competitiontribunal SOUTH AFRICA

# COMPETITION TRIBUNAL OF SOUTH AFRICA

**Case No:LM181Jan21**

In the matter between:

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| **DISCHEM PHARMACIES LIMITED** | Acquiring Firm |
| and | |
| **PURE PHARMACY HOLDINGS PROPRIETARY LIMITED** | Target Firm |

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| Panel | : | Enver Daniels (Presiding Member) |
| | : | Yasmin Carrim (Tribunal Member) |
| | : | Imraan Valodia (Tribunal Member) |
| Heard on | : | 17 September 2021 |
| Order issued on | : | 20 September 2021 |
| Reasons issued on | : | 19 October 2021 |

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## REASONS FOR DECISION

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## Approval

[1] On 20 September 2021, the Competition Tribunal conditionally approved the large merger between Dis-Chem Pharmacies Ltd (“Dis-Chem”) and Pure Pharmacy Holdings (Pty) Ltd (“PPH”).

[2] The reasons for the approval follow.

**Parties to the transaction and their activities**

*Primary acquiring firm*

[3] The primary acquiring firm is Dis-Chem, which is controlled by Ivlyn Local Investment Holdings (Pty) Ltd ("Ivlyn") (52.7%), while Dis-Chem's remaining shareholding is widely held by the general public. Ivlyn is ultimately wholly controlled [redacted][1]

[4] Dis-Chem, through its various subsidiaries, is active along the pharmaceutical supply chain ranging from wholesale distribution (including logistics) to the operation of retail pharmacies. Dis-Chem is a wholesale distributor of scheduled and unscheduled pharmaceutical products as well as front shop products.[2] Dis-Chem pharmacy stores are licensed to provide both scheduled and unscheduled pharmaceutical products,[3] front shop products, as well as primary healthcare services through its clinics which are located in most of its pharmacy stores.

[5] Dis-Chem also operates a courier pharmacy service for online orders, which dispenses and delivers over-the-counter drugs, prescription medicine and front shop products.

[6] The Competition Commission's ("Commission") investigation found that Dis-Chem wholly owns a subsidiary, The Local Choice (Pty) Ltd ("The Local Choice"), which is a franchisor of numerous independent franchisee pharmacies in the retail pharmaceutical market under The Local Choice pharmacy brand. The Commission therefore included the market share of The Local Choice franchisees in the computation of Dis-Chem's market share.

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[1] [redacted] directly and indirectly controls various residential, retail, warehouse and office property-owning companies throughout South Africa.

[2] Front shop products include healthcare, baby care, personal care, confectionery, dry groceries, household goods and perishables.

[3] Scheduled pharmaceutical products are medical products which can be obtained by prescription, or over-the-counter medicine which can be obtained without a prescription at a pharmacy. Unscheduled pharmaceutical products are those that can be purchased at a pharmacy, local shop or service stations and include items such as aspirins and vitamins.

[7] Dis-Chem's 181 pharmacy stores are located in the major metropolitan areas and suburbs in South Africa. Combined with The Local Choice's pharmacies, Dis-Chem controls a total of 320 pharmacies pre-merger.

*Primary target firm*

[8] The primary target firm is PPH, a private company controlled by SGP Investment Holdings (Pty) Ltd ("SGP Investment Holdings") [redacted]. SGP Investments Holdings controls several other firms.

[9] PPH is a healthcare and pharmacy group. Through its wholly owned subsidiary, Pure Pharmacy Retail (Pty) Ltd ("PPR"), PPH holds the retail pharmacy licenses for its 50 pharmacy stores branded "Medicare" which are active in the retail of scheduled and unscheduled pharmaceutical products, as well as front shop products.

[10] The Medicare stores are located in Gauteng, Limpopo, Mpumalanga, and the Western Cape. PPH, [redacted] that relates to its now discontinued wholesale distribution activities which were carried out under PPH's Pharmasave brand ("Pharmasave"). [redacted] of PPH's wholesale distribution activities (through Pharmasave) were dedicated to its Medicare pharmacies.

