ISSN 1178–2560
Decision Series
Project no. 11.04/16029

Public version

Determination

Boehringer Ingelheim International GmbH and Sanofi S.A. [2016] NZCC 18

The Commission:	Dr Mark Berry Sue Begg Graham Crombie
Summary of application:	An application from Boehringer Ingelheim International GmbH seeking clearance to acquire 100% of the shares and assets in Merial, the animal health business of Sanofi S.A.
Determination:	Under s 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to the proposed acquisition.
Date of determination:	13 September 2016

Confidential material in this report has been removed. Its location in the document is denoted by [ ].

Contents

The proposed acquisition

1. On 2 August 2016, the Commerce Commission registered an application from Boehringer Ingelheim International GmbH (Boehringer Ingelheim or the Applicant) seeking clearance to acquire 100% of the shares and assets of Merial, the animal healthcare business of Sanofi S.A. (Sanofi).[1]

2. The proposed acquisition is part of a global transaction in which, in exchange for Merial, Sanofi will acquire Boehringer Ingelheim's consumer healthcare products. The proposed acquisition would result in the aggregation of the animal healthcare operations of Boehringer Ingelheim and Sanofi in New Zealand. The application for clearance only relates to the aggregation of animal healthcare products.

The decision – clearance granted

3. The Commission gives clearance to the proposed merger as 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. In New Zealand, there is limited overlap between the two parties and in the areas where they do compete the merged entity would face competition from a number of other well established suppliers.

Our framework

4. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines.[2]

The substantial lessening of competition test

5. As required by the Commerce Act 1986, we assess acquisitions using the substantial lessening of competition test.

6. 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]

7. We make a pragmatic and commercial assessment of what is likely to occur in the future, with and without the acquisition, based on the information we obtain through our investigation and taking into account factors including market growth and technological changes.

8. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise price above the price that would exist in a

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1 As described in the Agreement for the sale and purchase of Sanofi's animal health business between Sanofi and Boehringer Ingelheim dated 26 June 2016.

2 Commerce Commission *Merger and Acquisition Guidelines* (July 2013) http://www.comcom.govt.nz/business-competition/guidelines-2/mergers-and-acquisitions-guidelines/

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

competitive market (the 'competitive price'),[4] or reduce non-price factors such as quality or service below competitive levels.

9. Determining the scope of the relevant market or markets can be an important tool in determining whether a substantial lessening of competition is likely.

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 Act, as a matter of fact and commercial common sense.[5]

When a lessening of competition is substantial

11. Only a lessening of competition that is substantial is prohibited. A lessening of competition will be substantial if it is real, of substance, or more than nominal.[6] Some courts have used the word 'material' to describe a lessening of competition that is substantial.[7]

12. There is no bright line that separates a lessening of competition that is substantial from one that is not. What is substantial is a matter of judgement and depends on the facts of each case. Ultimately, we assess whether competition will be substantially lessened by asking whether consumers in the relevant market(s) are likely to be adversely affected in a material way.

When a substantial lessening of competition is likely

13. A substantial lessening of competition is 'likely' if there is a real and substantial risk, or a real chance, that it will occur. This requires that a substantial lessening of competition is more than a possibility, but does not mean that the effect needs to be more likely than not to occur.[8]

The clearance test

14. We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.[9] If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.[10]

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4 Or below competitive levels in a merger between buyers.

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

6 *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

7 Ibid at [129].

8 *Woolworths & Ors v Commerce Commission* (HC) above n 6 at [111].

9 Section 66(3)(a).

10 In *Commerce Commission v Woolworths Limited* (CA), above n 3 at [98], the Court held that "the existence of a 'doubt' corresponds to a failure to exclude a real chance of a substantial lessening of competition".

Key parties

Boehringer Ingelheim

15. Boehringer Ingelheim is a global pharmaceutical company that manufactures and supplies a range of pharmaceutical and vitamin products for humans and for animals.

16. Boehringer Ingelheim does not have any manufacturing facilities in New Zealand. At present it imports a limited number of prescription animal healthcare products into New Zealand. Last year, its sales of these products totalled approximately [ ].

Sanofi

17. Sanofi is a global pharmaceutical company that manufactures and supplies a range of pharmaceutical and vitamin products for humans and for animals in New Zealand. Sanofi supplies all its animal health products to New Zealand through Merial, its animal healthcare business.

18. In New Zealand, Merial supplies a range of prescription and over the counter animal healthcare products. Last year its sales of these products totalled approximately [ ].

