



Australian
Competition &
Consumer
Commission

Draft Determination

Application for authorisation

lodged by

eRx Script Exchange Pty Ltd

in respect of

a Commercial Interchange Agreement with
MediSecure Pty Ltd

Date: 13 February 2013

Authorisation number: A91348

Commissioners: Sims
Rickard
Schaper
Court
Walker
Willett

Summary

The ACCC proposes to grant authorisation to eRx Script Exchange Pty Ltd to enter into and give effect to a contract with MediSecure Pty Ltd to facilitate interoperability between the parties' electronic pharmaceutical prescription exchange systems.

The ACCC proposes to grant authorisation until 30 June 2017.

The application for authorisation

1. On 13 November 2012 the ACCC received an application for authorisation from eRx Script Exchange Pty Ltd (eRx).
2. eRx is seeking authorisation to enter into a contract which has the purpose of enabling it to make its electronic pharmaceutical prescription exchange system interoperable with MediSecure Pty Ltd's (MDS) prescription exchange system and vice versa. Clause 14 of the proposed contract (Commercial Interchange Agreement), which is the subject of this application, provides that following the introduction of interoperability, eRx and MDS will share equally in the fee which is charged to a pharmacy user and the Commonwealth by the prescription exchange system provider to which the pharmacy is connected in respect of each prescription that has originated on the prescription exchange system of the other party.
3. In its application, eRx sought authorisation until such time as the contract between eRx and MDS has terminated, expired or is otherwise brought to an end. The ACCC understands that authorisation will only be required until such time that the Australian Technical Specifications for the Electronic Transfer of Prescriptions (the Australian Technical Specifications) have been completed and are operating (further information is provided at paragraphs 13 and 14 below). eRx anticipates that this will occur by 2015.

Interim authorisation

4. At the time of lodging the application eRx requested interim authorisation to allow it to enter into and give effect to a contract with MDS to enable their electronic prescription exchange systems to interact with each other.
5. The ACCC granted interim authorisation under subsection 91(2) of the *Competition and Consumer Act 2010* (the Act) on 6 December 2012. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Background

6. A prescription exchange service allows a prescriber to the service (usually a doctor) to lodge an electronic prescription for a patient with a prescription exchange service, which the patient may then be able to have downloaded by a dispenser (usually a pharmacy) accessing the prescription exchange service.
7. The Australian Government considers that the availability of electronic prescriptions is an important component of its ehealth policy. Under the Fifth Community Pharmacy Agreement¹ between the Australian Government and the Pharmacy Guild of Australia, the Australian Government allocated \$75.5 million in funding to provide a payment to pharmacies for each eligible prescription downloaded. The purpose of this payment is to assist pharmacies to offset some of the costs incurred through using prescription exchange services.
8. At present, an electronic prescription fee is paid by the Australian Government to the pharmacy (\$0.15) and the pharmacy in turn pays a fee to the prescription exchange service (currently \$0.15) which held the downloaded prescription. In addition, the prescription exchange service provider also receives a payment from the Government as described below at paragraph 12.
9. eRx submits that based on recent analysis of the data the number of eligible electronic prescriptions² for 2011-12 is less than expected, notwithstanding that there are large numbers of electronic prescriptions being written by doctors. DoHA has advised that between July and December 2012, 141 million prescriptions were processed by Medicare, of these only 3 million were electronic prescriptions (approximately 2.1 per cent).
10. eRx submits that the main cause of a low take-up of electronic prescriptions is an incompatibility between the systems. For example, at present patients present to a pharmacy which is not connected to the particular prescription exchange system containing the relevant prescription and because the systems of the two existing prescription exchange providers do not “talk” to each other the prescription cannot be downloaded.
11. Consequently, the Australian Government is seeking to significantly improve the uptake and use of electronic prescriptions and has therefore implemented a Prescription Exchange Service Interoperability Project. The Interoperability Project is designed to allow electronic prescriptions to be accessed by all pharmacies, irrespective of the prescription exchange service with which the electronic prescription was originally lodged.

¹ Fifth Community Pharmacy Agreement, 3 May 2010.

² In essence, an eligible prescription is a PBS or RPBS prescription (original or repeat) which has been generated electronically in accordance with the National E-Health Transition Authority’s specifications, and downloaded from a prescription exchange service and dispensed by an approved supplier.

12. As part of the Interoperability Project, the Government is contributing just over \$9 million, with \$660,000 for capital investment and \$8,361,460 for the Prescription Exchange Services Electronic Prescription Fee (PEPF). The Government paid \$0.85 to the prescription exchange service for each eligible electronic prescription lodged until 31 December 2012. This then reduced to \$0.35 for each eligible electronic prescription from 1 January 2013 until 30 June 2013 or until the fund has been expended.

Australian Technical Specifications

13. The National E-Health Transition Authority has developed draft electronic transfer of prescriptions (eTP) specifications. These specifications are currently being reviewed and further developed by Standards Australia, after which they will be ready to implement. Once they have been endorsed as an Australian Technical Specification,³ all compliant eTP systems will work towards having the same functionality.
14. Once the Australian Technical Specifications are in place, the ACCC understands from discussions with the Department of Health and Aging (DoHA) that the software underpinning all prescription exchange services will need to comply with those specifications and hence all will be interoperable.