[11] PPH previously owned Healthforce (Pty) Ltd ("Healthforce"), which provides clinic practice management software that functions as a telemedicine service enabling nurses in clinics to provide better care with the help of a team of remote general practitioners via video link. The merger parties submitted that Dis-Chem's acquisition of Healthforce in March 2021 was not notifiable as a small merger, and was a separate transaction from Dis-Chem's acquisition of PPH. The Commission subsequently requested the merger parties to notify the Healthforce acquisition to enable the Commission to assess it as part of Dis-Chem's acquisition of PPH.

## Proposed transaction

[12] In terms of the proposed transaction, Dis-Chem intends to acquire 100% of PPH's issued share capital. Post-merger, Dis-Chem will exercise sole control over PPH, and the Medicare pharmacies.

## Relevant markets and impact on competition

[13] The Commission considered the activities of the merger parties and found that the proposed transaction results in both horizontal and vertical overlaps. Based on previous precedent and information obtained from the market, the Commission assessed the proposed transaction's effect on competition in the following markets:

13.1. The national upstream market for the wholesale distribution of pharmaceutical products;
13.2. The national downstream market for the retail of scheduled pharmaceutical products;
13.3. The national downstream market for the retail of unscheduled pharmaceutical products;
13.4. The national downstream market for the retail of front shop products;
13.5. The local downstream markets for the retail of scheduled pharmaceutical products within a 5km radius of certain overlapping local markets;
13.6. The local downstream markets for the retail of unscheduled pharmaceutical products within a 5km radius of certain overlapping local markets;
13.7. The national market for the provision of telemedicine services.

*Market share assessment*

[14] The Commission considered the market shares of the merger parties and market participants based on both revenue and the number of retail pharmacy stores owned by the respective market participants.

[15] In the national upstream market for the wholesale distribution of pharmaceutical products, the Commission found that Dis-Chem had a market share of less than [redacted] based on revenue.[4] The Commission found that there would be no post-merger accretion as PPH Pharmasave exited this market in October 2020. The Commission found that Pharmasave's exit was not merger specific as it pre-dated merger discussions.

[16] In the national downstream market for the retail of scheduled pharmaceutical products, the Commission found that Dis-Chem (including TLC) held the largest market share and that the merged entity would have a market share below [redacted] following a low accretion of less than [redacted]

[17] In the national downstream market for the retail of unscheduled pharmaceutical products, the Commission found that Dis-Chem (including TLC) held the largest market share and that the merged entity would have a market share below [redacted] following a low accretion of less than [redacted]

[18] In the national downstream market for the retail of front shop products, the Commission found that Dis-Chem (including TLC) held the second largest market share and that the merged entity would have a market share below [redacted] following a low accretion of less than [redacted][5]

[19] In relation to the local downstream markets for the retail of scheduled and unscheduled pharmaceutical products within a 5km radius of certain overlapping local markets in 35 geographic areas, the Commission assessed whether the merger resulted in the reduction of the number of competing pharmacies within a 5km radius.[6]

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[4] Although the Commission and the merger parties' market share estimates differed considerably for this market, both found that Dis-Chem was the second largest participant in this market.

[5] The Commission found that market shares of big pharmacy groups like Dis-Chem and Clicks are insignificant in this market as their front shop products face competition from a variety of players such as large and small grocery chains (including online retailers), petrol stations and spaza shops who sell these products.

[6] The 5km radius has been confirmed by certain stakeholder submissions as the appropriate catchment area within which pharmacies compete to attract customers at a local level.

