

Statement of Preliminary Issues

GSK / Pfizer's consumer healthcare business

20 March 2019

Introduction

1. On 7 March 2019, the Commerce Commission (the Commission) registered an application from GlaxoSmithKline plc (GSK) seeking clearance to acquire the consumer healthcare business of Pfizer Inc (Pfizer) (the Proposed Acquisition).¹ The clearance application relates to the Proposed Acquisition to the extent that it affects markets in New Zealand.
2. The Commission will give clearance if it is satisfied that the Proposed Acquisition 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.²
4. We invite interested parties to provide comments on the likely competitive effects of the Proposed Acquisition. We request that parties who wish to make a submission do so by **Wednesday 3 April 2019**.

The parties

5. GSK is a global pharmaceutical company active in the research, development, manufacturing and supply of prescription pharmaceuticals, human vaccines, and consumer healthcare pharmaceuticals that are available without a prescription.
6. Pfizer is also a global pharmaceutical company involved in the research, development, manufacturing and supply of medicines. Pfizer's consumer healthcare business develops, manufactures and supplies non-prescription medicines in the areas of pain management, gastrointestinal health, respiratory, dietary supplements and personal care products.
7. In New Zealand, the main products that both parties supply are non-prescription cold and flu treatments, and medicines for systemic pain relief. In relation to:
 - 7.1 cold and flu treatments, GSK's brands include Otrivin and Coldrex while Pfizer's brands include Robitussin and Dimetapp; and

¹ A Public version of the application will be available on our website at: <https://comcom.govt.nz/case-register/case-register-entries/glaxosmithkline-plc,-pfizer-inc>

² 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.

- 7.2 systemic pain relief treatments, GSK's brands include Panadol, Panadeine and Voltaren, while Pfizer's main brand is Advil.

Our framework

8. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.³ As required by the Commerce Act 1986, we assess acquisitions using the substantial lessening of competition test.
9. We compare the extent of competition in each relevant market both with and without the acquisition. This allows us to assess the degree by which the proposed acquisition might lessen competition.⁴ If the lessening of competition is likely to be substantial, we will not give clearance to the proposed acquisition. When making that assessment, we consider, among other matters:
- 9.1 constraint from existing rivals – the extent to which current rivals compete and the degree they would expand their sales if prices increased;
- 9.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased; and
- 9.3 the countervailing market power of buyers – the potential constraint on a business from the purchaser's ability to exert substantial influence on negotiations.

Market definition

10. We define markets in the way that we consider best isolates the key competition issues that arise from the acquisition. 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.
11. The Proposed Acquisition relates to the supply of certain over-the-counter (OTC) pharmaceutical products, which are treatments and remedies that can be purchased without a prescription. GSK submits that the supply of OTC pharmaceuticals products should be assessed separately from prescription-only medicines, which is how the Commission has assessed similar products in the past.⁵
12. To this extent, GSK submits there is limited overlap between the two parties and that the only relevant markets are the national markets for the wholesale supply of:
- 12.1 OTC cold and flu products; and

³ Commerce Commission, *Mergers and acquisitions guidelines* (July 2013). Available on our website at: <https://comcom.govt.nz/>

⁴ *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

⁵ For example, the Commission took this approach in *Reckitt Benckiser Plc / Boots Healthcare International Limited* (Decision 567, 30 November 2005) and in *Johnson & Johnson / Pfizer Consumer Healthcare* (Decision 594, 8 December 2006).

