AUSTRALIAN COMPETITION
& CONSUMER COMMISSION

Draft Determination

Application for authorisation AA1000472
lodged by
eRx Script Exchange Pty Ltd
in respect of
a revenue sharing arrangement with IP MDS Pty Ltd
Authorisation number: AA1000472

13 November 2020

Commissioners:

Keogh

Court

Ridgeway

Summary

The ACCC proposes to re-authorise eRx Script Exchange Pty Ltd (eRx) to continue to give effect to a revenue sharing arrangement with IP MDS Pty Ltd (formerly MediSecure Pty Ltd) (MDS) until 30 June 2025.

The revenue sharing arrangement has the purpose of allowing eRx to continue operating its Prescription Exchange Service (PES), which communicates electronic prescription information between doctors and pharmacies, interoperably with MDS's PES. This means that patients can go to any pharmacy to get medicine, regardless of which PES the doctor uses.

The ACCC considers the revenue sharing arrangement is likely to result in public benefits in the form of: increased efficiencies for pharmacies in dispensing prescriptions; greater convenience for patients by being able to access electronic prescription services at more pharmacies; and reduced transcription and interpretation errors of medical prescriptions.

The ACCC originally authorised the revenue sharing arrangement in 2013. The revenue sharing arrangement has not changed since the original authorisation.

The ACCC will seek submissions in relation to this draft determination by 27 November 2020 before making its final decision.

1. The application for re-authorisation

1.1. On 2 March 2020, eRx Script Exchange Pty Ltd (**eRx**) lodged application for re-authorisation AA1000472 with the Australian Competition and Consumer Commission (the **ACCC**), seeking re-authorisation to continue to give effect to its revenue sharing arrangement with IP MDS Pty Ltd (formerly MediSecure Pty Ltd) (**MDS**).

1.2. The application was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).

1.3. The ACCC may grant authorisation, which provides businesses with legal protection for arrangements that may otherwise risk breaching competition law but are not harmful to competition and/or are likely to result in overall public benefits.

1.4. At the time of lodging the current application, eRx also requested interim authorisation to enable it to continue to give effect to the revenue sharing arrangement beyond 30 June 2020 (when the previous authorisation A91579 expired). The ACCC granted interim authorisation on 4 June 2020. A copy of the ACCC's interim authorisation decision is available on the ACCC's website.

1.5. The interim authorisation remains in place until the ACCC final determination comes into force or it is revoked.

eRx and MDS

1.6. eRx**,** established in 2009, is a wholly owned subsidiary of the Fred IT Group. In 2013, Telstra acquired 50 per cent of the Fred IT Group, which is also part owned by the Pharmacy Guild of Australia.

1.7. MDS is a private Australian company, established in 2009. In 2016, MDS merged with Simple Retail, a pharmacy software company.

1.8. eRx and MDS operate the only two Prescription Exchange Service (**PES**) systems that currently exist in Australia.

The Conduct

1.9. eRx seeks re-authorisation to continue to give effect to a revenue sharing arrangement that underpins the operation of its electronic pharmaceutical prescription exchange system (**the Conduct**). The revenue sharing arrangement has the purpose of allowing eRx to continue operating its PES interoperably with MDS's PES.

1.10. The revenue sharing arrangement for which authorisation is sought is set out in Clause 14 of a Commercial Interchange Agreement between eRx and MDS (see Annexure A of eRx's application).[1] Clause 14 provides that eRx and MDS agree to share equally in the fee which is paid to the dispensing pharmacist by the Australian Government and in turn charged by the owner of the dispensing prescription exchange system to that dispensing pharmacist for each prescription that originated on the prescription exchange system of the other party (the **revenue sharing arrangement**).

1.11. eRx submits that the aim of the revenue sharing arrangement is to eliminate any incentive which might otherwise exist for either service provider to hinder interoperability. That is, in the absence of interoperability, service providers might seek to ensure that prescriptions that have originated on their system (i.e. at the point of original prescribing) remain on their system at the point of dispensing (i.e. in the pharmacy).

1.12. eRx seeks authorisation to extend the operation of the revenue sharing arrangement until the Seventh Community Pharmacy Agreement expires on 30 June 2025.

