

Statement of Preliminary Issues

HealthCare of New Zealand Holdings Limited's proposed acquisition of Geneva Healthcare Limited and its related companies

14 July 2017

Introduction

1. On 30 June 2017 the Commerce Commission received an application from HealthCare of New Zealand Holdings Limited (HealthCare NZ) seeking clearance to acquire up to 100% of the shares in Geneva Healthcare Limited and its related companies: Geneva Clean Limited, My Skill Limited, Geneva Health Technology Limited and Geneva Care Limited (Geneva Healthcare Group).
2. The Commission will give clearance if it is satisfied that the proposed merger will not have or would not be likely to have the effect of substantially lessening competition in a market in New Zealand.
3. This Statement of Preliminary Issues sets out the issues we currently consider to be important in deciding whether or not to grant clearance.¹
4. We invite interested parties to provide comments on the likely competitive effects of the proposed merger. We request that parties wishing to make a submission do so by **Thursday 3 August 2017**.

The parties

5. HealthCare NZ is the holding company of Healthcare of NZ Limited, NZCare Group Limited, Healthcare Rehabilitation Limited, Explore Services Limited and Solora Limited. These companies provide home and community support services to injured, unwell, disabled and elderly New Zealanders.
6. The Geneva Healthcare Group also provides home and community support services to injured, unwell, disabled and elderly New Zealanders, as well as community living services to New Zealanders with a physical or intellectual disability. It also provides temporary staffing and recruitment services to hospitals and other providers. Geneva Healthcare Limited has a 50% shareholding in Geneva Elevator Limited Partnership, which provides recruitment services for people living with disabilities.
7. HealthCare NZ and the Geneva Healthcare Group predominantly provide these services through funding from the ACC, District Health Boards and the Ministry of Health. They also provide these services through private funding but on a much smaller scale.

¹ The issues set out in this statement are based on the information available when it was published and may change as our investigation progresses. The issues in this statement are not binding on us.

Our framework

8. Our approach to analysing the competition effects of the proposed merger is based on the principles set out in our Mergers and Acquisitions Guidelines.² As required by the Commerce Act 1986, we assess mergers using the substantial lessening of competition test.
9. We determine whether a merger is likely to substantially lessen competition in a market by comparing 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
10. We define markets in the way that we consider best isolates the key competition issues that arise from the merger. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Commerce Act, as a matter of fact and commercial common sense.⁴
11. We compare the extent of competition in each relevant market both with and without the merger. This allows us to assess the degree by which the proposed merger might lessen competition. If the lessening is likely to be substantial, we will not give clearance to the proposed merger. When making that assessment, we consider, among other matters:
 - 11.1 constraint from existing competitors – the degree to which existing competitors currently compete and the extent to which they would expand their sales if prices were increased;
 - 11.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete effectively if prices were increased; and
 - 11.3 the countervailing market power of buyers – the potential for a business to be sufficiently constrained by a buyer’s ability to exert substantial influence on negotiations.⁵

Market definition

12. HealthCare NZ submitted that the relevant market is the national market for the provision of home and community support services.⁶

² Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013. Available on our website at www.comcom.govt.nz

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

⁴ Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

⁵ Countervailing power is more than a customer’s ability to switch from buying products from the merged entity to buying products from a competitor. Similarly, a customer’s size and commercial importance is not sufficient in itself to amount to countervailing power.

⁶ Application at [35].

13. As part of our investigation, we will consider whether it is appropriate to define markets for other services provided by HealthCare NZ and the Geneva Healthcare Group.
14. In terms of geographic dimensions of the markets, we will consider whether it is appropriate to define the relevant markets as national in scope or whether it may be appropriate to define narrower regional geographic markets.
15. We will also consider whether it is appropriate to define the relevant markets according to the entity that is the relevant funder.

Without the acquisition

16. HealthCare NZ submitted that it was the successful bidder for the Geneva Healthcare Group in a competitive sales process with other interested purchasers.⁷ Therefore, the without-the-acquisition scenario is likely to be the Geneva Healthcare Group continuing to operate independently albeit under new ownership.⁸
17. In forming our view of the without the acquisition scenario, we will consider whether other potential acquirers of the Geneva Healthcare Group genuinely exist and the likelihood of the Geneva Healthcare Group accepting their bid.

Preliminary issues

18. HealthCare NZ submitted that competition in the home and community support services market occurs (primarily) at discreet times when Funders tender or renegotiate their requirements.⁹
19. We will investigate whether the proposed acquisition is likely to substantially lessen competition in the relevant markets by looking at the unilateral, coordinated and conglomerate effects that might result from the acquisition. In particular, we will consider the following issues.

Competition between HealthCare NZ and the Geneva Health Group.

20. We will consider the closeness of competition between the merging parties, including the extent to which they compete for contracts with funders that come up for tender.

Existing competition

21. HealthCare NZ submitted that the home and community support services market is unconcentrated and is characterised by a mix of 'for profit' and 'not for profit', national, supra-regional and regional providers.¹⁰
22. We will consider the extent to which other providers currently compete or could potentially compete with the merging parties in the relevant markets for contracts

⁷ Application at Executive Summary: "Aggregation of home and community support services".

⁸ Application at [20].

⁹ Application at [48].

¹⁰ Application at [43].

with funders, and whether they would effectively constrain the merged entity during tender processes.

Potential competition

23. HealthCare NZ submitted that barriers to expansion in the home and community support services market are not significant because the key resource to expand is people, and specifically support workers. There are 55,000 support workers in New Zealand and they can readily transfer between providers. An existing provider could expand into other regions with little difficulty.¹¹
24. We will consider entry and expansion conditions into the relevant markets and whether entry or expansion would be likely, timely, and sufficient in extent to prevent a substantial lessening of competition.

Countervailing power

25. HealthCare NZ submitted that the funders will continue to have countervailing power by structuring their contracts to facilitate a competitive outcome and constrain the merged entity.¹²
26. We will consider whether the funders will have sufficient power to sufficiently constrain the merged entity from increasing its prices or reducing the quality of its services.

Next steps in our investigation

27. The Commission is currently scheduled to make a decision on HealthCare NZ's application by **Friday 25 August 2017**. This date may change as our investigation progresses.¹³ In particular, if we need to test and consider the issues identified further, the decision date is likely to extend. Any extension of the decision date will be published on our clearances register.
28. As part of our investigation, we will be identifying and contacting parties we consider will be able to help us assess the preliminary issues identified above.

Making a submission

29. If you wish to make a submission on this matter, please send it to us at registrar@comcom.govt.nz with the reference HealthCare NZ/Geneva in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on **Thursday 3 August 2017**.
30. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version.
31. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be

¹¹ Application at [50]

¹² Application at [69 and 89].

¹³ The Commission maintains a clearance register on our website at <http://www.comcom.govt.nz/clearances-register/> where we update any changes to our deadlines and provide relevant documents.

good reason to withhold certain information contained in a submission under the OIA. For example, if disclosure would unreasonably prejudice the supplier or subject of the information. In assessing the confidentiality of information contained in submissions for the purposes of publication on our website, we intend to apply an approach that is consistent with the OIA.