12.2 OTC systemic pain management products.

13. GSK considers there is a broad range of OTC products that can be used to treat different cold and flu symptoms. For example, some products target one symptom while others target multiple symptoms, some products contain one active ingredient while others include a number, and some products come in several different forms (such as a pills, syrups, or sprays). As a result, consumers make their purchasing decision based on a variety of factors which tend to relate to the severity of their cold or flu symptoms.
14. To this extent, GSK submits that it is appropriate to assess all the single and multi-symptom cold and flu products together. These cold and flu products include:
 - 14.1 cold preparations
 - 14.2 cough suppressants;
 - 14.3 nasal decongestants; and
 - 14.4 throat preparations.
15. In respect of systemic pain management products, GSK submits that these include a broad range of products (containing a range of different active ingredients) that can be used by consumers to manage symptoms of mild-to-moderate pain. GSK further submits that systemic pain management and pain relief products, which are typically supplied in tablet or capsule form, target pain centrally and are therefore different to topical treatments such as gels or creams which are designed to treat more localised aches and pains.
16. In testing GSK's views, we will consider whether different types of cold and flu treatments should be defined as narrower product markets such as discrete single symptom and multi-symptom product markets.
17. We will also consider whether different types of OTC products should be further delineated by sales channel. While there are no restrictions on where some OTC products can be sold, other OTC products are classified as 'pharmacy-only' products or 'restricted medicines' which means that they can only be supplied under the direction of a pharmacist (although they can still be purchased without a prescription). To this extent, we will consider if 'pharmacy only' OTC products face different competitive constraints than other OTC products.

Without the acquisition

18. We will consider the likely state of competition if the Proposed Acquisition proceeds and compare it with the likely state of competition if it does not. GSK stated that if the Proposed Acquisition does not proceed, the status quo would continue with both GSK and Pfizer continuing to operate independently of one another either under present ownership or that of an independent third party.

Preliminary issues

19. GSK and Pfizer are direct competitors in the relevant markets. Therefore, our primary focus will be on investigating whether the Proposed Acquisition would be likely to substantially lessen competition in the relevant market (or markets) by assessing the horizontal effects from the Proposed Acquisition.
20. The key questions that we will be focusing on are would the merged entity by itself be able to profitably raise prices to its customers, reduce the quality of its products, or reduce the research and innovation it undertakes in respect of the relevant products?
21. In addition, we will consider whether the Proposed Acquisition raises any other competition issues such as increasing the potential for coordinated effects or potentially creating conglomerate effects by allowing GSK to tie certain products together.

Unilateral effects: would GSK be able to profitably raise prices by itself?

22. Where two suppliers compete in the same market, a merger of the two would remove a competitor that would otherwise act as a competitive constraint, potentially allowing the merged entity to unilaterally raise prices or lessen quality. In industries where firms compete to supply innovations to the market, a merger could also reduce the amount of innovation post-merger.⁶
23. GSK and Pfizer overlap in the supply of OTC cold and flu products and OTC systemic pain management products. To assess whether any loss of competition between GSK and Pfizer in the supply of these products would enable GSK to raise prices (or reduce quality), we will assess:
 - 23.1 how closely GSK and Pfizer compete against one another with their existing portfolio of products, including the extent to which brand plays a role in any competition between the two parties;
 - 23.2 how closely GSK and Pfizer compete with one another to introduce new products, including the extent to which there is overlap in the pipeline portfolios of the two parties; and
 - 23.3 the degree of constraint that rival suppliers of the different type of products would provide on GSK.

Next steps in our investigation

24. The Commission is currently scheduled to make a decision on whether or not to give clearance to the Proposed Acquisition by **Tuesday 7 May 2019**. However, this date

⁶ For ease of reference, we only refer to the ability of the merged entity to “raise prices” from this point on. This should be taken to include the possibility that the merged entity could reduce quality or worsen an element of service (ie, it could increase quality-adjusted prices), and include reduced levels of innovation.

may change as our investigation progresses.⁷ In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.

25. As part of our investigation, we will be identifying and contacting parties that we consider will be able to help us assess the preliminary issues identified above.

Making a submission

26. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference 'GSK/Pfizer' 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 **Wednesday 3 April 2019**.
27. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will be publishing the public versions of all submissions on the Commission's website.
28. 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 good reason to withhold certain information contained in a submission under the OIA (eg in circumstances where disclosure would unreasonably prejudice the supplier or subject of the information).

⁷ The Commission maintains a clearance register on our website where we update any changes to our deadlines and provide relevant documents: <https://comcom.govt.nz/case-register>