Other relevant parties

19. There are a number of other global pharmaceutical manufacturers who also supply animal healthcare products in New Zealand. The major suppliers with similar product ranges to Boehringer Ingelheim and Merial in New Zealand include:

    19.1 Zoetis New Zealand Limited (Zoetis);[11] and

    19.2 Norbrook New Zealand Limited (Norbrook).[12]

Industry background

20. The application relates to the supply of animal healthcare products. Before any of these products can be sold in New Zealand they go through a number of different stages.

    20.1 Research and development – most animal healthcare products contain an active pharmaceutical molecule that can take years to develop before it is patented and sold to customers. Once the patent on a certain molecule expires, other manufacturers may develop a generic product based on an equivalent pharmaceutical molecule.

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[11] Zoetis is one of the largest global producers of animal pharmaceuticals. Until recently it was the animal health division of Pfizer, Inc.

[12] Norbrook is a global animal pharmaceutical company, based in Ireland, which focuses on producing generic products.

20.2 Regulatory approval – before any animal healthcare product can be sold in New Zealand, it has to be registered in accordance with the Agricultural Compounds and Veterinary Medicines Act 1997 (ACVM). Registration requires suppliers to prove that their products meet the required standards around quality, efficacy and safety and that products do not pose unacceptable risk to trade in primary produce, animal welfare, agriculture security and public health.[13] The length of time it takes to register a product can depend on how novel the product is and the extent to which similar products are already registered in New Zealand.

20.3 Distribution to the customer – how the product is delivered to customers can depend on whether it can be purchased with or without a prescription. In New Zealand, most prescription products are sold to customers through veterinary clinics and manufacturers, like Boehringer Ingelheim, rely on dedicated veterinarian wholesalers to distribute their products to prescribing veterinarians.

Background on the areas of overlap

21. The proposed acquisition would result in overlap in the supply of certain prescription animal health products. These products can be classified in a number of different ways including: [14]

21.1 the therapeutic indication(s) that the product is aimed at treating;

21.2 the type of pharmaceutical molecule that makes up the active ingredient of the product;

21.3 the type of animal that is being treated, for example companion animals (cats or dogs), horses or production animals (such as cattle, dairy cows, pigs, sheep or deer);

21.4 the dosage of the product and the frequency with which it needs to be administered to the animal; and

21.5 the method by which the product is administrated to the animal such as by injection or oral tablet.

22. The Applicant submitted that although the merging parties each have a large global portfolio of animal health products, the overlap in New Zealand is relatively limited for both existing products as well as pipeline products.[15]

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13 www.foodsafety.govt.nz/industry/acvm/about/

14 We have previously considered similar criteria when assessing animal pharmaceutical products. For example, see Pfizer Inc and Wyeth Corporation (Commerce Commission Decision 678, 2009); Schering-Plough Corporation and Merck & Co., Inc (Commerce Commission Decision 677, 2009); and Schering-Plough Corporation and Organon BioSciences N.V. (Commerce Commission Decision 621, 2007).

15 The Applicant notes that the main reason for this limited overlap is that Boehringer Ingelheim's background in animal healthcare products has been in pigs while Merial's background has been in companion animals and poultry.

23. Where the overlap between the merging parties' products would be limited, we have not considered these products any further as the related competition would not be significantly affected by the acquisition. This is the case in respect of:

    23.1 antibiotics for cattle and dairy cows because the merging parties' respective products are prescribed for different therapeutic indications and for different stages of the cows' milking cycle.[16] Merial supplies an intramammary antibiotic that can only be used on dairy cows during their non-lactating (drying off) period. Boehringer Ingelheim's antibiotics are for use only on lactating dairy cows;[17] and

    23.2 anaesthetics for horses because the merging parties' respective products are prescribed for different therapeutic indications. Boehringer Ingelheim's anaesthetic is a sedative while Merial's products are general anaesthetics.[18]

24. The key animal health products that are of relevance to the proposed acquisition are:

    24.1 performance enhancers which are mineral nutrient supplements (these may include calcium, copper, selenium and/or cobalt) given to production animals; and

    24.2 non-steroidal anti-inflammatory drugs used to treat inflammation in horses, companion animals and production animals.

Performance enhancers

25. The merging parties either supply or intend to supply mineral nutrient supplements, also known as performance enhancers, for production animals. Cattle and dairy cows are the most common production animals to be administered with mineral supplements but they are also regularly given to sheep and deer to boost weight. The key distinction between the products for different species is the size of the animal which determines the dosage of the supplement.

