pharmacy Group Ltd applied for clearance¹ to acquire the Linwood pharmacy business of Community Pharmacy Ltd. A decision on the application was required by 4 September 2013.

Our framework

2. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.²

The substantial lessening of competition test

3. As required by the Commerce Act 1986, we assess whether a merger is likely to result in a substantial lessening of competition.
4. In making this assessment, we compare the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).³
5. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise price above the price that would exist in a competitive market (the 'competitive price'),⁴ or reduce non-price factors such as quality or service below competitive levels.

When a lessening of competition is substantial

6. Only a lessening of competition that is substantial is prohibited. A lessening of competition will be substantial if it is real, of substance, or more than nominal.⁵ Some courts have used the word 'material' to describe a lessening of competition that is substantial.⁶
7. Consequently, there is no bright line that separates a lessening of competition that is substantial from one that is not. What is substantial is a matter of judgement and depends on the facts of each case. Ultimately, we assess whether competition will be substantially lessened by asking whether consumers in the relevant market(s) are likely to be adversely affected in a material way.

When a substantial lessening of competition is likely

8. A substantial lessening of competition is 'likely' if there is a real and substantial risk, or a real chance, that it will occur. This requires that a substantial lessening of

¹ Under s 66 of the Commerce Act 1986.

² Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013.

³ *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

⁴ Or below competitive levels in a merger between buyers.

⁵ *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

⁶ *Woolworths & Ors v Commerce Commission* (HC) above n 5 at [129].

competition is more than a possibility, but does not mean that the effect needs to be more likely than not to occur.⁷

The clearance test

9. We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.⁸ If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.⁹

Parties

King Pharmacy Group Ltd (KPG)

10. KPG owns and operates two pharmacies in Linwood, Christchurch: Linwood Dispensary and Eastgate Pharmacy. Linwood Dispensary is adjacent to the Linwood Avenue Medical Centre and focuses largely on dispensing medicines. Situated in the Eastgate Mall, Eastgate Pharmacy has a large retail offering as well as dispensing medicines.
11. Mary King is the majority shareholder of KPG.

Community Pharmacy Limited (CPL)

12. CPL is owned by Joe and Ann Tiller and began operating in 2010. CPL has a small dispensing pharmacy, Community Pharmacy Linwood that shares premises with Piki Te Ora Medical Centre, a not for profit medical centre situated in Linwood.

Background

13. Pharmacies operate different business models – some are retail focused (eg, Eastgate Pharmacy) and some are focused on dispensing (eg, Community Pharmacy and Linwood Dispensary).
14. CPL runs a discount model of pharmacy, discounting the co-payment for prescription medication from the maximum legislated amount of \$5 to \$2.50. CPL is the only pharmacy operator in Christchurch that has adopted such a model, and one of only three pharmacies in the country to do so. Discounting of the co-payment is the main form of price competition that we are aware of.

With and without scenarios

With the acquisition

15. With the acquisition, KPG would acquire Community Pharmacy Linwood and would then own three proximate pharmacies in the Linwood area. It would also see both the dispensary model pharmacies in the vicinity under KPG's ownership. Any

⁷ *Woolworths & Ors v Commerce Commission* (HC) above n 5 at [111].

⁸ Section 66(1) of the Commerce Act 1986.

⁹ In *Commerce Commission v Woolworths Limited* (CA), above n 3 at [98], the Court held that “the existence of a ‘doubt’ corresponds to a failure to exclude a real chance of a substantial lessening of competition”. However, the Court also indicated at [97] that we should make factual assessments using the balance of probabilities.

competitive constraint placed on the KPG pharmacies by Community Pharmacy Linwood would be lost.

16. Although KPG has advised the Commission that it would continue to discount the co-payment for prescriptions at the Community Pharmacy, we have proceeded on the conservative basis that it would not do so.

Without the acquisition

17. One of the owners of the Community Pharmacy, Joe Tiller, advised the Commission that he is selling the Community Pharmacy []. He advised that should the Commission not grant clearance, he would seek an alternative buyer and if one could not be found, he would close the pharmacy.
18. In the case of an alternative buyer, our view is that, given there are only two other pharmacies in the country that discount the prescription co-payment, we cannot assume that a third party is any more likely than KPG to continue to discount the co-payment.
19. We note that if no alternative buyer could be found, Community Pharmacy would likely exit the market and the discounted prescription co-payment offered by the Community Pharmacy would be lost.
20. We therefore consider that there is unlikely to be a significant difference between the scenario with the acquisition and that without the acquisition. To this extent, we are of the view that the proposed transaction is unlikely to give rise to a substantial lessening of competition.

Overall conclusion

21. Accordingly, we are satisfied that the proposed acquisition, will not have, or would not be likely to have, the effect of substantially lessening competition.

Determination on notice of clearance

22. Pursuant to s 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to King Pharmacy Group Limited, or nominee, to acquire the pharmacy business of Community Pharmacy, Linwood.

Dated this 3rd day of September 2013

Sue Begg
Deputy Chair