[20] The Commission found that in the local markets where the post-merger market shares were below 35%, the market share accretions ranged between 1% and 10%. The Commission noted that in two of the localised markets where Dis-Chem had a 35% market share, the Medicare pharmacies in those markets appear not to be effective competitors [redacted]

[21] In the local markets where the post-merger market shares were above 35%, the Commission was concerned that the transaction may increase market concentration and may potentially distort competition in these markets. The Commission, however, found that the accretions were low [redacted] and do not raise any significant competition concerns.[7]

*Market structure and concentration*

[22] The Commission reviewed the retail pharmacy landscape to investigate whether the transaction would have any negative impact on the market structure going forward. The Commission conducted an analysis to show how the market structure has changed over time and looked in particular at a five-year period between 2017 to 2021. The Commission found that corporate pharmacy groups such as Clicks and Dis-Chem had grown considerably in terms of the number of pharmacy outlets during the period under review, compared to the decline of independent pharmacy groups. Dis-Chem (including TLC) grew from approximately 159 pharmacies in 2017 to 320 pharmacies in 2021 (a growth rate of 101%). During the hearing, it was clarified that the large majority of this growth was organic and not acquisitive.[8]

[23] The Commission further notes that the proposed transaction notably alters the structure of the national pharmaceutical retail market in that it reduces the number of significant independent pharmacy groups that appear to be closer competitors to the big two corporate groups (Dis-Chem and Clicks) compared to

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[7] Regarding the exception of Noordhoek in Cape Town where the accretion was [redacted] post-merger, the Commission found that there were 4 other pharmacies within a 5km radius, which included a Clicks.

[8] Transcript pages 136-137 from para 20.

individual independent pharmacies. The Commission notes that aside from PPH with its 50 pharmacies nationwide, the other significant true independent pharmacy groups are Arrie Nel with 86 pharmacies and Van Heerden with 18 pharmacies. The other independent groups would be the Alpha Pharm (415) and Link (170) commonly branded pharmacies.

[24] With the takeover of the PPH pharmacies, Dis-Chem (including TLC) would grow from 320 to 370 pharmacies nationwide and the market would be left with smaller independent pharmacy groups which had a regional as opposed to a national presence, such as Van Heerden, Klinicare and Mopani. The Commission found that the merger reduces the number of independent pharmacy groups that play an important role for competition, innovation and economic participation in the market.

*Creeping merger assessment*

[25] The Commission found that Dis-Chem has been implementing a series of mergers within the retail pharmaceutical market over the past 6 years with only a few of these being notifiable to the competition authorities.[9] The Commission submitted that it was concerned that Dis-Chem may be embarking on a creeping mergers strategy where it was growing its market share and pharmacy network undetected and without its regulatory oversight.

[26] In light of the above, the Commission imposed a condition requiring Dis-Chem to notify any small merger in terms of which it may acquire control over another entity in the pharmaceutical market, for a period of 5 years.

[9] Approximately [redacted] mergers and acquisitions of mainly single store retail pharmacies, with only [redacted] of these being notifiable transactions.

*Removal of an effective competitor*

[27] The Commission found that PPH and Dis-Chem offer comparable services in their respective retail pharmacy stores in relation to the provision of front shop products, telemedicine offerings, and primary healthcare through in-store pharmacy clinics (although the Commission found that Dis-Chem has a much larger floor size for its retail stores when compared to Medicare pharmacies owned by PPH). In addition, the Commission found that other pharmacy groups also provide comparable services and they would remain in the market to impose a competitive constraint on Dis-Chem post-merger.

[28] The Commission found that PPH had an intention [redacted]. As such, the Commission noted that PPH did not pose a credible, sustainable and effective competitive constraint in the retail pharmacy market given [redacted] PPH was unlikely to be an effective competitor to the corporate pharmacies without [redacted]

*Views of third parties*

[29] The Commission found that the “videomed” services provided by Healthforce, although innovative, were not unique to PPH as there were other competitors providing the same service in retail pharmacy stores. The Commission interviewed representatives from two videomed competitors, Udok (Pty) Ltd

("Udok")[10] and Allegra Virtual Care (Pty) Ltd ("Allegra"),[11] who raised concerns regarding the proposed transaction.