26. In some areas of New Zealand, soils are low in certain trace elements and farmers have the option of supplementing the diet of their animals if deficiencies are identified. The animals must only be provided supplements for minerals in which they are deficient because over supplementation can be toxic.

27. In New Zealand, mineral deficiencies in production animals have traditionally been treated with the application of an oral or injectable single dose of a short-acting single mineral supplement.

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16 Clearance Application from Boehringer Ingelheim (15 July 2016) and Commerce Commission interview with [ ].

17 Clearance Application from Boehringer Ingelheim (15 July 2016).

18 Clearance Application from Boehringer Ingelheim (15 July 2016) and Commerce Commission interview with [ ].

28. Bolus dispensed multi-mineral supplements are an emerging product in New Zealand. Bolus dispensed supplements operate in quite a different way to oral and injectable supplements. Bolus products, often referred to as a 'bullet', supplement the animal by an internal, slow-release, daily dosage of each mineral over a number of months. The primarily benefit of the bolus technology is it mitigates the risk of harm from over-supplementation.

Non-steroidal anti-inflammatory drugs

29. The merging parties each supply a range of non-steroidal anti-inflammatory drugs, NSAIDs. NSAIDs are used to treat a broad spectrum of inflammation in animals.

30. Certain NSAIDs contain different pharmaceutical molecules which dictate whether it is suitable to be used for a particular indication (for example, the molecule in the NSAID used to treat long term arthritis inflammation is different to that contained in the NSAID used to treat post-operative short term acute inflammation). Continuous research and development by the manufacturers means that there are newer 'generation' molecules being developed that can be better at treating certain types of inflammation.

31. Some types of NSAID molecule are more commonly supplied in oral form, while others are more typically used in injectable products. Most manufacturers produce both oral and injectable products. As such, there is a degree of differentiation between the NSAIDs supplied in New Zealand.

How the acquisition could substantially lessen competition

32. Our assessment has focused on the unilateral effects that could result from the proposed merger. In doing so, we assessed whether post-merger Boehringer Ingelheim could profitably raise prices for the animal healthcare products it would supply above the level that would prevail without the merger.

Market definition

Our approach to market definition

33. Market definition is a tool that helps identify and assess the close competitive constraints the merged entity would face. Determining the relevant market requires us to judge whether, for example, two products are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.

34. We define markets in the way that 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. What matters is that we consider all relevant competitive constraints, and the extent of those constraints. For that reason, we also consider products which fall outside the market but which still impose some degree of competitive constraint on the merged entity.

35. In general, the more closely substitutable two products are, the closer the competition and the greater the competitive constraint between the products.

36. As the customers of prescription-only products are veterinarians, the relevant question in defining these markets is whether veterinarians would switch to prescribing an alternative product should the price of the relevant product increase by a small but significant amount.

37. Most of the products supplied in this industry are manufactured overseas so the functional level for all the relevant markets is the manufacture/importation and wholesale supply level.

38. All parties supply their products nationally so the geographic dimension of all the relevant markets is national.

The Applicant's view on the relevant markets

39. The Applicant submitted that the proposed acquisition would result in actual or potential overlap in the national markets for the supply of:

    39.1 performance enhancers for cattle for treating copper and selenium deficiencies;

    39.2 oral NSAIDs for companion animals (principally dogs and cats); and

    39.3 multi-species injectable NSAIDs.

Our view of the relevant markets

40. For the purposes of this application, we consider the relevant markets to be the national markets for the manufacture/importation and wholesale supply of:

    40.1 multi mineral performance enhancers for production animals (the multi mineral performance enhancer market);

    40.2 oral NSAIDs which are primarily used to treat companion animals (the oral NSAID market); and

    40.3 injectable NSAIDs which are used to treat all types of animals species (the injectable NSAID market).

Product market for performance enhancers

41. Both the merging parties supply, or intend to supply, a mineral supplement product, or products, which are used to treat production animals for copper deficiency and selenium deficiency.

42. Merial only supplies a copper supplement and a selenium supplement. Boehringer Ingelheim does not supply any mineral supplements but it is currently in the process of introducing a multi mineral supplement to treat cattle with deficiencies in copper, selenium and cobalt in one application.