2. Background

Prescription Exchange Services

2.1. A PES is a computer system that communicates electronic prescription information between doctors and pharmacies. The PES used by the doctor is called the 'originating PES' and the PES used at the pharmacy is called the 'dispensing PES'. Both eRx and MDS operate an originating PES and a dispensing PES. This means that, for example, if a doctor is using the eRx originating PES and a pharmacy is using the eRx dispensing PES, the prescription can be processed through a single system. However, if, for example, the doctor is using the eRx originating PES and the pharmacy is using the MDS dispensing PES, there are two independently operated systems involved in processing the prescription.

2.2. Interoperability between PES systems has been a component of the Australian Government's work towards electronic prescribing. The Australian Government has been encouraging the uptake of electronic prescriptions to improve healthcare outcomes, including by avoiding pharmacies having to re-key the information on prescriptions, which reduces the number of transcription errors.

2.3. While PES systems enable electronic transfer of prescription information, including by way of barcode scanning of a paper script, this does not equate to 'electronic prescribing'. Until legislative changes were made in 2019, the paper script has been the only legal instrument that can be used to access the Pharmaceutical Benefits Scheme. Earlier this year, electronic prescribing trials began in several locations in

[1] Annexure A, eRx application for authorisation, available here.

Victoria. The architecture to enable electronic prescribing has been built around the existing PES systems. However, paper scripts will still be available, sitting alongside electronic prescribing.

2.4. With two PES systems operating in Australia, an agreement between the PES owners (and the Australian Government, through the Department of Health) was necessary to allow prescriptions to be put into one system and taken out of the other. As part of the Australian Government's Interoperability Project, data from paper scripts can now be transferred electronically by all pharmacies, no matter which PES the script originated on.

Australian Government funding

2.5. Eligible transactions through PES systems have previously been funded through the Community Pharmacy Agreements. The Sixth Community Pharmacy Agreement provided funding of $12.7 million per year and the arrangements have been continued for the first year of the Seventh Community Pharmacy Agreement, which commenced on 1 July 2020.[2] This money funds payments to pharmacists of $0.15 for each eligible prescription which is downloaded by a PES. In turn, pharmacies are charged $0.15 by the owner of the dispensing PES. It is this fee that eRx and MDS are seeking re-authorisation to split between them for eligible prescriptions, where one of them is the dispensing PES and the other the originating PES.

2.6. In its submission in support of the application, the Australian Government Department of Health notes that, under the Seventh Community Pharmacy Agreement, it has committed to continuing the existing Commonwealth funding arrangement relating to the Prescription Exchange Services. This will cover the 2020-21 financial year. After this, the Department of Health will establish direct arrangements with the PES systems to facilitate pharmacists' receipt of electronic prescriptions.

2.7. The Department of Health has clarified that although the mechanism may change, the funding is proposed to continue for the life of the Seventh Community Pharmacy Agreement.

Previous authorisations

2.8. On 7 March 2013, the ACCC granted authorisation to eRx to make and give effect to the revenue sharing arrangement with MediSecure (now MDS). The original authorisation expired on 30 June 2017, but was re-authorised until 30 June 2020.

2.9. Further information about the ACCC's original assessment of the likely public benefits and public detriments from the revenue sharing arrangement is contained in the 2013 eRx authorisation decision and the 2017 eRx authorisation decision.

3. Consultation

3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Conduct.

3.2. The ACCC invited submissions from a range of potentially interested parties and received two submissions, as well as a letter of support from the Department of Health.

3.3. The Medical Software Industry Association expressed support for the arrangements, particularly in the context of COVID-19.

2 Section 9.4 of the Seventh Community Pharmacy Agreement

3.4. An anonymous interested party, that describes itself as a potential new supplier of a PES, is concerned that the arrangements entrench a duopoly, rather than promoting innovation and competition between systems alongside the recent legislative changes that allow electronic prescribing.

3.5. In response to this point, eRx states the following:

- It has not been approached by any prospective new providers who are developing or considering developing a PES. eRx has regular meetings with a wide variety of organisations about electronic prescriptions but at no time has eRx discussed or been asked about a Commercial Interchange Agreement.
- During 2019-20, eRx and IP MDS Systems have been active participants in the design and development of ePrescribing in collaboration with the medical software industry, Commonwealth Department of Health (DOH) and the Australian Digital Health Agency. The DOH ePrescribing architecture specifies requirements to ensure additional PESs are able to enter the market and are able to enter a Commercial Interchange Agreement with eRx and IP MDS systems, should they meet the technical requirements as specified in the ePrescribing architecture.