[30] Udok submitted that Dis-Chem owning a technology firm operated by doctors that prescribe medication to that pharmacy would create a conflict of interest because the more prescriptions the doctors filled, the more revenue they would make from the pharmacy.

[31] Allegra submitted that it provides videomed services to PPH, and had previously provided videomed services to Dis-Chem until Dis-Chem terminated its contract in March 2021. Allegra submitted that the proposed transaction might result in its current users, who utilise Allegra's system at Dis-Chem pharmacies, no longer being able to utilise Allegra if Dis-Chem did not integrate Allegra into the Healthforce system,[12] as a patients' information should be readily available to ensure continuity of health care regardless of whether a patient decides to consult a doctor from a Clicks, Dis-Chem, Intercare etc. Allegra also submitted that if a patient consults with a doctor via e.g. Healthforce, that patient should be able to choose where they submit their prescription and which pharmacy provides them with medicine.[13]

[32] The Tribunal was ultimately satisfied with the conditions imposed by the Commission which sought to address the concerns of Udok and Allegra by creating open access to the Healthforce platform as well as maintaining a patient's ability to choose.

[10] Udok mainly delivers the videomed service to Clicks pharmacies in South Africa and it currently delivers services to about 100 clinics nationwide.

[11] Allegra provides videomed services to approximately 410 pharmacies in South Africa which include, inter alia, Clicks, Arrie Nel, Van Heerden Pharmacy, Alpha Pharm, Pick' n Pay, The Local Choice group and other independent pharmacies.

[12] Allegra indicated that interoperability was the feature that enabled unrestricted sharing and use of data or resources between unrelated systems via local area networks or wide area networks. Electronic health records, telemedicine and patient applications should all be part of the interface.

[13] This was submitted to be essential since medical schemes/funders had certain rules that were applicable in respect of designated service providers.

[33] During the hearing, the CEO of the Independent Community Pharmacy Association ("ICPA")[14] raised several concerns regarding how the proposed transaction continued the erosion of independent pharmacies and paved a move towards corporate oligopolies. It was submitted that prior to 2003, all pharmacies were independent, compared to the present position of 72% of pharmacies being independent and 28% being corporately owned, with the corporate pharmacies predominantly located in metropolitan areas. This erosion of independent pharmacies was said to have a more significant impact on pharmacies in smaller towns and non-urban areas should pharmacies in these areas be closed down as a result of poor performance, as this would affect access to healthcare in these communities.

[34] Through further engagement, it was ultimately established that the risk of diminished access to healthcare in smaller towns and non-urban areas with loss-making corporate pharmacies was sufficiently mitigated by likely scenarios including (i) a pharmacist purchasing the pharmacy and operating it independently; or (ii) a pharmacist opting to establish another smaller independent pharmacy nearby; or (iii) a corporate group opting to open a low-cost pharmacy model to service the area.

*Failing firm assessment*

[35] The Commission noted that although the merger parties did not submit that PPH was a failing firm, the merger parties intimated that absent this transaction [redacted]

[36] The Commission conducted a failing firm assessment in order to determine whether the target firm qualifies as a failing firm in terms of the Act. The Commission found that the PPH group (including Medicare and Healthforce) was [redacted]

[14] A non-profit company representing approximately 1225 pharmacies that are both independently and corporately owned, for the interests of small community independent pharmacies.

[redacted]

[37] PPH also retrenched 27 employees during May and June 2020 in its Medicare stores, which the merger parties submitted was [redacted] not merger related.

[38] Although the Commission was initially of the view that [redacted]

[39] The Commission was of the view that with the introduction of the proposed transaction, PPH did not have sufficient time to realise the benefits of the [redacted] As such, the Commission did not decisively determine whether the [redacted] was successful or not in line with the failing firm assessment. The Commission therefore imposed a condition that necessitated the merger parties waiting an additional 12 months from the implementation date before conducting any store closures to allow for the implementation of turn-around plans.[15]

[40] The Commission also found that PPH explored other, [redacted]

[15] This excludes the 14 loss making stores discussed in paragraph 49.