43. Supplements containing different minerals are not substitutable for one another because each type of mineral deficiency is distinct (i.e., a cobalt deficiency cannot be

treated by a copper supplement). For the same reasons, multi mineral supplements are not likely to be substitutes for single mineral supplements.

44. Nevertheless, production animals can be deficient in several minerals and this can be treated in two different ways:

    44.1 by administering several different single mineral supplements to the animal; or

    44.2 by administrating a multi mineral supplement to the animal.[19]

45. Therefore, there is likely to be some degree of competitive constraint on multi mineral supplements from the combination of single mineral supplements that match those of the multi mineral supplement.

46. Accordingly, for the purposes of the present application, we consider it appropriate in this instance to define a product market for copper, selenium and cobalt mineral supplements (multi mineral performance enhancers) for production animals, where the constraint could come from other multi mineral performance enhancers or from a combination of single mineral performance enhancers.

Product markets for NSAIDs

47. NSAIDs treat inflammation and work by interfering with the enzymes within the animal that are responsible for the inflammation and associated pain. For the purposes of this application, we have considered separate NSAID product markets based on the size of the animal and the method of administration.

48. Oral NSAIDs, such as those in tablet and oral suspension form, are typically administered to smaller animals such as companion animals for less acute, longer-term treatment (where the owner can administer the anti-inflammatory to the animal). There are also oral suspensions for horses.

49. Injectable NSAIDs are typically administered by a veterinarian in more acute cases (particularly post-operation). Dosages of injectable NSAIDs can be easily adapted to administer to a range of different animals including companion animals, horses, and production animals.

50. Some of the NSAIDs currently supplied in New Zealand contain different active molecules. In certain circumstances, this can impact on whether a particular NSAID is administered to the animal. For example, some NSAID molecules can result in more damage to the digestive system than others and so are considered less safe to administer over long periods of time.[20] Typically, it is the older generation NSAID molecules that can damage the digestive system (and lead to complications such as renal failure).

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19 The application method (a single dose versus a bolus) of these supplements further differentiates these products.

20 Clearance Application from Boehringer Ingelheim (15 July 2016) and Commerce Commission interview with [ ].

51. While there is a degree of differentiation between the different molecules contained in the different NSAIDs supplied in New Zealand, all of the products are used to treat the same types of inflammation. To this extent, for the purposes of assessing this application, the differentiation is not sufficient to place the different molecules in discrete product markets.

52. We therefore assess the impact of this merger on the product markets for:

    52.1 oral NSAIDs which are primarily used to treat companion animals; and

    52.2 injectable NSAIDs which are used treat all types of animals.

With and without scenarios

53. To assess whether competition is likely to be substantially lessened in any market, we compare the likely state of competition with the acquisition to the likely state of competition without the acquisition.[21]

With the acquisition

54. With the acquisition, Boehringer Ingelheim would acquire the business and assets of Merial, the animal health care business of Sanofi, in New Zealand.

Without the acquisition

55. Without the acquisition, Boehringer Ingelheim and Merial would continue to operate independent of one another with Merial remaining a business unit within Sanofi.

Competition assessment – the multi mineral performance enhancer market

56. Post-acquisition, in the multi mineral performance enhancer market, Boehringer Ingelheim would be constrained by the presence of well established competitors who supply fully substitutable products.

57. Boehringer Ingelheim does not currently supply any performance enhancers. However, Boehringer Ingelheim is in the process of completing ACVM registration to supply a multi mineral nutrient supplement for cattle, trademarked as Rumifert. Rumifert is a bolus based product that would treat cattle with deficiencies in cobalt, copper and selenium.

58. At present, Merial supplies the following performance enhancer products:

    58.1 Copacaps, for copper deficiency in production animals; and

    58.2 Selpor, for selenium deficiency in production animals.

59. The proposed acquisition would remove any competitive constraint that Merial's single mineral supplements for copper and selenium, when administered in

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[21] *Mergers and Acquisitions Guidelines* above n 1 at [2.29]; *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

combination with a cobalt supplement, would have had on Boehringer Ingelheims's multi mineral supplement.

60. However, even if this competitive constraint is lost, the merged entity's multi mineral product would continue to be constrained by the presence of other competitors who could readily expand. For example, both Bayer New Zealand Limited (Bayer) and Virbac New Zealand Limited (Virbac) have a well established presence in New Zealand and there appear to be no barriers to them expanding their current supply of their cobalt, copper and selenium mineral supplements.