3.6. In response to the anonymous interested party submission, the Department of Health notes that 'prescription exchanges are a competitive market and the Department has from time to time received expressions of interest from other providers to become a PES. An interoperable ecosphere is essential to foster this competition.'

4. ACCC assessment

4.1. The ACCC's assessment of the Conduct is carried out in accordance with the relevant authorisation test contained in the Act.

4.2. eRx has sought authorisation for conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act.

4.3. Consistent with subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (**authorisation test**).

Relevant areas of competition

4.4. To assess the likely effect of the Conduct, the ACCC will identify the relevant areas of competition likely to be affected.

4.5. The ACCC considers that the area of competition likely to be affected by the Conduct is the supply of pharmaceutical PES systems to Australian community pharmacies and doctors.

Future with and without the Conduct

4.6. In applying the authorisation test, the ACCC compares the likely future with the Conduct that is the subject of the authorisation to the likely future in which the Conduct does not occur.

4.7. eRx advises that the Commercial Interchange Agreement, underpinning interoperability of the two PES systems, would automatically terminate if the revenue sharing arrangement was not authorised.[3]

4.8. The ACCC considers that:

- without the revenue sharing arrangement, the Commercial Interchange Agreement underpinning the interoperability of the two PES systems would likely cease, which could have an adverse impact on the operation and use of electronic prescriptions within community pharmacies across Australia, and
- in the future where the revenue sharing arrangement occurs, the two PES systems would continue to interoperate, meaning electronic prescriptions would be able to be accessed by all pharmacies, no matter which PES the doctor used to write the prescription.

Public benefits

4.9. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

> *…anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements … the achievement of the economic goals of efficiency and progress.*[4]

4.10. eRx submits that the continued operation of the revenue sharing arrangement supports the uptake of electronic prescriptions which leads to improved healthcare outcomes and quality use of medicines. For example, avoiding the need for pharmacists to re-key prescription information leads to a reduction in transcription errors.

4.11. The Department of Health submits that interoperability between the two PES systems continues to be in the public interest as it enables patient choice of pharmacy and facilitates efficiencies through widespread use of electronic prescriptions in the community. Continuity of interoperability also allows continued improvement between the two PES systems and continued improvement of Australian medication management systems. It supports better Quality Use of Medicines under the National Medicines Policy and contributes to the broader digital health agenda.

4.12. In its 2013 authorisation, the ACCC concluded that the revenue sharing arrangement would facilitate the timely implementation of interoperability of the two PES systems. In turn, this was likely to increase the uptake and use of electronic prescriptions and result in the following public benefits:

- increased efficiencies for pharmacies in dispensing prescriptions

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[3] eRx covering letter to application for authorisation A91579, 28 April 2017, p. 2.

4 *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; cited with approval in *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

- greater convenience for patients by being able to access electronic prescription services at more pharmacies, and
- a reduction in transcription and interpretation errors.

4.13. Since the revenue sharing arrangement commenced, the ACCC notes the use of electronic prescriptions has increased. eRx submits that around 80 per cent of doctors and 90 per cent of pharmacies now use a PES.

4.14. The ACCC considers the continuation of the revenue sharing arrangement, which underpins the interoperability of the two PES systems, will facilitate the ongoing development and growth in the use of electronic prescriptions by doctors and pharmacies.

4.15. Accordingly, the ACCC considers that the Conduct is likely to continue to result in the public benefits identified at paragraph 4.12 above.

Public detriments

4.16. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal, which has defined it as:

> *…any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.*[5]

4.17. eRx submits there are no public detriments generated by the revenue sharing arrangement for the following reasons:

- it is not aware of any new providers who are developing or considering developing a PES,
- it expects it would take any new provider longer than the authorisation period sought (i.e. beyond 30 June 2025) to develop the necessary systems and establish the necessary arrangements to be able to enter the market as a PES
- in any event, the continued operation of the Revenue Sharing Arrangement is unlikely to prevent or deter new providers of PESs from entering the market. The Commercial Interchange Agreement (Annexure A) in Clause 49 provides that the parties are free to enter into similar interchange agreements with any other person or persons who develop a PES and who are permitted to commercialise the use of their PES by the Commonwealth. If a new entrant emerged, the parties are willing to negotiate to extend the Commercial Interchange Agreement to them as well. Were the parties unwilling to extend this 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
- the relatively short period of authorisation sought. eRx seeks authorisation until the new 7CPA will expire, of which a significant policy component is finalising the framework to enable the prescribing, dispensing and claiming of Pharmaceutical Benefits Scheme medicines in a seamless electronic manner, and
- given the Revenue Sharing Agreement is only relevant when a script originates on the software owned by the other party, eRx and MDS will still compete to supply their PESs to doctors and pharmacies.

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5 *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

4.18. In general, a revenue sharing agreement between competitors tends to reduce their incentives to compete. However, the ACCC recognises in this case that the revenue sharing arrangement underpins the interoperability of eRx and MDS's PES systems. Interoperability between these systems directly supports the policy outcomes sought by the Department of Health and supports Australia's National Digital Health Strategy. In addition, the revenue sharing arrangement relates only to the fee charged to the dispensing pharmacist and not to other revenue eRx and MDS receive in the course of their businesses.

4.19. The ACCC notes the concerns raised by a potential new supplier of PES systems and the comments in response from eRx and the Department of Health (at paragraphs 3.4 to 3.6). Based on the information available, the ACCC considers that the continued operation of the revenue sharing arrangement is unlikely to prevent new providers of PES systems from entering the market given that the Department of Health ePrescribing architecture specifies requirements to ensure additional PES systems are able to enter the market and are able to enter a Commercial Interchange Agreement with eRx and MDS systems, should they meet the technical requirements as specified in the ePrescribing architecture and conformance specifications.

4.20. The ACCC notes that if eRx and MDS did not extend the Commercial Interchange Agreement to a prospective new PES supplier, this might be a material change in circumstances that would provide grounds for the ACCC to review the authorisation.

4.21. Overall, the ACCC considers the Conduct is likely to result in minimal, if any, public detriment.

Balance of public benefit and detriment

4.22. The ACCC is satisfied that the Conduct is likely to result in the following public benefits and that these public benefits would outweigh any likely detriment to the public:

- increased efficiencies for pharmacies in dispensing prescriptions
- greater convenience for patients by being able to access electronic prescription services at more pharmacies, and
- a reduction in transcription and interpretation errors of medical prescriptions.

Length of authorisation

4.23. The Act allows the ACCC to grant authorisation for a limited period of time.[6] This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

4.24. In this instance, eRx is seeking authorisation to continue to give effect to the revenue sharing arrangement until 30 June 2025 when the Seventh Community Pharmacy Agreement expires.

4.25. The Department of Health submits that interoperability between the existing PES systems will provide benefits for the 2020-21 financial year and is expected to continue to provide benefits to the public beyond this. While the Commonwealth payment mechanism will change after the 2020-21 financial year, the Department of Health is

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6 Subsection 91(1).

supportive of the PES systems continuing to interoperate. Accordingly, the Department is comfortable with the authorisation aligning with the Seventh Community Pharmacy Agreement timeline (until 30 June 2025).

4.26. The ACCC considers the period of authorisation sought is appropriate, and proposes to grant authorisation until 30 June 2025.

5. Draft determination

The application

5.1. On 2 March 2020, eRx lodged application AA1000472 with the ACCC, seeking authorisation under subsection 88(1) of the Act.

5.2. eRx seeks authorisation for the Conduct outlined at paragraph 1.9.

5.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

5.4. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Conduct.

5.5. For the reasons outlined in this draft determination, and subject to the proposed conditions, the ACCC is satisfied, in all the circumstances, that the Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Conduct, including any lessening of competition.

5.6. Accordingly, the ACCC proposes to grant authorisation.

Conduct which the ACCC proposes to authorise

5.7. The ACCC proposes to grant authorisation to eRx to continue to give effect to the revenue sharing arrangement with MDS until 30 June 2025.

5.8. This draft determination is made on 13 November 2020.

6. Next steps

6.1. The ACCC now invites submissions in response to this draft determination by 27 November 2020.

6.2. In addition, consistent with section 90A of the Act, eRx or an interested party may request that the ACCC hold a conference to discuss the draft determination.