The Parties to the proposed arrangement

15. eRx and MDS are currently the only two parties operating a prescription exchange service in Australia. Currently the two prescription exchange systems are not interoperable – they do not “talk” to each other.
16. The lack of interconnection between the computer system operated by eRx and the computer system operated by MDS means that a pharmacy connected to one prescription exchange service cannot access the electronic prescriptions held by the other prescription exchange service.
17. eRx submits that in order to eliminate any incentives for one prescription exchange service to profit at the expense of the other, they have agreed, subject to authorisation, to divide the fee equally between them when prescriptions originate from one of them but it is dispensed at a pharmacy connected to the other. This is dealt with in Clause 14 of the Commercial Interchange Agreement.
18. eRx describes the market in which the parties operate as the market for the provision of electronic services for the communication of prescription information

³ <http://www.nps.org.au/conditions-and-topics/topics/e-health/electronic-transfer-of-prescriptions-etp>, sourced 17 January 2013.

between prescribers, their patients and pharmacies. eRx submits that these services consist of sophisticated computer systems, programs and equipment designed to ensure seamless, reliable and private communication of prescription communication.

ACCC evaluation

19. The ACCC may authorise anti-competitive conduct such as revenue sharing if it is satisfied that the likely public benefits of the conduct will outweigh the likely public detriments.⁴ Further details regarding the authorisation application can be found on the ACCC's Public Register.
20. In its evaluation of authorisation application A91348 the ACCC has taken into account:
 - that no submissions objecting to the application for authorisation were received⁵
 - the likely future if authorisation is not granted⁶ is that the uptake of electronic prescription dispensing is likely to remain low until such time that the prescription exchange service providers' systems are interoperable
 - the relatively short period of authorisation sought – namely until the Australian Technical Specifications are implemented which the applicant advised should be in 2015.

Public benefits

21. eRx submits that supporting the take-up and use of electronic prescriptions is a significant policy priority for the Government's Fifth Community Pharmacy Agreement. eRx submits that the Government aims to improve the quality use of medicines through supporting the use of electronic transfer of prescriptions via the prescription exchange systems.
22. Currently, the inability of eRx and MDS's systems to interact with each other significantly reduces the incentive for parties to take-up electronic prescriptions and without a revenue sharing agreement between the parties, there are insufficient commercial incentives for them to invest in interoperability.
23. eRx submits that it is expected that an increase in electronic prescriptions will reduce transcription errors and result in cost savings by reducing the time spent by pharmacies in re-keying the prescription information into their systems.

⁴ The statutory tests for granting authorisation are outlined at Attachment A. The ACCC's Guide to Authorisation 2007 (available from the ACCC website) has more details regarding the ACCC's authorisation process.

⁵ Please see the ACCC's Public Register at www.accc.gov.au for more details, including a list of parties consulted.

⁶ For more discussion see paragraphs 5.38-5.40 of the ACCC's Guide to Authorisation 2007.

24. More broadly, eRx submits that the Government's policy is expected to result in widespread improvements to healthcare in Australia, in particular medication management, which will reduce negative impacts on the Australian health system caused by transcription errors in prescription dispensing.
25. DoHA provided a submission in support of the application. DoHA submits that achieving interoperability is in the public interest because it will improve the management of medications for Australians, lower costs and create efficiencies in pharmacies by facilitating the widespread use of electronic prescriptions by medical practitioners and pharmacists.
26. The ACCC considers that authorisation will facilitate the timely implementation of interoperability of the two prescription exchange systems. This in turn is likely to increase the uptake and use of electronic prescriptions and result in public benefits from:
 - a reduction in transcription and interpretation errors
 - increased efficiencies for pharmacies in dispensing prescriptions and
 - greater convenience for patients by being able to access electronic prescription services at more pharmacies.

Public detriments

27. eRx submits that there will be no public detriments arising out of the Commercial Interchange Agreement.
28. The ACCC considers that the agreement is unlikely to prevent or deter new providers of electronic prescription exchange services from entering the market. The ACCC notes that market participants and DoHA are not aware of any prospective new providers in the short term and expect it would take any new provider longer than the expected term of this agreement to establish the necessary arrangements to be able to enter. Further, the parties have indicated that were a new entrant to arise, they are willing to negotiate to extend this agreement to them as well.
29. The ACCC considers that were the parties unwilling to extend the agreement to a prospective new entrant, this would amount to a material change in circumstances such that it would be grounds for the ACCC to review the authorisation.
30. The current arrangement has a 50-50 fee split. The ACCC understands that this was negotiated between the parties and may not fully reflect the respective costs incurred by the originating and dispensing electronic prescription exchange systems. However, in a two-sided market, it is not clear what the most efficient fee split would be. The ACCC also notes that this arrangement is for a relatively short period of time. As a result, the ACCC does not consider any detriment is likely to be significant.

Balance of benefits and detriments

31. On balance, the ACCC considers that the proposed arrangement is likely to result in a benefit to the public in the short term and that this benefit would outweigh any detriment to the public that is likely to result from the arrangement.

Length of authorisation

32. eRx sought authorisation until such time as the contract between eRx and MDS has terminated, expired or is otherwise brought to an end. The ACCC understands that authorisation will only be required until such time as the Australian Technical Specifications have become an Australian Standard which the parties' anticipate is likely to occur by 2015.
33. To ensure there is sufficient time for the Australian Technical Specifications to become an Australian Standard and thereby ensure that eRx and MDS' systems, and those of any future prescription exchange service provider, will be interoperable, the ACCC proposes to grant authorisation until 30 June 2017.

Draft determination

34. Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination. For the reasons set out in this draft determination, the ACCC is satisfied that the tests in sections 90(5A), 90(5B), 90(6) and 90(7) of the Act are met⁷. Accordingly, under sections 88(1A) and 88(1) of the Act, the ACCC proposes to grant authorisation A91348 until 30 June 2017 to allow eRx Script Exchange to enter into a contract with MediSecure and give effect to Clause 14 of the proposed contract, to facilitate interoperability between the parties electronic pharmaceutical prescription exchange systems.

⁷ See Attachment A.

Attachment A - Summary of relevant statutory tests

Subsections 90(5A) and 90(5B) provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of subsection 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

Subsections 90(6) and 90(7) state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.