60.1 The Applicant submitted that, last year, sales of mineral supplements used to treat deficiencies in cobalt, copper and selenium in New Zealand totalled [ ].[22] Bayer's share and Virbac's share of these sales was approximately [ ]respectively. Merial's share of these sales was approximately [

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61. In addition to Bayer and Virbac, we also understand there are a number of other existing suppliers of performance enhancers who could expand their presence in the market.[23] Further, the degree of any lost constraint between Boehringer Ingelheim and Merial is likely to be small since the merging parties' products are differentiated in terms of mineral content and method of application.

62. Accordingly, given the differentiation between the merging parties' products and the presence of other suppliers who could readily expand, we are satisfied that the proposed acquisition would not result in a substantial lessening of competition in the multi mineral performance enhancer market.

Competition assessment –the oral and injectable NSAID markets

63. Post-acquisition, in both the oral NSAID market and the injectable NSAID market, the merged entity would be constrained by the presence of at least two other well established competitors who supply substitutable products.

64. Industry participants noted that the competitive dynamics for the oral NSAID market and the injectable NSAID market are very similar, the only differences being the dosage and method of application.[24] To this extent, we have considered the two markets at the same time.

65. NSAIDs containing the pharmaceutical molecules meloxicam and carprofen are the two most prescribed products in both markets. While they are different molecules, industry participants advised that these molecules have very similar properties and

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22 Clearance Application from Boehringer Ingelheim (15 July 2016).

23 Such as Troy Laboratories Australia Pty Limited, Ethical Agents Veterinary Marketing Limited, Agrihealth NZ Limited and Donaghys Limited. Clearance Application from Boehringer Ingelheim (15 July 2016).

24 Commerce Commission interview with [ ] and Commerce Commission interview with [ ].

are used to treat the same ailments.[25] Nevertheless, some veterinarians will have their own preferences and this can impact on the extent to which NSAID they prescribe for particular animals.[26] At present, Merial does not supply any NSAIDs with meloxicam or carprofen and the existing suppliers who do are:

65.1 Boehringer Ingelheim and Norbrook, who both supply NSAIDs with meloxicam; and

65.2 Zoetis and Norbrook, who both supply NSAIDs with carprofen.

66. We have estimated the market shares for the two NSAID markets based on the Baron Strategic Services data provided by the Applicant.[27] Industry participants noted that demand in these two markets is relatively stable.

67. Table 1 below shows that Boehringer Ingelheim and Zoetis are the two main suppliers in the oral NSAID market.

67.1 Merial's product in the oral NSAID market is Previcox, which comes in a tablet form.[28] Previcox has a different pharmaceutical molecule than the other products in this market and we understand that Previcox is a more specialised product and mainly prescribed for the long term treatment of arthritis in large dogs. As such, it is not prescribed as regularly as the other NSAIDs in the oral NSAID market and industry parties advised there are other equivalent products in the market that compete directly with Previcox. [29]

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[25] Commerce Commission interview with [ ]and Commerce Commission interview with [ ]. Boehringer Ingelheim was the originator of meloxicam and Zoetis was the originator of carprofen.

[26] Commerce Commission interview with [ ]and Commerce Commission interview with [ ].

[27] Baron Strategic Services (Baron) is a consultancy and market research firm which specialises in the farmer/veterinarian sector. At present, Boehringer Ingelheim, Merial, Zoetis, Norbrook, Eli Lilly and Company (NZ) Limited (trading as Elanco Animal Health) and Bayer New Zealand Limited provide their data to Baron. We understand that there are a number of other parties currently supplying NSAIDs in the two markets that do not supply their data to Baron. The Baron figures, therefore, are likely to overestimate the shares of both Boehringer Ingelheim and Merial (and the other suppliers).

[28] Clearance Application from Boehringer Ingelheim (15 July 2016). [ ] Email from Merial to Commerce Commission (9 September 2016).

[29] Commerce Commission interview with [ ] and email from [ ] to the Commerce Commission (30 August 2016).

Table 1: Estimated market shares for the oral NSAID market, 2013-2015

Supplier	Brand	2013		2014		2015	
		Sales	Market share	Sales	Market share	Sales	Market share
Beohringer Ingelheim	Metacam	[					
Merial	Previcox						
Combined entity							
Zoetis	Rimadyl, Trocoxil						
Norbrook	Loxicom, Carprieve						
Other suppliers	Elanco's Onsior						]
Total		**[ ]**	**100%**	**[ ]**	**100%**	**[ ]**	**100%**

Source: Baron data.