[41] The Commission also met with the executives of PPH who submitted that [redacted]

[42] [redacted]

[43] [redacted]

[16] The SEP is comprised of the manufacturer's exit price ("ex-manufacturer price") plus a distribution or logistics fee (capped according to regulations) and 15% value-added tax ("VAT"). The ex-manufacturer price is the proposal put forward by the manufacturer for new drugs. The final price charged to the end-user includes a dispensing fee, which was charged in addition to the SEP, for services rendered by pharmacists.

[redacted]

[44] As such, the Commission was of the view that PPH had significant financial challenges that it failed to overcome despite numerous attempts over the years, and [redacted] and was unlikely to act as an effective competitive constraint on Dis-Chem.

*Conclusion on competition*

[45] The Commission was of the view that although the proposed transaction reduces the number of independent pharmacy groups which play an important role for competition, innovation and economic participation in the retail pharmacy market, and removes a competitor that owns a substantial number of retail pharmacy stores, PPH was not an effective competitor. Absent the proposed transaction, [redacted] that may ultimately have resulted in it closing a substantial number of its retail pharmacy stores such that its ability to compete would be diminished.

[46] In order to remedy some of the concerns identified during its investigation, such as the rapid growth of corporate pharmacy groups through acquisitions and the potential foreclosure of Dis-Chem competitors from accessing Healthforce, the Commission proposes that the proposed transaction be approved subject to the annexed conditions.

[47] We found no reason to disagree.

**Public interest**

[48] The Commission found that the proposed transaction was likely to result in duplications that may affect [redacted] employees as identified by the labour due diligence conducted by the merger parties. The Commission noted that the

merger parties conducted a rational process in identifying the employees that were likely to be affected by potential retrenchments. Of the [redacted] employees identified, the Commission noted that Dis-Chem would absorb [redacted] of the potentially affected employees and only [redacted] positions were likely to be redundant and retrenched.

[49] The Commission found that there were [redacted] loss-making stores owned by PPH that were likely to be closed after the implementation of the proposed transaction in an attempt to prevent the target firm from making further substantial losses. The merger parties, however, indicated that of the [redacted] loss-making stores, they would absorb the employees of [redacted] stores elsewhere in the Dis-Chem group and would limit retrenchments to [redacted] affected stores. The merger parties indicated that these [redacted] affected stores had approximately [redacted] employees.

[50] In light of the above, the Commission imposed a condition limiting the number of potential retrenchments to a maximum of [redacted] employees, being the [redacted] positions likely to be affected as a result of duplications and the [redacted] store employees that may be retrenched as a result of potential store closures of the [redacted] loss-making retail pharmacy stores. In addition, the merger parties had undertaken to offer these affected employees future employment should there be any vacancies within the merged entity in the future.

[51] The proposed transaction further raised no other public interest concerns.

**Conclusion**

[52] In light of the above, the Commission recommended that the proposed transaction be approved subject to the annexed conditions which adequately address the various concerns raised. We find no reason to disagree as any potential negative effect that the proposed transaction would have had on competition or the public interest, has been mitigated by the final conditions annexed hereto. Accordingly, we approve the proposed transaction subject to these conditions.

Enver Daniels

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| **Mr Enver Daniels** | **19 October 2021** |
| | **Date** |

**Ms Yasmin Carrim and Prof Imraan Valodia concurring.**

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| Tribunal case managers | : | Peter Kumbirai and Mpumelelo Tshabalala |
| For the merger parties | : | Lebohang Mabidikane of Bowman Gilfillan |
| For the Commission | : | Amanda Mfuphi and Ratshidaho Maphwanya |
| For ICPA | : | Jackie Maimin |