68. Table 2 below shows that Boehringer Ingelheim and Norbrook are the two main suppliers in the injectable NSAID market, followed by Zoetis.

68.1 Merial's product in the injectable NSAID market is Ketopen, which contains the molecule ketoprofen. At present, Merial only supplies a limited amount of this product in the market. Industry participants advised that the use of NSAIDs with ketoprofen have been in decline for some time and that Merial's Ketopen product has been superseded by the newer products developed by Boehringer Ingelheim and Zoetis.[30] These products have improved technology and offer a more targeted treatment and tend to have fewer side effects.

Table 2: Estimated market shares for the injectable NSAID market 2013-2015

Supplier	Brand	2013		2014		2015	
		Sales	Market share	Sales	Market share	Sales	Market share
Beohringer Ingelheim	Metacam	[					
Merial	Ketofen						
Combined entity							
Zoetis	Rimadyl, Trocoxil						
Norbrook	Loxicom, Carprieve						]
Total		**[ ]**	**100%**	**[ ]**	**100%**	**[ ]**	**100%**

Source: Baron data.

[30] Commerce Commission interview with [ ] and Commerce Commission interview with [ ].

69. Industry participants considered the main competitive constraint in the oral NSAID and the injectable NSAID markets is between the two main NSAID product developers, namely Boehringer Ingelheim and Zoetis. However, there are also now generic equivalents for the products supplied by both Boehringer Ingelheim and Zoetis. Some veterinarians advised that they prefer to support the 'originators' of a particular product while others are ambivalent and prescribe the generic version which tends to be cheaper.[31]

70. In both the oral NSAID market and injectable NSAID market Boehringer and Merial do not appear to be each other's closest competitors and so the loss of the existing constraint between the two parties is unlikely to be significant.

71. Further, post-acquisition Boehringer Ingelheim would be constrained by the presence of a number of other suppliers who supply equivalent products and for whom there appear to be no barriers to expansion. For example, both Zoetis and Norbrook have a well established presence in New Zealand and could readily expand their existing supply of NSAIDs.

72. In addition to those parties listed in Tables 1 and 2, we understand that there are a number of other suppliers that compete in the two NSAID markets and who could readily expand their existing presence, if incentivised. All these suppliers have NSAID products registered in New Zealand and can be currently purchased through one of the main veterinarian wholesalers. The Applicant estimated these suppliers account for an [ ]of the Baron sales in New Zealand. These suppliers include:

    72.1 Troy Laboratories Australia Pty Limited, with its Ilium products;

    72.2 Ethical Agents Veterinary Marketing Limited, with its Rheumocam products;

    72.3 Agrihealth NZ Limited, with its MeloxiVet and Ketomax products; and

    72.4 Phoenix Pharm Distributors Limited with its Kelaprofen products.

73. [

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74. The merging parties do not supply products that are each other's closest alternatives. In addition to this, the merged entity would be constrained by the presence of at least two other well established competitors who supply substitutable products and who could readily expand. Accordingly, we are satisfied that the proposed acquisition would not result in a substantial lessening of competition in either the oral NSAID market or the injectable NSAID market.

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[31] Commercial Commission interview with [ ] and Commerce Commission interview with [ ].

Overall conclusion

75. The proposed acquisition would result in the aggregation of New Zealand animal healthcare operations of Boehringer Ingelheim and Sanofi. We considered the impact of this acquisition on the national markets for the manufacture/importation and wholesale supply of:

    75.1 multi mineral performance enhancers for production animals;

    75.2 oral NSAIDs which are primarily used to treat companion animals; and

    75.3 injectable NSAIDs which are used to treat all types of animals species.

76. In most instances, the degree of aggregation between the two parties is small. In the markets where there is a higher degree of overlap – the oral NSAID market and the injectable NSAID market – the merging parties do not supply products that are each other's closest alternatives. In addition to this, in these two markets the merged entity would be constrained by the presence of at least two well-established competitors who supply substitutable products.

77. We are therefore satisfied that the proposed acquisition is unlikely to substantially lessen competition in any relevant market.

Determination

78. We are 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.

79. Under s 66(3)(a) of the Act, the Commerce Commission determines to give clearance to Boehringer Ingelheim International GmbH to acquire 100% of the shares and assets in Merial, the animal health business of Sanofi S.A.

Dated this 13th day of September 2016

Dr Mark Berry
Chairman